

MURDER AND MADNESS

SNAPSHOTS OF MENTAL STATE DEFENSES IN HOMICIDE CASES

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Introduction

Two years ago, I wrote an article and made a seminar presentation on “Turning Murder Into Manslaughter.” Last year I took the article and presentation on the road and gave talks to CPDA (with Michael Ogul) and CAP (without him) on the same subject. In the months after the CPDA presentation, I received a number of phone calls from desperate-sounding public defenders around the state with clients facing murder charges who were frantically seeking a way to create a manslaughter defense in their case. The common thread, as they described it to me, was that the client, for one or more of several reasons – mental disorder, drugs or alcohol, or, as it so commonly happens, some combination of the two – was out of his mind when the killing occurred. I patiently went over all the possibilities of a manslaughter defense, usually based on imperfect self-defense, which has a subjective standard, or other defenses to first degree murder which might at least avoid special circumstances.

What these poor sods were really asking me to do was tell them that diminished capacity – the demised defense which would almost certainly have applied to their clients – had been resurrected. Alas, unless you are lucky enough to have a client who committed his crime before January 1, 1982 – the date legislation expressly eliminating the defense

¹The author wishes to thank his co-presenter (but not co-author) Michael Ogul, Deputy Public Defender Extraordinaire from the Santa Clara County PD’s Office, for many of the good ideas and much useful comment and critique. Very special thanks are also due to SDAP’s founding and outgoing Executive Director, “El Magnifico,” Michael Kresser, who, with this article and all the others that preceded it, provided patience, careful editing, and wise comments and suggestions (and sometimes needed tone control). It should not need saying that the foolish, crazy suggestions presented herein are my own, for which, to paraphrase Mr. Nixon, I take full responsibility – but not the blame.

went into effect – there is no diminished capacity defense.²

So what is left? I rather glibly passed over this point in my manslaughter article, concluding “not much,” and pointing to language in a California Supreme Court opinion which described the rump “diminished actuality” defense as a “nonsensical phrase being judicial shorthand for the actual lack of a requisite mental state, due to an abnormal mental condition. . . .” (*People v. Wright* (2005) 35 Cal.4th 964, 978.) The big problem I saw with this defense was that in the limited manner in which it can be advanced – more on that later – it amounts to an “all-or-nothing” choice between murder and acquittal, an exponentially more difficult sell to a jury than the option of a voluntary manslaughter conviction.

The idea of this article is to try to say more than what I was able to in those phone calls, to explore the imaginable avenues of defense, excuse, or avoidance based on psychological or mental health-related factors. As the topic is large, and it intersects with mental health expertise, evidence law, and other subjects well beyond the scope of this article, the discussion here will be limited to some “snapshots” about key areas, an attempt to locate some important points of contestation within homicide law in California where assorted defenses to murder arise based on your client “going crazy” in the various senses of the phrase.

The discussion that follows is in a somewhat logical sequence, from the greatest to the least defenses in homicide cases. The first topic is the “insanity defense,” which arises upon a plea of “not guilty by reason of insanity,” hereinafter “NGI.” After tracing the ups and downs of this defense, the article will address some problems with instructions on this defense, including some areas of potential confusion and problems around the otherwise abandoned – except here – notion of “mental capacity.” The second topic is the much-maligned, but still alive-and-on-life-support “diminished actuality” defense. The discussion

² Murder, of course, has no statute of limitations (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250), and the legislative change abolishing diminished capacity is not retroactive. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241 & fn. 5.)

here will first look to recent favorable case law which sets out the permissible parameters of expert testimony with regard to this defense, discuss several variables in the efficacy of this defense depending on the theory of murder culpability advanced by the prosecution, and conclude with a suggestion – perhaps fanciful – as to how to combine this defense with an alternative, lesser offense verdict as to a form of voluntary manslaughter based on recent case law development.

The next set of topics concerns the role of mental disorders, illnesses, and distortions in the various objective and subjective mental state defenses to murder, i.e, perfect and imperfect self-defense, heat of passion manslaughter and unreasonable heat of passion second degree murder, followed by a short discussion of pertinent issues concerning the unconsciousness defense in murder cases. The thesis here is that expert evidence about your client’s mental disorders will often be relevant and admissible as to the “subjective” based claims of imperfect self-defense, and “imperfect” heat of passion negating premeditation and deliberation, with a critical analysis of recent case law excluding evidence of “delusions” as proof of an actual but unreasonable belief in the need to defend against imminent peril. While recognizing that the case for such evidence as to the objective-based defenses of heat of passion manslaughter and perfect self-defense is tougher, I will discuss ways in which evidence of certain mental disorders – particularly those related to post-traumatic stress – can be admissible as to such defenses.

In a brief parting discussion, I will focus on “something new and good,” i.e., recent U.S. Supreme Court Eighth Amendment case law relating to the mentally ill and juveniles. My suggestion is that with a bit of creativity, these cases can provide us with some promising avenues for further argument concerning mental defects or lack of development of the brain which can hopefully form the basis for future challenges and for a more favorable evolution of homicide law concerning mental illness and mental defects.

A. The Insanity Defense.

1. Evolution (and Devolution) of the Insanity Test.

Generally speaking, “criminal law rests on a postulate of free will – that all persons of sound mind are presumed capable of conforming their behavior to legal requirements and that when any such person freely chooses to violate the law, he may justly be held responsible. [citation] From the earliest days of the common law, however, the courts have recognized that a few persons lack the mental capacity to conform to the strictures of the law.” (*People v. Drew* (1978) 22 Cal.3d 333, 340.)

Initially, those whom the law recognized as lacking such capacity were only persons classified as “idiots,” persons we would now classify as “severely or profoundly mentally retarded . . . [.] who had a total lack of reason or understanding, or an inability to distinguish between good and evil.” (*Atkins v. Virginia* (2002) 536 U.S. 304, 340-341, diss. opin. of Scalia, J. See also Christopher Slobogin, “The End to Insanity: Recasting the Role of Mental Disability in Criminal Cases (Olin Working Paper No. 00-3), pp. 9-10.³) By the 19th century, “courts in both England and America increasingly referred to insanity as an inability to distinguish ‘right and wrong.’ (Slobogin, “The End to Insanity,” *supra*, p. 10.) This was soon thereafter recognized as the “M’Naghten test,” which encompassed both types of exemption from criminal responsibility.

[T]o establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”

M’Naghten’s Case, 10 Cl. & Fin. 200, 210 (1843), quoted in Slobogin, “The End to Insanity,” pp. 9-10.)

This is the test which most American courts, including California, followed for over a century after M’Naghten. The test was subjected to criticism for recognizing only

³See http://weblaw.usc.edu/centers/cleo/working-papers/olin/documents/00_3_paper.pdf.

cognitive impairments, but not *volitional* ones, and for focusing too specifically on knowledge of wrongfulness, when many severely mentally ill persons who commit crimes may understand that their act is wrong yet believe, because of their cognitive deficiencies or delusions, that they were morally justified in their acts. (*Ibid.*) These criticisms culminated in the development of the American Law Institute’s revised test for insanity in its Model Penal Code. (*Ibid.*) This test was ultimately adopted by judicial decision in California in *People v. Drew*, *supra*, 22 Cal.3d 333, decided in 1978:

“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”

(*Id.*, at p. 336, fn. 3.)

This very promising and realistic step forward was wiped out a mere four years later by Proposition 8, which amongst its other pieces of retrenchment and retribution, reinstated the M’Naghten test, now codified in Penal Code section 25, subdivision (b).⁴ (See, e.g., *People v. Wilder* (1995) 33 Cal.App.4th 90, 99.) That once-again controlling test provides for an NGI verdict only where “the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.” (§ 25, subd. (b).)

This very demanding test was further limited by section 25.5, enacted in 1994. This statute further limits an NGI defense by providing that a verdict of insanity “shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances.” (§ 25.5.)

This article is not really intended to address all of the permutations of the insanity

⁴Statutory references are to the Penal Code if not otherwise indicated.

defense, as it is a subject which comes up only rarely in our homicide or other cases.⁵ However, I have identified two potentially pertinent sets of issues which may arise regarding this defense.

b. Focus of Insanity Defense on “Capacity” and Problems with This.

With two near-simultaneous strokes, the Legislature and the Electorate removed psychiatric testimony and jury consideration of “capacity” from substantive homicide law by eliminating the defense of diminished capacity – more on that later – while inserting it into section 25 as a determinative term of the insanity defense under the M’Naghten test.

