HOMICIDE CASES - THE SEARCH FOR ISSUES[1]

BY: PAUL COUENHOVEN

GENERAL PRINCIPLES

Murder is an unlawful killing committed with malice aforethought. (§ 187, subd. (a).) An unlawful killing with malice aforethought, perpetrated by certain specified means (torture, lying in wait, destructive device or explosive, weapon of mass destruction, penetrating ammunition, poison,) or that is willful, deliberate, and premeditated, constitutes murder in the first degree. (§ 189.) A killing in the course of the commission of certain enumerated felonies (arson, rape and other listed sex crimes, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, shooting a firearm from a motor vehicle) also constitutes murder in the first degree. (§ 189.)

Second degree murder is an unlawful killing with malice aforethought, but without the elements that elevate an unlawful killing to first degree murder. (§§ 187, subd. (a), 189; *People v. Hansen* (1994) 9 Cal.4th 300, 307 (*Hansen*).) In addition, an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is

---

[1] I want to thank the following people for contributing ideas, and in many cases sample briefing, for this presentation: Steve Bedrick, Irma Castillo, Arthur Dudley, Kyle Gee, Mark Greenberg, Stephen Greenberg, Kat Kozik, Eric Multhaup, Dennis Riordan, Richard Rubin, Dallas Sacher, Steven Schorr, George Schraer, Courtney Shevelson, Joseph Shipp and David Stanley.

not included among the felonies enumerated in section 189, is murder in the second degree. (*People v. Ford* (1964) 60 Cal.2d 772, 795.)

Malice may be express or implied. Malice is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Voluntary manslaughter is an unlawful killing committed with the intent to kill or with conscious disregard for life (i.e., with malice), if the defendant killed in a "sudden quarrel or heat of passion" (§ 192, subd. (a); *People v. Lasko*, *supra*, at pp. 108, 110-111) or in an unreasonable but good faith belief in the need to act in self defense or in defense of others. (*People v. Blakeley* (2000) 23 Cal.4th 82, 89, 91; *People v. Randle* (2005) 35 Cal.4th 987, 994-1003.) Either of these circumstances negates malice.

Involuntary manslaughter is defined by statute as an unlawful killing without malice "in the commission of a misdemeanor which is inherently dangerous to human life," or "in the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection." (§ 192.) However, involuntary manslaughter covers all unlawful killings in which malice (either express or implied) is not proven.

The **felony-murder rule** eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and second degree felony murder.

Because malice is not an element of felony murder, circumstances that reduce the crime from murder to manslaughter, such as provocation or imperfect self-defense, are not relevant.

REVERSALS IN HOMICIDE CASES IN THE SIXTH DISTRICT, 2004 TO PRESENT

2006 REVERSALS

No reversals as of 3/30/06.

2005 REVERSALS (4 reversals)

People v. Russell Martinez (H025896)
Panel attorney: Arthur Dudley
Date: July 18, 2005

Appellant walked by a car repair shop where a long-time nemesis named Cerna was working. They mad-dogged each other. Cerna pointed a paint spray gun at appellant. Cerna's friend called appellant a faggot. Appellant went home, got a gun, returned two hours later, fired at Cerna but instead shot and killed Cerna's friend. A jury convicted appellant of second degree murder and attempted murder. The court of appeal reversed because the trial court refused to instruct on heat of passion. For years, appellant had been harassed, beaten and intimidated by Cerna. The years of provocation were sufficient to

require heat of passion instructions, despite the two-hour "cooling off" period.. (Staff attorney Paul Couenhoven)

Timothy Parle v. Runnels (N.D. Cal. No. C01--03487 WHA)
Panel attorney: Martin Buchanan
Date: July 12, 2005

A jury convicted defendant in the murder of his wife. Evidence showed the two had been physically and emotionally abusive to each other. The Sixth District Court of Appeal agreed the trial court made numerous evidentiary errors but found they were all harmless: (1) it should have excluded the testimony of defendant's psychiatrist because defendant invoked the psychotherapist privilege; (2) it should have permitted his expert witness testify as to the effects of a manic episode; (3) it should have admitted portions of the conditional examination of defendant's father who described defendant's mental condition on the night of the incident, (4) it should have admitted evidence of the victim's character for violence and threats against defendant, and (5) it should have excluded defendant's threats against the police five years after the incident. After the Supreme Court denied review, Martin Buchanan filed a federal habeas petition. The district court initially granted relief on the ground that admission of the victim's diary was unreliable and violated his right of confrontation. The Ninth Circuit Court of Appeals reversed because the statements in the diary were not testimonial. On remand, the district court granted relief because the cumulative prejudice of the remaining errors deprived him of a fair trial. (Staff attorney Michael Kresser)

People v. Salvador Garcia, Daniel Rios and Jesus Salazar (H026159)
Panel attorneys: C. Elliot Kessler, Philip Brooks, and Tara Mulay
Date: April 28, 2005

Appellants were charged with three counts of murder with special circumstances. The jury returned verdicts finding them guilty of the lesser included offenses of involuntary manslaughter. In this case, the defendants were previously attacked by gang members. After arming themselves, they returned later in a car to find friends and identify their earlier attackers so they could report them to police. Upon their return, 12 to 15 men started "walking real fast" towards the car. Afraid for his life, one of the defendants fired his gun several times, killing three people. On appeal, The court of appeal reversed because the trial court, which instructed on imperfect self-defense, refused to instruct on self-defense. (Staff attorney Michael Kresser)

People v. Jose Solorio (H025573)
Panel attorney: Cliff Gardner
Date: February 2, 2005

Among other things, appellant was convicted of five counts of attempted murder, and actively participating in a gang (Pen. Code, § 186.22, subd. (a)) with an enhancement for personally inflicting great bodily injury under Penal Code section 12022.7. Appellant had shot at four rival gang members and a bystander was shot. The court effectively instructed the jury of the theory of transferred intent which does not apply to attempted murder. he conviction for attempted murder of the bystander was reversed. (Staff attorney Dallas Sacher)

2004 REVERSALS (4 reversals)

People v. Fernando Dominguez (H022727)
Staff attorney: Dallas Sacher
Date: May 12, 2004/December 14, 2004

Appellant and a codefendant were charged with rape, kidnapping, and first degree murder. It appeared from the facts that the codefendant killed the victim, but the instructions on felony murder did not describe when appellant could be found guilty of felony murder based on the codefendant killing the victim. Instead, the instruction told the jury appellant could be guilty whenever the victim is killed during the commission of a certain felony. This was not the state of the law. Consequently, the court of appeal reversed in a published decision. The Supreme Court granted review and remanded it to the court of appeal. The court of appeal again reversed the convictions for felony murder and kidnapping in a published decision. The Supreme Court again granted review, and briefs have been filed in that court.

People v. Fidel Hernandez (H025946)
Panel attorney: Katarzyna Kozik
Date: October 22, 2004

A jury convicted appellant of murder. Appellant and the victim were selling drugs, and they stored the drugs and money in a public storage locker. Although they generally got along, they were heard having a heated argument just before Christmas 2001. A few weeks later, they met near the locker, and appellant killed the victim. He claimed he acted in self-defense. In instructing on imperfect self-defense, the court modified CALJIC No. 5.17 to state that the defense was unavailable when the defendant's "wrongful conduct" created the actual but unreasonable belief in the need to defend himself. The court of appeal decided

the modified instruction was erroneous because the correct law would require withdrawal of the defense only if the defendant's illegal conduct led to the circumstances requiring the perceived need to defend himself. The court of appeal also decided the trial court erred in not instructing on a provocation theory for voluntary manslaughter. (Staff attorney Bill Robinson)

People v. Loren Herzog (H023906)
Panel attorney: Eric Multhaup
Date: August 18, 2004

Appellant was charged with five counts of murder. The jury convicted him of three of them and found him not guilty of the remaining two. Each of the murders were actually committed by his long-time friend, but appellant was allegedly culpable as an aider and abettor. Appellant was subject to seven custodial interrogations spanning six days. The trial court ruled that appellant invoked his right to silence in the earlier interrogations, even though the officers continued to question him. The trial court suppressed his statements after the invocations. The trial court admitted statements from the last three interrogations which occurred on the final two days. Appellant argued the statements should have been suppressed because they were involuntary as a result of the officers continuing to question him after he invoked his right to silence during the earlier interrogations. The court of appeal agreed. Although it is not categorically forbidden to re-interrogate after a break a suspect who had invoked the right to silence, in this case it was concluded that under the totality of the circumstances the statements were coerced. The police had disregarded previous invocations, interrogated him over a prolonged period of time, delayed arraignment

to continue interrogations before the inevitable appointment of counsel, denigrated the usefulness of defense counsel when he asked about being assisted with counsel, falsely told him that the codefendant had implicated him, and implied that if he confessed the consequences would be less serious. The court decided the error was prejudicial. There was no other evidence of him being culpable of two of the murders. Although there was some evidence implicating him in the third murder, it could not be said his statements did not have a powerful effect in the jury returning its verdict. The judgment was reversed in its entirety. (Staff attorney Dallas Sacher)

People v. Francisco Hernandez (H026258)
Panel attorney: Julie Schumer
Date: May 14, 2004

The victim was shot dead, and a witness identified appellant as the shooter. There was evidence that the crime could have been committed by a third person, Orozco. At trial, the witness again identified appellant as the culprit, and she said she did not know Orozco. After the trial, the witness attempted to receive welfare. In order to qualify, she had to disclose who the father of her children was. She told a deputy district attorney that Orozco was the father of her daughter. Appellant moved for a new trial which was denied. The court of appeal reversed. It was undisputed this was legitimately newly discovered evidence. The court of appeal held it was material and required a new trial. (Staff attorney Bill Robinson)

HOMICIDE CASES IN THE UNITED STATES SUPREME COURT

DECISIONS, PAST THREE YEARS

No published cases in the past three years specifically address homicide issues, other than in the death penalty context. Here are cases on issues which frequently arise in homicide cases, as well as others.

