

ITEM 3
TEST CLAIM
PROPOSED DECISION

Penal Code Sections 188, 189, and 1170.95 as added or amended by
Statutes 2018, Chapter 1015 (SB 1437)

Accomplice Liability for Felony Murder

19-TC-02

County of Los Angeles, Claimant

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Exhibit A



TEST CLAIM FORM

<i>For CSM Use Only</i>	
Filing Date:	
<div style="border: 2px solid blue; border-radius: 15px; padding: 5px; display: inline-block;"> <p style="margin: 0;">RECEIVED December 31, 2019 <i>Commission on State Mandates</i></p> </div>	
Test Claim #:	19-TC-02

Section 1

Proposed Test Claim Title:

Accomplice Liability for Felony Murder

Section 2

Local Government (Local Agency/School District) Name:

County of Los Angeles

Name and Title of Claimant's Authorized Official pursuant to CCR, tit.2, § 1183.1(a)(1-5):

Arlene Barrera, Auditor-Controller

Street Address, City, State, and Zip:

500 West Temple St., Room 525, Los Angeles, CA 90012

Telephone Number	Fax Number	Email Address
<u>(213) 974-8301</u>	<u>(213) 626-5427</u>	<u>abarrera@auditor.lacounty.gov</u>

Section 3

Claimant Representative: Hasmik Yaghobyan Title Supervising Accountant

Organization: County of Los Angeles, Department of Auditor-Controller

Street Address, City, State, Zip:

500 West Temple Street, Room 603, Los Angeles, CA 90012

Telephone Number	Fax Number	Email Address
<u>(213) 974-9653</u>	<u>(213) 617-8106</u>	<u>hyaghobyan@auditor.lacounty.gov</u>

Section 4 – Please identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and don't forget to check whether the code section has since been amended or a regulation adopted to implement it (refer to your completed WORKSHEET on page 7 of this form):

Senate Bill 1437, Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code Relating to Felony Murder

- Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 12 / 31 / 2019
- A: Which is not later than 12 months following [insert the effective date of the test claim statute(s) or executive order(s)] 01 / 01 / 2019, the effective date of the statute(s) or executive order(s) pled; or
- B: Which is within 12 months of [insert the date costs were *first* incurred to implement the alleged mandate] / / , which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

Section 5 – Written Narrative:

- Includes a statement that actual and/or estimated costs exceed one thousand dollars (\$1,000). (Gov. Code § 17564.)
- Includes all of the following elements for each statute or executive order alleged pursuant to Government Code section 17553(b)(1) (refer to your completed WORKSHEET on page 7 of this form):
- Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;
- Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;
- Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

- Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;
Following FY: 2019 - 2020 Total Costs: \$18,153,459
- Identifies all dedicated funding sources for this program; State: N/A
Federal: N/A Local agency's general purpose funds: _____
Other nonlocal agency funds: N/A
Fee authority to offset costs: N/A
- Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: N/A
- Identifies a legislatively determined mandate that is on the same statute or executive order: N/A

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to Government Code Section 17553(b)(2) and California Code of Regulations, title 2, section 1187.5, as follows (refer to your completed WORKSHEET on page 7 of this form):

- Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
- Declarations identifying all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
- Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program).
- If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Government Code section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Government Code section 17574.
- The declarations are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to Government Code section 17553(b)(3) and California Code of Regulations, title 2, § 1187.5 (refer to your completed WORKSHEET on page 7 of this form):

- The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate. Pages 381 to 384.

- Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages 40 to 219.
- Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 220 to 380.
- Evidence to support any written representation of fact. *Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5).* Pages to .

Section 8 –TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553

- The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Arlene Barrera
Name of Authorized Local Government Official
 pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Auditor-Controller
Print or Type Title

Arlene Barrera
Signature of Authorized Local Government Official
 pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

2-19-20
Date

Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number: SB 1437, Chapter 1015, Statutes of 2018

Activity: It requires the County to provide representation, prosecution, and housing to the petitioners who file a resentencing petition under the subject law.

Initial FY: 18 - 19 Cost: 1,798,780 Following FY: 19 - 20 Cost: \$1,767,447

Evidence (if required): Declarations of Sung Lee and Ping Yu

All dedicated funding sources; State: \$0.00 Federal: \$0.00

Local agency's general purpose funds: \$0.00

Other nonlocal agency funds: \$0.00

Fee authority to offset costs: \$0.00

**COUNTY OF LOS ANGELES TEST CLAIM
ACCOMPLICE LIABILITY FOR FELONY MURDER
 Senate Bill (SB) 1437: Chapter 1015, Statutes of 2018
 Amending Sections 188 and 189 of the Penal Code
 Adding Section 1170.95 to the Penal Code, Relating to Felony Murder**

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COUNTY OF LOS ANGELES TEST CLAIM**

ACCOMPLICE LIABILITY FOR FELONY MURDER

**Senate Bill (SB) 1437: Chapter 1015, Statutes of 2018
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**SECTION 5: WRITTEN NARRATIVE
COUNTY OF LOS ANGELES TEST CLAIM**

ACCOMPLICE LIABILITY FOR FELONY MURDER

**Senate Bill (SB) 1437: Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code, Relating to Felony Murder**

I. STATEMENT OF THE TEST CLAIM

California law defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought¹.” Murder may be expressed or implied and falls into two categories, first and second degree, depending on the circumstances of the offense. First degree murder carries the possibility of a sentence of death, life imprisonment without the possibility of parole, or a term in state prison of 25 years to life. First degree murder, in part, is a murder that is committed in the perpetration of, or attempted perpetration of, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Any murder not enumerated as first degree murder in the statute is second degree murder. This carries a sentence of 15 years to life.

The felony murder rule applies to murder in the first degree as well as murder in the second degree. The rule creates liability for murder for actors (and their accomplices) who kill another person during the commission of a felony. The death need not be in furtherance of the felony, in fact the death can be accidental.

The purpose of the rule is to deter those who commit felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental during the perpetration or attempted perpetration of the felony².

The deterrent effect of the felony-murder doctrine has been debated for decades. Countless legal scholars and law review articles have addressed the issue. Most recent studies have concluded that the felony murder rule does not have a deterrent effect on the commission of dangerous felonies or deaths during the commission of a felony.

Proponents have argued that the felony-murder rule encourages criminals to reduce the number of felonies they commit and take greater care to avoid causing death while committing a felony.

Opponents argue that criminals are unaware of the existence of the felony-murder rule and, thus, it is impossible to deter criminals from committing unintentional and unforeseeable acts.

¹ Pen. Code, § 187, subd. (a)

² *People v. Cavitt* (2004) 33 Cal. 4th 187, 197

The result is that California's felony murder statute has been applied even when a death was accidental, unintentional, or unforeseen but occurred during the course of certain crimes.

The California Supreme Court has commented on the necessity to fix this interpretation of California's murder statute. In *People v. Dillon*³, the state Supreme Court called the use of the felony murder rule to charge those who did not commit a murder, or had no knowledge or involvement in the planning of the murder, "barbaric."

The Legislature recognized that there was a necessity for a statutory change to the felony-murder rule to more equitably sentence persons in accordance with their involvement in the crime.

SB 1437, Chapter 1015, Statutes of 2018, was signed into law and became effective on January 1, 2019. SB 1437 makes it unlawful for a person to be held liable for murder if that person did not act with careless disregard or indifference to human life and did not kill or intended to kill the victim. Further, not only it makes it possible for those in prison for felony murder to apply for resentencing, but also limits the ability of prosecutors to charge those who were an accomplice in a crime resulting in homicide using the "felony murder rule." Essentially, the District Attorney's Office has the burden of showing the accused had the intent to kill, which is a difficult task.

This bill does not eliminate the felony murder rule. The purpose of the legislation is to revise the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

The enactment of SB 1437 mandated new requirements on District Attorney's, Public Defenders', Alternate Public Defenders', and Sheriff's offices throughout the state.

The County of Los Angeles (Claimant, the County of Los Angeles, the County) hereby submits this Test Claim (TC) seeking to recover its costs in performing activities imposed by SB 1437.

SB 1437, Chapter 1015, Statutes of 2018, amended Penal Code Sections 188 and 189 and added Penal Code Section 1170.95, relating to the felony murder rule.

SB 1437 amended Penal Code § 188 to read:

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

³ *People v. Dillon* (1983) 34 Cal.3d. 441

- (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
 - (3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.
- (b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

Further, SB 1437 amended Penal Code § 189 to read:

- (a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.
- (b) All other kinds of murders are of the second degree.
- (c) As used in this section, the following definitions apply:
 - (1) "Destructive device" has the same meaning as in Section 16460.
 - (2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.
 - (3) "Weapon of mass destruction" means any item defined in Section 11417.
- (d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

- (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
 - (1) The person was the actual killer.
 - (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
 - (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.
- (f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

In addition, SB 1437 added Penal Code § 1170.95 to read:

- (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
 - (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
 - (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.
 - (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.
- (b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner

was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

- (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
 - (B) The superior court case number and year of the petitioner's conviction.
 - (C) Whether the petitioner requests the appointment of counsel.
- (2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.
- (c) The court shall review the petition and determine if the petitioner has made a *prima facie* showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause.
- (d)
- (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.
 - (2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.
 - (3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution

fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

- (e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.
- (f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.
- (g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

A. DESCRIPTION OF NEW ACTIVITIES

SB 1437 added Penal Code § 1170.95 and imposed an important new program on the County of Los Angeles. In implementing this program, the County's District Attorney's Office and Public Defender have analyzed current and future duties unavoidably resulting from the subject law. A description of their newly state mandated duties and attendant costs are as follows:

Public Defender

According to Harvey Sherman, the Deputy-in-Charge of the Public Integrity Assurance Section, at the Law Offices of the Los Angeles County Public Defender⁴, the subject law mandates the following activities on Public Defender:

- a) To file a petition with the court that sentenced the petitioner if: 1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; 2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder; and 3) The petitioner could not be convicted of first or second degree murder because of changes to sections 188 or 189 of the Penal Code effective January 1, 2019. (Penal Code §§'s 1170.95 (a), (1), (2), and (3);
- b) If the Court reviews the petition and determines that the petitioner has proven the *prima facie* showing that he/she qualifies for resentencing who has requested a

⁴ Declaration of Harvey Sherman

counsel, the court appoints a counsel to represent the petitioner. The Counsel will have to prepare for attendance at the resentencing hearing. (Penal Code § 1170.95 (c));

- c) In preparing for and appearing at the re-sentencing hearing, counsel will have to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators, and draft legal briefs for presentation to the court. (Penal Code §§ 1170.95 (c) & (d) (1)); and
- d) Participation of counsel in training to competently represent the petitioners. (Penal Code § 1170.95 (c))

On average, it will take at least: a) 25 hours per case excluding visitation with clients, b) additional investigation hours, and c) four (4) to five (5) hours of research. In total, a minimum of 30 hours per case⁵.

In implementing the above duties required under the subject law, the Los Angeles County Public Defender has incurred costs not reimbursed by the state, federal, or other non-local agency funds. Such actual costs in excess of \$1,000⁶, for Fiscal Years (FY) 2018-19 and 2019-20, are detailed in Exhibits A and B⁷, and summarized below:

FY 2018-19 \$206,496; FY 2019-20 \$471,595

District Attorney's Office

According to Brock Lunsford, the Deputy in charge of the Murder Resentencing Unit at the County of Los Angeles' District Attorney's Office, after the petitioner serves his/her petition on the prosecution, the prosecutor shall⁸:

- a) File a response within 60 days of service of the petition. The petitioner may file and serve a reply within 30 days after the prosecutor response is served. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause. Within 60 days after the order to show cause is issued, the court will set a resentencing hearing date. (Penal Code § 1170.95 (c))
- b) Preparation and attendance at the resentencing hearing. (Penal Code § 1170.95 (d) (1))

⁵ Declaration of Harvey Sherman

⁶ Government Code § 17564 (a)

⁷ Declaration of Sung Lee

⁸ Declaration of Brock Lunsford

- c) To prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. The prosecutors may rely on the record of conviction or offer new or additional evidence to meet their respective burdens or request additional documents. (Penal Code § 1170.95 (d) (3))
- d) Retention and utilization of experts to evaluate the petitioner's eligibility for resentencing. (Penal Code § 1170.95 (d) (3))
- e) Participation of counsel in training for a competent prosecution. (Penal Code § 1170.95 (d) (3))

On average, it will take at least 20 hours per case for obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time due to the loss of records that will be used to establish the firm basis for the petition⁹.

In implementing the above duties imposed by the subject law, the Los Angeles County District Attorney's Office has incurred costs not reimbursed by the state, federal, or other non-local agency funds well in excess of \$1,000¹⁰. Such actual costs for FYs 2018-19 and 2019-20 are detailed in Exhibits C and D¹¹, and summarized below:

FY 2018-19 \$1,592,284; FY 2019-20 \$1,295,852

Cost Summary

The new activities mandated under the subject law has imposed and continues to impose costs upon the Claimant. A summary of such costs incurred and reported by County Departments for FYs 2018-19 and 2019-20, are summarized below:

Department	FY 2018-19	FY 2019-20
District Attorney	\$1,592,284	\$1,295,852
Public Defender	\$ 206,496	\$ 471,595
Total	\$1,798,780	\$1,767,447

B. DESCRIPTION OF THE EXISTING ACTIVITIES AND COSTS MODIFIED BY THE MANDATE

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

⁹ Declaration of Brock Lunsford

¹⁰ Government Code § 17564 (a)

¹¹ Declaration of Ping Yu

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines second degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life¹².

Existing law does not include the statutory mandate. Penal Code § 1170.95 is a result of the regulation. SB 1437, Chapter 1015, Statutes of 2018, added Penal Code § 1170.95 into the law.

C. ACTUAL INCREASED COSTS INCURRED IN FY 2018-19, THE YEAR FOR WHICH THE CLAIM WAS FILED EXCEEDS ONE THOUSAND DOLLARS

The alleged mandate imposes a cost to the Claimant well in excess of \$1,000¹³.

FY 2018-19 is the FY the TC was filed for. The claimant incurred actual cost of \$1,798,780 in FY 2018-19¹⁴.

D. ACTUAL OR ESTIMATED ANNUAL COSTS THAT WILL BE INCURRED BY THE CLAIMANT TO IMPLEMENT THE ALLEGED MANDATE DURING THE FY IMMEDIATELY FOLLOWING THE FY FOR WHICH THE TC WAS FILED

FY 2019-20 is the FY following the FY for which the TC was filed. The Claimant estimates that it would cost \$1,767,447 to comply with the SB 1437 mandate in FY 2019-20¹⁵.

E. STATEWIDE COST ESTIMATE OF INCREASED COSTS THAT ALL LOCAL AGENCIES WILL INCUR TO IMPLEMENT THE MANDATE

According to the Senate Committee on Appropriation: “CDCR¹⁶ reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term of imprisonment for the principal offense of first degree murder and 7,299 were serving a term for the principal offense of second degree murder. If 10 percent of this population (2,177 individuals) were

¹² Penal Code §§ 187 & 188

¹³ Declaration of Sung Lee; Declaration of Ping Yu

¹⁴ Declaration of Sung Lee; Declaration of Ping Yu

¹⁵ Declaration of Sung Lee; Declaration of Ping Yu

¹⁶ California Department of Corrections and Rehabilitation

to petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, this would result in an additional workload costs to the court of about \$7.6 million¹⁷.”

Using the same terminology and number (2,177 individuals) of projected petitioners who would file a petition to the cost of representation, prosecution, and housing of the petitioners during the resentencing hearing, there would be a statewide cost estimate of about \$18,153,459¹⁸.

F. IDENTIFICATION OF AVAILABLE FUNDING SOURCES

The Claimant is not aware of nor did it receive any state, federal, or other non-local agency funds available for this program and all the increased costs were paid and will be paid from the Claimant’s General Fund appropriations¹⁹.

G. IDENTIFICATION OF PRIOR MANDATE DETERMINATIONS MADE BY THE BOARD OF CONTROL OR COMMISSION ON STATE MANDATES

The claimant is not aware of any prior mandate determination made by the Board of Control or the Commission on State Mandates²⁰.

H. IDENTIFICATION OF LEGISLATIVELY DETERMINED MANDATE PURSUANT TO GOVERNMENT CODE SECTION 17573 THAT IS ON THE SAME STATUTE OR EXECUTIVE ORDER

The Claimant is not aware of any legislatively determined mandates related to SB 1437, Chapter 1015, Statutes of 2018, pursuant to Gov. Code §17573²¹.

II. MANDATE MEETS BOTH SUPREME COURT TESTS

In *County of Los Angeles v. State of California*, 43 Cal.3d 46 (1987), the Supreme Court was called upon to interpret the phrase “new program or higher level of service” that was approved by the voters when Proposition 4 was passed in 1979 which added article XIII B to the California Constitution. In reaching its decision the Court held that:

...the term ‘higher level of service’ ... must be read in conjunction with the

¹⁷ SENATE COMMITTEE ON APPROPRIATION, May 14, 2018, FY 2017-2018 Regular Session, pages 4, ¶ 8

¹⁸ Average cost per case FY 19-20 = \$3,850 (PD’s Sung Lee) + \$4,489 (DA’s Ping Yu) + \$300 (SH)=\$8,639 x 2,177= \$18,807,103

¹⁹ Declaration of Sung Lee; Declaration of Ping Yu

²⁰ Declaration of Sung Lee; Declaration of Ping Yu

²¹ Declaration of Sung Lee; Declaration of Ping Yu

predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' But the term 'program' itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state²².

The definition, as set forth in *County of Los Angeles*, has two alternative prongs, only one of which has to apply in order for the mandate to qualify as a program. *Carmel Valley Fire Protection Dist. v. State of California*, 190 Cal.App.3d 521, 537 (1987). The activities mandated by SB 1437 meet both prongs as discussed below:

III. MANDATE IS UNIQUE TO LOCAL GOVERNMENT

The sections of the law alleged in this TC are unique to government as activities described in section A are provided by local governmental agencies.

IV. MANDATE CARRIES OUT STATE POLICY

The new state statute, the subject of this TC imposes a higher level of service by requiring local agencies to provide the mandated activities described in section A.

V. STATE MANDATE LAW

Article XIII B, § 6 requires the state to provide a subvention of funds to local government agencies any time the legislature or a state agency requires the local government to implement a new program or provide a higher level of service under an existing program. Section 6 states in relevant part:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service . . .

The purpose of § 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume the increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B imposes ²³." This section "was designed to protect the tax

²² *County of Los Angeles v. State of California*, 43 Cal.3d 46, 56 (1987).

²³ *County of San Diego v. State of California*, 15 Cal.4th 68, 81 (1997); *County of Fresno v. State of California*, 53 Cal.3d 482, 487 (1991)

revenues of local governments from state mandates that would require expenditure of such revenues²⁴.” In order to implement § 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims²⁵. Under this provision, the Legislature established the parameters regarding what constitutes a state mandated cost, defining “costs mandated by the state” to include:

...any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution²⁶.