The precise wording of the statutory M’Naghten test embodied in section 25 has given rise to some instructional mischief. Looking to the plain language of the statute, it appears to require, in the *conjunctive*, that the accused “prove[] by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.” (§ 25, italics added.)

This is clearly not a proper statement of the M’Naghten test. Prior to its elimination and reinstatement, the M’Naghten rule under California law required a defendant to prove “that, at the time of the committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; *or*, if he did know it, that he did not know he was doing what was wrong.” (*People v. Skinner* (1985) 39 Cal.3d 765, 768.)

In *Skinner*, the Supreme Court held that the purpose of the change in law wrought by Proposition 8 was to restore the M’Naghten test, not to narrow it, and essentially held that the “and” in section 25 was a draftsman’s error and should really be read as “or,” such that “there exist two distinct and independent bases upon which a verdict of not guilty by reason

⁵The NGI pleas which we tend to see often involve a deal being struck between the defense and prosecution. Otherwise, insanity trial defenses seem to be relatively rare in non-capital cases.

of insanity might be returned.” (*Id.*, at p. 769.) *Skinner* made it clear that where “mental illness is manifested in delusions which render the individual incapable either of knowing the nature and character of his act, or of understanding that it is wrong, he is legally insane under the California formulation of the M’Naghten test.” (*Id.*, at p. 782.)

A different problem arises based on the focus of instructions on “capacity” in a manner which suggests that the defense needs to prove an absence of capacity to understand right from wrong *in general*, rather than at the time of the criminal act.

This danger arises from the October 2010 revision to CALCRIM 3450, which eliminated language focusing on incapacity at the time of the crime. It now provides:

The defendant was legally insane if: [¶] 1. When (he/she) committed the crime[s], (he/she) had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature and quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong.

While the new version of CALCRIM 3450 parrots the statutory language of section 25, subdivision (b), it fails to explain that the statutory language—“incapable of knowing or understanding” the wrongfulness of his act — means that the defendant “did not know or understand” the wrongfulness *when he committed the criminal act*. As such, the new version of CALCRIM 3450 fails to properly explain the legal standard. Moreover, it is argumentative and prejudicially misleading because it appears to require the jury to find not merely that the defendant *did not know or understand* that his act was morally wrong, but further, that he was *incapable* of knowing that it was morally wrong. In other words, the instruction tells the jury that if the defendant could possibly have known his act was morally wrong under any circumstances, then he is not legally insane, even if he did not, in fact, know that his act was morally wrong.

Thus, when this instruction is given under CALCRIM 3540, you should be prepared to argue that it is a prejudicial misstatement of the law, contrary to the reinstated M’Naghten test of section 25, as interpreted by the Supreme Court in *People v. Skinner, supra*, 39 Cal.3d

765, and the independent state and federal constitutional guarantees to due process of law.

Michael Ogul, who suggested this instructional problem to me, and sought to challenge it in his trial in the *Lai* case last year, has suggested two revisions to the instruction to cure this problem, which I include in the margin below. The first is a restatement of the previous version of CALCRIM 3450.⁶ The second harmonized the two versions.⁷

b. Problems Concerning Proper Interpretation of Section 25.5.

i. Intoxication-Related Mental Disorders.

The additional limits on an NGI defense enacted in section 25.5 have sparked a couple of problems in the case law. The leading case interpreting section 25.5, *People v. Robinson* (1999) 72 Cal.App.4th 421 (which does *not* involve my mad cousin), holds that its purpose was to completely eliminate an insanity defense where the source of mental illness is protracted use of intoxicants. In other words, even if your client was really crazy when he committed his crime, if the origin of his mental disorder or derangement was his use of, and/or addiction to drugs or alcohol, he is precluded from showing he was legally insane at the time the crime was committed.

⁶ “The defendant must prove that it is more likely than not that he was legally insane when he committed the crime. [¶] The defendant was legally insane if: [¶] 1. When he committed the crime, he had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, he did not know or understand the nature and quality of his act, or did not know or understand that his act was morally or legally wrong.”

⁷ “The defendant must prove that it is more likely than not that he was legally insane when he committed the crime. [¶] The defendant was legally insane if: [¶] 1. When he committed the crime, he had a mental disease or defect; [¶] AND [¶] 2. Because of that disease or defect, he was incapable of knowing or understanding the nature and quality of his act, or was incapable of knowing or understanding that his act was morally or legally wrong. A defendant is incapable of knowing or understanding the nature and quality of his act, or that his act was morally or legally wrong if, he had a mental disease or defect when he committed the crime and, as a result of that mental disease or defect, he did not know or understand the nature and quality of his act, or did not know or understand that his act was morally or legally wrong.”

Section 25.5 provides that if an accused's insanity is caused solely by abuse of or addiction to intoxicating substances, then the insanity defense is not available to him or her. This statute makes no exception for brain damage or mental disorders caused solely by one's voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one's voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. In other words, if an alcoholic or drug addict attempts to use his problem as an escape hatch, he will find that section 25.5 has shut and bolted the opening.

(*Id.*, at p. 427.) *Robinson* cites legislative history documents indicating that the purpose of section 25.5 was to disallow an insanity defense for persons whose mental health problems are from drug or alcohol addiction. "The legislation takes the position 'that substance abuse and addiction is self-induced and does not, by itself, excuse criminal behavior.' ([Assem. Public Safety Com., Republican analysis of Sen. Bill No. 40X (1994)], p. 27.) By enacting this statute, the Legislature expressed its intent that individuals rendered insane solely because of their substance abuse should be treated differently than those afflicted by mental illness through no conscious volitional choice on their part." (*Id.*, at p. 428.)

The somewhat good news is that *Robinson* limits this holding, construing the statute as applying only where there is substantial evidence showing that mental illness was *solely* caused by use of intoxicants, concluding that it did not apply in Mr. Robinson's case because the expert testimony and presentation of the defense did not rely on a diagnosis of mental illness based on use of intoxicants, where Robinson had a history of mental retardation, and was diagnosed with a psychotic disorder and possible organic brain damage, in addition to a history of chronic substance abuse. Thus, because his defense of insanity was not premised *solely* on voluntary ingestion of intoxicants, it was error to give an instruction based on the language of 25.5. (*Ibid.*)

The good news ends there, however. The court in *Robinson* had no problem finding this error harmless. Applying the *Watson* test, the court held that the evidence of insanity

was weak, and pulled out a cherished appellate court end-play prejudice tool, concluding that because the trial court instructed on a legal principle applicable to facts not shown by the evidence, the jury would have followed the general instruction given to it and disregarded the instruction, since there was no evidence that defendant's mental problems were caused solely by intoxication. (*Id.*, at p. 429.)

If an improper instruction under section 25.5 arises on appeal, my suggestion would be to challenge the prejudice analysis of the court in *Robinson* on two fronts. First, it should be argued that the *Chapman* standard applies because the error is federal constitutional in dimension, since it deprived the defendant of his right to correct instructions on the defense theory of the case. (See, e.g., *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739: [“well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case”]; see also *Mathews v. United States* (1988) 485 U.S. 58, 63, and *People v. Benavides* (2005) 35 Cal.4th 69, 102-104.) Second, the court's analysis ignores the “obvious” reason it had cited a page earlier why it is error for a court to instruct on a legal theory not shown by the evidence, i.e., that “[s]uch an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved.” (*Id.*, at p. 428, quoting *People v. Jackson* (1954) 42 Cal.2d 540, 546-547.) The danger of the erroneous instruction in a case like *Robinson* is precisely that it would give the jury a basis for taking a shortcut to rejecting an insanity defense by concluding that it could not apply where it was based in any meaningful part on a history of substance abuse.

ii. **What’s Disordered? Mood, Personality, Adjustment? It Matters. . . .**

Mental disorders come in many shapes and sizes, and experts will frequently differ as to which category of mental problem, and which specific type of disorder, is present with respect to a particular person in a given time frame. Even the same expert will come up with different diagnoses of the same person at different times. Given this context, it is therefore troubling – and a source of potential issues in the trial court and on appeal – that section 25.5 erects a wall against presenting an NGI defense “solely on the basis of a personality or adjustment disorder. . . .” (§ 25.5.)

Personality disorders are typically classified as on the DSM Axis II. However, adjustment disorders, such as post-traumatic stress, are classified as belonging in the more serious, Axis I category, which refers to acute symptoms requiring treatment, and includes the most serious mental disorders, such as schizophrenia, as well as mood disorders like bipolar disorder and depression.⁸ And while the term “mood” and “personality” are somewhat synonymous, these are categorically different types of mental disorders. In fact, it is clear from the legislative history of section 25.5 that mood disorders such as bipolar disease were clearly included among those mental health diagnoses which, even after section 25.5's enactment, give rise to an NGI defense.