A. (*Missouri v. Seibert* (2004) __ U.S. __ (02-1371).) 6/28/04. Seibert was convicted of second degree murder. *Oregon v. Elstad* (1985) 470 U.S. 298 (1985) held that a suspect who initially answers questions without receiving *Miranda* warnings cannot use that as basis to suppress subsequent voluntary statements given after being *Mirandized*. *Seibert* held *Oregon v. Elstad* does not apply when the police intentionally forego *Miranda* warnings, obtain a confession, then give *Miranda* warnings, and have defendant repeat the confession. The second statement is inadmissible when police intentionally sidestep requirements of *Miranda*.

B. *Fellers v. United States* (2004) 540 U.S. 519 (02-6320).) In a drug case, Supreme Court held the 8th Circuit had erred by using a Fifth Amendment analysis to find Fellers had knowingly and voluntarily made statements to police. Court should have instead applied *Massiah,* which found a Sixth Amendment violation occurs when the government deliberately elicits incriminating statements from a defendant after he is formally charged.

C. *Banks v. Dretke* (2004) 540 U.S. 668 (02-8286).) 2/24/4. In felony murder case, where evidence showed that the prosecution failed to disclose (1) that one witness

had been intensively coached by police and prosecutors, and (2) that another witness was a paid informant, the federal appellate court erred in dismissing the defendant''s *Brady v. Maryland* claim and denying the defendant a certificate of appealability.

PENDING CASES IN UNITED STATES SUPREME COURT

No murder issues pending, but the following are of interest:

A. Does an alleged victim's statements to a 911 operator naming her assailant - admitted as "excited utterances" under a jurisdiction's hearsay law - constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington* (2004) 541 U.S. 36? (*Davis v. Washington* (Wash. 2005) 111 P.3d 844, cert. granted 10/31/05 (05-5224).)

B. Is an oral accusation made to an investigating officer at the scene of an alleged crime a testimonial statement within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36? (*Hammon v. Indiana* (Ind. 2005) 829 N.E.2d 444, cert. granted 10/31/05 (05-5705).)

C. Where a criminal defendant raises a duress defense, should the burden of persuasion be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence. (*Dixon v. United States* (5th Cir. 2005) 413 F.3d 520, cert. gr. 1/13/06 (05-7053).) [NB: this would only be relevant in a felony murder prosecution, since duress cannot be a defense to murder]

HOMICIDE CASES IN THE CALIFORNIA SUPREME COURT

DECISIONS, PAST THREE YEARS

A. (*People v. Smith* (2005) 37 Cal.4th 733 (S123074). The evidence was sufficient to support the jury's verdict of two counts of attempted murder even though Smith only fired one bullet at a car containing his intended victim and the victim's baby. The single bullet fired into the vehicle narrowly missed both the mother and infant. Motive isn't an element of the crime; intentionally firing a weapon at someone shows an intent to kill.

B. *People v. Howard* (2005) 34 Cal.4th 1129. The crime of driving with willful disregard for safety while evading an officer (Veh. Code, § 2800.2) is not an inherently dangerous felony for purposes of the second degree felony-murder law. The element of wanton and willful disregard for human life under section 2800.2 can be established by proving that the defendant committed three traffic violations assigned a point count under the Vehicle Code. Applicable traffic violations include a number which are clearly not inherently dangerous to human life. Thus, the trial court erred in instructing the jury to convict the defendant of murder if it found that he had killed the victim in the commission of a violation of section 2800.2.

C. *People v. Randle*, *supra*, 35 Cal.4th 987 (S117370/A097168). The Supreme Court affirmed the reversal of appellant's second degree murder conviction because the trial court erred in refusing to instruct on the imperfect defense of another. Further, it was error under the circumstances of this case for the trial court to have instructed the jury

that it could convict of second degree felony murder based on appellant's discharge of a firearm in a grossly negligent manner.

D. *People v. Wright* (2005) 35 Cal.4th 964 (S119067/C039031). The question presented was whether the doctrine of imperfect self-defense applies where the defendant's actual but unreasonable belief in the need to defend himself is based on a delusion resulting from mental illness attributable to methamphetamine abuse.

The Court declined to reach the issue because the defendant was able to claim imperfect self-defense, the jury heard evidence supporting that defense, and so the trial court exclusion of additional evidence by a defense expert supporting that defense was not prejudicial.

E. *People v. Garcia* (2005) 36 Cal.4th 777 (S124003/A098872). When a trial court permits a jury to revisit a crime scene after the jury has begun deliberations, the defendant and his or her counsel have the right to be present and to observe what occurs during the jury visit. A return visit carries a substantially greater risk that the jury will be exposed to new or improper evidence, than when evidence is examined in the jury deliberation room. First degree murder with lying in wait special circumstance reversed.

F. *People v. Cavitt* (2004) 33 Cal.4th 187 (S105058/A081492/A088117). The issue was whether an accomplice is liable for first degree murder under the felony-murder rule whenever a killing is committed while the accomplice and the actual killer are jointly engaged in a felony, or is an accomplice liable only where the killing is committed

in furtherance of a common purpose or design to commit the underlying felony The Court held the felony-murder rule requires both a causal relationship and a temporal one between the underlying felony and the act resulting in death. Causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the act and the underlying felony the accomplice committed or attempted to commit. Temporal relationship is established by proof of the felony and the homicidal act were part of one continuous transaction. Thus, even if the accomplice left before the killing was done, they are still liable for first-degree felony murder.

G. *People v. Taylor* (2002) 32 Cal.4th 863 (S112443/A095412). A defendant may be held liable for the second-degree, implied-malice murder of a fetus even where he was unaware of the woman's pregnancy.

H. *People v. Robertson* (2004) 34 Cal.4th 156 (S118034/A095055). The merger doctrine (see *People v. Ireland* (1969) 70 Cal.2d 522; *People v. Hansen* (1994) 9 Cal.4th 300) does not bar an instruction on second degree murder based on a felony-murder theory where the predicate offense is discharging a firearm in a grossly negligent manner (Pen. Code, §§ 246.3).

I. *People v. Monterroso* (2004) 34 Cal.4th 743 (S034473). Admission of a dying declaration does not violate the Confrontation Clause of the Sixth Amendment. The Court noted that the *Crawford* opinion specifically excepted dying declarations from the general holding that testimonial statements must be excluded in the absence of cross-examination.

J. *People v. Lee* (2003) 31 Cal.4th 613 (S094597/F028940). In order to be convicted of an attempt to commit willful, deliberate and premeditated murder an aider and abettor need not personally act with premeditation and deliberation. It is enough that the attempted murder is willful, deliberate, and premeditated.

K. *People v. Billa* (2003) 31 Cal.4th 1064 (S111341/C037717). Felony-murder rule applies where an accomplice accidentally kills himself while jointly engaged with the defendant in the perpetration of the underlying felony of arson.

L. *People v. Dent* (2003) 30 Cal.4th 213 (S024645). The trial court erroneously denied a self-representation request made by a defendant in a death penalty case. Although the evidence against appellant was overwhelming, and the record shows he was adequately represented by two appointed counsel and received a fair trial, the trial court denied the defendant's self-representation request because of its misunderstanding of the law. Erroneous denial of a *Faretta* motion is reversible per se.

PENDING CASES IN CALIFORNIA SUPREME COURT

A. Are *all* statements made by an ostensible crime victim to a police officer in response to general investigative questioning "testimonial hearsay" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 and inadmissible in the absence of an opportunity to cross-examine the declarant, or does "testimonial hearsay" include only statements made in response to a formal interview at a police station? (*People*

v. Cage (2004) 120 Cal.App.4th 770, rev. granted 10/13/04 (S127344/E034242).)

Review has also been granted on *Crawford* issues in

- *People v. Adams* (2004) 120 Cal.App.4th 1065, rev. granted 10/13/04 (S127373/C040891)
- *People v. Caudillo* (2004) 122 Cal.App.4th 1417, mod. 123 Cal.App.4th 1106a, rev. granted 1/12/05 (S129212/H026166)
- *People v. Kilday* (2004) 123 Cal.App.4th 406, rev. granted 1/19/05 (S129567/A099095)
- *People v. Lee* (2004) 124 Cal.App.4th 483, rev. granted 3/16/05 (S130570/B166204)
- *People v. Ochoa* (2004) 121 Cal.App.4th 1551, mod. 122 Cal.App.4th 823c, rev. granted 11/17/04 (S128417/D042215)
- *People v. Rivas*, unpublished opn., rev. granted 4/13/05 (S131315/B171183)
- *People v. Ruiz*, unpublished opn., rev. granted 1/19/05 (S129498/B169642)
- *People v. Wang*, unpublished opn., rev. gr. 3/23/05 (S130916/B164939)
- *People v. Herring*, unpublished opn., rev. gr. 7/27/05 (S134398/A104624)
- *People v. Wahlert* (2005) 130 Cal.App.4th 709, rev. gr. 9/28/05 (S135805/E035174)
- *In re T.W.* unpublished opn., rev. gr. 10/26/05 (S136916/B175355).

B. Does the mental state required for implied malice include only conscious disregard for human life, or can it be satisfied by an awareness that the act is likely to result in great bodily injury? Did the trial court abuse its discretion in granting defendant Knoller's motion for new trial under Penal Code section 1181, subdivision (6), as to her conviction for second degree murder.? (*People v. Noel* (2005) 128 Cal.App.4th 1391, rev. gr. 7/27/05 (S134543/A099366).)