VI. STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code §17556 which could serve to bar recovery of “costs mandated by the State”, as defined in Government Code §17556. None of the seven disclaimers apply to this TC:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon the local agency or school district requesting the legislative authority.
2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.
3. The statute or executive order implemented a Federal law or regulation and resulted in costs mandated by the Federal government, unless the statute or executive order mandates costs which exceed the mandate in that Federal law or regulation.
4. The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.
5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts or includes additional revenue that was specifically intended to fund costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

²⁴ *County of Fresno, supra*, 53 Cal.3d at 487; *Redevelopment Agency v. Commission on State Mandates*, 55 Cal.App.4th 976-985 (1997)

²⁵ Gov. Code § 17500, et seq.; *Kinlaw v. State of California*, 54 Cal.3d 326, 331, 333 (1991) (statutes establish “procedure by which to implement and enforce § 6”)

²⁶ Gov. Code §17514.

6. The statute or executive order imposes duties which were expressly included in a ballot measure approved by the voters in Statewide election.
7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any applicability to this TC.

The enactment of SB 1437, Chapter 1015, Statutes of 2018 which amended Penal Code Sections 188,189, and added Penal Code Section 1170.95, relating to felony murder, imposes a new state mandated program and cost on the Claimant, and none of the exceptions in Government Code Section 17556 excuse the state from reimbursing Claimant for the costs associated with the implementing the required activities. SB 1437, therefore, represents a state mandate for which Claimant is entitled to reimbursement pursuant to § 6.

VII. CONCLUSION

SB 1437, Chapter 1015, Statutes of 2018, imposes state mandated activities and costs on the Claimant. Those state mandated costs are not exempted from the subvention requirements of § 6. There are no funding sources, and the Claimant lacks authority to develop and impose fees to fund any of these new state mandated activities. Therefore, Claimant respectfully requests that the Commission on State Mandates find that the mandated activities set forth in the TC are state mandates that require subvention under § 6.

SECTION 6

DECLARATION OF HARVEY SHERMAN

ACCOMPLICE LIABILITY FOR FELONY MURDER

**Senate Bill 1437: Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code, Relating to Felony Murder**

I, HARVEY SHERMAN, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I have been employed by the Law Offices of the Los Angeles County Public Defender since 1994. I am currently the Deputy-in-Charge of the Public Integrity Assurance Section. I have worked as a Deputy Public Defender continuously since 1994 as a trial attorney, a litigation support attorney, and as a supervising attorney.
2. I have read and I am familiar with Penal Code section 1170.95, the specific section of the subject legislation containing the mandated activities. This section which was added to the Penal Code by SB 1437 (Stats. 2018, ch.1015 § 4), became effective on January 1, 2019.
3. In October of 2018, I was approached by Public Defender management to implement a plan to identify cases and supervise a team of attorneys to handle the likely influx of cases falling within the scope of the Penal Code Section 1170.95.
4. After the passage of SB 1437, I requested additional information from the California Department of Corrections and Rehabilitation for data related to sentenced and paroled individuals who were convicted of murder in the County of Los Angeles. That request was then expanded in coordination with the California Public Defenders Association to include all counties.
5. I participated in organizational meetings and teleconferences to develop methodologies and forms to assist inmates and parolees through a new petition process.
6. This new process includes filing a petition in the Superior Court, obtaining critical documents, filing replies to prosecution responses, meeting with clients who are serving life sentences in state prison, reviewing and detailing trial transcripts, jury instructions, jury verdicts, jury questions, Court of Appeal opinions, and litigating factual and legal issues in the superior court.
7. The reviewing, writing, and litigation are more closely akin to developing a writ of habeas corpus.

8. Since Penal Code Section 1170.95 includes a provision in subsection (d)(3), "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens," it is likely that the entire case would need to be reinvestigated and a proceeding more like a new trial may be necessary.
9. The newly-mandated activities include:
 - a. Preparation for and attendance at the sentencing hearing by indigent defense counsel and staff. In preparing for and appearing at the sentencing hearing, counsel may now be required to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators and draft legal briefs for presentation to the court;
 - b. Assignment of investigators to locate and interview anyone that can provide new evidence not previously identified prior to the trial or plea;
 - c. Retention and utilization of experts, which may include, without limitation:
 - i. False and fabricated statement experts to provide opinion evidence regarding the coercive effect and voluntariness of statements made by petitions in parole hearings;
 - ii. Forensic experts to test or retest physical evidence that was not tested;
 - iii. A gang expert for those clients that may be entrenched in gang life; and
 - iv. Ballistics experts to examine and/or retest gun, casing, and bullet evidence.
 - v. Psychological experts to evaluate and opine regarding the intellectual capabilities and maturity of clients in relation to the "reckless indifference" balancing to be done by the court.
 - d. Attendance and participation of counsel in training necessary for a competent representation of the clients.
10. The California Department of Corrections and Rehabilitation identified 8,445 inmates who are serving sentences for murder who were committed from Los Angeles County.
11. The California Department of Corrections and Rehabilitation identified 1,259 parolees who have already served their sentences for murder who were committed from Los Angeles County.
12. A subset of these inmates and parolees are former Public Defender clients. The number of former clients is not possible to establish with certainty due to the lack of historically accurate date, other projects undertaken by the Public Defender tend

existing program within the meaning of § 6 of Article XIII B of the California Constitution.”

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein.

I declare the foregoing to be true and correct under penalty of perjury.

Executed this 23rd of December 2019, at Lomita, California.

A handwritten signature in cursive script, appearing to read "Harvey Sherman", written in black ink.

Harvey Sherman

SECTION 6

DECLARATION OF BROCK LUNSFORD

ACCOMPLICE LIABILITY FOR FELONY MURDER

**Senate Bill 1437: Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code, Relating to Felony Murder**

I, Brock Lunsford, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I have been employed by the Law Offices of the Los Angeles County District Attorney since 2000. I am currently the Deputy-in-Charge of the Murder Resentencing Unit. I have worked as a Deputy District Attorney continuously since 2000 as a trial attorney and as a supervising attorney.
2. I have read, and I am familiar with Penal Code section 1170.95, the specific section of the subject legislation containing the mandated activities. This section which was added to the Penal Code by SB 1437 (Stats. 2018, ch. 1015 § 4), became effective on January 1, 2019.
3. In December 2018, I was approached by District Attorney management to serve as our office's contact person regarding SB 1437 and Penal Code section 1170.95.
4. In December 2018, I was asked to put together several different options regarding how the District Attorney's Office could handle the likely influx of petitions filed pursuant to Penal Code Section 1170.95.
5. After January 1, 2019, I was responsible for receiving and forwarding 1170.95 petitions received by our office. I also worked with a paralegal in our office to create a database to track the 1170.95 petitions for all of Los Angeles County.
6. I attended meetings with representatives from the Los Angeles County Public Defender's Office, the Los Angeles County Alternate Public Defender's Office, the Los Angeles County Bar Association I.C.D.A. Program, the Los Angeles County Superior Court, and the Los Angeles County Court Clerk's Office. These meetings were designed to address questions about the handling and processing of 1170.95 petitions.

7. I participated in organizational meetings and teleconferences within my office to develop methodologies and responses for personnel within the District Attorney's office as they handle various aspects of the 1170.95 petition process.
8. The new 1170.95 mandated new activities on the District Attorney, such as: receiving a petition from various sources; obtaining critical documents such as trial transcripts, jury instructions, jury verdicts, jury questions, and Court of Appeal opinions from the Superior Court, the Court of Appeal and the Attorney General's office; reviewing these critical documents which can exceed 1,000 pages for a single case; filing Responses to the petition; utilizing District Attorney Investigators to locate victim's family; utilizing District Attorney Victim Advocates to contact victim's family; meeting with victim's family to discuss this new process and explain that the murder conviction that occurred long ago could now be overturned due to the new law; and litigating factual and legal issues in the Superior Court.
9. Since Penal Code section 1170.95 includes a provision in subsection (d)(3), "The prosecutor and the petition may rely on the record of conviction or offer new or additional evidence to meet their respective burdens," it is likely that the entire case may need to be reviewed and reinvestigated and a proceeding much like a new trial may be necessary.
10. This process is followed by members of the District Attorney's Office who originally tried the murder case and are still available to handle the 1170.95 petition. This process is also followed by members of the Murder Resentencing Unit.
11. In March 2019, in response to the rapidly increasing number of 1170.95 petitions, the District Attorney's Office created the Murder Resentencing Unit to handle many of the 1170.95 petitions within our office.
12. The Murder Resentencing Unit includes one deputy in charge, six experienced deputy district attorneys, four paralegals and one LOSA II. The personnel in this unit work on 1170.95 petitions on a full-time basis.
13. In March 2019, I became the Deputy in Charge of the Murder Resentencing Unit. I supervise the six attorneys in the unit while also reviewing critical documents and writing responses to certain petitions.
14. In March 2019, I provided office-wide training regarding the 1170.95 petition process and our intended plan of action.
15. The California Department of Corrections and Rehabilitation has identified 8,445 inmates who are serving sentences for murder who were committed

from Los Angeles County.

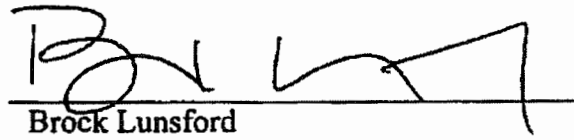
16. The California Department of Corrections and Rehabilitation has identified 1,259 parolees who have already served their sentences for murder who were committed from Los Angeles County.
17. Based on those numbers, there are potentially 9,704 petitions that could be filed in Los Angeles County Superior Court pursuant to Penal Code section 1170.95 that would be handled by attorneys employed by the District Attorney's Office.
18. As of this date, the Los Angeles County District Attorney's Office has already received 1,558 petitions. The new law has only been effective for six months.
19. The handling of these petitions is incredibly time consuming even for a petition that does not fall within the language of the new statute and is, thus, meritless.
20. I estimate that attorneys can spend at least 20 hours per case obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time because time has resulted in loss of records that will be used to establish the firm basis for the petition. Some cases require significantly less time because the petition is facially meritless.
21. I have examined the SB 1437 test claim prepared by the Claimant and based on my personal knowledge, information, and belief, the costs incurred in this Test Claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly computed and are "costs mandated by the State", as defined in Government Code §17514:

". . . any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution."

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein.

I declare the foregoing to be true and correct under penalty of perjury.

Executed this 27th of December 2019, at Los Angeles, California.


Brock Lunsford

SECTION 6

DECLARATION OF SUNG LEE

ACCOMPLICE LIABILITY FOR FELONY MURDER

Senate Bill 1437: Chapter 1015, Statutes of 2018

Amending Sections 188 and 189 of the Penal Code

Adding Section 1170.95 to the Penal Code, Relating to Felony Murder

I, Sung Lee, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

- 1) I am the Departmental Finance Manager, who oversees and manages the Fiscal/Budget Services for the Los Angeles County Public Defender's Office. I am responsible for the complete and timely recovery of costs mandated by the State.
- 2) SB 1437, Chapter 1015, Statutes of 2018, added Penal Code Section 1170.95. Specifically, Penal Code § 1170.95 (a), (b), and (c), imposed the following state mandated activities and costs on the Public Defender:
 - (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
 - (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
 - (2) The petitioner was convicted of first degree or second-degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second-degree murder.
 - (3) The petitioner could not be convicted of first or second-degree murder because of changes to Section 188 or 189 made effective January 1, 2019.
 - (b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

- (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
 - (B) The superior court case number and year of the petitioner's conviction.
 - (C) Whether the petitioner requests the appointment of counsel.
- (c) The court shall review the petition and determine if the petitioner has made a *prima facie* showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause.
 - (d) Preparation for and attendance at the sentencing hearing by indigent defense counsel and staff. In preparing for and appearing at the sentencing hearing, counsel may be required to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators and draft legal briefs for presentation to the court; and.
 - (e) Attendance and participation of counsel in training to be able to competently represent clients. (Penal Code § 1170.95 (c))
- 3) As a result, local agencies will incur cost from the mandated activity that will exceed \$1,000¹.
 - 4) As a Finance Manager, I am familiar with the new activities and cost stemming from the alleged statutory mandate in SB 1437. The costs and the activities are accurately described in sections A, B, C, D, and E. FY 2018-2019 was the fiscal year the alleged mandate in SB 1437 was implemented and the Test Claim was filed for.
 - 5) I declare that I have prepared and have personal knowledge of the attached schedule of costs summarized in the attached Exhibit A. The actual cost of providing activities described in section (2) above was \$206,496 for FY 2018-19.

¹ Government Code § 17564 (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars (\$1,000).

- 6) Public Defender estimates that it will incur \$471,595 in increased cost of providing services to comply with the SB 1437 mandates in FY 2019-20. FY 2019-20 is the FY following the implementation of the mandate. The cost is summarized in the attached Exhibit B.
- 7) According to the Senate Committee on Appropriation: "CDCR² reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in an additional workload costs to the court of about \$7.6 million³"

Using the same terminology and number (2,177 individuals) of projected petitioners who would file a petition to the cost of representation, prosecution, and housing of the petitioners during the re-sentencing hearing, and applying the average cost per case for Public Defender, District Attorney, there would be a statewide cost estimate of \$18,153,459.

- 8) Public Defender has not received any local, state, or federal funding and does not have a fee authority to offset its increased direct and indirect cost of providing mandated activities described in section (2) above in compliance with SB 1437. Public Defender has incurred actual cost of \$206,496 (Exhibit A) for FY 2018-19 and will incur an estimated cost of \$471,595 for FY 2019-2020 (Exhibit B).
- 9) Public Defender is not aware of any prior determination made by the Board of Control or the Commission on State Mandates related to this matter⁴.
- 10) Public Defender is not aware of any legislatively determined mandate related to SB 1437, Chapter 1015, Statutes of 2018⁵.
- 11) I have examined the SB 1437 Test Claim prepared by the Claimant (County of Los Angeles) and based on my personal knowledge, information, and belief, the costs incurred in this test claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly computed and are "costs mandated by the State", as defined in Government Code §17514:

² California Department of Correction and rehabilitation

³ SENATE COMMITTEE ON APPROPRIATION, May 14, 2018, FY 2017-2018 Regular Session, pages 4, ¶ 8

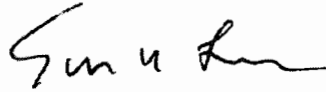
⁴ Government Code §17553(b)(2)(B).

⁵ Government Code § 17573.

“ . . . any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.”

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein.

Executed this 20th day of February 2020 in Los Angeles, CA.



Sung Lee
Finance Manager
Law Office of Public Defender
County of Los Angeles

EXHIBIT A

County of Los Angeles Public Defender
 SB 1437
 FY 2018-19

		Total Hours	1,392.00	Total Costs	\$206,496	Last Stats Received :		1/2019-4/2019					
Employee	Title	[a]	[b]	[c]	[d]	[e]	[f]	[g]	[h]	[i]	[j]	[k]	[l]
		Total Months Worked	Total Salary Worked	Actual Hours Worked	Shareers Productive	Productive Hours Used (larger of "c" or "d")	Productive Hourly Rate Used (b/e)	Salary (c * f)	Employee Benefits (g * 58.87%)	Indirect Cost (g * 33.10%)	Travel	Mileage	TOTAL (g + h + i + j + k)
Adams, Larisse	LOSA	3	15,726.00	229.50	435.75	435.75	36.09	8,283	4,676	2,742			15,900
Cruz, Jonathan	DPD III	4	46,720.40	241.75	581.00	581.00	80.41	19,440	11,444	6,435			37,319
Dowdall, Erika	DPD III	4	52,073.12	120.50	581.00	581.00	89.63	10,800	6,356	3,575			20,733
Dudeck, Rebecca	Paralegal	1	6,137.00	58.25	145.25	145.25	42.25	2,461	1,449	815			4,725
McDermott, Timothy	DPD III	4	46,720.40	337.25	581.00	581.00	80.41	27,120	15,965	8,977			52,061
Reed-Mclean, Keisha	DPD III	4	52,073.12	210.00	581.00	581.00	89.63	16,822	11,080	6,230			36,132
Sherman, Harvey	OPD IV	4	61,681.84	194.75	581.00	581.00	105.99	20,642	12,152	6,833			39,627
TOTAL				1392.00				107,557	63,325	36,606			206,496

Average hourly cost = total cost/number of hours worked= \$206,496/1,392= \$148
 Average cost per case= number of hours per case 25 x \$148= \$3,700
 Statewide cost estimate= 2,177 x \$3,700= \$8,054,900

EXHIBIT B

County of Los Angeles Public Defender
SB 1437
FY 2019-20

		Total Hours	3,061.90	Total Costs	5473,856	Last State Received: 7/2019-11/2019							
Employee	Title	(a)	(b)	(c)	(d) Standard Productive Work Hours (1744 / 12 * Total Months Worked)	(e) Productive Hours Used (larger of "c" or "d")	(f) Productive Hourly Rate Used (b/e)	(g) Salary (e*f)	(h) Employee Benefits (g * 60.37%)	(i) Indirect Cost (g * 31.37%)	(j) Travel	(k) Mileage	(l) TOTAL (g + h + i + j + k)
		Total Months Worked	Total Salary Worked	Actual Hours Worked									
Adams, Larissa	LDSA	5	26,470.72	317.50	726.67	726.67	36.43	11,566	6,982	3,628			22,176
Cruz, Jonathan	DPD II	5	80,838.84	472.50	726.67	726.67	83.72	39,559	23,882	12,410			75,851
Dowdell, Erika	DPD III	5	67,054.14	336.25	726.67	726.67	92.28	31,026	18,732	9,733			59,493
Dudeck, Rebecca	Paralegal	5	30,892.88	317.50	726.67	726.67	42.65	13,541	8,175	4,248			25,964
McDermott, Timothy	DPD III	5	80,838.84	656.00	726.67	726.67	83.72	55,090	33,256	17,282			105,629
Reed-Mclean, Kelsha	DPD III	5	67,054.14	567.50	726.67	726.67	92.28	52,367	31,614	16,427			100,408
Sherman, Harvey	DPD IV	5	78,296.10	392.25	726.67	726.67	109.13	42,805	25,841	13,428			82,074
TOTAL				3061.90				245,968	148,463	77,156			471,596

Average hourly cost = total cost/number of hours worked= \$471,595/3,062= \$154
Average cost per case= number of hours per case 25 x \$154= \$3,850
Statewide cost estimate= 2,177 x \$3,850= \$8,381,450

SECTION 6

DECLARATION OF PING YU

ACCOMPLICE LIABILITY FOR FELONY MURDER
Senate Bill 1437: Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code, Relating to Felony Murder

I, Ping Yu, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

- 1) I am an Accounting Officer I with the Los Angeles County's District Attorney's Office. I am responsible for the complete and timely recovery of costs mandated by the State.
- 2) SB 1437, Chapter 1015, Statutes of 2018, added Penal Code Section 1170.95. specifically, Penal Code §§ 1170.95 (c) and (d)(3), imposed the following state mandated activities and costs on the District Attorney:
 - (c) ... The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause.
 - (d) (3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.
 - (e) Attendance and participation of counsel in training to be able to competently represent clients.
- (3) As a result, local agencies will incur cost in complying with the mandated activities that will exceed \$1,000¹.