An Assembly committee report explains what is targeted by the legislation, quoting contrasting definitions by the Department of Mental Health of major mental disorders, on the one hand, versus personality and adjustment disorders, on the other.

a) Major Mental Disorders. Major mental disorders are manifest by substantial disorganization of thinking, emotions, and/or perceptions of reality; they are illnesses which interfere with the capacity for normal work and social function. Examples are manic-depressive illness and schizophrenia. Persons subject to major mental disorders can be expected to benefit from mental health treatments, such as medications, therapy, and psychosocial support. These disorders are the traditional basis of a finding of not guilty by reason of insanity. This bill would not affect use

⁸See, e.g., http://www.psyweb.com/DSM_IV/jsp/dsm_iv.jsp

of major mental disorders as the basis of an NGI finding.

b) Personality Disorders. Persons with personality disorders are not out of touch with reality. Persons with these disorders have difficulty adjusting to societal constructs and are persons who are easily angered and have irresponsible behavior patterns. They are not particularly amenable to therapeutic support. These disorders could not be used as the sole basis of an NGI finding under this bill.

c) Adjustment Disorders. Adjustment disorders are temporary, short-lived, uncharacteristic, dysfunctional reactions that may occur in response to a normal life situation. Persons with these disorders are not out of touch with reality. These disorders could not be used solely as a basis of an NGI finding under this bill.

(Ass. Comm. on Public Safety, Report of 8-9-94, pp. 1-2⁹.)

Clearly, the amendment was focused on the typical “sociopath” client diagnosed, for example, with “antisocial personality disorder.” Equally clearly, it was not intended to apply to persons with a mood disorder such as bipolar disorder, as it is, in fact the very same illness described under the category of “major mental disorder,” i.e., “manic-depressive illness.”¹⁰

As *Robinson* emphasized, the language of statute refers to the defense not being made “solely on the basis of a personality or adjustment disorder . . .”, which does not suggest it is inadmissible as part of expert testimony, but merely that this can’t be *the only* basis. (§ 25.5; *Robinson, supra*, 72 Cal.App.4th at p. 428.) A recent case where this came up, though it was not the legal issue in the case, was *People v. Cabonce* (2009) 169 Cal. App.4th 1421, where the defense expert opined that defendant had a serious mental disorder exacerbated by personality disorders, and the prosecution expert countered that he had only a personality

⁹ See http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0001-0050/sbx1_40_cfa_940808_141132_asm_comm, last checked 4-6-12.

¹⁰“Bipolar disorder” is simply another label for the mental disorder formerly called manic-depression. (See *People v. Halvorsen, supra*, 42 Cal. 4th at p. 391.) Thus, you should be wary of any case where a section 25.5 instruction is given to the jury about “personality” and “adjustment” disorder not qualifying where there it is undisputed that the client was diagnosed as bipolar.

disorder and was malingering. In that case, unlike *Robinson*, an instruction would be proper since there was substantial evidence – in the form of the prosecution expert’s testimony – which suggested there was only a personality disorder, with the defense being able to argue, based on its expert’s conclusions, that the instruction would be inapplicable.

Unresolved by this legislative act of “walling off” personality and adjustment disorders is the status of many more recently-identified and evolving mental disorders, such as post-traumatic stress disorder, borderline personality disorder, and social anxiety disorder. Even a brief peek into the multitudinous sources of information on the Internet regarding mental disorders suggests that it is anything but settled where these diagnoses fit in with respect to being mood, personality, adjustment, or what-have-you disorders. Thus, exclusion of evidence of mental disorders under section 25.5, or even an instruction advising a jury not to consider personality or adjustment disorders, should raise a red flag and give rise to serious inquiry for potential issues in a case.

iii. **Due Process Trump Card?**

There is something of a tension here. On the one hand, it would seem that we could make an argument that where a particular mental illness, even one currently classified as a personality or adjustment disorder, can combine with other factors to make a person not understand the wrongfulness of his or her criminal conduct, categorical exclusion of the defense would violate the due process right to present a defense. However, such an approach may be limited by the U.S. Supreme Court holding that states can define insanity in any manner they choose.

[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical

definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. [Citations.] There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.

(*Clark v. Arizona* (2006) 548 U.S. 735, 752-753, citations and internal quotations omitted.)

While plainly binding on California courts in terms of federal due process, one has to question the reasoning process of this analysis. The “flux and disagreement” about medical/psychiatric categories provides ample grounds for precluding a state from excluding particular diagnoses from being admissible to show legal insanity. This is essentially the position espoused in Justice Kennedy’s dissent in *Clark*, which concludes that the due process right to present a complete defense precludes a state from categorically excluding certain types of mental disorder as part of a defense to murder charges. (*Clark, supra*, at pp. 789-785, dis. opn. of Kennedy, J.) I hasten to add that when Justice Kennedy dissents, it’s a bit like when E.F. Hutton speaks: you should listen very carefully and try to imagine a different majority which could achieve the position which is advanced. What I am trying to say here is that due process constitutional challenges to the categorical limitations of section 25.5, though arguably futile under *Clark*, may be well worth pursuing.

B. The “Diminished Actuality” Defense to Murder.

Okay, I need to begin discussion of this point by eating my words from my previous homicide article, where I described diminished actuality as “a phantom defense . . . which permits the defense to show that because of intoxication and/or mental defects of the defendant, he did not (as opposed to “could not”) form an intent to kill . . .”, quoted language from the Supreme Court describing it as a “nonsensical phrase being judicial shorthand for the actual lack of a requisite mental state, due to an abnormal mental condition . . .” (*People v. Wright, supra*, 35 Cal.4th at 978), and downplayed the significance of this defense from the assumed fact that it leaves a jury with an “all-or-nothing” choice between acquittal or conviction for murder, with no intermediate option of voluntary manslaughter.

When I first queried Michael Ogul about the potential topics for this article, he properly chastised me for this denigration of diminished actuality, reminding me of some favorable case law which provides considerable latitude to a defense expert in connection with this aspect of a mental state defense in a murder case, and pointing out that the same issues and expert evidence which give rise to a diminished actuality defense will often spill-over into factual issues related to imperfect self-defense, or defenses against deliberate, premeditated first degree murder, which can provide a jury with options besides acquittal or full conviction. As a second related point, this defense is not subject to the legislatively imposed restrictions of section 25.5, and thus can include evidence of personality and adjustment disorders, as well as intoxication-based mental disorders. Finally, although a pinpoint request is required to give rise to a duty to instruct, evidence that your client was intoxicated or out of his mind on drugs is admissible with respect to the diminished actuality defense, as, excepting the statutorily delineated exclusion of implied malice murder under section 22, subdivision (b) (more on this later), the defense involves a challenge to the prosecution's proof of a required specific mental, to which evidence of intoxication is relevant. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1117–1120.)

1. *Cortes* and Improper Restrictions on the Expert.

A helpful recent example of this is a recent Sixth District opinion, authored by Justice McAdams, in *People v. Cortes* (2010) 192 Cal.App.4th 873, where the Court of Appeal reversed defendant's murder conviction because of improper restrictions on the expert's testimony. The opinion, which arose out of a panel case where Steve Schorr did an outstanding job, features an excellent explanation of the expansive scope of testimony an expert is allowed to give concerning a defendant's mental health, including, but not limited to, at the time of the alleged crime, and how it affected him at that time.

First, the court reiterated settled law permitting a mental health expert to opine that a defendant suffered from a mental illness at the time of the homicide, including a description of how that mental illness can affect a person, such as the fact that it “can lead

to impulsive behavior. . . .” (*Id.*, at p. 902, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 582-583.)

Second, *Cortes* provides a detailed picture of the permissible parameters of such testimony. An expert cannot testify that defendant did not have the *ability* to form the requisite mental state because of the abolition of diminished capacity as a defense by sections 25 and 28. Neither can the expert expressly opine that defendant did not harbor the required specific intent, because section 29 prohibits testimony as to that ultimate fact. But what remains between these two extremes, and is permitted under the parameters of section 28, subdivision (a), is very significant.¹¹

[T]he defendant can call an expert to testify that he had a mental disorder or condition (such as or PTSD, or dissociation), as long as that testimony tends to show that the defendant did or did not in actuality (as opposed to capacity) have the mental state (malice aforethought, premeditation, deliberation) required for conviction of a specific intent crime (as opposed to a general intent crime) with which he is charged, except that the expert cannot offer the opinion that the defendant actually did, or did not, harbor the specific intent at issue. Put differently, sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged.