C. When the evidence presented at the preliminary hearing indicates that defendant paid an individual who defendant believed was a hired assassin (but who actually was an

undercover officer) to murder a specified victim and gave the ostensible assassin information about the victim, can defendant be prosecuted for attempted murder or only for solicitation of murder? (*People v. Superior Court (Decker)* (2004) 124 Cal.App.4th 104, rev. granted 2/23/05 (S130489/B176608).)

D. Did the trial court adequately instruct the jury with respect to the liability of an aider and abettor for felony murder under the principles of *People v. Cavitt* (2004) 33 Cal.4th 187, and was any error prejudicial? (*People v. Dominguez* (2004) 124 Cal.App.4th 1270, mod. 125 Cal.App.4th 699b, rev. gr. 3/30/05 (S130860 / H022727).) This is staff attorney Dallas Sacher's case.

ISSUES IN HOMICIDE CASES - GENERAL THOUGHTS

A. ALWAYS CONSIDER ISSUES WHICH ARE NOT UNIQUE TO HOMICIDE CASES, PARTICULARLY FEDERAL CONSTITUTIONAL ISSUES

In the Sixth District, *Brady* error and a Fifth Amendment violation (involuntary confession) have resulted in reversals during the past three years.

In recent United States Supreme Court criminal cases, Fifth Amendment (coerced confession), Sixth Amendment (eliciting statements after a defendant was formally charged) and *Brady* claims have succeeded.

In recent California Supreme Court homicide cases, the right of a defendant to be present when the jury visits a crime scene, and a defendant's right to self-representation (*Faretta*) have succeeded.

In the Ninth Circuit, after losing in the Sixth District, Martin Buchanan obtained a reversal in a homicide case based on evidentiary rulings which adversely impacted a defendant's right to present a defense and to a fair trial. (*Parle v. Runnels*.)

Federal constitutional errors, in particular, can frequently result in reversal because the standard for reversal is either *per se* (*Faretta* error, some instructional errors, other structural errors) or subject to the more stringent *Chapman* standard for prejudice, (*Chapman v. California* (1967) 386 U.S. 18), under which the State must "prove[] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-59; see also, *Arizona v. Fulminante* (1991) 499 U.S. 279, 294-295.)

B. INSTRUCTIONAL ISSUES IN HOMICIDE CASES

While other issues must be considered, instructional issues most frequently result in reversals in homicide cases. Five of the eight reversals in homicide cases in the Sixth District in the past three years are due to instructional error.

There are three reasons which explain the predominance of homicide reversals based on instructional errors:

> The complexity of homicide law. Drug or theft cases might have one jury instruction which is specific to the crime. A homicide case, in contrast can easily have a dozen or even two dozen. After instructing on the general principles of murder, a court may have to instruct on express and implied malice, premeditation and deliberation, felony

murder, self-defense, imperfect self-defense and heat of passion. The sheer volume of applicable instructions leaves that much more room for error.

The court has an independent duty to provide correct instructions. Thus, it does not matter whether defense counsel requests, or objects to, an instruction. Waiver is rarely an issue.

If a challenged or omitted instruction involves an essential element of the crime, the error is subject to the stringent *Chapman* standard for prejudice.

General principles which help us argue jury instructional issues:

A trial court must instruct the jury on those "general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case." (*People* v. *Price* (1991) 1 Cal.4th 324, 442.)

This duty implements the state and federal due process right to a jury determination of all elements of the offense charged. (See *Mullaney* v. *Wilbur* (1975) 421 U.S. 684, 697-698; *Sandstrom* v. *Montana* (1979) 442 U.S. 510, 512-514.) Its purpose is "to assure, in the interest of justice, the most accurate possible verdict encompassed by the charge and supported by the evidence." (*People v. Elize* (1999) 17 Cal.App.4th 605, 613.)

Despite the lack of an objection or a request for an instruction, errors involving jury instructions can usually be raised on appeal because it affects the defendant's substantial rights. (See Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

The court has an independent duty to refrain from giving instructions which have no applicability to the facts of the case. "'The court should instruct on every theory of the case, but only to the extent each is supported by substantial evidence.' [Citation.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) Substantial evidence is "evidence from which a jury composed of reasonable men could have concluded" that the theory applied to the facts. (*Id.* at 684.) "This principle .... is implicitly based on the concern that the giving of unnecessary instructions -- even if abstractly correct -- increases the potential for jury confusion." (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539.) The vice of a factually inapplicable instruction is that it "tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." (*People v. Jackson* (1954) 42 Cal.2d 540, 546-547.)

The court has an independent duty to define terms that have a technical meaning peculiar to the law. (*People v. Bland* (2002) 28 Cal.4th 313, 334.) "'A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. [Citation.]'" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023.)

Appellate review is *de novo*, with no deference given to the trial court's decision. "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that ... is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

If you argue the court failed to instruct on a lesser included offense or a defense, you can recite the facts in the way which supports the instruction, avoiding the need to recite the facts in a manner which supports the judgement. The evidence at trial must be evaluated with an emphasis on facts which would support the instruction. (*People v. King* (1978) 22 Cal.3d 12, 15.)

If the instructional error lowers the prosecutor's burden of proving an essential element of the offense, it is the People's burden to establish that the error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 19.)

Furthermore, if the court instructs the jury on an invalid legal theory, reversal is automatic unless the court can specifically determine the jury resolved the case solely on the basis of a valid theory of guilt. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.

ISSUES IN FIRST DEGREE FELONY MURDER CASES

First degree felony murder is a killing occurring during the commission of specified inherently dangerous felonies which are listed in Penal Code section 189. The listed felonies include arson, rape, other forcible sex crimes, carjacking, robbery, burglary, mayhem and kidnapping.

If your client was convicted of first degree felony murder, that was the only theory presented, and the only theory was that your client did the killing, there are few homicide-specific issues which can be raised. You should instead focus on discovering other errors. This is because felony murder is a strict liability offense. Your client's state of mind in

reference to the killing is irrelevant. The felony-murder rule holds a felon "strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

In a first-degree felony murder case, homicide related issues arise more frequently when your client is not the killer. A non-killer tried for felony-murder is only guilty of murder if there is "both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death." (*Id*. at p. 193.) A temporal relationship "is established by proof the felony and the homicidal act were part of one continuous transaction." (*Ibid*.) A causal relationship "is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the non-killer committed or attempted to commit." (*Ibid*.)

The court has an independent duty to instruct on this principal of law (contained in CALJIC 8.27 and CALCRIM 540B) in a case where there is evidence the defendant tried for felony-murder is not the killer. This was the holding in *People v. Dominguez* (2005) 125 Cal.App.4th 699b (review granted.) In the Supreme Court (case number S130860) the Attorney General has conceded the court erred when it failed to give this instruction.

It is possible the killing may have no causal relationship with the felony, in which case a non-killer is not guilty of murder even if he is guilty of the underlying felony. The following example is found in *People v. Cavitt*, *supra*: while people are

burglarizing a house, one of the burglars looks out a window and sees his mortal enemy outside. He shoots and kills him. Under this scenario there is no causal relationship between the felony and the killing. (*People v. Cavitt, supra*, 33 Cal.4th at pp. 200, 203.) However, other than extreme facts like this, almost any killing perpetrated during the commission of a felony will have a causal relationship with the felony. Only if the killing "is *completely* unrelated to the felony" can the non-killer escape liability. (*Ibid*., emphasis added.) Even if the killer has some independent animus against the victim of the felony and kills the victim based on that animus, others who participated in the felony will be liable for felony-murder. (*Id*. at pp. 202-203.)

A non-killer is not liable for a killing committed before he joins in, or aids and abets, the underlying felony. (*People v. Pulido* (1997) 15 Cal.4th 713.) If there are facts suggesting the defendant on trial did not aid and abet the felony until after a killing was committed, argue the trial court must instruct on this principal of law. Note, however, the Supreme Court declined to decide whether there was an independent duty to instruct on this principle, instead finding any instructional error was harmless. (*Id*., at pp. 726-727.) However, the court stated the standard instruct "may require modification" to include this principle of law if warranted by the facts. (*Id*., at p. 728.) CALCRIM 540B contains a bracketed paragraph addressing this issue, but the use note refers to it as a "pinpoint" instruction which must be given only upon request. To the contrary, this is a standard part of the instruction on aiding and

abetting. An essential element of aiding and abetting liability is that "*before or during* the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime." (CALCRIM 401.) The trial court has a sua sponte duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) The sua sponte duty extends to instructions on mere presence at the scene and withdrawal from participation in the crime. (See *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14; *People v. Ross* (1979) 92 Cal.App.3d 391, 404-405.) It should equally extend to an instruction that intent to aid, and aid, must be present before or during the commission of the crime.

Should the duration of the crime of murder be an issue in determining when the defendant joined the criminal enterprise, argue a murder ends when the act which causes death ends, not when the victim dies. Penal Code section 187, subdivision (b), refers to "*an act* which results in death." Section 188 refers to "the *doing of an act* with express or implied malice." Section 194 refers to "the act" which causes death. CALJIC 3.40, instructing on causation, refers to "an unlawful *act or omission* which was a cause" of death. CALCRIM 620 (on causation) refers to "an *act* [which] causes death." A ruling that the duration of a murder continues until the victim dies would produce absurd results since the victim can survive for weeks, months and even years (see § 194) and still be a murder victim.

NOTE: this issue could arise in a non-felony-murder case, where a defendant is tried for murder on an aiding and abetting theory. There may be a basis to argue the court failed to instruct the jury that liability as an aider and abetter only attaches when the defendant provides aid before or during the murder.