¹ Government Code § 17564 (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars (\$1,000).

- (4) I am familiar with the new activity and cost stemming from the alleged statutory mandate in SB 1437. The costs and the activities are accurately described in sections A, B, C, D, and E. FY 2018-2019 was the fiscal year the alleged mandate in SB 1437 was implemented and the Test Claim was filed for.
- (5) I declare that I have prepared and have personal knowledge of the attached schedule of costs summarized in the attached Exhibit C. The actual cost of providing activities described in section (2) above was \$1,592,284 for FY 2018-19.
- (6) The District Attorney's Office estimates that it will incur \$1,295,852 in increased cost of providing services to comply with the SB 1437 mandates in FY 2019-20. FY 2019-20 is the FY following the implementation of the mandate. The cost is summarized in the attached Exhibit D.
- (7) According to the Senate Committee on Appropriation: "CDCR² reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in an additional workload costs to the court of about \$7.6 million³"

Using the number of projected petitioners who would file a petition to the cost of representation, prosecution, and housing of the petitioners, it would result in a statewide cost estimate of \$18,153,459, average cost from Exhibit B & D.

- (8) District Attorney's Office has not received any local, state, or federal funding and does not have a fee authority to offset its increased direct and indirect cost of providing mandated activities described in section (2) above in compliance with SB 1437. The District Attorney's Office has incurred actual cost of \$1,592,284 (Exhibit C) for FY 2018-19 and will incur an estimated cost of \$1,295,852 for FY 2019-2020 summarized in the attached Exhibit D.
- (9) District Attorney's Office is not aware of any prior determination made by the Bard of Control or the Commission on State Mandates related to this matter⁴.

² California Department of Correction and rehabilitation

³ SENATE COMMITTEE ON APPROPRIATION, May 14, 2018, FY 2017-2018 Regular Session, pages 4, ¶ 8

⁴ Government Code §17553(b)(2)(B).

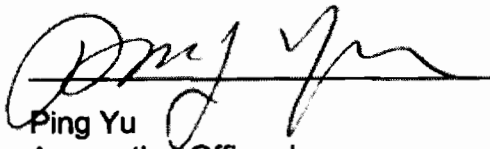
District Attorney's Office is not aware of any legislatively determined mandate related to SB 1437, Chapter 1015, Statutes of 2018⁵.

I have examined the SB 1437 Test Claim prepared by the Claimant (County of Los Angeles) and based on my personal knowledge, information, and belief, the costs incurred in this test claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly computed and are "costs mandated by the State", as defined in Government Code §17514:

" . . . any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution."

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein.

Executed this 20th day of February 2020 in Los Angeles, CA.



Ping Yu
Accounting Officer I
District Attorney's Office
County of Los Angeles

⁵ Government Code § 17573.

EXHIBIT C

DISTRICT ATTORNEY'S OFFICE
 SB90 - 1437 Penal Code Section 1170.95 Petitions
 FISCAL YEAR 2018 - 2019
 Period 01/01/19 - 06/30/19

Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	Branch & Area Operation			Special Operations	Central Operations	TOTAL
									EB 60.886%	ICRP 56.781%	ICRP 63.125%	ICRP 59.086%		
Adomian, Natalie	449655	DPY D.A. IV	Central Operations	Jan 2019	15,395.46	105.93	15.00	1,652.51	1,006.15				976.40	3,635.06
Arias, Jose	419629	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	7.00	741.51	451.48		468.08			1,661.07
Chun, Moon	430496	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	24.50	2,595.29	1,580.17			1,639.28		5,813.74
Debbaudi, Marc	228139	DPY D.A. IV	Branch & Area Operations	Jan 2019	15,395.46	105.93	10.90	1,154.64	703.01	655.62				2,513.27
Klein, Lesley	434748	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	1.50	158.90	96.75			100.31		151.96
Lunford, Block	472685	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	168.00	17,796.74	10,835.42			11,213.88		29,805.54
Megan, Juan	422352	DPY D.A. IV	Branch & Area Operations	Jan 2019	15,395.46	105.93	20.00	2,118.60	1,289.93		1,202.96			4,611.49
Nixon, Edward	239987	DPY D.A. IV	Branch & Area Operations	Jan 2019	15,395.46	105.93	8.70	921.59	561.12		543.29			2,026.00
Raf, Grate	449660	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	1.10	116.52	70.94			73.55		261.01
Sedgwick, Mary	431061	DPY D.A. IV	Branch & Area Operations	Jan 2019	15,395.46	105.93	0.75	78.48	49.12		15.04			172.64
Hernandez, Alberto	473829	DPY D.A. III	Special Operations	Jan 2019	12,609.74	87.18	0.45	39.23	23.89			24.76		87.89
Carter, Santalia	489755	Sr. Paralegal	Special Operations	Jan 2019	6,840.00	47.00	143.00	6,729.58	4,097.37		4,248.75			15,075.00
Shaffer, Steven	287945	Paralegal	Special Operations	Jan 2019	6,137.00	42.23	160.00	6,756.00	4,113.95		4,265.23			15,135.98
Adomian, Natalie	449655	DPY D.A. IV	Central Operations	Feb 2019	15,702.82	108.05	12.90	1,393.85	848.66				823.57	3,066.05
Anat, Jose	419629	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	4.20	453.61	276.31			286.47		1,016.59
Chun, Moon	430496	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	17.00	1,836.65	1,118.36			1,159.51		4,114.74
Debbaudi, Marc	228139	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	32.10	3,468.41	2,111.78	1,969.40				7,549.59
Dodd, Byron	455597	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	8.30	896.87	545.04			566.12		2,008.98
Klein, Lesley	434748	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	0.25	27.01	16.45			17.25		60.51
Kranz, Deborah	108399	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	10.00	1,080.50	657.87		613.52			2,351.89
Lopez, Ana Maria	221556	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	49.05	5,299.85	3,276.87		3,345.53			11,872.25
Lunford, Block	472685	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	152.00	16,423.60	9,999.67		10,367.40			36,790.67
McPherson, Scott	294844	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,282.82	105.16	27.85	2,926.71	1,783.17	1,662.95				6,374.83
Meglia, Joan	422352	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	54.00	5,834.70	3,552.52	3,313.00				12,700.22
Murray, Mary	445376	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	47.00	5,078.35	3,092.00			3,205.71		11,376.06
Musto, Joseph	400995	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	14.00	1,512.70	921.02		858.93			3,292.65
Nixon, Edward	239987	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	4.55	491.63	299.39			279.15		1,070.17
Raf, Grate	449660	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	23.10	2,495.96	1,519.69			1,575.57		5,591.22
Reid, Judith	250210	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	1.00	108.05	65.78			68.21		242.05
Sedgwick, Mary	431061	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	18.45	1,777.42	1,082.20	1,009.24				3,868.86
Borghis, Samantha	543054	DPY D.A. III	Special Operations	Feb 2019	12,576.45	86.54	5.50	475.97	289.80			300.46		1,066.23
Erlitz, Ryan	600448	DPY D.A. III	Branch & Area Operations	Feb 2019	10,406.41	71.60	5.25	375.90	228.87		213.44			618.21
Holtz, R. Lou	419636	DPY D.A. III	Branch & Area Operations	Feb 2019	13,278.10	91.36	8.50	776.56	472.82	440.94				1,690.37
Urman, Renée	219977	DPY D.A. III	Special Operations	Feb 2019	13,278.10	91.36	22.00	2,509.92	1,223.76		1,268.76			4,002.44
Carter, Santalia	489755	Sr. Paralegal	Special Operations	Feb 2019	6,840.00	47.00	154.00	7,247.74	4,512.55		4,574.82			16,334.61
Shaffer, Steven	287945	Paralegal	Special Operations	Feb 2019	6,137.00	42.23	116.00	4,898.68	2,982.61		3,092.29			10,973.58
Beart, Marc	443448	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	21.00	2,269.05	1,381.53			1,432.34		5,082.97
Burnley, Marc	464159	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	19.50	1,437.07	874.97			907.15		3,219.15
Chun, Moon	430496	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	18.00	1,944.90	1,184.17			1,227.72		4,356.75
Dodd, Byron	455597	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	2.50	270.13	164.47			170.52		605.12
Garcia, Manuel Jr	250002	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	4.00	432.20	263.15			272.83		968.18
Klein, Lesley	434748	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	0.58	62.67	38.16			39.56		140.39
Lopez, Ana Maria	221556	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	10.07	1,088.06	662.48			684.84		2,437.38
Lunford, Block	472685	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	152.00	16,423.60	9,999.67		10,367.40			36,790.67
Nixon, Edward	239987	DPY D.A. IV	Branch & Area Operations	Mar 2019	15,702.82	108.05	17.50	1,899.88	1,151.28		1,073.66			4,115.82

DISTRICT ATTORNEY'S OFFICE
SB90 - 1437 Penal Code Section 1170.95 Petitions
FISCAL YEAR 2018 - 2019
Period 01/01/19 - 06/30/19

Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate	Hours per Month	Claimable Salary	Branch & Area Operation			Special Operations	Central Operations	TOTAL
									EB	ICRP	ICRP	ICRP		
									60.886%	56.781%	63.125%	59.088%		
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Mar 2019	14,873.82	102.34	142.00	14,532.28	8,948.12			9,173.50		37,553.90
Raf, Grace	449660	DPY D A IV	Special Operations	Mar 2019	15,702.82	108.05	94.60	10,243.14	6,236.64			6,465.98		22,945.76
Raf, Judith	250010	DPY D A IV	Special Operations	Mar 2019	15,702.82	108.05	1.50	162.08	98.60			102.21		363.07
Rose, Renee	431134	DPY D A IV	Special Operations	Mar 2019	15,702.82	108.05	4.00	432.20	263.15			272.83		968.18
Tandler, Karen	204167	DPY D A IV	Special Operations	Mar 2019	15,702.82	108.05	3.00	324.15	197.36			204.62		726.13
Borgh, Samantha	543054	DPY D A III	Special Operations	Mar 2019	12,976.46	86.54	2.80	249.21	147.53			152.95		541.80
Duckett, Keith	507106	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	160.00	14,617.60	8,906.07			9,127.36		32,745.03
Erich, Ryan	600448	DPY D A III	Branch & Area Operations	Mar 2019	10,688.82	73.35	2.50	183.68	111.96		104.41			402.75
Garmo, Evelis	466276	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	159.00	14,526.24	8,844.45			9,169.69		32,540.38
Lonsdale, Jose	510866	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	169.00	15,439.84	9,400.70			9,746.40		24,586.94
Hatami, Jonathan	517053	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	6.00	548.16	333.75			346.03		1,227.94
Henry, Candice	505049	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	152.00	13,886.72	8,455.67			8,765.99		21,107.78
Yun, Hubert	519572	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	151.00	11,795.36	8,399.44			8,708.32		30,901.12
Carter, Santana	489755	Sr Paralegal	Special Operations	Mar 2019	6,840.00	47.06	142.00	6,729.58	4,087.37			4,248.05		15,073.00
Romero, Eileen	629876	Paralegal	Special Operations	Mar 2019	4,322.60	29.74	161.00	4,788.14	2,915.31			3,022.51		10,725.96
Shaffer, Steven	787945	Paralegal	Special Operations	Mar 2019	6,137.00	42.23	151.00	6,376.73	3,882.54			4,025.31		14,284.58
Sripeta, Sumita	625865	Paralegal	Special Operations	Mar 2019	5,078.00	34.94	139.02	4,857.36	2,957.45			3,066.21		10,881.02
Murphy, Alisha	479785	STAFF ASST II	Special Operations	Mar 2019	5,774.82	39.74	87.00	3,457.38	2,105.06			2,182.47		7,744.91
Chun, Moon	430436	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	13.00	1,404.65	855.24			885.69		3,146.58
Dyer, Rob	236081	DPY D A IV	Branch & Area Operations	Apr 2019	15,702.82	108.05	16.60	1,728.80	1,052.60		981.63			3,763.03
Garcia, Manuel Jr	250002	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	12.00	1,296.60	789.45			818.48		2,904.53
Hansen, Tuna	221633	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	6.00	648.30	394.72			409.24		1,452.26
Kilberg, Brian	119040	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	4.00	432.20	263.15			272.83		968.18
Lopez, Ana Maria	221556	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	46.44	5,017.84	3,053.16			3,167.51		11,740.51
Lunsford, Brock	472665	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	176.00	19,016.80	11,578.57			12,004.36		42,599.73
Murray, Mary	443376	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	15.00	1,620.75	986.81			1,073.10		3,630.66
Nixon, Edward	239887	DPY D A IV	Branch & Area Operations	Apr 2019	15,702.82	108.05	11.30	1,220.97	743.40		693.28			2,657.65
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	17.40	1,869.07	1,144.70			11,816.04		41,931.45
Raf, Grace	449660	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	7.50	810.38	493.41			1,186.79		4,211.56
Rose, Renee	491134	DPY D A IV	Special Operations	Apr 2019	15,702.82	108.05	15.00	1,620.75	986.81			511.55		3,115.34
Schwartz, Susan	260110	DPY D A IV	Central Operations	Apr 2019	15,702.82	108.05	15.00	1,620.75	986.81				957.64	3,565.20
Raf, Douglas	607276	DPY D A III	Branch & Area Operations	Apr 2019	10,124.00	69.66	14.05	978.72	595.90		555.71			2,180.35
Borgh, Samantha	543054	DPY D A III	Special Operations	Apr 2019	12,976.46	86.54	3.80	242.31	147.53			152.95		542.80
Duckett, Keith	507106	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	160.00	14,617.60	8,906.07			9,227.36		32,745.03
Garmo, Evelis	466276	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	178.00	16,262.08	9,901.33			10,265.44		36,428.85
Genesier, Jose	510866	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	107.00	9,775.52	5,951.92			6,170.60		21,898.24
Henry, Candice	505049	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	135.00	12,474.96	7,565.06			7,843.26		27,843.28
Manakata, Shaim	460791	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	13.90	1,269.90	773.19			801.62		2,844.71
Ostrowski, Allyson	507113	DPY D A III	Branch & Area Operations	Apr 2019	13,278.10	91.36	11.10	1,014.10	617.44		575.82			2,207.36
Yun, Hubert	519572	DPY D A III	Special Operations	Apr 2019	13,278.10	91.36	178.00	16,262.08	9,901.33			10,265.44		36,428.85
Nell, Eric	616963	DPY D A II	Branch & Area Operations	Apr 2019	10,688.82	73.55	16.00	1,176.80	716.51			568.20		2,561.51
Rodriguez, Cesar	431134	DPY D A II	Branch & Area Operations	Apr 2019	8,373.18	57.61	12.00	691.32	420.92			397.54		1,504.78
Carter, Santana	489755	Sr Paralegal	Special Operations	Apr 2019	6,840.00	47.06	142.00	6,682.52	4,068.72			4,218.34		14,969.58
Romero, Eileen	629876	Paralegal	Special Operations	Apr 2019	4,322.60	30.50	160.00	4,280.00	2,971.24			1,080.50		10,933.74
Shaffer, Steven	787945	Paralegal	Special Operations	Apr 2019	6,137.00	42.23	178.00	7,516.54	4,576.76			4,747.07		16,838.77

DISTRICT ATTORNEY'S OFFICE
SB90 - 1437 Penal Code Section 1170.95 Petitions
FISCAL YEAR 2018 - 2019
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Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate	Hours per Month	Claimable Salary	Branch & Area Operation			Special Operations		Central Operations		TOTAL
									EB	ICRP	CRP	ICRP	ICRP			
									60.896%	56.781%	63.125%	59.086%				
Sripata, Susmita	625865	Paralegal	Special Operations	Apr 2019	5,216.00	35.89	176.00	6,316.64	3,645.93			3,587.39				14,149.97
Morales, Alissa	479785	STAFF ASST. II	Special Operations	Apr 2019	5,813.00	40.00	142.00	5,600.00	3,458.32			3,585.50				12,723.82
Chun, Hoan	430496	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	21.00	2,269.05	1,381.53			1,432.94				5,082.92
Kao, Warren	460945	DPY D A IV	Special Operations	May 2019	15,702.82	105.16	8.00	841.38	512.72			531.06				1,884.56
Lopez, Ana Maria	221556	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	28.00	3,025.40	1,842.06			1,909.78				6,777.23
Lunsford, Block	472685	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	168.00	18,152.40	11,052.27			11,458.70				40,663.37
Murray, Mary	443376	DPY D A IV	Special Operations	May 2019	16,589.52	114.15	19.00	2,168.85	1,320.53			1,369.09				8,858.47
Nelson, Edward	239987	DPY D A IV	Branch & Area Operations	May 2019	15,702.82	108.05	6.30	600.72	414.46		386.52				1,481.70	
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	May 2019	15,702.82	105.16	106.00	11,146.96	6,786.94			7,035.52				24,970.42
Raf, Grace	449660	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	4.20	453.81	276.31			286.67				1,016.59
Reif, Judith	250010	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	1.00	108.05	65.79			68.21				242.05
Rose, Renee	431134	DPY D A IV	Special Operations	May 2019	15,702.82	108.05	31.50	3,403.58	2,072.30			2,148.51				7,624.39
Duckert, Keith	507106	DPY D A III	Special Operations	May 2019	13,278.10	91.36	144.00	13,155.84	8,010.06			8,304.62				29,476.52
Gamble, Evelis	466276	DPY D A III	Special Operations	May 2019	13,278.10	91.36	169.00	15,439.84	9,400.70			9,746.00				34,586.94
Gonzalez, Jose	510866	DPY D A III	Special Operations	May 2019	13,278.10	91.36	187.00	17,084.37	10,401.96			10,784.48				36,270.76
Henry, Candace	505049	DPY D A III	Special Operations	May 2019	13,278.10	91.36	176.00	16,079.36	9,790.08			10,150.10				36,019.54
Atanaraju, Shalini	460791	DPY D A III	Special Operations	May 2019	13,278.10	91.36	10.00	913.60	556.25			576.71				2,046.56
Urrutia, Renee	249977	DPY D A III	Special Operations	May 2019	13,278.10	91.36	2.00	181.72	111.25			115.34				409.31
Yun, Hubert	519572	DPY D A III	Special Operations	May 2019	13,278.10	91.36	177.00	16,370.72	9,845.70			10,207.77				36,224.19
Carter, Santalia	489755	Sr. Paralegal	Special Operations	May 2019	6,840.00	47.06	170.00	8,000.20	4,871.00			5,050.13				17,921.33
Romero, Eileen	628876	Paralegal	Special Operations	May 2019	4,432.00	30.50	174.00	5,303.00	3,231.22			3,350.04				11,886.26
Shaffer, Steven	207945	Paralegal	Special Operations	May 2019	6,137.00	47.23	169.00	7,136.87	4,345.35			4,505.15				15,987.37
Sripata, Susmita	625865	Paralegal	Special Operations	May 2019	5,216.00	35.89	153.00	5,707.95	3,475.34			3,603.14				17,786.43
Morales, Alissa	473785	STAFF ASST. II	Special Operations	May 2019	5,813.00	40.00	142.00	5,600.00	3,458.32			3,585.50				17,223.82
Arag, Jose	419629	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	6.00	648.30	394.72			409.24				1,452.26
Brodsky, Dmitry	470889	DPY D A IV	Special Operations	Jun 2019	15,702.82	105.16	7.50	788.70	480.21			497.87				1,766.78
Chun, Hoan	430496	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	21.00	2,269.05	1,381.53			1,432.94				5,082.92
Garcia, Manuel Jr	250002	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	2.00	216.10	131.57			136.41				484.08
Hansen, Tina	221633	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	20.50	2,215.03	1,348.64			1,398.74				4,961.91
Henry, Candace	505049	DPY D A IV	Special Operations	Jun 2019	13,561.73	93.31	170.00	11,197.20	6,817.53			7,068.23				25,087.96
Lunsford, Block	472685	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	144.00	15,559.20	9,473.37			9,821.75				34,854.32
Murray, Mary	443376	DPY D A IV	Special Operations	Jun 2019	16,589.52	114.15	39.00	4,451.85	2,710.55			2,810.23				9,972.63
Nelson, Edward	239987	DPY D A IV	Branch & Area Operations	Jun 2019	15,702.82	108.05	6.70	722.94	440.78		411.06				1,575.78	
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Jun 2019	15,702.82	105.16	160.00	16,825.66	10,244.63			10,621.16				37,691.19
Raf, Grace	449660	DPY D A IV	Special Operations	Jun 2019	15,702.82	108.05	5.50	594.26	361.83			375.14				1,331.25
Duckert, Keith	507106	DPY D A III	Special Operations	Jun 2019	13,278.10	91.36	170.00	10,963.20	6,675.06			6,920.52				24,558.77
Gamble, Evelis	466276	DPY D A III	Special Operations	Jun 2019	13,278.10	91.36	160.00	14,617.60	8,900.07			9,277.36				32,744.03
Gonzalez, Jose	510866	DPY D A III	Special Operations	Jun 2019	13,278.10	91.36	160.00	14,617.60	8,900.07			9,277.36				32,744.03
Hajami, Jonathan	517052	DPY D A III	Special Operations	Jun 2019	13,278.10	91.36	1.00	91.36	55.63			57.67				204.56
Ostrowski, Alyson	510572	DPY D A III	Branch & Area Operations	Jun 2019	14,088.46	95.94	3.50	139.29	206.58		192.65				738.52	
Urrutia, Renee	249977	DPY D A III	Special Operations	Jun 2019	13,278.10	91.36	160.00	14,617.60	8,900.07			9,277.36				32,744.03
Yun, Hubert	519572	DPY D A III	Special Operations	Jun 2019	6,840.00	47.06	132.00	8,111.92	3,782.19			3,921.27				13,915.38
Carter, Santalia	489755	Sr. Paralegal	Special Operations	Jun 2019	4,432.00	30.50	160.00	4,880.00	2,971.24			3,080.50				10,931.74
Romero, Eileen	628876	Paralegal	Special Operations	Jun 2019	6,137.00	47.23	142.00	5,996.66	3,651.19			3,785.39				13,433.18
Shaffer, Steven	207945	Paralegal	Special Operations	Jun 2019	6,137.00	47.23	142.00	5,996.66	3,651.19			3,785.39				13,433.18
Sripata, Susmita	625865	Paralegal	Special Operations	Jun 2019	5,216.00	35.89	143.00	5,132.27	3,174.89			3,239.75				11,496.85