(*Cortes, supra*, 92 Cal.App.4th at p. 908.) Thus, the Sixth District concluded, the trial court erred in precluding the expert from testifying “about defendant’s particular diagnoses and

¹¹Section 28(a) provides: “Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.”

mental condition and their effect on him at the time of the offense, and in limiting [the expert's] testimony to diagnoses or mental conditions in the abstract and their effects on the general person in the population at large.” (*Id.*, at p. 909.)

Cortes goes further, holding that it is proper in this situation for an expert to paint the story of a defendant's mental problems with a fairly broad brush.

[The expert] should have been permitted to testify about defendant's upbringing and traumatic experiences as a child and/or adolescent, inasmuch as defendant's prior traumatic experiences informed [his expert] opinion, and explained the connection between defendant's diagnoses, his mental state and his behavior. He should have been permitted to explain both the psychological condition and the phenomenon of dissociation, and dissociation's relationship to PTSD and defendant's upbringing and traumatic experiences. He should have been permitted to explain the bases for his opinions, including defendant's statements describing his perception of the stabbing.

(*Id.*, at p. 910.) More specifically, *Cortes* holds that the trial court erroneously prohibited the expert from testifying that “the defendant's traumatic experiences as an abused adolescent caused him to suffer several DSM IV diagnosable conditions which were (a) likely to have colored his perceptions of the situation, and (b) impaired his consciousness in specific ways.” (*Id.*, p. 911.) Although such testimony “would have given the jury a basis to infer that defendant actually did not harbor malice, premeditate, or deliberate, even if [the psychiatrist] did not come out and say that defendant lacked such mental states..., [that] is exactly the type of testimony sections 28, 29, and the case law, permit.” (*Id.*, at p. 912.)

The favorable prejudice holding in *Cortes* concludes that the exclusion of this evidence hobbled the defense because the excluded testimony was relevant to questions of whether the defendant was not guilty because he acted in self-defense, or whether he was guilty of manslaughter instead of murder because of imperfect self-defense or heat of passion. (*Ibid.*)

Cortes is a very helpful case, in that it is common, in my experience, for prosecutors to seek, and trial courts to impose, considerable restrictions on the scope of expert testimony

which, after the abolition of diminished capacity, is confined to the seemingly narrow space between prohibited testimony on “capacity” on the one hand, and the also-prohibited express opinion as to whether the defendant actually formed the requisite intent, on the other. Where the scope of expert testimony is improperly restricted, *Cortes* and the case law it discusses provide a strong basis for arguing error that deprived the defendant of his due process right to present a meaningful defense to the charges. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 687 and cases discussed therein, and *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414 [“defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense”].)

2. **Instructional Issues.**

Instructions on a “diminished actuality” defense, like an intoxication defense, are only given on request, as, under the reasoning of *Saille*, such an instruction would be considered as “pinpointing” the jury’s attention on particular facts with regard to the prosecution’s burden to prove the mental state element of the charged crime. (*People v. Saille, supra*, 54 Cal.3d at p. 1120; see CALCRIM No. 3428 “Bench Notes” [citing *Saille* for proposition that “court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state . . . [but] must give this instruction on request”].) Both CALCRIM and CALJIC provide an instruction on diminished actuality, although (fortunately) the phrase is not used in either of them. (See CALCRIM No. 3428, CALJIC No. 3.32)¹²

¹²The CALCRIM instruction appears to be the better one, as it properly pinpoints the prosecution’s burden of proof.

You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime.

The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <insert specific intent or mental state required, e.g., “malice aforethought,” “the intent to permanently deprive the owner of his or her property,”

Where such an instruction is requested but refused, and there is substantial evidence to support it, the error should be challenged on appeal. Although the California Supreme Court classifies this type of error as subject to *Watson*, state constitutional analysis (see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1135), the Ninth Circuit sees the matter differently, and the error should be federalized as both deprivation of the due process right to present a defense under cases like *Crane* and *Sayetsitty*, and as improper refusal to instruct on the defense theory of the case. (See *Conde v. Henry*, *supra*, 198 F.3d at p. 739 and *Mathews v. United States*, *supra*, 485 U.S. at p. 63.)

3. **Implied Malice.**

Normally, the standards and circumstances under which intoxication evidence and diminished actuality evidence are admissible are consonant. There is, however, a legislatively created exception for implied malice. Following the Supreme Court’s decision in *People v. Whitfield* (1994) 7 Cal.4th 437, 442–444 that intoxication evidence was admissible to negate the mental state of implied malice, the Legislature amended section 22, subdivision (b) to make it clear that evidence of voluntary intoxication is not admissible with respect to proof of the mental state required for implied malice. (See *People v. Wright*, *supra*, 35 Cal.4th at p. 985.)¹³ However, this anti-*Whitfield* amendment to § 22 only applies to intoxication evidence, and has no impact with respect to mental disease and defect evidence under section 28(a), which applies to proof of “any mental state.” Thus, a

or “knowledge that ...”> . If the People have not met this burden, you must find the defendant not guilty of _____ <insert name of alleged offense> .
(CALCRIM No. 3428)

¹³In my murder-manslaughter article, I argued that this creates the untenable situation that intoxication would be admissible to negate malice based on imperfect self-defense only if the prosecution’s theory of the killing is express malice, but would be inadmissible as to implied malice and that, if applied as such, should be challenged under federal constitutional grounds as denying the defendant the right to present admissible and relevant evidence to negate proof of a required element of the prosecution’s case. (See, e.g., *Crane v. Kentucky*, *supra*, 476 U.S. at p. 687, *Washington v. Texas* (1967) 388 U.S. 14.)

diminished actuality defense can be interposed when the prosecution's theory of guilt is implied malice.

4. **Caveat: Felony Murder Exception.**

The foregoing analysis and discussion applies to a charge of malice murder. It would not apply, or at least not in the same way, where the theory of guilt is felony murder. This is true because malice is not an element of felony murder, with the prosecution having the burden to prove only defendant's guilt for the underlying triggering felony offense, and that the killing occurred in the course of commission of, or flight from, the felony. (See case law cited at *People v. Robertson* (2004) 34 Cal.4th 156, 165 [overruled on other grounds in *People v. Chun* (2009) 45 Cal. 4th 1172, 1201].) Thus, expert testimony about your client's mental disorders would have to undermine proof of the mental state element of underlying crime, e.g., robbery, which is much harder to do.

Some years ago I had a murder case where my client was charged with felony murder for the killing of a pizza delivery man during the course of a robbery. Defense counsel put on evidence that, at the time of the crime, the client was out of his mind on PCP, and presented excellent expert testimony to the effect that defendant, who had been diagnosed with schizoaffective disorder, also suffered a PCP induced dissociative delirium at the time of the killing. However, the prosecutor in that case barely addressed the expert's conclusions, simply arguing to the jury that there was absolutely no question that defendant, whatever drug he was on, had the requisite specific intent to steal when he demanded that the pizza man give him the money, and there was little that could be said, either by trial counsel or by appellate counsel, to refute this point.

It may well be that in felony murder cases such as the one I just described, a defendant may have a better chance with an insanity defense by means of an NGI plea than a diminished actuality defense.

5. **Un-Caveat: Aiding and Abetting and *Mendoza*.**

With respect to a different species of indirect culpability for murder, aiding and

abetting, the story is much better. To prove the guilt of an aider and abetter, the prosecution must show that the defendant “act[ed] with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense. . . .” (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) It seems there is this very favorable California Supreme Court decision in *People v. Mendoza, supra*, 18 Cal.4th 1114, which holds that the knowledge and intent elements of aiding and abetting culpability are sufficiently akin to a specific intent such that intoxication evidence is admissible to negate proof of such intent, and that this situation prevails even when the theory of vicarious liability involves application of the “natural and probable consequences” doctrine with respect to a general intent target crime, such as shooting at an inhabited building.¹⁴

If intoxication evidence is admissible as to these elements of proof, it inexorably follows that evidence of mental disease or disorder would also be relevant and admissible where it bears on the existence of the requisite knowledge and intent elements of aiding and abetting culpability. Put colloquially, if it’s relevant that somebody was wasted when the crime went down, it’s obviously going to be relevant that he or she was nuts. (See, e.g., *People v. Hering* (1999) 20 Cal.4th 440, 447, and § 28, subd. (a): “Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.”)