The killing does not have to occur while the felony is being committed. It is enough if the felony and the killing "are parts of one continuous transaction." (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 206.) In *Cavitt*, a killing allegedly committed by one participant in the felony five to ten minutes after the felony had ended was part of one continuous transaction. The Supreme Court said, however, if that person killed the victim two weeks later, this requirement would not be met.

In *Cavitt*, the Supreme Court stated "there is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide *without regard to whether the evidence supports such an instruction.* (*People v. Cavitt*, *supra*, 33 Cal.4th at p. 204, emphasis added.) This suggests that if the evidence ***does*** raise the question whether the felony and the killing "are parts of one continuous transaction" the court would have to give an appropriate instruction, such as CALCRIM 549. If the evidence raises a question on this issue, it would be a "principle[] closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*Ibid*., citation omitted.)

The killing must be committed by one of the felons for felony-murder to apply. (*People v. Washington* (1965) 62 Cal.2d 777, 783.) However, the victim need not be

a non-felon. if one of the felons accidentally kills himself, the felony-murder rule applies. (*People v. Billa* (2003) 31 Cal.4th 1064.)

While duress is not a defense to murder (see § 26; *People* v. *Anderson* (2002) 28 Cal.4th 767, 772-784), it can be raised as a defense to the felony which is the basis of a felony-murder theory. (*See id.; see*, *also*, *People* v. *Coffman and Marlow* (2004) 34 Cal.4th 1, 100 n. 31.)

> [D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. (See *People* v. *Anderson* (1991) 233 Cal.App.3d 1646, 1666-1667, fn. 18 [ ]; Perkins & Boyce, Criminal Law [(3d ed. 1982)], ch. 9, § 2, pp. 1058-1059; LaFave, Criminal Law [(3d ed. 2000)], § 5.3(b), pp. 468-469.) If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony. (*People* v. *Anderson*, *supra*, 28 Cal.4th at 784.)

ISSUES IN SECOND DEGREE FELONY MURDER CASES

Felony murder presents the "hottest" area of current homicide law in California. Over the past three years, five of the twelve opinions in criminal cases published by the California Supreme Court concerned issues in felony-murder cases. Three of those involved issues in second-degree felony murder cases.

An unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189 is second degree felony murder. (*People v. Robertson*, *supra*, 34 Cal.4th 156, 164.)

Felony-Murder Eliminates (or Presumes) Malice. Malice is not an element in a felony murder prosecution. "The felony-murder rule eliminates the need for proof of malice." (*People v. Robertson*, *supra*, 34 Cal.4th at p. 165.) In older cases the Supreme Court stated malice is presumed or imputed in a felony-murder case. (See, e.g., *People v. Hansen*, *supra*, 9 Cal.4th at p. 308; *People v. Satchell* (1971) 6 Cal.3d 28, 34, 43 and fn. 11; *People v. Olsen* (1889) 80 Cal. 122, 126-127.) Whether malice is presumed or eliminated, the only required mental state is the intent to commit the underlying felony. As long as that intent is present, the defendant is guilty of felony murder even if the killing was unintentional, accidental, or negligent. (CALCRIM 541A.) This doctrine is particularly pernicious because, as "malice has been eliminated as an element, circumstances that may serve to reduce the crime from murder to manslaughter, such as provocation or imperfect self-defense, are not relevant." (*Robertson*, *supra*, at p. 165.) While these defenses are difficult to imagine in first-degree felony-murder prosecutions, they frequently appear in second-degree felony-murder cases. Thus, if the defendant allegedly commits the inherently dangerous felony of shooting at an inhabited dwelling, shooting at an occupied vehicle, or discharging a firearm with gross negligence, he will not be able to rely on

heat of passion or imperfect self-defense to reduce the crime to voluntary manslaughter if he is tried on a felony-murder theory.

The Underlying Felony Must Be Inherently Dangerous. This issue produced a reversal last year in *People v. Howard*, *supra*, 34 Cal.4th 1129. Reckless driving while evading a police officer (Veh. Code § 2800.2) is not an inherently dangerous felony because the element of wanton and willful disregard for human life can be established by proving the defendant committed three traffic violations assigned a point under the Vehicle Code. These include driving on a suspended license . . .

Whether a crime is an inherently dangerous felony is determined based on "the elements of the felony in the abstract, not the particular facts of the case." *People v. Henderson* (1977) 19 Cal.3d 86, 93-94.) It does not matter how inherently dangerous the defendant's conduct was if the crime can be committed in ways that are not inherently dangerous. This issue is a question of law for the court. (*People v. Schaefer* 92004) 118 Cal.App.4th 893, 900-902.)

Court have found the following are inherently dangerous felonies:

-Shooting From a Vehicle at an Inhabited Dwelling (*People v. Hansen* (1994) 9 Cal.4th 300, 311;

-Shooting at an Inhabited Dwelling (*People v. Tabios* (1998) 67 Cal.App.4th 1, 9-10;

-Shooting at Occupied Vehicle (*Ibid*.);

-Grossly Negligent Discharge of a Firearm (*People v. Clem* (2000) 78 Cal.App.4th 346, 353-354; *People v. Robertson* 34 Cal.4th 156, 168-169, 173);

-Poisoning With Intent to Injure (*People v. Mattison* (1971) 4 Cal.3d 177);

-Arson of a Motor Vehicle (*People v. Nichols* (1970) 3 Cal.3d 150, 163);

-Manufacturing Methamphetamine (*People v. James* (1998) 62 Cal.App.4th 244, 271);

-Kidnapping (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 377; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299);

-reckless or malicious possession of a bomb (*People v. Morse* (1992) 2 Cal.App.4th 620, 646);

-attempted escape from prison by force or violence (*People v. Lynn* (1971) 16 Cal.App.3d 259, 272; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143-1146)

Court have found the following do not qualify as inherently dangerous felonies:

-Felonious Practice of Medicine Without a License (*People v. Burroughs* (1984) 35 Cal.3d, 824, 830-833);

-False Imprisonment (*People v. Henderson* (1977) 19 Cal.3d 86, 92-96);

-Possession of a Concealable Firearm by a Convicted Felon (*People v. Satchell* (1971) 6 Cal.3d 28, 35-41);

-Possession of a Sawed-Off Shotgun (*id.* at pp. 41-43);

Escape From Prison Without Force or Violence (*People v. Lopez* (1971) 6 Cal.3d 45, 51-52);

-Grand Theft (*People v. Phillips* (1966) 64 Cal.2d 574, 580-583; *People v. Morales* (1975) 49 Cal.App.3d 134, 142-143);

-Conspiracy to Possess Methedrine (*People v. Williams* (1965) 63 Cal.2d 452, 458);

-Extortion (*People v. Smith* (1998) 62 Cal.App.4th 1233, 1236-1238);

-Furnishing PCP (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1099);

-Child Endangerment or Abuse (*People v. Lee* (1991) 234 Cal.App.3d 1214, 1229).

-Driving With a Willful or Wanton Disregard for the Safety of Persons or Property While Fleeing From a Pursuing Police Officer (*People v. Howard*, *supra*, 34 Cal.4th 1129.)

- **If a firearm or other assaultive conduct is involved, the *Ireland* merger should apply.**

In *People v. Ireland* (1969) 70 Cal.2d 522 the Supreme Court held assault with a firearm cannot serve as a felony-murder predicate. This has become known as the merger rule.

> The merger rule is premised upon the concern that it 'would subvert the legislative intent for a court to apply the felony-murder rule automatically to elevate all felonious assaults resulting in death to second degree murder even where the felon does not act with malice. ... [I]f the felony-murder rule were applied to felonious assaults, all such assaults ending in death would constitute murder, effectively eliminating the requirement of malice--a result clearly contrary to legislative intent. [Citation.] (*People v. Robertson*, *supra*, 34 Cal.4th at p. 170, internal quotation marks omitted.)

> To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault-a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*People v. Ireland*, *supra*, 70 Cal.2d at p. 539.)

The Collateral and Independent Purpose Test. Logically, any crime involving an assault with a deadly weapon should be subject to the merger rule, regardless whether the victim is in a car or a house instead of standing nearby. Not so. In *People v. Robertson* the Supreme Court applied the **"collateral and independent" purpose test** (see *People v. Mattison*, *supra*, 4 Cal.3d 177, 185) and held the defendant could be tried for felony murder when he negligently discharged a firearm. That test is used to determine if "the purpose of the predicate felony was *independent of or collateral to an intent to cause injury* that would result in death." (*Robertson*, *supra*, 34 Cal.4th at 170, emphasis added.) In *Mattison*, this test had some logic. Mattison, who worked in a prison infirmary, sold methyl alcohol to an alcoholic prisoner. Methyl alcohol is poisonous. The prisoner, after getting drunk, died. The Supreme Court held the *Ireland* merger rule did not apply because Mattison acted with a collateral and independent purpose: furnish an

intoxicating drug. (See also, *People v. Taylor* (1970) 11 Cal.App.3d 57 [victim died of heroin overdose. Second-degree felony-murder conviction not subject to *Ireland* merger rule because underlying felony committed with collateral felonious purpose].) This is a logical result. When the crime is furnishing heroin or alcohol, the defendant is usually not acting "with the intend to commit injury which would cause death." (*Mattison*, *supra*, at p. 185.)

In *Robertson* the court applied this test when the underlying felony was negligent discharge of a firearm. The merger rule did not bar a felony-murder prosecution in *Robertson* because he told police he had fired into the air intending to scare people away. (*Robertson*, *supra*, at pp 162, 171.) However, if the evidence shows the defendant's intent was to shoot at the victim, either to injure or kill the victim, the merger rule will apply to bar application of the second-degree felony murder rule. Thus, in the recent case of *People v. Randle, supra,* 35 Cal.4th 987, the Court held the *Ireland* merger rule precluded use of felony-murder instructions because "defendant admitted shooting *at* Robinson." (*Id*., at p. 1005.)