DISTRICT ATTORNEY'S OFFICE
 SB90 - 1437 Penal Code Section 1170.95 Petitions
 FISCAL YEAR 2018 - 2019
 Period 01/01/19 - 06/30/19

Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate	Hours per Month	Claimable Salary	Branch & Area Operation			TOTAL		
									EB	ICRP	ICRP			
Mora es Al isa	479785	STAFF ASST	Specia Operations	Jun 2019	5,813.00	1744	40.00	5,997.00	60.826%	56.781%	69.125%	13,199.73		
								3,587.40			3,719.33			
TOTAL														
								9,391.10	711,827.44	433,403.18	18,792.98	425,502.38	2,757.61	1,592,283.59

Average cost per hour = $\frac{1,592,283.59}{9,391.10} = \$169.56/\text{hour}$
 Average 30/hr per case = $25 \text{ hour} \times \$169.56 = \$4,239 \text{ per case}$
 Statewide cost estimate = $7,177 \times \$4,239 = \$30,228,303$

EXHIBIT D

DISTRICT ATTORNEY'S OFFICE
 5890 - 1437 Penal Code Section 1170.95 Petitions
 FISCAL YEAR 2019 - 2020
 Period 07/01/19 - 10/31/19

Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	Branch & Area Operation				TOTAL
									EB 65.623%	ICRP 60.700%	Special Operations ICRP 64.788%	Central Operations ICRP 64.381%	
Chu, Hsion	430496	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	3.50	378.18	248.17		245.02		871.37
Duckett, Keith	507106	DPY D A IV	Special Operations	Jul-19	14,088.46	96.94	168.00	16,185.92	10,687.31		10,551.32		17,524.55
Garcia, Manuel Jr	250002	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	1.00	100.05	70.91		70.00		248.96
Gonzalez, Jose	510886	DPY D A IV	Special Operations	Jul-19	14,088.46	96.94	141.00	13,669.54	8,959.71		8,855.57		11,492.82
Hansen, Tina	221633	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	0.50	54.03	35.46		35.00		124.49
Henry, Candice	505049	DPY D A IV	Special Operations	Jul-19	14,088.46	96.94	176.00	17,061.44	11,196.23		11,053.77		19,113.44
Jezet, Erika	507100	DPY D A IV	Special Operations	Jul-19	14,088.46	96.94	3.25	315.06	206.75		204.12		725.53
Lunsford, Block	472685	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	176.00	19,016.80	12,479.39		12,370.50		48,816.79
Nison, Edward	239987	DPY D A IV	Branch & Area Operations	Jul-19	15,702.82	108.05	17.10	1,847.66	1,212.49	1,121.53			4,181.68
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Jul-19	15,282.82	105.16	176.00	18,718.48	12,283.63		11,127.33		43,129.44
Rose, Renee	431134	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	4.00	432.20	283.62		280.01		995.83
Schwartz, Susan	260110	DPY D A IV	Central Operations	Jul-19	15,702.82	108.05	14.00	1,512.70	592.68			979.91	3,479.29
Silverman, Beth	407888	DPY D A IV	Special Operations	Jul-19	15,702.82	108.05	7.00	756.35	496.34		490.02		1,747.71
Dominaquez, Shelly	475005	DPY D A II	Special Operations	Jul-19	14,088.46	96.94	1.00	96.94	63.61		62.91		223.36
Garmo, Everts	466276	DPY D A II	Special Operations	Jul-19	13,278.10	91.36	80.00	7,208.80	4,795.25		4,735.23		16,840.28
Manakata, Shabni	460791	DPY D A II	Special Operations	Jul-19	13,278.10	91.36	26.50	2,473.04	1,588.76		1,568.54		3,578.34
Yun, Hubert	519572	DPY D A II	Special Operations	Jul-19	13,278.10	91.36	169.00	15,439.84	10,132.09		10,003.16		35,575.09
Carter, Santalia	489755	Sr Paralegal	Special Operations	Jul-19	6,840.00	47.06	177.00	8,329.62	5,466.15		5,396.59		13,192.36
Ruiz, Eileen	629876	Paralegal	Special Operations	Jul-19	4,432.00	30.50	160.00	4,889.15	3,208.41		3,187.58		11,284.14
Shaffer, Steven	287945	Paralegal	Special Operations	Jul-19	6,137.00	42.73	160.00	6,795.00	4,434.03		4,377.60		10,568.63
Singala, Susmita	625865	Paralegal	Special Operations	Aug-19	5,716.00	35.89	176.00	4,593.92	3,014.67		2,976.31		7,468.88
Reard, Marc	441448	DPY D A IV	Special Operations	Aug-19	15,702.82	108.05	3.00	324.15	212.72		210.01		746.88
Burley, Mark	464159	DPY D A IV	Special Operations	Aug-19	15,702.82	108.05	3.00	324.15	212.72		210.01		746.88
Duckett, Keith	507106	DPY D A IV	Special Operations	Aug-19	14,088.46	96.94	176.00	17,061.44	11,196.23		11,053.77		19,113.44
Garcia, Manuel Jr	250002	DPY D A IV	Special Operations	Aug-19	15,702.82	108.05	1.00	108.05	70.91		70.00		248.96
Gonzalez, Jose	510886	DPY D A IV	Special Operations	Aug-19	14,088.46	96.94	100.00	15,510.40	10,178.39		10,040.88		15,737.57
Henry, Candice	505049	DPY D A IV	Special Operations	Aug-19	15,702.82	108.05	5.80	626.69	411.25		406.02		1,431.96
Lunsford, Block	472685	DPY D A IV	Special Operations	Aug-19	14,088.46	96.94	186.00	18,183.84	8,651.68		8,541.55		10,377.02
Nison, Edward	239987	DPY D A IV	Branch & Area Operations	Aug-19	15,702.82	108.05	176.00	19,016.80	12,479.39		12,370.50		48,816.79
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Aug-19	15,282.82	105.16	13.30	1,437.07	943.05	872.30			3,252.42
Silverman, Beth	407888	DPY D A IV	Special Operations	Aug-19	15,282.82	105.16	109.00	17,772.04	11,652.55		11,514.15		40,948.74
Garmo, Everts	466276	DPY D A II	Special Operations	Aug-19	15,702.82	108.05	5.00	540.25	354.53		350.02		1,244.80
Kassaban, Lisa	500594	DPY D A II	Special Operations	Aug-19	13,278.10	91.36	177.00	16,170.72	10,513.73		10,476.69		37,251.12
Yun, Hubert	519572	DPY D A II	Special Operations	Aug-19	13,278.10	91.36	3.00	274.08	179.86		177.57		611.51
Carter, Sanjita	489755	Sr Paralegal	Special Operations	Aug-19	6,840.00	47.06	89.00	8,131.04	5,335.83		5,257.94		10,716.81
Pomero, Eileen	629876	Paralegal	Special Operations	Aug-19	4,432.00	30.50	158.00	4,980.36	3,273.51		3,231.86		11,478.73
Shaffer, Steven	287945	Paralegal	Special Operations	Aug-19	6,137.00	42.23	160.00	6,756.80	4,434.03		4,377.60		11,124.59
Singala, Susmita	625865	Paralegal	Special Operations	Aug-19	5,716.00	35.89	176.00	6,316.64	4,145.17		4,082.42		15,568.23
Doorn, Yvora	459597	DPY D A IV	Special Operations	Sep-19	15,702.82	108.05	3.00	374.15	257.72		257.72		746.88

DISTRICT ATTORNEY'S OFFICE
 5890 - 1437 Penal Code Section 1170.95 Petitions
 FISCAL YEAR 2019 - 2020
 Period 07/01/19 - 10/31/19

Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	Branch & Area Operation		Special Operations		Central Operations		TOTAL
									EB 65.613%	ICRP 60.700%	ICRP 64.780%	ICRP 64.262%			
Duckett, Keith	507106	DPY D.A. IV	Special Operations	Sep-19	14,088.45	96.94	160.00	15,510.40	10,178.39		10,048.88				35,737.67
Gonzalez, Inse	510866	DPY D.A. IV	Special Operations	Sep-19	14,058.45	96.54	160.00	15,510.40	10,178.39		10,048.88				35,737.67
Haussee, Michele	454500	DPY D.A. IV	Special Operations	Sep-19	15,707.82	108.06	8.45	913.02	599.15		591.53				1,193.70
Henry, Candice	505049	DPY D.A. IV	Special Operations	Sep-19	14,088.45	96.94	152.00	14,734.88	9,669.47		9,546.43				33,950.78
Lumford, Block	472685	DPY D.A. IV	Special Operations	Sep-19	15,702.82	108.06	160.00	17,288.00	11,344.90		11,200.55				39,833.45
Nason, Edward	239987	DPY D.A. IV	Branch & Area Operations	Sep-19	15,702.82	108.06	3.60	388.98	255.26	236.11					880.35
O'Crowley, Patrick	460951	DPY D.A. IV	Special Operations	Sep-19	15,702.82	108.16	160.00	16,825.60	11,041.46		10,900.97				38,768.03
Schwartz, Susan	260110	DPY D.A. IV	Central Operations	Sep-19	15,702.82	108.06	3.40	367.27	241.00				236.52		844.97
Domiguez, Shelly	475005	DPY D.A. II	Special Operations	Sep-19	14,088.45	96.94	10.50	1,017.87	667.96		659.46				2,345.29
Garma, Evelis	466276	DPY D.A. II	Special Operations	Sep-19	13,278.10	91.36	160.00	14,617.60	9,527.51		9,470.45				33,680.56
Manantala, Shantia	480791	DPY D.A. II	Special Operations	Sep-19	13,278.10	91.36	8.00	730.68	479.63		473.52				1,654.03
Yun, Hubert	519572	DPY D.A. II	Special Operations	Sep-19	13,278.10	91.36	160.00	14,617.60	9,527.51		9,470.45				33,680.56
Falter, Santia J	489755	Sr Paralegal	Special Operations	Sep-19	6,840.00	47.06	152.00	7,253.12	4,654.09		4,614.36				16,481.57
Romero, Eileen	629876	Paralegal	Special Operations	Sep-19	4,432.00	30.50	152.00	4,797.65	3,148.36		3,108.30				11,054.31
Shaffer, Steven	287945	Paralegal	Special Operations	Sep-19	6,137.00	42.23	151.00	6,376.73	4,184.60		4,131.26				14,692.69
Snipata, Susmita	625865	Paralegal	Special Operations	Sep-19	5,216.00	35.89	112.00	4,019.68	2,637.83		2,604.27				9,261.78
Doed, Epm	459597	DPY D.A. IV	Special Operations	Oct-19	16,194.02	111.43	6.00	668.58	438.74		433.16				1,540.48
Duckett, Keith	507106	DPY D.A. IV	Special Operations	Oct-19	14,440.28	99.36	176.00	17,487.36	11,475.73		11,329.71				40,292.83
Garca, Manuel Jr	250007	DPY D.A. IV	Special Operations	Oct-19	17,003.66	117.00	1.00	117.00	76.78		75.80				266.58
Gonzalez, Jose	510866	DPY D.A. IV	Special Operations	Oct-19	14,440.28	99.36	170.00	16,091.20	11,084.51		10,941.47				38,919.18
Henry, Candice	505049	DPY D.A. IV	Special Operations	Oct-19	16,099.82	110.74	176.00	19,490.24	12,790.08		12,677.34				44,907.66
Lumford, Block	472685	DPY D.A. IV	Special Operations	Oct-19	15,664.28	107.78	179.00	19,164.84	12,589.67		12,479.67				44,203.98
O'Crowley, Patrick	460951	DPY D.A. IV	Special Operations	Oct-19	15,355.77	105.56	3.20	338.11	221.88						777.67
Schwartz, Susan	260110	DPY D.A. IV	Central Operations	Oct-19	14,440.28	99.36	5.00	496.80	326.87				217.66		1,144.69
Scott, Deborah	287873	DPY D.A. IV	Special Operations	Oct-19	13,609.92	93.65	169.00	15,826.85	10,386.05		10,251.90				35,466.80
Garma, Evelis	466276	DPY D.A. II	Special Operations	Oct-19	13,609.92	93.65	178.00	16,603.70	10,919.16		10,790.97				38,409.83
Yun, Hubert	519572	DPY D.A. II	Special Operations	Oct-19	13,609.92	93.65	179.00	16,634.96	10,931.16		10,790.97				38,466.80
Carter, Santia	489755	Sr Paralegal	Special Operations	Oct-19	7,010.92	48.24	179.00	8,634.96	5,666.52		5,594.42				19,895.50
Romero, Eileen	629876	Paralegal	Special Operations	Oct-19	4,542.92	31.26	164.00	5,198.54	3,411.44		3,368.02				11,978.01
Shaffer, Steven	287945	Paralegal	Special Operations	Oct-19	6,355.30	43.04	134.00	5,757.35	3,784.74		3,735.56				13,268.63
Snipata, Susmita	625865	Paralegal	Special Operations	Oct-19	5,346.00	36.78	120.00	4,413.60	2,896.34		2,859.48				10,169.42
Ferez, Michelle	450785	Spvg Legal Office	Special Operations	Oct-19	5,987.92	41.20	166.00	6,835.78	4,488.09		4,430.58				15,759.22
TOTAL									7,717.30	562,478.08	360,114.59	1,229.94	360,601.05	1,428.13	1,295,853.15

Average cost per hour= \$1,295,852.15/7,717.30= \$179.55
 Average number of hours per case= 25 hour x \$179.55= \$4,488.75
 Statewide cost estimate= 2,177 x \$4,488.75= \$9,772,009



User Name: Hasmik Yaghobyan

Date and Time: Wednesday, September 11, 2019 7:01:00 PM EDT

Job Number: 97169049

Document (1)

1. *Cal Pen Code § 188*

Client/Matter: -None-

Search Terms: Penal Code Sec. 188

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Sources: CA, Related Federal

Cal Pen Code § 188

Deering's California Codes are current through Chapters 1-70, 72-127, 130-133, 149, 157, 159, 161, and 215 of the 2019 Regular Session, including all legislation effective September 4, 2019 or earlier.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 1 Of Crimes and Punishments (Titles 1 — 17) > Title 8 Of Crimes Against the Person (Chs. 1 — 11) > Chapter 1 Homicide (§§ 187 — 199)

§ 188. Malice defined

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

History

Enacted 1872. Amended Stats 1981 ch 404 § 6; Stats 1982 ch 893 § 4; Stats 2016 ch 1015 § 2 (SB 1437), effective January 1, 2019.

Annotations

Notes

Historical Derivation:

Editor's Notes—

Amendments:

Note—

Historical Derivation:

Crimes and Punishment Act §§ 20, 21 (Stats 1850 ch 99 §§ 20, 21 p 231), as amended Stats 1856 ch 139 § 2

Editor's Notes—

(See also Cal Digest of Official Reports 3d Series, Homicide.)

Amendments:**1981 Amendment:**

Added the second paragraph.

1982 Amendment:

Amended the second sentence of the second paragraph by (1) adding "Neither"; and (2) substituting "nor acting despite such awareness is" for "is not".

2018 Amendment (ch 1015):

Rewrote the section which read: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite awareness is included within the definition of malice."

Note—

Stats 2018 ch 1015 provides:

SECTION 1. The Legislature finds and declares all of the following:

- (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
- (b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
- (c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
- (d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
- (e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.

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(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

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1. Generally

Under the statutes prior to the adoption of the Penal Code, there could be no murder without malice, either express or implied. *People v. Moore* (Cal. July 1, 1857), 8 Cal. 90, 1857 Cal. LEXIS 303.

To constitute murder in the first degree, express malice is necessary. *People v. Cox* (Cal. May 25, 1888), 76 Cal. 261, 18 P. 332, 1888 Cal. LEXIS 875.