I should add a caveat as to aiding and abetting culpability that while the question of intent and knowledge is based on subjective factors, another potential issue, the application of the natural and probable consequences doctrine, is based on an objective test, such that the jury should be instructed that evidence of intoxication, mental disease or defect should

¹⁴Yeah, yeah, it was my case, and my one and only Supreme Court win. For those readers unfamiliar with the natural and probable consequences doctrine, see generally *People v. Prettyman* (1996) 14 Cal.4th 248.

not be considered as to this question. (See *Mendoza, supra*, at p. 1134, and CALCRIM No. 3428.)

6. **But Wait: After *Garcia* and *Lasko*, Is Voluntary Manslaughter an LIO of Murder When There is a Failure to Prove Malice Based on a Diminished Actuality Defense?**

Okay, this is where *I* start hallucinating with a crazy idea. In *People v. Saille, supra*, 54 Cal.3d 1103, the Supreme Court made it crystal clear that diminished actuality and the relevance of intoxication evidence survived the abolition of diminished capacity and related legislative changes, but that it no longer gave rise to a lesser included offense of voluntary manslaughter. (*Id.*, at p. 1114.) This viewpoint has essentially been accepted thereafter as gospel truth. (See, e.g., *People v. Wright, supra*, 35 Cal.4th at p. 979 [explaining the holding in *Saille* as a conclusion that “elimination of the diminished capacity defense effectively eliminated the middle option of voluntary manslaughter in a diminished actuality case”].)

However, it is my suggestion that two recent developments in California homicide law may signal that there is room to argue for the “middle option” of a voluntary manslaughter verdict in a cases with a diminished actuality defense. The first change in the law is the one recognized by the Supreme Court in *People v. Lasko* (2000) 23 Cal.4th 101 and *People v. Blakeley* (2000) 23 Cal.4th 82, namely the demise of the seemingly-settled rule that voluntary manslaughter required, as an element, a specific intent to kill. (See, e.g., *People v. Brubaker* (1959) 53 Cal.2d 37, 44.) In *Lasko*, the Supreme Court concluded that voluntary manslaughter did not really include or require an intent to kill, then followed the same holding in *Blakeley*, with the court concluding that voluntary manslaughter was a lesser included crime of murder regardless of whether the mental state element of the murder was express or implied malice. (*People v. Lasko*, 23 Cal.4th at p. 110 [heat of passion] and *People v. Blakeley*, 23 Cal.4th at p. 91 [imperfect self-defense].)

Why does this matter for purposes of my novel thesis? Because the reasoning of *Saille*, in concluding that voluntary manslaughter was no longer a lesser included offense in a homicide case where a diminished actuality defense applies, is very much focused on

amendments to section 188 which redefined the meaning of “malice” to make it clear that express malice was nothing more, and nothing less, than the intent to kill. This view was advanced to negate the argument of the defendant in *Saille* that voluntary manslaughter survived as a lesser offense when a defendant successfully negated malice by means of diminished actuality or intoxication evidence, which was based on the premise that malice could be negated while the defendant still had the intent to kill required for voluntary manslaughter. (See *Saille, supra*, at pp. 1113-1116.) The *Saille* court relied extensively on an identical holding by the Court of Appeal in *People v. Bobo* (1990) 229 Cal.App.3d 1438, which expressly cited, in connection with this holding, the then-accepted dictum that “voluntary manslaughter . . . require[s] . . . specific intent to kill.” (*Id.*, at p. 1439.) It is based on this premise, I believe, that the Supreme Court in *Saille*, like the Court of Appeal in *Bobo*, concluded that when a defendant is successful in raising reasonable doubt as to the existence of malice based on mental disease, defect, disorder, and/or intoxication, “the only supportable verdict would be involuntary manslaughter or an acquittal.” (*Saille, supra*, at p. 1117, citing *Bobo, supra*, at pp. 1442-1443.)

Of course, the holdings in *Lasko* and *Blakeley* topple this reasoning process. Voluntary manslaughter does not require an intent to kill. Thus, if there is an unlawful killing, but one done without express malice intent to kill (or implied malice) it can, in fact, be voluntary *or* involuntary manslaughter.

The second, and decisive piece of the puzzle is the recent holding in *People v. Garcia, supra*, 162 Cal.App.4th 18, that, in light of this holding in *Lasko* and *Blakeley*, “an unlawful killing during commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter.” (*Id.*, at p. 30.) I hasten to add that *Garcia* was not a decision favorable to our side. In that case, the defendant, charged with murder, was convicted of the lesser included offense of voluntary manslaughter, and the holding in the case was a rejection of the defendant’s *Saille*-like contention that the most he could be convicted of, in

light of the jury's conclusion that he lacked malice, was involuntary manslaughter.¹⁵

The reasoning of *Garcia*, in my opinion, lends itself to an argument for instructions on voluntary manslaughter as a lesser included offense, applicable in most cases involving diminished actuality, where malice is negated. *Garcia* first concludes that any killing in the commission of an inherently dangerous felony cannot be involuntary manslaughter; that a killing in the course of an inherently dangerous felony is, typically, second degree felony murder, but that under the *Ireland* doctrine, the felony murder rule cannot apply where the underlying felony is an assaultive crime which is an integral part of the homicide, and a finding of guilt for murder must be based on malice. In *Garcia*, the killing was committed in the course of an *Ireland*-merged felony of assault with a deadly weapon. However, when the jury acquitted Garcia of murder based on evidence negating malice, but believed the killing was still unlawful, the crime was manslaughter, i.e., “the unlawful killing of a human being without malice . . .” (§ 192), and, according to the court in *Garcia*, could be no less than voluntary manslaughter because it fit none of the statutory or nonstatutory definitions of involuntary manslaughter. (*Garcia, supra*, 162 Cal.App.4th at pp. 28-33.) Thus, the court in *Garcia* concluded, “an lawful killing during commission of a inherently dangerous felony, even if unintentional, is at least voluntary manslaughter.” (*Id.*, at p. 29.)

Now take the reasoning, of *Garcia*, and apply it to a killing in the course of an inherently dangerous felony such as assault with a deadly weapon, assault by means of force likely to inflict great bodily injury, or shooting at an inhabited dwelling which “merges” under the *Ireland* doctrine. (See *People v. Chun, supra*, 45 Cal. 4th at p. 1200-1201.)

¹⁵ The *Garcia* variant of voluntary manslaughter was recognized in a subsequent Court of Appeal decision which found trial court error for a failure to instruct on this type of voluntary manslaughter. However, review has been granted in this case. (*People v. Bryant* (2011) 198 Cal.App.4th 134, rev. gtd. 11-16-11, S196365.) Needless to say, if the Supreme Court's resolution of the question in *Bryant* smothers this newly recognized form of voluntary manslaughter in its crib, and disapproves the holding in *Garcia*, my argument herein may end up stillborn.

Where, in a murder case which involves (as most murders do), this type of dangerous assaultive felony, a jury concludes that it has reasonable doubt as to the existence of malice, based on “diminished actuality” evidence of mental defect, disorder, and/or intoxication, because the killing took place in the commission of this type of inherently dangerous felony, it must be “at least voluntary manslaughter” under *Garcia*. (*Garcia, supra*, at p. 29.)

I know what you’re thinking. Bill Robinson is out of his mind. We can never get the California Supreme Court to effectively overrule *Saille* and reinstate voluntary manslaughter as a lesser included offense where a diminished actuality defense is shown. And you are probably right. But I think it is arguable, in light of *Blakeley*, *Lasko*, and *Garcia*. My suggestion, then, is to raise this contention both by requesting such a manslaughter instruction in the trial court, and/or, on appeal, by arguing, looking to the reasoning (but not the authority) of the now-unpublished holding in *Bryant*, that there is a sua sponte duty to instruct on voluntary manslaughter in a case with a diminished actuality defense to the malice element, and a killing which takes place in the commission of a merged inherently dangerous felony.

I will end this discussion with a caveat. In light of the, shall-we-say, contingent nature of the above thesis, it behooves us to continue to seek instructions on voluntary manslaughter based on the current “garden” varieties of this unusual lesser offense, heat of passion manslaughter and imperfect self-defense manslaughter. As explained below, the same evidence giving rise to a diminished actuality defense can be utilized as to these defenses. And while we face significant hurdles in putting forward these defenses (see my Murder-Manslaughter article), you will at least not have to persuade the trial or appellate court of the legal authority in support of the lesser manslaughter instruction.