The reach of the collateral and independent purpose test is still in flux. In *People v. Hansen* (1994) 9 Cal.4th 300, where defendant was convicted of felony-murder based on shooting at an inhabited dwelling, the court refused to apply the test. It stated it would not extend the *Ireland* doctrine "beyond the

context of assault." (*Id*., at p. 312.) Since "[m]ost homicides do not result from violations of section 246," a felony-murder prosecution will not prevent the jury from considering issues involving malice in the great majority of all homicides. However, in *Robertson* and *Randle* the court *did* extend the *Ireland* doctrine beyond the crime of assault with a deadly weapon. In *Robertson*, the court also noted that "a defendant who discharges a firearm at an inhabited dwelling house . . . has a purpose independent from the commission of a resulting homicide if the defendant claims he or she shot to intimidate, rather than to injure or kill the occupants." (*Robertson*, *supra*, 34 Cal.4th at p. 171, citing Justice Werdeger's concurrent opinion in *Hansen, supra*, at p. 318.) Whether the court would now hold apply the *Ireland* test in a case involving shooting at an inhabited dwelling house is an open question.

In *People v. Tabios* (1998) 67 Cal.App.4th 1, 11, the court of appeal applied *Hansen* and said the merger doctrine did not apply when the underlying offense was shooting at an occupied vehicle. The analysis in *Robertson* and *Randle* provides a basis to challenge this holding. *Tabios* engages in virtually no analysis, being largely content to cite *Hansen*. There is also a basis for distinguishing between shooting at an inhabited dwelling house (*Hansen*) and shooting at an occupied motor vehicle. The crime of shooting at an inhabited dwelling house does not require that anyone be present. (*Hansen*, *supra*, 9 Cal.4th at p. 310.) However, someone must

necessarily be present when the crime is shooting at an *occupied* vehicle. Thus, the crime of shooting at an occupied vehicle is virtually identical to an assault with a deadly weapon. The merger doctrine should therefore apply.

Attempted Murder Cannot Be Based Upon a Felony-Murder Theory. Since attempted murder can only be based on express malice aforethought, namely, a specific intent to kill, it cannot be based on a felony-murder theory. It would be error for the trial court to give a felony-murder instruction in an attempted murder case. (*People v. Guerra* (1985) 40 Cal.3d 377; *People v. Wein* (1977) 69 Cal.App.3d 79, 92 ["[T]he felony-murder rule has no application to a charge of attempted murder. An attempted murder requires the intent to take a human life-an element which cannot be supplied by the ... felony-murder rule."])

If it Was Error to Instruct on Felony-Murder, Prejudice Will Ordinarily Be Present

In the usual case, the jury will be instructed on malice murder and felony-murder. If the felony-murder instruction was erroneous, either because the underlying felony was not inherently dangerous, or because of the merger doctrine, reversal is required unless the record affirmatively shows the jury relied solely on the legally correct theory of malice murder. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.)

If There Is an Issue Involving the Merger Doctrine, the Jury Must Be Instructed on How to Apply the Collateral Purpose Rule

Assuming the merger doctrine is an issue in the case, its resolution involves a factual inquiry. In *Robertson* the court said the merger doctrine did not "preclude application of the felony-murder rule *under the facts of the present case.*" (*Robertson*, *supra*, at p. 173, emphasis added.) In *Randle* the court emphasized, "The *fact* that defendant admitted shooting at Robinson distinguishes *Robertson* and supports application of the merger rule here." (*Randle*, *supra*, at p. 1005.) Since the application of the collateral and independent purpose test hinges on the defendant's intent, the defendant has a constitutional right to have the jury make that factual determination. The United States Supreme Court has ruled that whenever a defendant's exposure to greater punishment or liability depends on factual findings concerning the circumstances of the offense, those findings must be made by a jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 484-485.) The question whether a defendant had an "independent and collateral purpose" when he committed an underlying felony "goes precisely to what happened in the commission of the offense." (*Id*., at p. 496.)

Neither CALJIC nor CALCRIM has a proposed instruction concerning the application of the independent and collateral purpose test. It is therefore unlikely any such instruction will be given in a felony-murder prosecution.

This issue was argued by Brad O'Connell in *Randle*, but the Supreme Court did not address it since it found the felony-murder rule did not apply.

Since the issue involves an essential element of felony-murder, the standard for prejudice should be the stringent *Chapman* standard. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625.) If there is any factual dispute in the case whether the defendant intended to shoot the victim or merely to frighten, the failure to instruct on the collateral and independent purpose test should be found prejudicial.

If Malice is Presumed in a Second-Degree Murder Prosecution it Is an Irrebutable Presumption Which is Prohibited by the Constitution.

In older cases, the Supreme Court has stated malice is presumed, imputed, superadded, infered or ascribed a a felony-murder case. (*People v. Olsen*, *supra*, 80 Cal. at pp. 126-127; *People v. Brown* (1958) 49 Cal.2d 577, 591 fn. 3; *People v. Washington* (1965) 62 Cal.2d 777, 780; *People v. Antick* (1975)15 Cal.3d 79, 87; *People v. Nichols* (1970) 3 Cal.3d 150, 164; *People v. Satchell*, *supra*, 6 Cal.3d at pp. 34, 43 and fn. 11.) As recently as 1994 the Supreme Court stated, "The felony-murder rule imputes the requisite malice for a murder conviction." (*Hansen*, *supra*, at p. 308.) "The felony-murder doctrine . . . operates to posit the existence of that crucial mental state." (*Ibid*.) If this is the case, the second-degree felony murder rule is contrary to the due process clause of the federal constitution.

First-degree felony murder is statutory. In section 189 the Legislature established a form of first-degree murder which does not include any element of malice aforethought. The Legislature has the power to do this, since it has the authority to define crimes. Second-degree felony murder, however, is a

judicial creation. There is no statute prohibiting second-degree felony murder. Therefore, it comes under section 187, which requires proof of malice. The Supreme Court recognized this basic principle in *People v. Hansen*, *supra*, 9 Cal.4th at p. 308.

As a matter of due process, a court may not instruct a jury that it must conclusively presume an element of the offense has been proven. (*Yates v. Evatt* (1991) 500 U.S. 391; *Carella v. California* (1989) 491 U.S. 263.) Since the standard second-degree felony-murder instructions given in California (see CALCRIM 540A to 540C) do not require the jury to find malice, it is effectively told malice is conclusively proven under that theory, which violates the federal constitution.

Reversal is required when a jury is instructed on a mandatory presumption unless th record establishes beyond a reasonable doubt that "the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." (*Yates v. Evatt*, *supra*, at p. 404.) In a second-degree felony-murder case it will be virtually impossible to meet this standard.

If the Second-Degree Felony Murder Theory Eliminates Malice as an Element, it Violates Separation of Powers, Due Process, and Section 6 as a Judicial Creation of a Non-Statutory Crime.

In *Robertson*, rather than talking about imputing or presuming malice, the Supreme Court said, "The felony-murder rule *eliminates* the need for proof of malice

in connection with a charge of murder." (*Robertson*, *supra*, 34 Cal.4th at p. 165.) "[M]alice has been eliminated as an element." (*Ibid*.) If this is the case, the second-degree felony-murder rule is still unconstitutional.

Under article III, section 3 of the California Constitution, "the power to define crimes and fix penalties is vested exclusively in the legislative branch." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516.) Section 6 reinforces that constitutional command, providing "[n]o act or omission ... is criminal or punishable, except as authorized by this Code."

In eliminating malice as an element of murder in second-degree felony murder prosecutions, *Robertson* violates this principle. *Robertson* describes second-degree felony-murder as "a common law doctrine." (*Robertson*, *supra*, 34 Cal.4th at 166.) However, "'In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned ....' [Citation.]" (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631-632.) Judicial elimination of a statutorily-prescribed element is tantamount to judicial recognition of a common law offense or judicial prescription of punishment greater than authorized by the Legislature. (*In re Brown* (1973) 9 Cal.3d 612, 624; *People v. Tufunga* (1999) 21 Cal.4th 935, 939.) As Justice Brown stated in dissent in *Robertson*, if the doctrine is understood as eliminating (rather than imputing) malice, it contravenes section 187. (See *Robertson*, *supra*, 34 Cal.4th at 191 (Brown, J., dis. opn.).)

The second-degree felony-murder doctrine is also wrong because it overrides the Legislature's statutory command fixing killings committed in the heat of passion as voluntary manslaughter. (§ 192, subd. (a).) When an assaultive crime is committed in the heat of passion it should not matter whether it can be labeled as shooting at an occupied vehicle or inhabited residence or negligent discharge of a firearm. "By holding that the second degree felony-murder rule applies to violations of section 246[], the majority undermines the Legislature's determination that homicides committed in the heat of passion or in unreasonable self-defense are not murder but voluntary manslaughter." (*Robertson*, *supra*, 34 Cal.4th at 182 fn. 4 (Kennard, J., dis. opn.).)

ISSUES INVOLVING SELF DEFENSE, UNREASONABLE SELF-DEFENSE AND HEAT OF PASSION

Three of the eight reversals in homicide cases in the past three years involved errors in instructing on self-defense, unreasonable self-defense and provocation. These principles frequently give rise to appellate arguments in homicide cases.

The court must instruct on any lesser included offense supported by the evidence, with or without a request from defense counsel. (*People v. Breverman* (1998) 19 Cal.4th 142, *People v. Turner* (1990) 50 Cal.3d 668, 690.) The court must also instruct on any defense relied upon by the defendant, or supported by substantial

evidence where the defense is not inconsistent with that offered at trial. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

As obvious as this seems, three reversals out of eight were due to the court's refusal to instruct on voluntary manslaughter or on self-defense when those instructions were requested by the defendant.