When an unlawful act which results in death is deliberately performed by an assailant who knows that his conduct endangers the life of another, and it is executed without provocation or sudden passion which would reduce the offense to manslaughter, malice is presumed, and under such circumstances the killing constitutes murder of the second degree, when it is not perpetrated by means of poison, lying in wait, torture, or any other kind of wilful, deliberate, or premeditated killing. *People v. Semone* (Cal. App. Aug. 4, 1934), 140 Cal. App. 318, 35 P.2d 379, 1934 Cal. App. LEXIS 432.

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Malice is an essential element of murder whether it be first or second degree. People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300, People v. Wolff (Cal. Aug. 31, 1964), 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959, 1964 Cal. LEXIS 258.

To constitute murder by beating with hands, there has to be intent to kill or such wanton and brutal use of hands without provocation as to indicate that they would cause death or serious bodily injury. People v. Teixeira (Cal. App. 1st Dist. Oct. 13, 1955), 136 Cal. App. 2d 136, 288 P.2d 535, 1955 Cal. App. LEXIS 1461.

Felonious purpose, accomplished by felonious means, is sufficient to constitute murder in second degree. People v. Fuqua (Cal. App. 2d Dist. May 31, 1960), 181 Cal. App. 2d 510, 5 Cal. Rptr. 408, 1960 Cal. App. LEXIS 2021.

When a defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. Such a killing is attributable, not merely to the commission of the felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life. People v. Velasquez (Cal. App. 2d Dist. Dec. 9, 1975), 53 Cal. App. 3d 547, 126 Cal. Rptr. 11, 1975 Cal. App. LEXIS 1588.

An awareness of the obligation to act within the general body of laws regulating society is included in the statutory definition (Pen C, § 188) of implied malice and in the definition of express malice. People v. Carpenter (Cal. App. 1st Dist. Dec. 10, 1979), 99 Cal. App. 3d 527, 160 Cal. Rptr. 386, 1979 Cal. App. LEXIS 2452.

A minor, who was alleged to have committed murder when he shot an unarmed person who had threatened him in the past and was taunting him, was entitled to assert the defense of imperfect self-defense (actual but unreasonable belief of imminent peril negates malice, and thus defendant can be convicted of no crime greater than voluntary manslaughter). The defense of imperfect self-defense was not abolished by 1981 amendments to Pen C § 28 (defense of diminished capacity), Pen C § 29 (expert testimony about mental illness), and Pen C § 188 (definition of malice). These amendments, abolishing the defense of diminished capacity, were the response to public outcry against the use of the diminished capacity defense in a highly publicized homicide trial, which did not involve any issues of self-defense. Also, the defenses of diminished capacity and imperfect self-defense were well-established doctrines in 1981, the doctrines have historically been considered separate and distinct, and there was nothing in the language of the amendments or the legislative record that indicated a consideration of the policy issues attendant to the imperfect self-defense doctrine or an intent to abolish imperfect self-defense. In re Christian S. (Cal. May 16, 1994), 7 Cal. 4th 768, 30 Cal. Rptr. 2d 33, 872 P.2d 574, 1994 Cal. LEXIS 2196.

In the context of an imperfect self-defense, a person who honestly believes there is an imminent threat to his own life or the lives of others cannot harbor malice, and nowhere does *People v. Flannel* suggest that only "reasonably unreasonable" defendants may avail themselves of its rationale, thus, excluded evidence of defendant's delusions was relevant to the defense theory of imperfect self-defense. People v. Wright (Cal. App. 3d Dist. Aug. 4, 2003), 110 Cal. App. 4th 1594, 2 Cal. Rptr. 3d 903, 2003 Cal. App. LEXIS 1187, review granted, depublished, (Cal. Nov. 12, 2003), 6 Cal. Rptr. 3d 421, 79 P.3d 539, 2003 Cal. LEXIS 8671, rev'd, (Cal. May 25, 2005), 35 Cal. 4th 964, 28 Cal. Rptr. 3d 708, 111 P.3d 973, 2005 Cal. LEXIS 5611.

Appellate court had properly determined that defendant's prior guilty plea to murder in Texas could be the basis for a prior murder-special circumstance finding when the Texas murder would have been punishable as second degree murder under California law; defendant's argument that the Texas conviction did not satisfy Cal Penal Code § 190.2(a)(2) as the elements were not the same as those under California law, was barred by the law of the case doctrine. People v. Martinez (Cal. Aug. 18, 2003), 31 Cal. 4th 673, 3 Cal. Rptr. 3d 648, 74 P.3d 748, 2003 Cal. LEXIS 6089, cert denied, (U.S. May 17, 2004), 541 U.S. 1045, 124 S. Ct. 2160, 158 L. Ed. 2d 736, 2004 U.S. LEXIS 3458.

2. Distinction between Murder and Manslaughter

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It is malice, express or implied, that distinguishes murder from manslaughter People v. Teixeira (Cal. App. 1st Dist. Oct. 13, 1955), 136 Cal. App. 2d 136, 288 P.2d 535, 1955 Cal. App. LEXIS 1461

Implied malice described in section requires no specific intent to kill, and distinguishing characteristics between murder and manslaughter is malice, rather than presence or absence of intent to kill People v. Mears (Cal. App. 4th Dist. June 11, 1956), 142 Cal. App. 2d 198, 298 P.2d 40, 1956 Cal. App. LEXIS 1967.

Distinguishing characteristic between murder and manslaughter is malice, rather than presence or absence of intent to kill. People v. Oqq (Cal. App. 2d Dist. Mar. 31, 1958), 159 Cal. App. 2d 38, 323 P.2d 117, 1958 Cal. App. LEXIS 1958.

The critical factor in distinguishing the degrees of a homicide is the perpetrator's mental state. If a diminished capacity renders him incapable of entertaining either malice or an intent to kill, his offense is mitigated to a lesser crime. Although a finding that he was unconscious would establish the ultimate facts that he lacked both the ability to entertain malice and an intent to kill, the absence of either or both of such may, nevertheless, be found even though his mental state had not deteriorated into unconsciousness. People v. Ray (Cal. Apr. 17, 1975), 14 Cal. 3d 20, 120 Cal. Rptr. 377, 533 P.2d 1017, 1975 Cal. LEXIS 274, overruled in part, People v. Blakeley (Cal. June 2, 2000), 23 Cal. 4th 82, 96 Cal. Rptr. 2d 451, 999 P.2d 675, 2000 Cal. LEXIS 4414.

The legislative modification of the definition of malice contained in Pen C § 188, which modification eliminated the judicially developed requirement that the defendant have been aware of the obligation to act within society's laws and have acted despite such awareness, did not obliterate the distinction between murder based on express malice and voluntary manslaughter. The change merely narrowed the definition of malice and thereby removed one base upon which a defendant formerly could establish a diminished capacity defense to reduce murder to manslaughter. People v. Campbell (Cal. App. 4th Dist. Aug. 12, 1987), 193 Cal. App. 3d 1653, 239 Cal. Rptr. 214, 1987 Cal. App. LEXIS 2009.

The equation in Pen C § 188 (defining malice), of express malice and intent unlawfully to kill, as the result of a 1981 statutory amendment, does not abrogate the statutory crime of voluntary manslaughter. Although the diminished capacity defense reducing murder to voluntary manslaughter is no longer tenable, the statutory "sudden quarrel or heat of passion" strand of voluntary manslaughter is still recognized. Voluntary manslaughter now encompasses only an intentional killing resulting from a sudden quarrel or heat of passion (with adequate provocation), and perhaps a killing arising from an honest but unreasonable belief in the need to defend. People v. Bobo (Cal. App. 3d Dist. July 6, 1990), 229 Cal. App. 3d 1417, 3 Cal. Rptr. 2d 747, 1990 Cal. App. LEXIS 728, ordered published, (Cal. Dec. 11, 1991), 3 Cal. Rptr. 2d 677, 822 P.2d 385, 1991 Cal. LEXIS 5578.

It is incorrect to differentiate manslaughter from murder on the basis of deliberate intent. Deliberate intent is not an essential element of murder as such. It is an essential element of one class only of first degree murder, and it is not at all an element of second degree murder. "Deliberate intention," as stated in Pen C § 188, defining malice, merely distinguishes "express" from "implied" malice, whereas premeditation and deliberation is one class of first degree murder. "Deliberate" in § 188 implies an intentional act and is essentially redundant to the language defining express malice. People v. Bobo (Cal. App. 3d Dist. July 6, 1990), 229 Cal. App. 3d 1417, 3 Cal. Rptr. 2d 747, 1990 Cal. App. LEXIS 728, ordered published, (Cal. Dec. 11, 1991), 3 Cal. Rptr. 2d 677, 822 P.2d 385, 1991 Cal. LEXIS 5578.

Refusal to instruct on voluntary manslaughter as a lesser included offense to first degree murder was not reversible error, where the victim was purportedly asleep when defendant shot him. Even under defendant's version of events, that he repeatedly told the victim to calm down and said he did not want any problems, there was no indication that defendant's actions reflected any sign of heat of passion in order to negate malice, as defined in Pen C § 188. People v. Manriquez (Cal. Dec. 5, 2005), 37 Cal. 4th 547, 36 Cal. Rptr. 3d 340, 123 P.3d 614, 2005 Cal. LEXIS 13664, cert. denied, (U.S. June 5, 2006), 547 U.S. 1179, 126 S. Ct. 2359, 165 L. Ed. 2d 280, 2006 U.S. LEXIS 4368.

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In a trial for second degree murder, the trial court should have instructed the jury on imperfect self-defense because the evidence could have allowed a reasonable jury to conclude that defendant actually believed his life was in imminent peril and thus that he did not have the required malice. The evidence was that defendant confronted the victim with an accusation, that the victim then began to choke defendant, and that defendant pulled out a gun and repeatedly shot the victim. People v. Vasquez (Cal. App. 2d Dist. Feb. 15, 2006), 136 Cal. App. 4th 1176, 39 Cal. Rptr. 3d 433, 2006 Cal. App. LEXIS 212.

Unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter. People v. Garcia (Cal. App. 2d Dist. Apr. 21, 2008), 162 Cal. App. 4th 18, 74 Cal. Rptr. 3d 912, 2008 Cal. App. LEXIS 583, overruled in part, People v. Bryant (Cal. June 3, 2013), 56 Cal. 4th 959, 157 Cal. Rptr. 3d 522, 301 P.3d 1136, 2013 Cal. LEXIS 4695.

Evidence that purely delusional perceptions caused a belief in the need for self-defense amounts to evidence of insanity, which is admissible only at a sanity trial; thus, absent any factual basis for such a belief, defendant was not entitled to an instruction on unreasonable self-defense at a trial on guilt to negate malice and reduce murder to voluntary manslaughter. People v. Elmore (Cal. June 2, 2014), 59 Cal. 4th 121, 172 Cal. Rptr. 3d 413, 325 P.3d 951, 2014 Cal. LEXIS 3761.

3. Definition, Nature and Elements of Malice

Malice necessary to constitute crime of murder is not confined to intention to take away life of person, or to spite, malevolence, or revenge, which may be manifested by external acts and declarations, but also includes intent to do unlawful act, which may probably end in depriving person of life. People v. Whithurst (1858).

While malice, in common acceptance, means ill will against a person, in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. People v. Ah Toon (Cal. Jan. 22, 1886), 68 Cal. 362, 9 P. 311, 1886 Cal. LEXIS 439.

The notion of intent is included in the primary and generally received legal definition of malice. People v. Kernaghan (Cal. June 27, 1887), 72 Cal. 609, 14 P. 566, 1887 Cal. LEXIS 586.

Malice as defined by this section is expressly limited in its application to those cases in which malice aforethought is made an essential element, and is not applicable in determining whether acts constitute mayhem. People v. Wright (Cal. Mar. 10, 1892), 93 Cal. 564, 29 P. 240, 1892 Cal. LEXIS 601.

Where no spite, or hatred, or ill will exists, there may, nevertheless, be legal malice. People v. McRoberts (Cal. App. May 24, 1905), 1 Cal. App. 25, 81 P. 734, 1905 Cal. App. LEXIS 7.

An unlawful act done intentionally without just cause or excuse is done with "malice." People v. McRoberts (Cal. App. May 24, 1905), 1 Cal. App. 25, 81 P. 734, 1905 Cal. App. LEXIS 7.

The definition of malice in § 7 is not appropriate in defining murder. People v. Waysman (Cal. App. July 3, 1905), 1 Cal. App. 246, 81 P. 1087, 1905 Cal. App. LEXIS 62; People v. Harris (Cal. Dec. 18, 1914), 169 Cal. 53, 145 P. 520, 1914 Cal. LEXIS 278.

The necessary element of malice is manifested when it appears that the killing was the result of a deliberate intention unlawfully to take the life of a fellow creature. People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 510, 76 P.2d 493, 1938 Cal. LEXIS 239.

It is not necessary to show personal enmity on the part of the defendant toward the decedent, to establish malice or support a conviction of first degree murder. People v. Cornell (Cal. App. Oct. 22, 1943), 61 Cal. App. 2d 98, 141 P.2d 916, 1943 Cal. App. LEXIS 614.

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The word "malice" does not, at least insofar as implied malice is concerned, require a pre-existing hatred or enmity toward the individual injured. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

Context of word "malice" in statutes specifically relating to homicide [§ 187, and this section] shows that word here means something more than word imports as defined in § 7, as wish to vex, annoy or injure another person, or intent to do wrongful act. People v. Goshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296, overruled in part, People v. Wetmore (Cal. Sept. 26, 1978), 22 Cal. 3d 318, 149 Cal. Rptr. 265, 583 P.2d 1308, 1978 Cal. LEXIS 290, overruled in part, People v. Blakeley (Cal. June 2, 2000), 23 Cal. 4th 82, 96 Cal. Rptr. 2d 451, 999 P.2d 675, 2000 Cal. LEXIS 4414.

Malicious intent is not synonymous with wilful, deliberate, and premeditated intent. People v. Conley (Cal. Mar. 15, 1956), 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 1966 Cal. LEXIS 258

Malice may be shown by the extent and severity of the injuries inflicted upon the victim and by the condition in which the victim was left by the attacker. People v. Seastone (Cal. App. 5th Dist. Dec. 29, 1969), 3 Cal. App. 3d 60, 82 Cal. Rptr. 907, 1969 Cal. App. LEXIS 1361.

Under the law of homicide, the mental state constituting malice does not require that the perpetrator harbor any ill will or hatred toward the victim, malice is found where one acts with wanton disregard for human life by doing an act that involves a high probability that it will result in death. People v. Matta (Cal. App. 5th Dist. Mar. 31, 1976), 57 Cal. App. 3d 472, 129 Cal. Rptr. 205, 1976 Cal. App. LEXIS 1467.

The judicial rule that malice aforethought requires an awareness of the obligation to act within the general body of laws regulating society was legislatively superseded by Pen C § 188, as amended effective January 1, 1982, to provide that such awareness is not included within the definition of malice. People v. Sanders (Cal. App. 2d Dist. Mar. 30, 1984), 154 Cal. App. 3d 487, 201 Cal. Rptr. 411, 1984 Cal. App. LEXIS 1903.

Use of the term "deliberate intention" for malice aforethought, as required in second degree murder, is not the same as use of the term "deliberate" in defining first degree murder. "Deliberate intention," as stated in Pen C § 188 (defining malice), merely distinguishes "express" from "implied" malice, whereas premeditation and deliberation is one class of first degree murder. Thus, in a proceeding to adjudicate a minor a ward of the court (Welf. & Inst. Code, § 602) for committing murder in violation of Pen C § 187, the trial court's finding of express malice was proper, notwithstanding that the court rejected a finding of premeditation and deliberation for first degree murder, where an expert psychiatric witness who had examined the minor stated that his impulsiveness in shooting his sister at her request indicated a lack of regard for consequences rather than a lack of awareness. The court was free to reject testimony of an expert witness for the defense to the contrary. In re Thomas C. (Cal. App. 2d Dist. July 23, 1986), 183 Cal. App. 3d 786, 228 Cal. Rptr. 430, 1986 Cal. App. LEXIS 1845.

Malice as defined in Pen C § 188, does not require an awareness to act within the body of laws nor acting despite such awareness. People v. Saille (Cal. App. 5th Dist. June 14, 1990), 221 Cal. App. 3d 307, 270 Cal. Rptr. 502, 1990 Cal. App. LEXIS 627, review granted, depublished, (Cal. Oct. 11, 1990), 274 Cal. Rptr. 370, 798 P.2d 1213, 1990 Cal. LEXIS 4570, reprinted, (Cal. App. 5th Dist. June 14, 1990), 229 Cal. App. 3d 1376, 270 Cal. Rptr. 502, 1990 Cal. App. LEXIS 627.

The second paragraph of Pen C § 188, added in 1981, clearly provides that once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish express malice aforethought. The question of whether a defendant acted with a wanton disregard for human life or with some antisocial motivation is no longer relevant to the issue of express malice. After the 1981 legislation, express malice and an intent unlawfully to kill are one and the same. However, the mere intent to kill remains distinct from a deliberate and premeditated intent to kill, premeditation and deliberation still requiring more understanding and comprehension of the character of the act. In this light, the distinction between first and second degree murder—in the absence of other statutory circumstance (e.g., murder by poison, torture, etc.)—is maintained. People v. Bobo (Cal. App. 3d Dist. July 6,

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1990), 229 Cal. App. 3d 1417, 3 Cal. Rptr. 2d 747, 1990 Cal. App. LEXIS 728, ordered published, (Cal. Dec. 11, 1991), 3 Cal. Rptr. 2d 677, 822 P.2d 385, 1991 Cal. LEXIS 5578.

The adverb "unlawfully" in the express malice definition of Pen C § 188, means simply that there is no justification, excuse, or mitigation for the killing recognized by the law. People v. Bobo (Cal. App. 3d Dist. July 6, 1990), 229 Cal. App. 3d 1417, 3 Cal. Rptr. 2d 747, 1990 Cal. App. LEXIS 728, ordered published, (Cal. Dec. 11, 1991), 3 Cal. Rptr. 2d 677, 822 P.2d 385, 1991 Cal. LEXIS 5578.

The 1981 legislation abolishing the diminished capacity defense and limiting admissible evidence to actual formation of various mental states does not violate the due process right to present a defense. In amending Pen C § 188, the Legislature equated express malice and an intent unlawfully to kill. Since two distinct concepts no longer exist, some narrowing of the mental elements included in the statutory definition of express-malice murder has evolved. But a defendant is still free to show that, because of his mental disease, defect, or disorder, he did not in fact intend unlawfully to kill (i.e., did not in fact have express malice aforethought). If a reasonable doubt arises from such a showing, the killing (assuming there is no implied malice) can be no greater than involuntary manslaughter (i.e., an unjustified or unexcused killing lacking both malice and an intent to kill). People v. Bobo (Cal. App. 3d Dist. July 6, 1990), 229 Cal. App. 3d 1417, 3 Cal. Rptr. 2d 747, 1990 Cal. App. LEXIS 728, ordered published, (Cal. Dec. 11, 1991), 3 Cal. Rptr. 2d 677, 822 P.2d 385, 1991 Cal. LEXIS 5578.