C. Self Defense and Heat of Passion, Perfect and Imperfect.

As suggested above, the next and quite interesting topic concerns how evidence of your client’s mental diseases or disorders can be relevant and admissible as to the most common murder defenses, namely perfect self-defense (which leads to acquittal if

successful), imperfect self-defense and reasonable provocation/heat of passion (both of which leads to conviction for the lesser crime of voluntary manslaughter), or “imperfect heat of passion,” e.g., actual but unreasonable provocation based on heat of passion (which precludes first degree murder conviction based on premeditation and deliberation). It is my thesis that such evidence is highly relevant and admissible to the two varieties of this defense which are based principally on the *subjective*, “actual” mental state of your client, i.e., imperfect self-defense and “imperfect heat of passion” because what is at stake is your client’s actual mental state as to his fear of death or bodily injury, or his actual arousal to act out of passion rather than reason, without regard to whether his state of mind is reasonable or not. At the same time, I will argue that even with respect to the “reasonable person” based tests for perfect self-defense and heat of passion manslaughter, evidence of mental disorder can be highly relevant as critical background about the nature of the person and circumstances of the acts in question which, under the rubric of cases like *People v. Humphrey* (1996) 13 Cal.4th 1073, and because of the “actual” mental state components of these defenses (see, e.g., *People v. Moye* (2009) 47 Cal.4th 537, 541), can be a critical part of the background to a jury’s determination of the bona fides of these defenses.

1. **Mental Disorder Evidence as to Imperfect Self-Defense, and the Problem of “Delusions.”**

Imperfect self-defense arises in murder cases in which a defendant cannot “perfect” his claim of self-defense because the belief in the need to defend himself or another against imminent peril (death or great bodily injury), though actual, is shown to be unreasonable. (See *People v. Flannel* (1979) 25 Cal.3d 668.) By way of background, to obtain a conviction for murder, the burden is on the prosecution to show, beyond a reasonable doubt, that a killing was not committed based on a *reasonable* belief in the need to defend against imminent peril, with the consequence of a failure to prove being acquittal based on perfect self-defense. (See § 189.5; *People v. Banks* (1976) 67 Cal.App. 3d 379, 383-384.) The crime is “reduced” to voluntary manslaughter under the doctrine of imperfect self-defense where the prosecution cannot prove beyond a reasonable doubt that the killing was not the result of an actual but *unreasonable* belief in the need to defend oneself or another against imminent peril. (See *People v. Rios* (2000) 23 Cal.4th 450, 462.)

For purposes of this article, the question is whether facts, brought forward in expert testimony, about a defendant’s mental disorder diagnoses are admissible with respect to a claim of imperfect self-defense. The answer should be a resounding “Yes.” Imperfect defense is raised to challenge the “malice” mental state of murder. (See *In re Christian S.* (1994) 7 Cal. 4th 768, 771 [defendant who kills based on actual but unreasonable belief of imminent peril “is deemed to have acted without malice”].) As such, under section 28(a), it should follow that “[e]vidence of mental disease, mental defect, or mental disorder is admissible . . . on the issue whether or not the accused actually . . . harbored malice aforethought. . . .”

In spite of this rather obvious conclusion, several lower appellate courts, while recognizing that evidence of mental illness may be relevant to imperfect self-defense insofar as it informs the defendant’s actual perceptions and beliefs about the need to defend against imminent peril, have held that imperfect self-defense cannot be grounded upon “delusions” or “hallucinations” of a defendant. (See *People v. Mejia-Lenares* (2006) 135 Cal.App.4th

1437, 1454-1455, and authorities discussed therein.)

Although *Christian S.* settled the question of the imperfect self-defense doctrine's viability following the elimination of the diminished capacity defense, neither it nor any subsequent Supreme Court opinion suggests this "narrow" doctrine (*Christian S.*, *supra*, 7 Cal.4th at p. 783) now covers aspects of diminished capacity or diminished actuality not previously included. Thus, imperfect self-defense remains a species of mistake of fact (see *id.* at p. 779, fn. 3); as such, it cannot be founded on delusion. In our view, a mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. 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.

(*Mejia-Lenares*, *supra*, 135 Cal.App.4th at pp. 1453-1454.)

In my view, the analysis in *Mejia-Lenares* is built upon a faulty premise, and should be challenged as untenable. That "mistakes of fact" can be the basis for self-defense is obvious. A "mistake of fact" which gives rise to an actual belief in the need to defend against mortal danger is likely to be based on a combination of objective and subjective factors. If it is a mistake based only on *objective* factors and reasonable subjective factors, it would be a reasonable mistake of fact, and thus would give rise to *perfect* self-defense. (See, e.g., *People v. Clark* (1982) 130 Cal.App.3d 371, 377.)

A hypothetical tragic example of this would be a person confronted by shadowed man holding a firearm replica who, perceiving the replica pointed at him, reasonably believed he was threatened by a gun-wielding adversary, and shoots him, only to learn afterwards that the gun was a fake, and that the man was his brother playing a joke. The *objective* factors, an unknown man pointing a gun-like object at him, combined with subjective factors, the shooter's perception abilities and reasoning process about a gun-wielding person posing a threat, combine to give rise to a reasonable (though, ultimately, erroneous) belief in the need to defend against imminent peril, which makes this poor fellow's act of shooting his unfortunate brother excusable homicide committed in self-defense.

Contrast this to a similar hypothetical example, in which the same man, with a severe case of post-traumatic stress disorder, for example, perceives his brother holding a flashlight and pointing it at him, but that the man actually, but unreasonably, believes the object is a gun which his brother intends to use upon him. If this belief is caused by post-traumatic stress, i.e., he is unduly fearful because of the impact of a series of traumatic experiences, causing him to leap to the unreasonable conclusion that the object is a gun, imperfect self-defense should be an available defense. However, under the reasoning of *Mejia-Lenares*, if his belief in danger is the product of a delusion or hallucination that the object his brother is holding is a gun, this would not give rise to imperfect self-defense, even though this delusion, and the “actual but unreasonable” perception of danger, is the product of his mental disorder.

In the two examples, there is a combination of objective and subjective factors which leads our poor shooter to actually believe, reasonably in the first example, and unreasonably in the second, that he is in imminent peril. In my view, it violates both section 28(a) and the due process right to present a defense to allow self-defense to apply in the first example, but not imperfect self-defense as to the second.

My position appears supported by case law and current CALCRIM instructions which make it clear that hallucinations are relevant to negate premeditation and deliberation in a first degree murder case. (See *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 and CALCRIM 627.) *Padilla* held that “evidence of a hallucination – a perception with no objective reality – is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder.” (*Ibid.*) Notably, the variety of manslaughter at issue in *Padilla* was not imperfect self-defense, but heat of passion manslaughter. The “delusion” in question in *Padilla* was the defendant’s psychotically induced belief that the shooting victim had killed his father and brothers (*id.*, at p. 678) – a fact which, if *reasonably* believed as true, could well be considered provocation sufficient to raise reasonable doubt

whether the crime was committed in the heat of passion. However, since this belief was entirely delusional, and the standard for heat of passion manslaughter is arousal to passion of an average, reasonable person, the holding in *Padilla* makes sense because “[a] perception with no objective reality cannot arouse the passions of the ordinarily reasonable person.” (*Id.*, at p. 679.)

By the same token, such a delusion could give rise to an “actual but unreasonable perception,” which makes it entirely proper for a jury’s consideration in a subjective-based defense, such as *unreasonable* heat of passion – as recognized by the court in *Padilla* – or, as I maintain, contrary to the holding in *Mejia-Lenares*, with respect to subjectively based imperfect self-defense.

Perhaps the answer to this problem, as Michael Ogul suggested to me, can be found in the extremity of the “delusion” in *Mejia-Lenares*, which was along the lines of a true hallucination or psychotic delusion, where the defendant believed that the stabbing victim “was transforming into the devil and wanted to kill him.” (*Mejia-Lenares, supra*, 135 Cal.App.4th at p. 1444.) By contrast, where delusions are along the lines of irrational distorted beliefs rather than psychotic hallucinations – e.g., in my hypothetical, the post-traumatically stressed shooter believing that the flashlight in his brother’s hand is a gun – imperfect self-defense would be a tenable claim based on the defendant’s exaggerated, mental-disorder-based exaggerated perceptions of reality. In any event, the issue is one well worth flagging when this constellation of factors gives rise to an actual, but unreasonable mental-disorder-based belief in the need to defend against imminent peril.

2. **Mental Disorder Evidence as to “Reasonable-Person” Defenses.**

As suggested above, there are much more significant impediments to including evidence concerning a defendant’s mental illness in the context of the “reasonable person” defenses of heat of passion manslaughter and perfect self-defense. This is so because the primarily objective-based tests for these defenses are based on the standard of a “reasonable person” with an “average disposition.” (See, e.g., CALCRIM 570 (heat of passion

manslaughter) and CALCRIM No. 505 (self-defense).)