Heat of Passion Based Upon Adequate Provocation can be based upon many different circumstances. There must merely be objective evidence of adequate provocation and evidence of subjective heat of passion, most typically anger or fear.

> Provocation can extend over a long period of time. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Wharton* (19910 53 D3 522, 569-571; *People v. Borchers* (1958) 50 Cal.2d 321, 328 [provocation can be based on "a series of events over a considerable period of time"].) Reversing for refusing to instruct on heat of passion, the court in *People v. Martinez* (H025896) considered evidence of provocation, consisting of taunts, threats and bullying, which had gone on for the past six or seven years (since junior high school). No specific type of provocation is required. it ca be either physical or verbal. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Berry*, *supra*, at p. 515.) "Verbal provocation may be sufficient." (*Ibid.*; see *People v. Valentine* (1946) 28 Cal.2d 121, 137-144.) The only requirement is that the provocation be such as would cause an ordinary person of average disposition to act rashly or without reflection. (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.)

"If sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) However, there is no specific cut-off time. In *People v. Brooks* (1986) 185 Cal.App.3d 687, 695, a two-hour period separating provocation and killing was not enough to extinguish a heat of passion defense as a matter of law. And, a long history of provocation can affect the determination whether sufficient time has elapsed. In *People v. Berry, supra*, at pp. 515-516, the defendant waited 20 hours for his wife to come home before strangling her to death. The Supreme court held "the long course of provocative conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past, [and which] reached its final culmination in the apartment . . ." did not justify refusing to instruct on heat of passion.

One who has previously been harmed or threatened by another, or by people reasonably associated with the other person, can act more quickly and take harsher measures in self-defense in the event of an actual or threatened assault. (*People v. Moore* (1954) 43 Cal.2d 517; *People v. Spencer* (1996) 51 Cal.App.4th 1208; *People v. Gonzales* (1992) 8 Cal.App.4th 1658; *People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [threats by third parties].) A defendant is entitled to a pinpoint instruction on this legal principle upon request. (*People v. Moore*, *supra*, at pp. 527-529; *People v. Pena* (1984) 151

Cal.App.3d 462, 475.) CALCRIM 3470, the basic instruction on self-defense, includes bracketed paragraphs outlining this principle.

Evidence Supporting One Theory of Manslaughter Often Supports the Other. Often, evidence which supports one form of voluntary manslaughter will support the other as well. If the court only instructed on one, it may have been prejudicial error. (See *People v. Breverman, supra*, 19 Cal.4th at pp. 153, 163-164 [same evidence of threat and fear of harm which led court to instruct on unreasonable self-defense also gave rise to sua sponte duty to instruct on manslaughter based on heat of passion]; *People v. Viramontes* (2001) 93 Cal.App.4th 1256 [even though defendant did not testify, evidence which supported heat of passion equally supported imperfect self-defense; conviction reversed].) If the trial court instructed on only one theory of voluntary manslaughter, consider whether it should have instructed on both.

Standard of Prejudice Where The Court Fails to Instruct on Manslaughter. In *People v. Breverman, supra*, 19 Cal.4th at p.165, the Supreme Court held that the failure to instruct on a lesser included offense does not offend the federal constitution and is therefore only an error of state law subject to state law standards for prejudice. (*People v. Breverman*, *supra*, at p. 165.) However, a persuasive argument can be made that in the case of murder, the failure to instruct on heat of passion or unreasonable belief in self-defense, when supported by substantial evidence, is federal constitutional error since these defenses negate malice, an essential element of murder or attempted murder. In her dissent in *Breverman*, Justice Kennard reasoned the

special relationship between voluntary manslaughter and murder required this result. Significantly, the majority in *Breverman* did not reject Justice Kennard's reasoning. Instead, it declined to reach that issue because it was not properly raised on appeal. (*Id*., at pp. 169-170, fns. 18 & 19.) This issue is therefore an open question, even though the court of appeal typically will only apply the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) prejudice standard, citing *Breverman*. The argument for a federal constitutional standard is:

> Unlike other lesser included offenses, there is a unique relationship between murder and voluntary manslaughter, a relationship in which voluntary manslaughter includes all the elements necessary to support a conviction for murder *plus* the additional element of heat of passion or the unreasonable belief in the need for self-defense.
>
> In contrast with other lesser included offenses, to establish the absence of malice in a murder prosecution one does not prove the absence of the mental states used to define malice (i.e., the intent to kill or implied malice). Although the absence of malice may be shown in this way, it may also be shown by proving an *additional* element: that the defendant, even though intending to kill, acted in the heat of passion or in the unreasonable belief in the need for self-defense. "[W]hen the intentional killing results from a sudden quarrel or heat of passion induced by adequate provocation," the killer lacks malice and the only crime committed is voluntary manslaughter. (*People v. Saille* (1991)

54 Cal.3d 1103, 1114.) The presence of heat of passion or unreasonable belief in the need for self defense establishes the absence of malice even when the mental state necessary for murder is present. Thus, in contrast with other LIO situations, here the lesser offense includes all the elements of the greater offense *plus* an additional element, either heat of passion or unreasonable belief in the need for self defense.

Therefore, the failure to instruct on voluntary manslaughter is federal constitutional error under the analysis of the United States Supreme Court in *Mullaney v. Wilbur* (1975) 421 U.S. 684. In *Mullaney*, the State of Maine defined murder as an unlawful killing with malice aforethought, defined malice as an intentional killing in the absence of provocation, and defined manslaughter as an intentional killing without malice. (*Id*., at pp. 684-687, 696-698, 703.) As in California, murder and manslaughter in Maine were composed of common elements (*id*., at p. 685) except for manslaughter's additional element of "heat of passion on sudden provocation." (*Id*., at p. 703.) Due process required that the state have the burden of proving beyond a reasonable doubt every element necessary to establish the offense. (*Id*., at p. 685.) Maine, however, sought to put upon the defendant the burden of proving the *presence* of heat of passion. The Supreme Court concluded that, given the relationship Maine had structured between murder and manslaughter, due process required the state to treat the *absence* of heat of

passion as part of the definition of murder and to assume the burden of proving that the defendant did not act in the heat of passion, just as the state must prove every other element of the crime. (*Id*., at pp. 698, 704.)

California's definition of murder is similar to Maine's. Malice is an essential element of murder. (*People v. Rios* (2000) 23 Cal.4th 450, 469.) heat of passion or the unreasonable belief in the need for self-defense negates malice. (*People v. Lasko*, *supra*, 23 Cal.4th at p. 109; *People v. Flannel*, *supra*, 25 Cal.3d at p. 674.) Under *Mullaney*, when a factual circumstance negates an element of the crime, as heat of passion or the unreasonable belief in the need for self-defense negates malice, the prosecution bears the burden of proving the absence of that circumstance beyond a reasonable doubt. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 704; *Walker v. Endell* (9th Cir. 1988) 850 F.2d 470, 472.) To sustain a conviction for murder under California law the prosecution must prove malice and, in so doing, must prove the absence of heat of passion. (*People v. Rios, supra*, at p. 469.) Accordingly, the absence of heat of passion is an element, or an essential component of an element, of the offense of murder or attempted murder. The failure to instruct on that principle therefore violates the federal constitution.

Seeking a Quarrel or Other Wrongful Conduct as a Bar to Self-Defense or Unreasonable Belief in the Need for Self-Defense.

Instructional issues often arise due to instructions which limit a defendant's right to claim self defense or the unreasonable belief in the need for self-defense on

the basis that the defendant has engaged in wrongful conduct. For example, CALCRIM 3472 states, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." The final paragraph of CALJIC 5.17 states that imperfect self-defense is "not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attach or pursuit." Such instructions are frequently used improperly to nullify or undercut a defendant's claim of self-defense or imperfect self-defense.

CALCRIM 3472 states, "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." The same instruction, using slightly different language, is found in CALJIC 5.55. A review of old Supreme Court cases, however, provide a basis to challenge this instruction.

- CALCRIM 3472 cites *People v. Hinshaw* (1924) 194 Cal.1, 26-27. Hinshaw kicked a rival in the shins and pushed him. The rival fought back. Hinshaw broke his rival's jaw. In that context, the court upheld an instruction which said, "Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus . . . to create a real or apparent necessity for making a felonious assault." In *Hinshaw* "quarrel" apparently meant a physical fight; not merely words.

- However, mere words, unless they involve credible threats of violence, do not strip one of the right to self-defense. "[A] defendant does not become an aggressor where he demands an explanation of offensive words or conduct; where he discusses the settlement of a claim; where he discusses a sensitive subject; where he uses opprobrious language and insulting epithets to the deceased; or where he performs an inconsiderate act." (Torcia, Wharton's Criminal Law (15th ed.), §137, at pp. 230-231.) A person's mere words, no matter how hostile, cannot justify his or her opponent's use of force. (*People v. Lynch* (1894) 101 Cal. 229, 231.) Even threats alone, if there is no design to immediately carry them out, cannot justify the person threatened in launching an assault. The threatened party must actually and reasonably believe he is in imminent danger. (*People v. Torres* (1949) 94 Cal.App.2d 146, 152.)

- *Hinshaw* stands for the rule that one cannot provoke an opponent with the intent to provide a pretext to violently assault him. As *Wharton's Criminal Law* explains this type of situation arises where "the provocation was designed to provide ... a pretext for killing ... ," and in such a situation "the homicide will be murder." (*Wharton's Criminal Law*, *supra*, at p. 228; emphasis added.) However, the more usual type of situation does not involve a "pretext" or "secret design" but merely

actions by the defendant which prompt a violent response. In those situations, the issue turns on whether the defendant's actions had reached the point that the alleged "victim" was himself legally justified in resorting to the level of force selected. If so, the defendant cannot rely on self-defense; if not, he or she can. (See *People v. Hecker* (1895) 109 Cal. 451; *People v. Conkling* (1896) 111 Cal. 626.)