Pursuant to Pen C § 188, the malice required to support a murder conviction may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and it is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Implied malice has both a physical and a mental component, the physical component being the performance of an act, the natural consequences of which are dangerous to life, and the mental component being the requirement that the defendant knows that his or her conduct endangers the life of another and acts with a conscious disregard for life. People v. Hanson (Cal. Dec. 30, 1994), 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P.2d 1022, 1994 Cal. LEXIS 6590, overruled in part, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Under Pen C § 188, express malice signifies an intent unlawfully to kill, whereas implied malice is characterized by circumstances showing an abandoned and malignant heart or the absence of considerable provocation. Rather than defining different mens reas, however, express and implied malice are really a shorthand way of denoting the requisite mental state for murder known as malice aforethought. People v. Brown (Cal. App. 4th Dist. May 31, 1995), 35 Cal. App. 4th 708, 41 Cal. Rptr. 2d 321, 1995 Cal. App. LEXIS 500.

Even under the deferential "some evidence" standard, the justification given by the Governor of California for denying parole to an inmate convicted of the 1983 second-degree murder of his wife after the California Board of Parole Hearings found him suitable for parole could not withstand scrutiny where the Governor cited no evidence to suggest that, in the face of overwhelming evidence of his suitability for parole, the inmate's release would pose an unreasonable risk of danger to society because the Governor's justification for finding that the murder was particularly egregious was based on the fact that the inmate decided at some point during an encounter in which he and his wife were discussing their marital problems to kill his wife and did so by deliberately shooting her multiple times at close range, but the fact that the inmate intentionally killed his wife was not a permissible factor, inasmuch as malice was one of the minimal elements of second-degree murder and malice involved either an intent to kill or an intent to commit an act, the natural consequences of which were dangerous to human life. The fact that the inmate entered a negotiated plea of guilty to second-degree murder did not preclude the Governor from considering particular aspects of the crime beyond its basic elements, and the fact that the inmate shot his wife multiple times at close range did not demonstrate that the crime was particularly egregious, atrocious, or heinous such that the inmate remained a danger to the public nearly a quarter of a century later because he did not attack, injure or kill multiple victims; did not carry out the offense in a dispassionate and calculated manner, such as an execution-style murder, or in a manner that demonstrated an exceptionally callous disregard for human suffering; and the motive for the crime was not inexplicable or very trivial. In re Burdan (Cal. App. 3d Dist. Mar. 24, 2008), 161 Cal. App. 4th 14, 73 Cal. Rptr. 3d 581, 2008 Cal. App. LEXIS 385, review granted, depublished, (Cal. July 9, 2008) 80 Cal. Rptr.

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3d 26, 187 P.3d 886, 2008 Cal. LEXIS 8245, transferred, (Cal. Oct. 28, 2008), 85 Cal. Rptr. 3d 689, 196 P.3d 217, 2008 Cal. LEXIS 12746, sub. op., (Cal. App. 3d Dist. Dec. 12, 2008), 169 Cal. App. 4th 18, 86 Cal. Rptr. 3d 549, 2008 Cal. App. LEXIS 2407.

Verdict based on murder during the course of a kidnapping was a murder committed with malice, which supported a minimum finding of second degree murder. People v. Sanchez (Cal. App. 2d Dist. Nov. 27, 2013), 221 Cal. App. 4th 1012, 164 Cal. Rptr. 3d 880, 2013 Cal. App. LEXIS 959

4. Express Malice

Express malice is the deliberate intention unlawfully to take the life of a fellow creature, which is manifested in external circumstances, and capable of proof. People v. Garibaldi (1857)

Malice is express when there is manifested a deliberate intention unlawfully to take the life of a human being. People v. Weeks (Cal. App. Mar. 27, 1930), 104 Cal. App. 708, 286 P. 514, 1930 Cal. App. LEXIS 1079.

Evidence is sufficient to show express malice aforethought, where much more than the isolated fact that the decedent was unlawfully killed by the defendant is established, and the conclusion of express malice is fairly deducible from the evidence. People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239

Malice in murder prosecution may be express, or implied; express malice appears where there is manifested deliberate intention unlawfully to take away life of fellow-creature, while implied malice comes into being when no considerable provocation appears, or circumstances attending killing show abandoned or malignant heart. People v. Taylor (Cal. App. 3d Dist. Feb. 27, 1961), 189 Cal. App. 2d 490, 11 Cal. Rptr. 480, 1961 Cal. App. LEXIS 2206, People v. Edgmon (Cal. App. 3d Dist. Nov. 29, 1968), 267 Cal. App. 2d 759, 73 Cal. Rptr. 634, 1968 Cal. App. LEXIS 1449.

Murder may be committed without express malice, that is, without a specific intent to take human life, but to be so committed, except where the felony-murder rule is applicable, the actor must intend to commit acts that are likely to cause death and that show a conscious disregard for human life. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305

In a prosecution of defendant for first degree murder (Pen C § 187) and attempted murder (Pen C §§ 664/187), the trial court did not err in failing to instruct that intoxication could negate express malice so as to reduce a murder to voluntary manslaughter, in view of statutes abolishing the defense of diminished capacity (Pen C §§ 22, 26) and the amendment to Pen C § 188, equating express malice with an intent unlawfully to kill. A defendant 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 or an acquittal. If such a showing gives rise to a reasonable doubt, the killing, assuming there is no implied malice, can be no greater than involuntary manslaughter. People v. Saite (Cal. Dec. 12, 1991), 54 Cal. 3d 1103, 2 Cal. Rptr. 2d 364, 820 P.2d 538, 1991 Cal. LEXIS 5504.

Under Pen C § 188, as amended in 1981, once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish malice aforethought. Whether a defendant acted with a wanton disregard for human life or with some antisocial motivation is no longer relevant to the issue of express malice. After the amendment of § 188, express malice and intent unlawfully to kill are one and the same. Pursuant to the language of § 188, when an intentional killing is shown, malice aforethought is established. Accordingly, the concept of "diminished capacity voluntary manslaughter" (nonstatutory manslaughter) is no longer valid as a defense. The concept of malice aforethought is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse. Thus, the adjective "deliberate" in § 188 implies an intentional act and is essentially redundant to the language defining express malice, while the adverb "unlawfully" in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the

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law. People v. Saille (Cal. Dec. 12, 1991), 54 Cal. 3d 1103, 2 Cal. Rptr. 2d 364, 820 P.2d 588, 1991 Cal. LEXIS 5504

Pen C §§ 22, 28, state that voluntary intoxication or mental condition may be considered in deciding whether a defendant actually had the required mental state, including malice, and relate to any crime, and make no attempt to define what mental state is required. Because Pen C § 188, on the other hand, defines malice for purposes of murder, and the combination provides that voluntary intoxication or mental condition may be considered in deciding whether there was malice as defined in Pen C § 188, there is no conflict in the provisions. People v. Saille (Cal. Dec. 12, 1991) 54 Cal. 3d 1103, 2 Cal. Rptr. 2d 364, 820 P.2d 588, 1991 Cal. LEXIS 5504.

The Legislature's narrowing of the definition of express malice (Pen C §§ 22, 28, 188) and the resulting restriction on the scope of voluntary manslaughter does not violate due process. The Legislature can limit the mental elements included in the the statutory definition of a crime, and thereby curtail the use of mens rea defenses. If, however, a crime requires a particular mental state the Legislature may not deny a defendant the opportunity to prove he did not possess that state. The abolition of the diminished capacity defense and limitation of admissible evidence to actual formation of various mental states does not violate the due process right to present a defense. People v. Saille (Cal. Dec. 12, 1991), 54 Cal. 3d 1103, 2 Cal. Rptr. 2d 364, 820 P.2d 588, 1991 Cal. LEXIS 5504.

Under Pen C § 188, express malice signifies an intent unlawfully to kill, whereas implied malice is characterized by circumstances showing an abandoned and malignant heart or the absence of considerable provocation. Rather than defining different mens reas, however, express and implied malice are really a shorthand way of denoting the requisite mental state for murder known as malice aforethought. People v. Brown (Cal. App. 4th Dist. May 31, 1995), 35 Cal. App. 4th 708, 41 Cal. Rptr. 2d 321, 1995 Cal. App. LEXIS 500.

Substantial evidence supported eight attempted murder convictions arising out of two drive-by shootings, since Pen C § 188's express malice requirement was met, even though the defendants could not see all their victims during the shooting rampage. Spraying an occupied residence with bullets from high-powered assault rifles manifested a deliberate intention to unlawfully take the lives of its inhabitants. The fact that one of the intended victims had moved and was not present when defendants attempted to kill him did not make the evidence insufficient. People v. Vang (Cal. App. 5th Dist. Mar. 2, 2001) 87 Cal. App. 4th 554, 104 Cal. Rptr. 2d 704, 2001 Cal. App. LEXIS 150.

Evidence of voluntary intoxication was admissible during a convicted offender's second-degree murder trial to assess the offender's subjective state of mind related to the presence or absence of malice at the time he shot and killed a long-time friend; furthermore, because the prosecutor's theory focused on express malice, evidence of voluntary intoxication was also admissible under Pen C § 22(b). Such evidence, if raised by defense counsel, would have likely created a reasonable doubt about the prisoner's intent, and defense counsel's failure to introduce evidence of the prisoner's intoxication at the time of the offense undermined confidence in the verdict. Miller v. Terhune (E.D. Cal. Aug. 16, 2007) 510 F. Supp. 2d 486, 2007 U.S. Dist. LEXIS 63951.

5. Implied Malice

If a homicide is committed by means of wilful, deliberate, and premeditated killing, it shows an abandoned and malignant heart. People v. Williams (Cal. Apr. 1, 1972), 43 Cal. 344, 1972 Cal. LEXIS 84, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296

Where no specific intent to take life appears or exists, a large number of homicides have been adjudged murder, besides those committed in the perpetration of felonies. Thus, where the killing is involuntary, but happens in the commission of an unlawful act, which in its consequences naturally tends to destroy life, it is murder; so, if the intent to kill is not made apparent, but the killing is unlawful, and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these, and in like cases, the malice aforethought is implied, the law attributing to the slayer the intent to kill, although such intent is not made manifest as a fact. People v. Doyell (Cal. Apr. 1, 1874), 48 Cal. 85, 1874 Cal. LEXIS 101; People v. Olsen (Cal.

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Aug. 3, 1889), 80 Cal. 122, 22 P. 125, 1889 Cal. LEXIS 873, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270.

There is no inconsistency between actual intent to take life and the implied malice in the statutory definition. People v. Mendenhall (Cal. Jan. 13, 1902), 135 Cal. 344, 67 P. 325, 1902 Cal. LEXIS 803.

Regardless of whether the killing was in the perpetration of a misdemeanor or a felony, if it was done in the absence of "considerable provocation" malice is implied and the act constitutes murder. People v. Ford (Cal. App. Sept. 10, 1914), 25 Cal. App. 388, 143 P. 1075, 1914 Cal. App. LEXIS 354.

Where no provocation appeared for the killing, malice could be implied from the nature and circumstances of the act. People v. Montezuma (Cal. App. Sept. 25, 1931), 117 Cal. App. 125, 3 P.2d 370, 1931 Cal. App. LEXIS 390, modified, (Cal. App. Oct. 10, 1931), 117 Cal. App. 125, 4 P.2d 285.

In order to constitute crime of murder in second degree, malice aforethought must be present in mind of killer of human being, but existence of such condition may be implied when circumstances attending killing show abandoned and malignant heart. People v. Wallace (Cal. App. Nov. 15, 1934), 2 Cal. App. 2d 238, 37 P.2d 1053, 1934 Cal. App. LEXIS 1410.

Malice may be expressed or implied, and it is expressed when there is manifested deliberate intention unlawfully to take away life of fellow creature, and it is implied when no considerable provocation appears or when circumstances attending killing show abandoned or malignant heart. People v. Cook (Cal. May 20, 1940), 15 Cal. 2d 507, 102 P.2d 752, 1940 Cal. LEXIS 240.

If jury finds that there was no considerable provocation and that defendant acted with abandoned and malignant heart, malice will be implied and murder will be of second degree. People v. Ogg (Cal. App. 2d Dist. Mar. 31, 1958), 159 Cal. App. 2d 38, 323 P.2d 117, 1958 Cal. App. LEXIS 1958.

Implied malice requires no specific intent to kill. People v. Ogg (Cal. App. 2d Dist. Mar. 31, 1958), 159 Cal. App. 2d 38, 323 P.2d 117, 1958 Cal. App. LEXIS 1958; People v. McCartney (Cal. App. 2d Dist. Nov. 20, 1963), 272 Cal. App. 2d 461, 35 Cal. Rptr. 256, 1963 Cal. App. LEXIS 1691.

Implied malice described in this section requires no specific intent to kill, and distinguishing characteristic between murder and manslaughter is malice, rather than presence or absence of intent to kill. People v. Toth (Cal. App. 3d Dist. July 19, 1960), 182 Cal. App. 2d 819, 6 Cal. Rptr. 372, 1960 Cal. App. LEXIS 2184.

Though deliberate intention to kill is absent, if no considerable provocation appears or circumstances attending killing show abandoned and malignant heart, malice will be implied. People v. Bufarale (Cal. App. 4th Dist. July 3, 1961), 193 Cal. App. 2d 551, 14 Cal. Rptr. 381, 1961 Cal. App. LEXIS 1737.

Malice required for murder may be express or implied, it is implied where no considerable provocation appears or where circumstances attending killing show abandoned and malignant heart; implied malice does not require preexisting hatred or enmity for victim. People v. Torres (Cal. App. 2d Dist. Apr. 3, 1963), 214 Cal. App. 2d 734, 29 Cal. Rptr. 706, 1963 Cal. App. LEXIS 2667.

Awareness of obligation to act within general body of laws regulating society is included in statutory definition of implied malice in terms of abandoned and malignant heart and in definition of express malice as deliberate intention unlawfully to take life. People v. Conley (Cal. Mar. 15, 1966), 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 1966 Cal. LEXIS 258.

It would be the killing of a human being with malice where the killing is done without considerable provocation or where the circumstances of the killing show an abandoned and malignant heart. In either situation, malice is implied. (Pen Code, § 188) People v. Hudgins (Cal. App. 2d Dist. June 29, 1967), 252 Cal. App. 2d 174, 60 Cal.

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Rptr. 176, 1967 Cal. App. LEXIS 1496, cert. denied, (U.S. Apr. 1, 1968), 390 U.S. 965 88 S. Ct. 1073, 19 L. Ed. 2d 1167, 1968 U.S. LEXIS 2457.

The definitions of implied malice (Pen C § 188), and gross negligence (Pen C § 192), although bearing a general similarity, are not identical. Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. In addition, a finding of gross negligence is made by applying an objective test while a finding of implied malice depends on a determination that the defendant actually appreciated the risk involved. People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191

When conduct resulting in a vehicular homicide can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied (Pen C § 188), and a murder charge is appropriate. There is no indication that the Legislature intended the conduct of the culpable party in a vehicular homicide case automatically to be characterized as gross negligence in order to bring all vehicular homicides within the scope of Pen C § 192, subd. 3(a) (vehicular homicide). People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191

Under Pen C §§ 187 and 188, defining murder as the unlawful killing of a human being with malice aforethought, the necessary malice is implied when no considerable provocation appears. An assault with a deadly weapon made in a manner to endanger life and resulting in death is sufficient to sustain a conviction of second degree murder, as the requisite malice is implied from the assault. People v. Pacheco (Cal. App. 1st Dist. Mar. 9, 1981), 116 Cal. App. 3d 617, 172 Cal. Rptr. 269, 1981 Cal. App. LEXIS 1478.

The existence of express or implied malice will support a conviction of second degree murder. Implied malice can be found when the circumstances attending the killing show an abandoned and malignant heart (Pen C § 188), that is, when a defendant, knowing that his or her conduct endangers life and acting with a conscious disregard of the danger, commits an act the natural consequences of which are dangerous to life. Thus, a person who fires a bullet through a window, not knowing or caring whether anyone is behind it, may be liable for homicide regardless of any intent to kill. People v. Roberts (Cal. Mar. 23, 1992), 2 Cal. 4th 271, 6 Cal. Rptr. 2d 276, 826 P.2d 274, 1992 Cal. LEXIS 975, modified, (Cal. May 20, 1992), 2 Cal. 4th 758c, 1992 Cal. LEXIS 2486, cert. denied, (U.S. Nov. 2, 1992), 506 U.S. 964, 113 S. Ct. 436, 121 L. Ed. 2d 356, 1992 U.S. LEXIS 6978.

Under Pen C § 188, second degree murder may be predicated on a finding of implied malice, when the circumstances surrounding the killing reveal an abandoned and malignant heart. In other words, implied malice may be found when a defendant, knowing that his or her conduct endangers life and acting with conscious disregard of the danger, commits an act the natural consequences of which are dangerous to life. Thus, where the evidence establishes a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied. People v. Brown (Cal. App. 4th Dist. June 22, 1995), 35 Cal. App. 4th 1585, 42 Cal. Rptr. 2d 155, 1995 Cal. App. LEXIS 567.

The jury had sufficient evidence of petitioner's implied malice to convict him of second-degree murder. He performed an act (driving a tow truck with bad brakes at a high rate of speed down a narrow residential street) the natural consequences of which were dangerous to life; he was subjectively aware of the risk to human life and consciously chose to disregard that risk. Contreras v. Rice (C.D. Cal. May 6, 1998), 5 F. Supp. 2d 854, 1998 U.S. Dist. LEXIS 7633

Second degree murder conviction was reversed where the jury was instructed both on implied malice and felony murder, with the felony murder based on evading an officer with willful or wanton disregard for safety under Veh C § 2800.2, a violation of § 2800.2 could not serve as the predicate offense for second-degree felony murder. Jurors did not have to find equivalent mental states under either theory because there was a subtle but inescapable difference between the disregard for the safety of persons required under § 2800.2 and the disregard for human life required for a finding of implied malice. People v. Calderon (Cal. App. 5th Dist. June 2, 2005), 129 Cal. App. 4th

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1301, 29 Cal. Rptr. 3d 277, 2005 Cal. App. LEXIS 891, modified, (Cal. App. 5th Dist. June 27, 2005), 2005 Cal. App. LEXIS 1016.