However, as discussed in the “Murder-Manslaughter” article, there are significant subjective (and mixed objective/subjective) components to these reasonable person standards which, given the right factual background, could make evidence of a client’s mental disorder relevant to such defenses. First, an element of the “objective” test for heat of passion manslaughter is proof of the “subjective” fact “that the defendant subjectively killed under the heat of passion . . .”, an aspect found missing by a majority of the Supreme Court in *People v. Moye, supra*, 47 Cal.4th at p. 541.) In some circumstances, your client’s mental health infirmities could be relevant to the existence of this required subjective mental state.

Second, as I discussed under the “Fourth Pillar” of heat of passion manslaughter in my article, California law recognizes that a proper “objective” assessment of whether there was provocation leading to acts based on passion rather than judgment requires consideration of important *subjective* factors, namely the specific circumstances surrounding the situation giving rise to the killing and the facts known to the defendant, allowing considerable room to argue that the unique circumstances present would have led a reasonable person *in your client’s situation and knowing what he/she knew*, to act rashly out of passion. (See, e.g., *People v. Logan* (1917) 175 Cal. 45, 49 [“the conduct of the defendant is to be measured by that of the ordinarily reasonable man *placed in identical circumstances*”], emphasis added.)

Thus, the life experiences and background history of a defendant can be highly relevant to a proper calculus by the jury of the objective standard for heat of passion manslaughter and perfect self-defense. The best of example of this principle in the case law is *People v. Humphrey, supra*, 13 Cal.4th 1073, a self-defense case, where the Supreme Court held that “the jury, in determining objective reasonableness, must view the situation from the defendant’s perspective . . .”, and that therefore evidence of battered women’s syndrome was relevant to this defense because, according to the expert on the subject, “a battered woman can become increasingly sensitive to the abuser’s behavior, [which is] relevant to determining whether defendant reasonably believed when she fired the gun that

this time the threat to her life was imminent.” (*Id.*, at p. 1086) Thus, in effect, the proper question is not whether the defendant’s belief in the need to defend against imminent peril was reasonable in some abstract sense, divorced from the experiences and perceptions of the defendant, but rather whether this belief was reasonable “consider[ing] defendant’s situation and knowledge. . . .” (*Id.*, at p. 1087.)

Can this situation be applied with respect to a defendant’s mental disorder? Arguably, that is exactly what the court did in *Humphrey*. Battered women’s syndrome has been described as a “subcategory” of post-traumatic stress disorder, which is classified under DSM IV as an Axis I anxiety disorder. (Walker, Lenore, “Battered Woman Syndrome: Key Elements of a Diagnosis and Treatment Plan,” In *Psychiatric Times*, 7-7-09¹⁶; see *People v. Gomez* (1999) 72 Cal.App.4th 405, 410.)¹⁷

In my view, the envelope can and should be pushed with respect to related mental disorder diagnoses. I argued in the Manslaughter article the reasoning of *Humphrey* should carry over to the related-but-different objective standard for heat of passion manslaughter. If, in the context of self-defense, the “defendant’s perspective,” which includes the effect of the systematic brutalization explained by battered women’s syndrome, is a factor which informs the jury’s determination of the reasonableness of the battered woman defendant’s belief in the need to defend against peril, it follows that similar evidence of brutalization and victimization – and, axiomatically, other background facts concerning your client which lead to a diagnosis of PTSD – are relevant to determining, in addition to perfect-self-defense, the related question whether a battered woman defendant killed while under the heat of passion. For example, conduct, such as egregious taunting, which might not provoke a person without the experiences of a battered woman, could very well provoke a rash response from a person who had experiencing repeated humiliation and brutalization in the past from the person

¹⁶ Found at <http://www.psychiatrictimes.com/display/article/10168/1426560> .

¹⁷See http://www.psyweb.com/DSM_IV/jsp/Axis_I.jsp.)

doing the taunting. The same reasoning could apply to persons with PTSD caused by chronic bullying (to choose a currently fashionable example), combat-based stress anxiety, or other stress-related disorders.

This is not the place, and I lack the expertise, to analyze the applicability of this type of reasoning to different forms of diagnosed mental disorders. The point here is to simply emphasize the extent to which certain mental diagnoses, particularly those related to a history of environmental stresses, are arguably admissible with respect to the subjective components of the “reasonable person” defenses of heat of passion manslaughter and perfect self-defense.

A similar argument can be made with respect to evidence showing mental retardation or borderline retardation. If, for example, your client’s demonstrated low intelligence level means that he or she has more difficulty processing information and handling stressful situations than a person of more average intelligence, wouldn’t that fact be relevant and admissible with respect to the question whether a person *in his circumstances*, with *his life experiences*, would believe at a given moment that he was in imminent peril, or reasonably be provoked to act out of passion rather than reason? The informing question, it seems to me, is whether it matters that a reasonable person with a low IQ would reasonably believe in the need to defend against imminent peril, or be provoked, where a reasonable person without such mental deficiencies would not.

Finally, consider the range of impacts that mental illness can have on your client’s “actual perception” of an event or situation, many of which fall short of the type of “delusion” or “hallucination” found irrelevant to heat of passion defense in cases like *Padilla, supra*, 103 Cal.App.4th 675, discussed above. If a distorted (but not imagined/hallucinated) perception of reality that is a product of a mental disorder, such as schizophrenia, or bipolar disorder, colors your client’s *actual* perception of an event or a past relationship with the victim of the homicide, isn’t this akin to the traumatic stress life experiences of the battered woman in *Humphrey*, and distinguishable from the situation in

Padilla, where the client delusionally believes the victim is turning into the devil?

In all these suggested areas, as with PTSD, the devil (as it were), will be in the details, i.e., fitting in your client's mental deficiency or disorder into the relatively narrow subjective aspects of the objective defenses. However, in my view, it is worth the effort to explore this type of issue in murder cases where the client has a demonstrable mental disorder that appears related to the circumstances of the killing.

D. **Unconsciousness Defense.**

One cannot be guilty of a crime if he or she “committed the act charged without being conscious thereof.” (§ 26, par. Four.) This gives rise to a complete defense of “unconsciousness” to a charge of murder, or a partial defense, and an involuntary manslaughter verdict, where unconsciousness is the result of voluntary intoxication.

Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [citations] To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist “where the subject physically acts but is not, at the time, conscious of acting.” [citations] If the defense presents substantial evidence of unconsciousness, the trial court errs in refusing to instruct on its effect as a complete defense.

People v. Halvorsen (2007) 42 Cal. 4th 379, 417, citations omitted, quoting and citing *People v. [Huey P.] Newton* (1970) 8 Cal. App. 3d 359, 376.)

Where unconsciousness results from voluntary intoxication, it gives rise to a partial defense.

Voluntary intoxication can prevent formation of any specific intent requisite to the offense at issue, but it can never excuse homicide. Hence, at the time defendant committed his crimes, where voluntary intoxication rendered the defendant unconscious, “criminal negligence [was] deemed to exist irrespective of unconsciousness,” “and the offense is involuntary manslaughter.

(*People v. Boyer* (2006) 38 Cal.4th 412, 469, quoting *People v. Tidwell* (1970) 3 Cal.3d 82, 86.)

Predictably, the case law on this subject limits this defense to a fairly narrow category of circumstances, holding that a defendant's professed "amnesia" about what happened, and even an expert's opinion that his failure to remember is genuine, is not sufficient to give rise to this defense where circumstances indicate defendant knew what was going on when it happened but subsequently has had it blocked from his memory. (See, e.g., *People v. Heffington* (1973) 32 Cal.App.3d 1, 10, *People v. Rogers* (2006) 39 Cal.4th 826, 888.)

Expert testimony and other evidence of mental defects or disorders can be relevant to an unconsciousness defense. For example, in one recent capital case, the defendant presented an unconsciousness defense based on testimony from two defense psychiatric experts indicating that he was suffering from mental disorders which may have given rise to seizure-induced unconsciousness at the time of the killing. (*People v. Clark* (2011) 52 Cal.4th 856, 935-936.) Notably, the court in *People v. Kitt* (1978) 83 Cal.App.3d 834, 845 (overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836), rejected a line of authority, and a then-extant CALJIC instruction, which held that unconsciousness is unavailable as a defense for persons of "unsound mind," citing case law supporting this defense with respect to persons diagnosed with various mental illnesses.

I want to make three short points about the "partial" defense of unconsciousness based on intoxication. First, I would suggest that in many circumstances, evidence indicating unconsciousness will come in the form of some combination of voluntary ingestion of drugs and/or alcohol with mental disease, defect, or disorder, and should be considered as a basis for instructions on involuntary manslaughter.