- Language similar to that found in *Hinshaw* is also found in *People v. Westlake* (1882) 62 Cal. 303, 307: "a cause which originates in the fault of the person himself – in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, can not be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person." In *People v. Conkling* the Supreme Court expressly overruled this language in *Westlake*. (See *People v. Conkling, supra*, 111 Cal. at pp. 624-627.) Even though Conkling had armed himself and traveled down a road his neighbor had blockaded, fully anticipating the possibility of violence, he had the right to claim self-defense if his neighbor initiated the violence. *Conkling* criticized the language in *Westlake* because it could mislead the jury into rejecting self-defense, not because Conkling was the first to resort to violence, but because through his own "fault" or "misconduct" he provoked the deadly

encounter or voluntarily placed himself in the realm of danger leading to it.

- The focus, then, should not be on whether the defendant is without fault in putting himself at risk or provoking his opponent. The focus should be on determining who is the initial aggressor. (*People v. Hecker*, *supra*, 109 Cal. at p. 459.)

CALJIC 5.17, the instruction on imperfect self-defense, ends with the following language: "[imperfect self-defense] is not available and malice aforethought is not negated if the defendant, by his unlawful or wrongful conduct, created the circumstances which legally justified his adversaries [sic] use of force, attack or pursuit." The new CALCRIM instruction on imperfect self-defense does not contain this language, but prosecutor's will request it anyway because it is taken almost verbatim a footnote in *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) Prosecutor's may use this language to argue a defendant must be wholly without fault in the affray which led to the slaying or attempted slaying. This is not the law.

- The language in *Christian S.* is specifically qualified by examples of what constitutes wrongful conduct" "e.g., the initiation of a physical assault or the commission of a felony." So qualified, the principle is correct. The problem arises when prosecutors expand the meaning of "wrongful conduct."

- The law does not require a defendant be wholly without fault to claim self-defense. In several old cases, the Supreme Court reversed convictions because the jury was told the defendant had to be wholly without fault to claim self-defense. In *People v. Conkling*, *supra*, 111 Cal. 616 the jury was instructed "to render such killing justifiable, it must appear that the defendant was wholly without any fault imputable to him by law in bringing about the commencement of the difficulty in which the mortal wound was given." (*Id*., at pp. 624-625.) While finding some support for this instruction, the Supreme Court called it "extreme." (*Id*., at p. 626.) "Having committed the first wrongful act, the plea of self-defense is foreclosed to him, and his life is the penalty, no matter what turn the affray may subsequently take. This doctrine would seem to be utterly inconsistent with the whole theory of self-defense, and gives a party assailed the absolute right to avenge his own wrongs." (*Ibid*.)

- *People v. Button* (1895) 106 Cal. 628 reached a similar result. Button and the decedent had argued while drunk, with Button stomping upon the decedent's face and dazing the decedent. As Button was attempting to leave to avoid further conflict, the decedent attempted first to stab and then to shoot Button, whereupon Button shot and killed the decedent. The jury was instructed that "No man, by his own lawless

acts, can create a necessity for acting in self-defense, ... *The plea of necessity is a shield for those only who are without fault* in occasioning it and acting under it." (*Id.* at PP. 636-637; emphasis added.) The Supreme Court reversed. "The instruction is bad law .... It is not true that the plea of necessity is a shield only for those who are without fault .... [¶] The instruction assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby the defendant would be justified in taking the life of the party assaulted. The law of self-defense is to the contrary." (*Id*. at p. 636.)

- Even if the defendant has reason to believe likely be attacked if he goes to a certain location, he has no legal obligation to curtail his activities to avoid a confrontation. One who "know[s] that if he travels along a certain highway he will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant . . . has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected attack." (*People v. Gonzales* (1887) 71 Cal. 569, 578.)

Imperfect Self-Defense Where the Unreasonable Belief is the Product of Mental Illness

Imperfect self-defense is where the defendant honestly believes he needs to defend himself, but the belief is unreasonable. Shouldn't the defense be available to a person who honest but unreasonable belief is the product of mental illness? Since

the belief need not be "reasonable" why can't the belief be the product of mental illness.

This issue was before the Supreme Court in *People v. Wright, supra,* 35 Cal.4th 964. The question on review was whether the doctrine of imperfect self-defense applies where the defendant's actual but unreasonable belief in the need to defend himself is based on a delusion resulting from mental illness attributable to methamphetamine abuse. The court The Court declined to reach the issue.

In *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 (petition for review filed) the court rejected this claim. The defendant, experiencing a paranoid delusion, stabbed a person 101 times believing that person was the devil, and was trying to kill him. The court held permitting this defense was contrary to the Legislature's abolishment of the diminished capacity defense and contrary to the Supreme Court's reasoning in *People v. Saille*, *supra*, 54 Cal.3d 1103. "Imperfect self-defense remains a species of mistake of fact; as such, it cannot be founded on delusion." (*Id*. at p. 1453, citation omitted.) "A person acting under a delusion is not negligently interpreting actual facts; instead he or she is out of touch with reality. That may be insanity, but it is not a mistake as to any fact." (*Id*. at pp. 1453-1454.)

Unfortunately for the future of this issue, *Mejia-Lenares* is well-reasoned and supported by careful research, including many cases from other jurisdictions.

Attempted Murder, Concurrent Intent and Attempted Voluntary Manslaughter. Prosecutors are increasingly filing multiple attempted murder charges when an individual fires a gun at a group of people, into a car or down the street. They rely on the concurrent intent theory as explained by the Supreme Court in *People v. Bland*, *supra*, 28 Cal.4th 313. If the defendant shoots at an intended victim but kills someone else, he is tried for murder under the principle of transferred intent. (See generally *People v. Scott* (1996) 14 Cal. 4th 544.) The number of charges is limited by the number of people killed. However, attempted murder convictions cannot be based on a transferred intent theory because attempted murder requires a specific intent to kill that particular victim. (*People v. Bland*, *supra*, at pp. 326-331.) Instead, "concurrent" intent provides the basis for liability in relation to "unintended" victims. Under the concurrent intent theory, a defendant can be found guilty of attempted murder of any number of victims if his attempt to kill his intended victim is so lethal it can be inferred he intended to kill everyone in the "kill zone" in order to assure the death of his intended victim. The concurrent intent theory produces problems when a defendant seeks to raise defenses in justification or in mitigation of his conduct.

> Heat of passion can reduce attempted murder to attempted voluntary manslaughter. When a firearm is discharged causing great bodily injury, the difference is critical since attempted voluntary manslaughter is not subject to the 25-years-to-life enhancement required by section 12022.53(d). The heat of passion defense is problematic, however, in an attempted murder case tried

on a concurrent intent theory. The problem arises due to the confluence of two principles. First, to raise a heat of passion defense, "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim. (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.) Second, as already noted, transferred intent does not apply in attempted murder cases.

In a transferred intent murder case, if a defendant shoot at one person but your assault is off the mark and instead you kill another, her or his state of mind, including mental states involved in self defense or heat of passion, transfer to the unintended victim. (*People v. Levitt* (1984) 156 Cal.App.3d 500, 507; *People v. Spurlin* (1984) 156 Cal.App.3d 119, 126.) That is, transferred intent can work for the defendant as well as against the defendant.

Thus, if a defendant relies on self-defense,

> [T]he doctrine of transferred intent is available as a defense in California. Under this doctrine, just as "one's criminal intent follows the corresponding criminal act to its unintended consequences," so too one's lack of criminal intent follows the corresponding non -criminal act to its unintended consequences. (Citation.) Thus, a defendant is guilty of no crime if his legitimate act in self-defense results in the inadvertent death of an innocent bystander. (*People v. Levitt* (1984) 156 Cal.App.3d

500, 507; see also *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024.)

The same is true in a heat of passion case. "[I]f A aims at B with intent to kill under circumstances which would make him guilty of voluntary manslaughter of B, but he hits and kills C instead, A is guilty of voluntary manslaughter of C." (Wayne R. LaFave & Austin W. Scott, Jr., 1 *Substantive Criminal Law* § 312(d) (1986); see also Charles E. Torcia, 2 Wharton's Criminal Law § 146 (15th ed. 1994) [if homicide would have been manslaughter as to intended victim, defendant is guilty of manslaughter in death of unintended bystander].)

However, in an attempted murder case tried on a concurrent intent theory, the defendant's criminal intent cannot be transferred. Logically, then, a defendant's *lack* of criminal intent (self-defense), or *mitigated* criminal intent (heat of passion), cannot be transferred either. This produces an anomalous result. A defendant relying on self-defense or heat of passion who shoots at but misses his intended victim while hitting another, is better off if the other person is killed than if the other person is only wounded.

This result should be challenged. To paraphrase the Supreme Court, "It would be anomalous to place the person who intends to attack one person and in the course of the assault [wounds] another

> inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and [wounds] one or both." (*People v. Sears* (1970) 2 Cal.3d 180, 189.) Heat of passion based on adequate provocation negates malice. (*People v. Saille*, *supra*, 54 Cal.3d 1103, 1114.) If malice is negated as to the intended victim, it should be negated as to persons nearby, whether shots nearly miss them or even if they are wounded. The defendant's mitigated mental state should apply to all.