Merger doctrine did not preclude a jury instruction on second-degree felony murder with a predicate of negligently discharging a firearm, the court explained that the felony-murder rule eliminated the need for proof of malice in connection with a charge of murder. People v. Robertson (Cal. Aug. 19, 2004), 34 Cal. 4th 156, 17 Cal. Rptr. 3d 604, 95 P.3d 872, 2004 Cal. LEXIS 7589, overruled, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Trial court erred in granting defendant's motion for a new trial under Pen C § 1181(6) because it used the incorrect standard for subjective awareness when considering implied malice under Pen C §§ 187(a), 188, and 189. The prosecution only had to prove that defendant knew that, by taking two untrained, aggressive dogs outside of her apartment without a muzzle, she was endangering the life of another. People v. Noel (Cal. App. 1st Dist. May 5, 2005), 128 Cal. App. 4th 1391, 28 Cal. Rptr. 3d 369, 2005 Cal. App. LEXIS 711, review granted, depublished, (Cal. July 27, 2005), 32 Cal. Rptr. 3d 1, 116 P.3d 475, 2005 Cal. LEXIS 8228, rev'd, (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

Ample evidence supported the jury's verdict that defendant was guilty of second degree murder under Pen C §§ 187(a), 188, and 189 where defendant knew her Presa Canario dog was huge, untrained, and bred to fight; she had seen and heard of his numerous and ominous aggressive acts in the months leading up to the fatal attack, she had been warned about the dangers inherent in his lack of training; and her repeated disregard for the obvious dangers culminated in her fatal decision to take her dogs outside her apartment without muzzles, despite knowing she could not control them. Remand was necessary, however, to allow the trial court to consider defendant's new trial motion in light of the appropriate standard for implied malice and in light of the trial court's proper role as the 13th juror. People v. Noel (Cal. App. 1st Dist. May 5, 2005), 128 Cal. App. 4th 1391, 28 Cal. Rptr. 3d 369, 2005 Cal. App. LEXIS 711, review granted, depublished, (Cal. July 27, 2005), 32 Cal. Rptr. 3d 1, 116 P.3d 475, 2005 Cal. LEXIS 8228, rev'd, (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

In a trial involving the beating death of a spouse, the jury was properly instructed that it could consider evidence of voluntary intoxication only in deciding whether defendant acted with an intent to kill; defendant was not entitled to have the jury consider that evidence on the issue of a conscious disregard for life. The court noted that the mental requirement for unintentional voluntary manslaughter and the definition of implied malice under Pen C § 188 shared the concept of conscious disregard for life. People v. Timms (Cal. App. 1st Dist. June 11, 2007), 151 Cal. App. 4th 1292, 60 Cal. Rptr. 3d 677, 2007 Cal. App. LEXIS 952.

Second-degree felony-murder rule is based on statute, specifically Pen C § 188's definition of implied malice, and hence is constitutionally valid. People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Driver of a semi-trailer truck was properly indicted for second degree murder after his brakes failed, resulting in two deaths, because malice, as defined in Pen C § 188, could be implied from the fact that he continued to drive the steep winding road after being told that the truck was emitting a continuous cloud of white smoke from its rear left wheels, along with a smell of burning rubber. People v. Superior Court (Costa) (Cal. App. 2d Dist. Apr. 5, 2010), 183 Cal. App. 4th 690, 107 Cal. Rptr. 3d 576, 2010 Cal. App. LEXIS 471.

Defendant's second degree murder conviction based on implied malice was supported by substantial evidence, where defendant drove 70 miles per hour in a 35-mile-per-hour zone, crossed into the opposing traffic lane, caused oncoming drivers to avoid him, ran a red light and struck a car in the intersection without even attempting to apply his brakes. Defendant acted with wanton disregard of the near certainty that someone would be killed. People v. Moore (Cal. App. 2d Dist. Aug. 23, 2010), 187 Cal. App. 4th 937, 114 Cal. Rptr. 3d 540, 2010 Cal. App. LEXIS 1461.

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Evidence was sufficient for a jury to find that a single punch to the head involved implied malice and therefore to convict defendant for second degree murder. Defendant was bigger and taller than his the victim, and his sucker punch emerged from the greater height of the curb after a running start, landed with unprecedented force according to those at the scene, and launched the victim head first to the pavement with a sickening crack People v. Gravens (Cal. Jan. 30, 2012), 53 Cal. 4th 500, 136 Cal. Rptr. 3d 40, 267 P.3d 1113, 2012 Cal. LEXIS 601, modified, (Cal. Mar. 14, 2012), 2012 Cal. LEXIS 2216.

Evidence that defendant shot his girlfriend in the face was sufficient to convict him for second degree murder but not first degree murder. His statement that he knew the gun was loaded, that he intentionally cocked the hammer, and that the hammer slipped was the only evidence of his intent and was sufficient to establish implied malice but not premeditation and deliberation. People v. Boatman (Cal. App. 4th Dist. Dec. 4, 2013), 221 Cal. App. 4th 1253, 165 Cal. Rptr. 3d 521, 2013 Cal. App. LEXIS 976.

Evidence was sufficient to find that defendant, a federal correctional peace officer, acted with implied malice because, while partying, he waved a loaded gun at the victim, overrode the safeties, ordered the victim to hurry up and puke, and discharged the gun, severing the victim's jugular vein. A person acts with implied malice when he or she is under the influence, engages in joking or horseplay with a firearm, and causes the discharge of the firearm killing another person. People v. McNally (Cal. App. 2d Dist. May 21, 2015), 235 Cal. App. 4th 1419, 187 Cal. Rptr. 3d 391, 2015 Cal. App. LEXIS 443.

In a trial for implied malice murder, defendant was not entitled to an instruction that voluntary intoxication negates malice because the instruction should only be given when the defendant is charged with premeditated murder or harbored express malice. People v. McNally (Cal. App. 2d Dist. May 21, 2015), 235 Cal. App. 4th 1419, 187 Cal. Rptr. 3d 391, 2015 Cal. App. LEXIS 443.

In a DUI murder case, the evidence was sufficient to find implied malice, defendant's subjective awareness that her actions were dangerous to human life was shown by her attendance at a victim impact panel that reviewed the consequences of drinking and driving, her signature on a license renewal form that stated a murder charge could be a consequence of DUI, and prior occasions when she was drinking and called taxis. Evidence that she deliberately drove with conscious disregard for human life included that her blood alcohol content was four times over the legal limit. People v. Wolfe (Cal. App. 4th Dist. Feb. 21, 2018), 229 Cal. Rptr. 3d 414, 20 Cal. App. 5th 673, 2018 Cal. App. LEXIS 136.

In convicting defendant, a physician, of the second-degree murders of three of her patients, substantial evidence supported the jury's findings of implied malice because defendant knew that the opioid drugs she prescribed were dangerous and that the combination of the prescribed drugs, often with increasing doses, posed a significant risk of death; defendant sent her patients to small "mom and pop" pharmacies that she knew would continue to fill her prescriptions after larger pharmacies refused to fill them, at the time she was treating the victims, she was aware of the deaths of several other of her patients who had similar patient profiles, and she altered patient records after she learned she was under investigation. People v. Tseng (Cal. App. 2d Dist. Dec. 14, 2018), 241 Cal. Rptr. 3d 194, 30 Cal. App. 5th 117, 2018 Cal. App. LEXIS 1157.

Trial court erred in failing to instruct on the lesser-included offense of involuntary manslaughter where there was substantial evidence from which a reasonable juror could have doubted that defendant was subjectively aware the beating could kill the victim, as the victim had a hidden spinal injury, and the medical examiner testified that almost all of the victim's injuries—taken alone—were nonlethal, the error was prejudicial because there was a reasonable probability that at least one juror would have voted to convict defendant of involuntary manslaughter if given the chance, given that the instruction embodied the defense theory of the case, that the evidence of malice was not overwhelming, and that the jury struggled with its verdict People v. Vasquez (Cal. App. 2d Dist. Dec. 27, 2018), 241 Cal. Rptr. 3d 882, 30 Cal. App. 5th 756, 2018 Cal. App. LEXIS 1204.

6. Acts with High Probability of Death Resulting

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If the natural consequences of an unlawful act be dangerous to human life, an unintentional killing resulting therefrom will be murder, though the unlawful act amounted to no more than a misdemeanor. If the natural consequences of an unlawful act be dangerous to life, and so known to the wrongdoer, there is implied such a high degree of conscious and wilful recklessness as to amount to malignancy of heart which constitutes malice, and the malice aforethought which is an essential element of murder is implied. People v. Hubbard (Cal App, Oct. 2, 1923), 64 Cal App 27, 220 P. 315, 1923 Cal App LEXIS 178.

When defendant, with wanton disregard for human life, does an act that involves high degree of probability that it will result in death, he acts with malice aforethought. People v. Conley (Cal Mar. 15, 1966) 64 Cal 2d 310, 49 Cal Rptr. 815, 411 P.2d 911, 1966 Cal LEXIS 258.

Intentional act highly dangerous to human life done in disregard of actor's awareness that society requires his conduct to conform to law is done with malice though he acts without ill will toward his victim or believes his conduct justified, and it is immaterial that he does not know his specific conduct is unlawful, for all persons are presumed to know law including that prohibiting causing of another's injury or death. People v. Conley (Cal Mar. 15, 1966) 64 Cal 2d 310, 49 Cal Rptr. 815, 411 P.2d 911, 1966 Cal LEXIS 258.

Where, despite awareness of duty society places on all persons to act within law, defendant does act likely to cause serious injury or death to another, he exhibits that wanton disregard for human life or antisocial motivation that constitutes malice aforethought. People v. Conley (Cal Mar. 15, 1966), 64 Cal 2d 310, 49 Cal Rptr. 815, 411 P.2d 911, 1966 Cal LEXIS 258.

An intentional act that is highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law, is done with malice regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified; however, if because of mental defect, disease, or intoxication, the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought. People v. Steele (Cal App, 2d Dist. Sept. 28, 1967), 254 Cal App 2d 758, 62 Cal Rptr. 452, 1967 Cal App LEXIS 1453, cert. denied, (U.S. May 6, 1968), 391 U.S. 908, 88 S. Ct. 1661, 20 L. Ed. 2d 423, 1968 U.S. LEXIS 1806.

An intentional act highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law, is done with malice though he acts without ill will toward his victim or believes his conduct justified and it is immaterial that he does not know that his specific conduct is unlawful, for all persons are presumed to know the law, including that which prohibits causing another's injury or death. An awareness of the obligation to act within the general body of laws regulating society is included in the statutory definition of implied malice in terms of an abandoned and malignant heart and in the definition of express malice as the deliberate intention unlawfully to take life. People v. Wetborn (Cal App, 2d Dist. Dec. 27, 1967), 257 Cal App 2d 513, 65 Cal Rptr. 8, 1967 Cal App LEXIS 1808, overruled in part, People v. Wetmore (Cal Sept. 26, 1978) 22 Cal 3d 318, 149 Cal Rptr. 265, 583 P.2d 1308, 1978 Cal LEXIS 290.

The mental state constituting malice aforethought does not require any ill will or hatred toward the victim, when one acts with wanton disregard for human life and does an act that involves a high degree of probability that it will result in death, he acts with malice aforethought. People v. Caylor (Cal App 2d Dist. Feb. 20, 1968), 259 Cal App 2d 191, 66 Cal Rptr. 448, 1968 Cal App LEXIS 1962.

An intentional act which is highly dangerous to human life and which is done in disregard of the actor's awareness that society requires him to conform his conduct to the law is accomplished with malice, regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified. People v. Caylor (Cal App 2d Dist. Feb. 20, 1968) 259 Cal App 2d 191, 66 Cal Rptr. 448, 1968 Cal App LEXIS 1962.

In homicide cases involving diminished capacity, an intentional act that is highly dangerous to human life, done in disregard of the actor's awareness that society requires him to conform his conduct to the law, is done with malice regardless of the fact that the actor acts without ill-will toward his victim or believes that his conduct is justified, but if

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because of mental defect, disease, or intoxication, a defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought and cannot be guilty of murder in the first degree. People v. Moise (Cal. Apr. 10, 1969), 70 Cal. 2d 711, 76 Cal. Rptr. 391, 452 P.2d 607, 1969 Cal. LEXIS 364, cert. denied, (U.S. 1970), 397 U.S. 944, 90 S. Ct. 959, 25 L. Ed. 2d 124, 1970 U.S. LEXIS 2817.

Under the rule that in felony-murder cases malice aforethought is presumed on the basis of the commission of a felony inherently dangerous to human life, no intentional act is necessary other than the attempt to or the actual commission of the felony itself, thus, when a robber enters a place with a deadly weapon with the intent to commit robbery, malice is shown by the nature of the crime. People v. Stamp (Cal. App. 2d Dist. Dec. 1, 1969), 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, 1969 Cal. App. LEXIS 1403, cert. denied, (U.S. Dec. 1, 1970), 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46, 1970 U.S. LEXIS 878.

The mental state constituting malice aforethought does not require any ill will or hatred toward the victim and when one acts with wanton disregard for human life, that is, when one does an act that involves a high degree of probability that it will result in death, he then acts with malice aforethought. An intentional act which is highly dangerous to human life and which is done in disregard of the actor's awareness that society requires him to conform his conduct to the law is accomplished with malice, regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified. People v. Brunt (Cal. App. 2d Dist. Apr. 17, 1972), 24 Cal. App. 3d 945, 101 Cal. Rptr. 457, 1972 Cal. App. LEXIS 1180.

In a prosecution of defendant for second degree murder, there was sufficient evidence to warrant the trial court to instruct the jury on second degree murder in a killing resulting from an unlawful act dangerous to life, where the prosecution's theory was that defendant consistently fought with the victim over the use of her car, and on the night of the killing, after she refused to let him use it, he tried to persuade her by placing a loaded gun to her head, and when she continued to argue, he pulled the trigger, where the jury, in rejecting defendant's explanation, inferred from all the evidence, including powder marks on the victim's head and from defendant's statements, that the prosecution theory was correct, where defendant's flight in avoiding apprehension afforded a basis for an inference of consciousness of guilt and constituted an implied admission, and where defendant's failure to seek medical aid for the victim after the shooting was probative he conducted himself with an abandoned and malignant heart. People v. Love (Cal. App. 4th Dist. Oct. 10, 1980), 111 Cal. App. 3d 98, 168 Cal. Rptr. 407, 1980 Cal. App. LEXIS 2297.

In a criminal prosecution arising out of a vehicular homicide, there existed a rational ground for concluding that defendant's conduct was sufficiently wanton to hold him on a second degree murder charge where the record disclosed that defendant's blood alcohol level at the time of the collision at issue was more than twice the percentage necessary to support a finding that he was legally intoxicated, that he had been driving at highly excessive speeds through city streets and had had one near miss before colliding with the victims' vehicle, and that he belatedly attempted to brake his car before the collision, suggesting an actual awareness of the great risk of harm which he had created. In combination, such facts reasonably supported a conclusion that defendant acted wantonly and with a conscious disregard for human life. People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191.

Malice is implied under Pen C § 188, defining murder, when the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death. People v. Davenport (Cal. Dec. 31, 1985), 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861, 1985 Cal. LEXIS 447.

7. Prosecution Generally

Whether malice be express or implied, the crime is murder; the express intent to kill or to commit one of the named felonies (§ 189) may be affirmatively established, or, the killing being proved, the malice may be implied. People v. Keefe (Cal. May 12, 1884), 65 Cal. 232, 3 P. 818, 1884 Cal. LEXIS 498.

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Questions for the jury are presented in determining whether there was no considerable provocation, or whether the circumstances attending the killing showed an abandoned and malignant heart. People v. Johnson (Cal. Jan. 19, 1928), 203 Cal. 153, 263 P. 524, 1928 Cal. LEXIS 758.

The existence of provocation, and its extent and effect upon the defendant's mind in relation to premeditation and deliberation in forming a specific intent to kill, as well as in regard to the existence of malice, constitute questions of fact for the jury. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 380, 156 P.2d 7, 1945 Cal. LEXIS 262.

Whether or not defendant in murder case acted without malice during sudden quarrel and in heat of passion, and whether or not evidence discloses premeditation, are factual questions for jury. People v. Pope (Cal. App. 4th Dist. Jan. 21, 1955), 130 Cal. App. 2d 321, 279 P.2d 108, 1955 Cal. App. LEXIS 1896.

It is exclusively province of jury in murder case to determine degree of crime when there is any evidence to support determination. People v. Oqq (Cal. App. 2d Dist. Mar. 31, 1958), 159 Cal. App. 2d 38, 323 P.2d 117, 1958 Cal. App. LEXIS 1958.

In homicide case, existence of provocation and its extent and effect on defendant's mind in relation to existence of malice are questions of fact for jury. People v. Cooley (Cal. App. 5th Dist. Dec. 20, 1952), 211 Cal. App. 2d 173, 27 Cal. Rptr. 543, 1962 Cal. App. LEXIS 1496, overruled, People v. Lew (Cal. June 25, 1968), 68 Cal. 2d 774, 69 Cal. Rptr. 102, 441 P.2d 942, 1968 Cal. LEXIS 205.

In order to justify a finding of "wanton disregard for human life" for the purpose of implying malice in a homicide prosecution, it must be shown that the accused was both aware of his duty to act within the law and acted in a manner likely to cause death or serious injury despite such awareness. The effect which a diminished capacity bears on malice in a second degree-implied malice case is thus relevant both to the question whether the accused, because of a diminished capacity, was unaware of a duty to act within the law, and, assuming that he was aware of such duty, the question whether he was, because of a diminished capacity, unable to act in accordance with that duty. People v. Poddar (Cal. Feb. 7, 1974), 10 Cal. 3d 750, 111 Cal. Rptr. 910, 518 P.2d 342, 1974 Cal. LEXIS 360.

8. Indictment and Information

Allegation of premeditation or malice aforethought is necessary ingredient to crime of murder. People v. Uitas (Cal. 1859), 12 Cal. 325, 1859 Cal. LEXIS 71.

An allegation of "express malice" is unnecessary in an indictment for murder, and, if made, need not be proved to justify a verdict of guilty in the first degree; proper allegation is of "malice aforethought." People v. Bonilla (Cal. Oct. 1, 1869), 38 Cal. 699, 1869 Cal. LEXIS 227.

Malice aforethought is necessary ingredient in crime of murder and should be alleged in indictment or information either expressly or by words equivalent in their import. People v. Schmidt (Cal. Jan. 13, 1883), 63 Cal. 28, 1883 Cal. LEXIS 341.

9. Burden of Proof

Effect of §§ 187–189 and former Pen C § 1105 (placing burden on defendant of explaining mitigating circumstances once homicide had been proved) (see now Pen C § 189.5), construed together, was that every killing was murder unless defendant proved contrary. People v. Todd (Cal. App. 1st Dist. Oct. 22, 1957), 154 Cal. App. 2d 601, 317 P.2d 40, 1957 Cal. App. LEXIS 1672.

Provision that malice, as element of offense of murder, is implied when no considerable provocation appears, or when circumstances attending killing show abandoned and malignant heart, is merely rule of procedure, which does

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not purport to shift general burden of proof, and is not unconstitutional. People v. Curry (Cal. App. 4th Dist. May 29, 1961), 192 Cal. App. 2d 664, 13 Cal. Rptr. 596, 1961 Cal. App. LEXIS 1986

Even at trial of homicide case, necessary elements of malice may be inferred from circumstances of homicide; to require prosecution to present specific proof of malice aforethought at grand jury hearing, over and above fundamental showing of defendant's killing of victim, would in effect place greater burden on prosecution at accusatory stage than at trial itself. Jackson v. Superior Court of San Francisco (Cal. Mar. 1, 1965), 62 Cal. 2d 521, 42 Cal. Rptr. 838, 399 P.2d 374, 1965 Cal. LEXIS 269.

Though § 1105 does not place on defendant charged with homicide burden of persuasion, but merely declares procedural rule imposing on him duty to go forward with evidence of mitigating circumstances, if he fails to discharge this duty by raising reasonable doubt, presumption of malice will operate and his homicide will be deemed malicious and act of murder. Jackson v. Superior Court of San Francisco (Cal. Mar. 1, 1965), 62 Cal. 2d 521, 42 Cal. Rptr. 838, 399 P.2d 374, 1965 Cal. LEXIS 269.