Second, I would note that if this defense is raised, and the jury was instructed on involuntary manslaughter based on unconsciousness, you should check to see that the jury was properly instructed as to the requisite mens rea for the lesser offense. It is not, as with the typical type of involuntary manslaughter, "general criminal intent," but rather "criminal negligence." (*People v. Graham* (1969) 71 Cal.2d 303, 316-317; *People v. Lara* (1996) 44 Cal.App.4th 102, 109, fn. 2.) General intent instructions, in this situation, are erroneous and

misleading because a negligence standard is inconsistent with any kind of intentionality. (See, e.g., *People v. Alonzo* (1993) 13 Cal.App.4th 535, 539-540, defining “gross negligence.”) Some years ago, I won an unpublished reversal in a murder case based on erroneous instruction on general intent as to involuntary manslaughter where there was strong defense of unconsciousness based on voluntary intoxication. The appellate court found the error prejudicial, concluding that it essentially precluded the jury from convicting on the lesser charge based on the impossibility of finding general criminal intent for an act committed while the defendant was unconscious..

Finally, I will note the apparent anomaly with respect to the unconsciousness defense and the diminished actuality defense to implied malice murder. As explained above, after the Supreme Court’s holding in *Whitfield, supra*, 7 Cal.4th 437 that intoxication evidence was admissible to negate the mental state of implied malice, the Legislature amended section 22, subdivision (b) to overrule *Whitfield* and make voluntary intoxication inadmissible to negate proof of the mental state required for implied malice. (See *People v. Wright, supra*, 35 Cal.4th at p. 985.) However, nothing about this amendment would apply to an unconsciousness defense under section 26, as intoxication evidence is relevant and admissible with respect to an unconsciousness defense to express or implied malice murder.

E. Parting Thoughts on Eighth Amendment Issues and Envelope-Pushing.

Having, as is my tendency, run out of time in writing this article, I will close with only a brief sketch of some ideas arising out of recent U.S. Supreme Court decisions to the effect that execution of mentally retarded persons and juveniles violates the Eighth Amendment protection against cruel and unusual punishment (*Atkins v. Virginia, supra*, 536 U.S. 304, *Roper v. Simmons* (2005) 543 U.S. 551), and that LWOP for non-homicides for juveniles violates 8th amendment (*Graham v. Florida* (2010) __ US __, 130 S.Ct. 2011). It is my contention that these landmark decisions can give rise to potential bootstrap, envelope-pushing claims about unconstitutional punishments as to retarded, mentally ill, and not-fully-developed persons (i.e., juveniles).

Leaving aside for now a detailed discussion of the holdings in these cases, what they all have in common is an emphasis on current knowledge and understanding about the human brain, specifically, the effect of reduced mental ability and the less-than-fully developed brains of juveniles on culpability.

Atkins holds that the penological purposes of the death penalty are disserved by execution of mentally retarded persons, whom a consensus of authorities conclude are less culpable than other offenders because, while understanding the difference between right and wrong, have, as a result of their impairments, “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . .”, and, while no more likely statistically to engage in criminal conduct than others, “often act on impulse rather than pursuant to a premeditated plan, and . . . in group settings . . . are followers rather than leaders.” (*Atkins, supra*, 536 U.S. at pp. 317-321.)

In *Roper*, the Court held that the death penalty cannot be imposed on juvenile offenders because they “cannot with reliability be classified among the worst offenders . . .” because of their “lack of security and underdeveloped sense of responsibility . . .”, because they are inherently “vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . .”, and because “the character of a juvenile is not as well formed as that of an adult.” (*Roper, supra*, 543 U.S. at pp. 568-570.)

Finally, in *Graham*, the Court held that life without parole sentences for non-homicide offense by juveniles were prohibited based on the same analysis in *Roper* concerning the nature of juvenile offenders, coupled with “developments in psychology and brain science [which] continue to show fundamental differences between juvenile and adult minds . . .”, including the fact that “parts of the brain involved in behavior control continue to mature through late adolescence.” (*Graham, supra*, 130 S.Ct. at pp. 2026-2027.)

These three landmark decisions have seismically altered the landscape of Eighth Amendment jurisprudence. For our purposes, the common feature between them is a

recognition that the constitutional permissibility of the most extreme punishments can be challenged with respect to persons whose culpability is inherently less than average adults because deficiencies in mental understanding, and/or the lack of brain and character development due to youth or mental infirmity. My suggestion is that it behooves us as advocates seeking to advance the cause of justice and fairness for mentally ill and juvenile offenders, to advance the following types of arguments which seek to push the analysis of *Atkins*, *Roper*, and *Graham* to the next level.

a. **Facial Challenges**

First, I would suggest a further set of “facial” Eighth Amendment challenges.

i. **No LWOP for Juveniles Applies to “Virtual LWOP” Sentences.**

When a juvenile tried as an adult is sentenced to a term for a non-homicide offense which amounts to a *virtual* sentence of life without parole, without being one in name – e.g., 4 consecutive 25 to life sentences, or a determinate term of 140 years – most of us assumed that the holding in *Graham* would apply with equal measure. Not so, said several of our lower appellate courts, applying a rigid analysis limiting the holding in *Graham* only to an actual sentence of life without parole. Since, under California law, this punishment only can be imposed as to murder, this line of cases would render *Graham* a nullity in California. Fortunately, the California Supreme Court has granted review and will decide this issue. (See *People v. Caballero* (2011) 191 Cal.App.4th 1248, rev. gtd. 4-13-11, S190647 to consider the following question: “Does a sentence of 110 years to life for a juvenile convicted of committing non-homicide offenses constitute cruel and unusual punishment under the Eighth Amendment on the ground it is the functional equivalent of a life sentence without the possibility of parole? (See *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825.)”

Obviously in any case involving a juvenile sentenced to a virtual LWOP term for non-homicide offenses, the *Graham-Cabellero* issue must be raised and preserved.

ii. **Challenge to LWOP Sentence For Juvenile with Murder Conviction.**

If one combines the reasoning of *Roper* with that of *Graham*, it does not take much of a stretch to question the constitutionality under the Eighth Amendment of an LWOP sentence applied to a juvenile tried as an adult and convicted of murder.

I note that currently pending legislation, SB 9, sponsored by Senator Yee, would “authorize a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to life without parole to submit a petition for recall and resentencing to the sentencing court . . .”, and require a hearing on resentencing in certain situations, outlining various pertinent criteria which could be put forward that would militate towards a reduction of sentence to a term of 25 years to life, including conviction pursuant to felony murder or aiding and abetting, lack of prior serious juvenile offenses, the involvement of adults in his or her crime, and post-incarceration activity tending to show rehabilitation. (See Legislative’s Counsel’s Digest and Provisions of SB 9.¹⁸)

Whether or not this legislation becomes law, I would suggest there is room to argue that the reasoning of *Roper* and *Graham* should apply with equal weight to LWOP sentences imposed for homicide crimes committed when the offender was less than 18 years of age.

iii. **Anti-Death Penalty and LWOP Arguments About Severely Mentally Ill Offenders.**

It also seems to me that the reasoning of the trilogy of recent Eighth Amendment cases would militate against the constitutionality of imposition of the death penalty for persons with severe mental illness, such as schizophrenia, convicted of murder. Likewise, challenges should be considered for LWOP punishments for mentally retarded persons, for both non-homicide and homicide offenses. These arguments can be framed in terms of emerging trends of advancement in the treatment of mental illness, including new medication

¹⁸ See http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_bill_20120202_amended_asm_v94.html.

and treatment regimes.

b. “As Applied” 8th Amendment Arguments.

Landmark cases are impressive because they apply across the board. But they are also important because they can lay the groundwork for “as applied” Eighth amendment arguments with respect to both juveniles and the mentally ill, for LWOP and virtual LWOP sentences in every sort of case, not just homicides. For example, it is not likely that you will succeed in arguing that your mentally retarded client’s virtual LWOP sentence of 130 years to life is cruel and unusual punishment on its face, as no court, other than the U.S. Supreme Court, is likely to make such a determination. However, if proper evidence of mitigating factors based on retardation and life experiences is presented at a sentencing hearing, or in a habeas petition, an argument could be made, under the reasoning of *Atkins*, *Roper*, and *Graham*, that such a punishment is cruel and/or unusual under the state and federal constitution as applied to your client. (See, e.g., “as applied” standards under *People v. Dillon* (1983) 34 Cal.3d 441, 482-489 [state constitutional standard] and *Solem v. Helm* (1983) 463 U.S. 277 [federal standard].)