In addition to its anomalous effect on defenses, the concurrent intent theory produces other problems. In a transferred-intent murder case, the number of charges is strictly delineated by the number of persons killed. In a concurrent-intent attempted murder case, however, the limit on the number of potential victims is amorphous. In many cases the number of victims exceeds the number of shots fired and the number of persons hit. So far, courts have had no problems with this. In *People v. Smith*, *supra*, 37 Cal.4th 733 the Supreme Court upheld two attempted murder convictions where the defendant fired a single shot into a car, narrowly missing two occupants. In the unpublished portion of the now depublished opinion in *People v. McMahon* (2005) 131 Cal.App.4th 80 (superceded by grant of review), the court upheld six attempted murder convictions in addition to one murder conviction where a defendant fired five shots into a van with seven occupants.

In the unpublished opinion in *People v. Robles* (2005) 2005 Cal.App.Unpub.LEXIS 1652, the court upheld nine attempted murder convictions where a defendant repeatedly fired a rifle at a fleeing car, and where three bullets entered two other cars which contained a total of nine passengers, injuring one person (the intended victims in the fleeing car were not even alleged as victims).

Results such as these should be challenged. Criminal liability under the concurrent intent theory is supposedly limited to those persons in the "immediate vicinity" of the intended victim. (*People v. Bland*, *supra*, at p. 330, quoting from *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984, 1001].) Some narrowing is necessary to give meaning to this requirement.

ISSUES INVOLVING INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is a lesser included offense of murder. (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.) Section 192 defines involuntary manslaughter as an unlawful killing without malice "in the commission of a misdemeanor which is inherently dangerous to human life," or "in the commission of an act, ordinarily lawful, which involves a high degree of risk of death or great bodily harm, without due caution and circumspection."

However, these two specific descriptions do not adequately describe involuntary manslaughter. Involuntary manslaughter is *any* unlawful killing (no justification or excuse applies) which is committed without malice, whether express (intent to kill) or implied.

Note: voluntary manslaughter is a killing in which malice is "negated" by heat of passion upon adequate provocation (*People v. Saille* (1991) 54 Cal.3d 1103, 1114), or due to an actual but unreasonable belief in the need to defend oneself or others (*People v. Flannel* (1979) 25 Cal.3d 668, 674.). When you look at the facts of a voluntary manslaughter case, however, the defendant acts with either express or implied malice. That is, there is either an intent to kill or an intentional act, the natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. An unlawful killing in which there is truly a reasonable doubt whether the defendant intended to kill and whether she or he acted with implied malice is *involuntary* manslaughter. It is a catch-all for all unlawful killings which do not qualify as either murder or voluntary manslaughter.

> Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse. (Perkins, *Criminal Law* (2d ed 1969) page 70, emphasis added; quoted with approval at *People* v. *Morales* (1975) 49 Cal.App..3d 134, 145 n. 7.)
>
> The crime of manslaughter complements the crime of murder. Thus, if a killing is unlawful it must constitute either a murder or manslaughter, the defining boundary being malice; if the homicide is unlawful and malice is lacking the offense is manslaughter. If the offense cannot be voluntary manslaughter, ..., it is manslaughter nonetheless and, a fortiori, must be

involuntary manslaughter. (*People* v. *Cameron* (1994) 30 Cal.App.4th 591, 605.)

Therefore, in any case which presents grounds to question whether there was a basis to argue there was a lack of malice (both express and implied), but not on the basis of provocation or the unreasonable belief in the need of self-defense, the trial court should instruct on involuntary manslaughter as a lesser included offense of murder. A court must instruct sua sponte on a lesser included offense when the evidence raises a question as to whether all elements of the charged offense are present. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) **NOTE:** However, when the basis for arguing the absence of malice is voluntary intoxication, the Supreme Court has held there is no sua sponte duty to so instruct. Rather, it is a "pinpoint" instruction which must be requested by the defendant. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1120.)

> Whether the court must instruct on involuntary manslaughter depends on whether there is a basis to argue the defendant's state of mind was consistent with criminal negligence instead of express or implied malice. Implied malice involves an intentional act whose natural consequences are dangerous to human life, deliberately performed with a knowledge of, and conscious disregard for, the danger to life. (*See People* v. *Dellinger* (1989) 49 Cal.3d 1212, 1222.) Criminal negligence refers to conduct that is such a departure from the conduct of an ordinary person under the circumstances as to manifest

a disregard for life or an indifference to consequences. (*See People* v. *Penny* (1955) 44 Cal.2d 861, 879.)

if a defendant commits a felony which is not inherently dangerous to human life which results in death, and arguably has no intent to kill and acts without due caution and circumspection, the court would have a sua sponte duty to instruct on involuntary manslaughter, even though the two statutory definitions of involuntary manslaughter (see § 192) do not apply. (*People v. Burroughs* (1984) 35 Cal.3d 824, 836.) For example, it could be:

- a felony assault committed without malice (e.g., where an "eggshell" victim dies due to an assault, even though there was no express or implied malice).
- felony child abuse of the assaultive category, where a death results but malice is arguably absent.
- felonious unlicenced practice of medicine. (*People v. Burroughs, supra*.)
- felony grand theft. (*People v. Morales* (1975) 49 Cal.App.3d 134, 144.)

a homicide could theoretically be involuntary manslaughter even if it occurred during the commission of an inherently dangerous felony where the assault could not be the basis for felony murder under the "merger doctrine," and where malice is arguably not proven. (*People v. Cameron*, *supra*, 30

Cal.App.4th at pp. 603-605.) This will be a rare case, however, since the commission of most inherently dangerous felonies will include, by definition, strong evidence of implied malice.

Involuntary manslaughter also includes cases where malice is negated by unconsciousness produced by intoxication. "When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter." (*People v. Ochoa* (1998) 19 Cal.4th 353, 423.) Unconsciousness does not mean that the actor is comatose. Instead, a person is deemed "unconscious" if he or she committed the act without being conscious thereof. (*Id.* at pp. 423-424. Other than a state of unconsciousness, intoxication cannot be used to negate implied malice. (See § 22 [intoxication admissible in murder prosecution solely "on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought"])

Previously, intoxication was a form of diminished capacity which could reduce a murder to voluntary manslaughter. (See, e.g., *People v. Conley* (1966) 64 Cal.2d 310.) However, section 28, enacted in 1981, abolished the defense of diminished capacity. (See also § 25(a), enacted in 1982.)

A homicide is involuntary manslaughter if malice is negated by a defendant's mental impairment. "A defendant, however, is still free to show that because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought). In a murder case, if this evidence is believed, the only supportable verdict would be involuntary manslaughter." (*People v. Saille*, *supra*, 54 Cal.3d at pp. 1116-1117.) **NOTE:** Due to the subsequent amendment to section 22, which specifies that voluntary intoxication cannot be used to prove the absence of implied malice, voluntary intoxication cannot reduce a murder to manslaughter except where it results in "unconsciousness."

Section 192 lists only two ways in which malice is negated. However, cases have recognized this is not an exclusive list.

CALJIC instructions on involuntary manslaughter were deficient in several ways. First, CALJIC 8.45 listed a killing committed in the unreasonable belief in the necessity to defend oneself or another as involuntary manslaughter. (summarize change in law from unpublished 6th dist. case) Second, CALJIC 8.45 defined an unlawful killing solely in the language of section 192, which excludes any felonies which result in death committed without malice.

CALCRIM instructions largely remedy the problems with the CALJIC instructions on involuntary manslaughter. It does not list the unreasonable belief in the need for self-defense as a basis for involuntary manslaughter. It includes a killing resulting

from a felony which is not inherently dangerous. However, it does not contemplate the possibility of an inherently dangerous felony which results in death, cannot be murder because of the merger doctrine, but where malice is arguably not present. Admittedly, such a case is hard to imagine, but it is conceivable.

MISCELLANEOUS HOMICIDE ISSUES

Dilution of Required Mental State for Homicide

The Definition of implied malice has always required evidence the defendant "subjectively appreciated the life-threatening risk created by his conduct." (*People v. Bellinger* (1989) 49 Cal.3d 1212, 1217.) The standard CALJIC instruction speaks of acting "with knowledge of the danger to, and with conscious disregard for, human life." (CALJIC 8.11; see also, *People v. Estrada* (1995) 11 Cal.4th 568, 578 [implied malice requires "a defendant's subjective awareness of the grave risk to human life"].)

- Courts sometimes seek to dilute the mental state required for homicide. For example, In *People v. Knoller*, involving the infamous killing by Presa Canario dogs, the court of appeal majority held the subjective requirement for implied malice was satisfied by evidence of "the awareness that the act is life-threatening or *likely to result in great bodily injury*." (*People v. Noel* (2005) 128 Cal.App.4th 1391, 1449 [superceded by grant of review].) The court stated, "Knowledge that a person is going to die or that the act has a high probability of death

is not the proper subjective standard." (*Id*. at p. 1446.) This issue is now on review in *People v. Noel* (2005) 128 Cal.App.4th 1391, rev. gr. 7/27/05 (S134543/A099366).) Dennis Riordan is representing Marjorie Knoller.

Another example of the dilution of the mental state required for a homicide is the original version of the concurrent intent, or "kill zone" instruction, found in CALJIC 8.66.1. As originally written, this instruction read as follows:

> A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator *intended to ensure harm* to the primary victim *by harming everyone* in that victim's vicinity.
>
> Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone,' is an issue to be decided by you.

- This instruction was subject to attack because it diluted the required mental state for attempted murder. A specific intent to kill is an essential element of attempted murder. (*People v. Whitfield* (1994) 7

Cal.4th 437, 464.) By inserting language about an "intent to ensure harm" this instruction dilutes the requirement of specific intent.

- However, no court has agreed that CALJIC 8.66.1 is misleading.
- Furthermore, in the July 2004 edition the CALJIC Committee substituted the terms "intended to kill" and "killing" where "intended to harm" and "harming" formerly appeared. (CALJIC (July 2004 ed.) No. 8.66.1, p. 387.)