Provisions of Pen Code, § 188, create presumption of malice when commission of homicide by defendant has been proved and place burden on him to raise reasonable doubt that malice was present. People v. Conley (Cal. Mar. 15, 1966), 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 1966 Cal. LEXIS 258.

When it is proved that a defendant has committed homicide, malice is presumed, and the burden is on defendant to raise, in the minds of the jurors, a reasonable doubt of its existence. People v. Williams (Cal. July 7, 1969), 71 Cal. 2d 614, 79 Cal. Rptr. 65, 456 P.2d 633, 1969 Cal. LEXIS 276.

In a prosecution for second degree murder and robbery and assault by means of force likely to produce great bodily injury of a second victim, the trial court erred in finding defendant was not prejudiced by jury misconduct which undisputedly occurred. The jury engaged in misconduct when it consulted a legal dictionary to clarify for itself the meaning of the term "malice" as that term was used in an instruction. Use of a dictionary to obtain further understanding of the court's instructions poses a risk that the jury will misunderstand the meaning of terms which have a technical or unique usage in the law. Plainly, a presumption of prejudice arose from the misconduct. Presumably, the trial court believed nothing in the dictionary definition lightened the prosecution's burden of proof, or contradicted any defense, or caused the jury to "misunderstand the meaning of terms which have a technical or unique usage in the law." The dictionary definition of malice reviewed by the jury differed from the instruction in at least three ways. It allowed the jury to convict defendant of murder, based on a showing that amounts to nothing more than general criminal intent. The dictionary definition in no way stated or even suggested the subjective components of knowledge of the risk of death, and conscious disregard for human life that are essential to a conviction for second degree murder. People v. Somersall (Cal. App. 1st Dist. Sept. 30, 1999), 75 Cal. App. 4th 657, 89 Cal. Rptr. 2d 449, 1999 Cal. App. LEXIS 894.

10. Inferences: Generally

It is the province of the jury to draw the inference of malice from the facts and circumstances. People v. Roberts (Cal. Apr. 1, 1856), 6 Cal. 214, 1856 Cal. LEXIS 99; People v. Copley (Cal. App. Apr. 4, 1939), 32 Cal. App. 2d 74, 89 P.2d 160, 1939 Cal. App. LEXIS 316

When a homicide is proved to have been committed by the accused, and he fails to show justification, excuse, or circumstances of mitigation, the law infers that he is guilty of murder. People v. Gibson (Cal. 1861), 17 Cal. 283, 1861 Cal. LEXIS 42.

Malice may always be inferred from the circumstances as shown by the evidence. People v. Glover (Cal. Dec. 3, 1903), 141 Cal. 233, 74 P. 745, 1903 Cal. LEXIS 497; People v. Campos (Cal. App. Nov. 21, 1935), 10 Cal. App. 2d 310, 52 P.2d 251, 1935 Cal. App. LEXIS 1401.

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In prosecution for murder, it is not necessary that there should be express evidence of deliberate purpose to kill; it may be inferred from such facts and circumstances in the case as reasonably warrant inference of its existence. People v. Golsh (Cal. App. Sept. 1, 1923), 53 Cal. App. 609, 219 P. 456, 1923 Cal. App. LEXIS 342.

Malice must be implied from all the circumstances. People v. Richards (Cal. App. Feb. 21, 1935), 4 Cal. App. 2d 590, 41 P.2d 570, 1935 Cal. App. LEXIS 506.

In prosecution for murder it is not necessary that there be express evidence of deliberate purpose to take life of another in order to show premeditation in support of verdict of murder in first degree, and it is sufficient if facts and circumstances surrounding commission of offense reasonably warrant inference to that effect. People v. Smith (Cal. July 16, 1940), 15 Cal. 2d 640, 104 P.2d 510, 1940 Cal. LEXIS 255.

If the killing by the defendant has been adequately established, malice may be implied from the circumstances. People v. Cornett (Cal. App. Oct. 22, 1943), 61 Cal. App. 2d 98, 141 P.2d 916, 1943 Cal. App. LEXIS 614.

Murder by strangulation indicates malice, but it does not by itself indicate intent to make victim suffer. People v. Caldwell (Cal. Jan. 28, 1955), 43 Cal. 2d 864, 279 P.2d 539, 1955 Cal. LEXIS 392.

To sustain a conviction of either first or second degree murder, an essential element is malice which may be inferred from the circumstances of the homicide. People v. Lewis (Cal. App. 2d Dist. Nov. 13, 1969), 1 Cal. App. 3d 698, 81 Cal. Rptr. 900, 1969 Cal. App. LEXIS 1318.

In a prosecution for second degree murder and robbery and assault by means of force likely to produce great bodily injury of a second victim, the trial court erred in finding defendant was not prejudiced by jury misconduct which undisputedly occurred. The jury engaged in misconduct when it consulted a legal dictionary to clarify for itself the meaning of the term "malice" as that term is used in an instruction. Use of a dictionary to obtain further understanding of the court's instructions poses a risk that the jury will misunderstand the meaning of terms which have a technical or unique usage in the law. Plainly, a presumption of prejudice arose from the misconduct. Presumably, the trial court believed nothing in the dictionary definition lightened the prosecution's burden of proof, or contradicted any defense, or caused the jury to "misunderstand the meaning of terms which have a technical or unique usage in the law." The dictionary definitions of malice reviewed by the jury differed from the instruction in at least three ways. It allowed the jury to convict defendant of murder, based on a showing that amounts to nothing more than general criminal intent. The dictionary definition in no way states or even suggests the subjective components of knowledge of the risk of death, and conscious disregard for human life that are essential to a conviction for second degree murder. People v. Somersall (Cal. App. 1st Dist. Sept. 30, 1999), 75 Cal. App. 4th 657, 89 Cal. Rptr. 2d 449, 1999 Cal. App. LEXIS 894.

11. Inferences: Killing Proved and Nothing Further Shown

When a killing is proved to have been committed by the defendant, and nothing further is shown, the presumption is that it was malicious and an act of murder. People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239.

When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder, but in such case the verdict should be murder of the second degree, not of the first degree. People v. Ross (Cal. App. Sept. 18, 1939), 34 Cal. App. 2d 574, 93 P.2d 1019, 1939 Cal. App. LEXIS 143; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227; People v. Jones (Cal. App. 2d Dist. Mar. 16, 1964), 225 Cal. App. 2d 598, 37 Cal. Rptr. 454, 1964 Cal. App. LEXIS 1411; Jackson v. Superior Court of San Francisco (Cal. Mar. 1, 1965), 62 Cal. 2d 521, 42 Cal. Rptr. 838, 399 P.2d 374, 1965 Cal. LEXIS 269.

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12. Inferences: No Provocation; Abandoned and Malignant Heart

When no provocation appears from the evidence given by the prosecution, malice is implied, and the killing being with malice is unlawful. People v. Knapp (Cal. Sept. 18, 1886), 71 Cal. 1, 11 P. 793, 1886 Cal. LEXIS 509.

The law presumes malice when the circumstances of the crime indicate that it proceeded from the promptings of an abandoned and malignant heart. People v. Kafoury (Cal. App. July 31, 1911), 16 Cal. App. 718, 117 P. 938, 1911 Cal. App. LEXIS 247.

Where one deliberately and unnecessarily shoots into a crowd of people, with an utter disregard of consequences, whereby human life is destroyed, malice is implied and the crime is murder, although he has no malice against any particular person in the crowd. People v. Stein (Cal. App. Oct. 28, 1913), 23 Cal. App. 108, 137 P. 271, 1913 Cal. App. LEXIS 177.

Where there was no evidence of provocation for the killing of the victim as the result of a union controversy, and the circumstances showed nothing but an abandoned and malignant heart, malice was implied. People v. King (Cal. App. Dec. 28, 1938), 30 Cal. App. 2d 185, 85 P. 2d 928, 1938 Cal. App. LEXIS 467.

Malice is implied when no considerable provocation occurs, or when circumstances attending the killing show an abandoned and malignant heart. People v. Spinelli (Cal. Aug. 3, 1939), 14 Cal. 2d 137, 92 P. 2d 1017, 1939 Cal. LEXIS 317; People v. Dugger (Cal. App. 1st Dist. Apr. 13, 1960), 179 Cal. App. 2d 714, 4 Cal. Rptr. 388, 1960 Cal. App. LEXIS 2285; People v. Lint (Cal. App. 2d Dist. July 5, 1960), 182 Cal. App. 2d 402, 6 Cal. Rptr. 95, 1960 Cal. App. LEXIS 2124.

Malice will be implied in a prosecution for murder where the evidence establishes that a defendant had been of abandoned and malignant heart throughout the course of his abuse of the victim. People v. Endner (Cal. App. Feb. 8, 1946), 73 Cal. App. 2d 20, 165 P. 2d 712, 1946 Cal. App. LEXIS 800.

Malice was presumed when it appeared that the victim was deliberately shot twice and killed with a deadly weapon without sufficient provocation, under circumstances indicating that the act was performed by the defendant with an abandoned and malignant heart. People v. Bjornsen (Cal. App. May 7, 1947), 79 Cal. App. 2d 519, 180 P. 2d 343, 1947 Cal. App. LEXIS 857.

Where evidence in murder prosecution warrants conclusion that defendant killed decedent and there is nothing to show provocation or justification, malice will be implied. People v. Cole (Cal. Oct. 5, 1956), 47 Cal. 2d 99, 301 P. 2d 854, 1956 Cal. LEXIS 257.

Even though deliberate intention to kill is absent, if no considerable provocation appears or circumstances attending killing show abandoned and malignant heart, malice will be implied. People v. Jones (Cal. App. 2d Dist. Apr. 22, 1963), 215 Cal. App. 2d 341, 30 Cal. Rptr. 280, 1963 Cal. App. LEXIS 2505; People v. Finley (Cal. App. 2d Dist. Aug. 14, 1963), 219 Cal. App. 2d 330, 33 Cal. Rptr. 31, 1963 Cal. App. LEXIS 2378, cert. denied, (U.S. 1964), 377 U.S. 912, 84 S. Ct. 1174, 12 L. Ed. 2d 181, 1964 U.S. LEXIS 1477.

In prosecution for murder, though there was no direct evidence on issue of malice aforethought, this element of murder may be properly implied from circumstances of homicide, as when no considerable provocation appears. People v. Davis (Cal. Dec. 7, 1965), 63 Cal. 2d 648, 47 Cal. Rptr. 801, 408 P. 2d 129, 1965 Cal. LEXIS 224.

Although reference, in instruction defining second degree murder, to "abandoned and malignant heart" does not constitute error, such a charge is superfluous and should be replaced, since it could lead jury to equate malignant heart with evil disposition or despicable character and, in close case, to convict defendant because they believe him to be "bad man," and since it could encourage jury to apply objective rather than subjective standard in determining whether defendant acted with conscious disregard of life, thereby obliterating line that separates murder from involuntary manslaughter. People v. Phillips (Cal. May 23, 1966), 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P. 2d 353.

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1966 Cal. LEXIS 288, overruled. People v. Flood (Cal. July 2, 1998), 18 Cal. 4th 470, 76 Cal. Rptr. 2d 180, 957 P.2d 869, 1998 Cal. LEXIS 4033

Evidence of adequate provocation in a homicide case overcomes the presumption of malice. People v. Williams (Cal. July 7, 1969), 71 Cal. 2d 614, 79 Cal. Rptr. 65, 456 P.2d 633, 1969 Cal. LEXIS 276

Conviction of second degree murder of either an actual killer or his aider and abettor requires no proof of premeditation or even of actual intent to take life; rather, the malice (intent) necessary to constitute second degree murder may be implied from commission of an unlawful act without sufficient provocation or when the circumstances attending the killing show an abandoned and malignant heart. People v. Gonzales (Cal. App. 5th Dist. Feb. 18, 1970), 4 Cal. App. 3d 593, 84 Cal. Rptr. 863, 1970 Cal. App. LEXIS 1562.

Evidence was sufficient to establish malice and therefore to convict defendant for second degree murder under Pen C §§ 187, 188, 189. The jury reasonably could have concluded that defendant acted with malice because he intentionally shot the victim twice at close range without provocation. People v. Ramirez (Cal. Aug. 7, 2006), 39 Cal. 4th 398, 46 Cal. Rptr. 3d 677, 139 P.3d 64, 2006 Cal. LEXIS 9294, cert. denied, (U.S. May 29, 2007), 550 U.S. 970, 127 S. Ct. 2877, 167 L. Ed. 2d 1155, 2007 U.S. LEXIS 6130

13. Inferences: Killing in Perpetration of Felony

Even an accidental killing by a person doing an act with the design of committing a felony is murder. People v. De La Roa (Cal. App. Dec. 28, 1939), 36 Cal. App. 2d 287, 97 P.2d 836, 1939 Cal. App. LEXIS 47.

Where there is a felonious intent to commit larceny in the perpetration of which a victim is slain, malice is implied. People v. Bauman (Cal. App. June 21, 1940), 39 Cal. App. 2d 587, 103 P.2d 1020, 1940 Cal. App. LEXIS 441

When killing is not committed by robber or by his accomplice, but by his victim, malice aforethought is not attributable to robber, for killing is not committed by him in perpetration or attempt to perpetrate robbery. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

Under Pen C § 189, concerning the felony-murder doctrine, malice aforethought may not be implied to make a killing murder unless defendant or his accomplice commits the killing in the perpetration of an inherently dangerous felony. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

When one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of attempted crime, and the law fixes on the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree, the law presumes malice aforethought on the basis of the commission of the felony. People v. Ketchel (Cal. July 7, 1969), 71 Cal. 2d 635, 79 Cal. Rptr. 92, 456 P.2d 660, 1969 Cal. LEXIS 277.

Malice may be implied from a felonious assault without justification or mitigating circumstances. Accordingly, the jury in a murder trial could have easily inferred malice from evidence that defendant inflicted repeated violent beatings on the elderly victim, which ultimately resulted in his death, without any justification therefor. People v. Malta (Cal. App. 5th Dist. Mar. 31, 1976), 57 Cal. App. 3d 472, 129 Cal. Rptr. 205, 1976 Cal. App. LEXIS 1467; People v. Watson (Cal. App. 3d Dist. July 28, 1980), 108 Cal. App. 3d 677, 167 Cal. Rptr. 22, 1980 Cal. App. LEXIS 2095, superseded, (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191.

Trial court erred in instructing the jury that defendants, who caused a fatal car crash while fleeing from police, could be convicted of second degree felony murder based upon the predicate offense of violating Veh. C. § 2800.2 by committing three traffic violations that were assigned a point count under Veh. C. § 12810, such a violation is not

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inherently dangerous to human life because it can be committed without endangering life. People v. Lewis (Cal. App. 4th Dist. May 19, 2006), 139 Cal. App. 4th 874, 44 Cal. Rptr. 3d 403, 2006 Cal. App. LEXIS 747.

In a trial for murder of an accomplice under the provocative act doctrine, the felony-murder rule did not preclude a conviction for first degree murder rather than second degree murder. Contrary to defendants' suggestion, the murder convictions were not based on a provocative act implied malice theory under Pen C § 188 that would have required a finding of second degree murder; instead, the convictions were based on defendants' express malice in attempting to kill the victim. People v. Concha (Cal. App. 2d Dist. Mar. 18, 2008), 160 Cal. App. 4th 1441, 73 Cal. Rptr. 3d 522, 2008 Cal. App. LEXIS 372, modified, (Cal. App. 2d Dist. Apr. 16, 2008), 2008 Cal. App. LEXIS 555, review granted, depublished, (Cal. July 30, 2008), 81 Cal. Rptr. 3d 613, 189 P.3d 879, 2008 Cal. LEXIS 9374, rev'd, superseded, (Cal. Nov. 12, 2009), 47 Cal. 4th 653, 101 Cal. Rptr. 3d 141, 218 P.3d 660, 2009 Cal. LEXIS 11598.

14. Inferences: Assault with Deadly Weapon

If a person takes the life of another in mutual combat, and the slayer uses a weapon superior to the weapon of the person slain, this fact is not of itself evidence from which malice may be inferred. People v. Bony (Cal. Ct. 1, 1866), 31 Cal. 357, 1866 Cal. LEXIS 214.

When an unlawful assault is made with a deadly weapon upon the person of another, resulting in death and not perpetrated in necessary self-defense or in the heat of passion, malice may be presumed. People v. Butterfield (Cal. App. Sept. 20, 1940), 40 Cal. App. 2d 725, 105 P.2d 628, 1940 Cal. App. LEXIS 157.

Where one assaults another violently with a dangerous weapon and takes his life, the presumption is that the assailant intended death or other great bodily harm. People v. Isby (Cal. Nov. 18, 1947), 30 Cal. 2d 879, 186 P.2d 405, 1947 Cal. LEXIS 212.

Malice may be presumed and second degree murder verdict may be found under evidence that homicide was not perpetrated by means of poison, lying in wait, torture or any other wilful, deliberate or premeditated killing, but was result of assault with deadly weapon that was not provoked or perpetrated in necessary self-defense or heat of passion. People v. Palmer (Cal. App. 2d Dist. Oct. 28, 1960), 185 Cal. App. 2d 737, 8 Cal. Rptr. 482, 1960 Cal. App. LEXIS 1574.

Where one assaults another violently with gun and takes his life, presumption is that death or great bodily harm was intended. People v. McCartney (Cal. App. 2d Dist. Nov. 20, 1963), 222 Cal. App. 2d 461, 35 Cal. Rptr. 256, 1963 Cal. App. LEXIS 1691.

Malice is implied from assault with dangerous weapon when assault is made in manner to endanger life. People v. Jones (Cal. App. 2d Dist. Mar. 16, 1964), 225 Cal. App. 2d 598, 37 Cal. Rptr. 454, 1964 Cal. App. LEXIS 1411.

Where homicide results from assault with deadly weapon and evidence did not create reasonable doubt as to whether defendant's act was justified or its criminal character mitigated by influence of passion, no further proof of malice or intent to kill is required to support second degree murder verdict, of that crime, actual intent to kill is not necessary component, and malice is implied from assault in absence of justifying or mitigating circumstances. Jackson v. Superior Court of San Francisco (Cal. Mar. 1, 1965), 62 Cal. 2d 521, 42 Cal. Rptr. 638, 399 P.2d 374, 1965 Cal. LEXIS 269.

To convict defendant of first degree murder for killing committed by another, following principle may be invoked murder is unlawful killing of human being with malice aforethought, and such malice is implied under § 188 when defendant or his accomplice for base, antisocial motive and with wanton disregard for human life, does act involving high degree of probability that it will result in death. Initiating gun battle is such act. People v. Gilbert (Cal. Dec. 15

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1965), 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 226, vacated, (U.S. June 12, 1967) 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

An assault with a dangerous weapon made in a manner endangering life and resulting in death is sufficient to sustain a conviction of second degree murder; malice is implied from the assault. People v. Lewis (Cal. App. 2d Dist. Nov. 13, 1969), 1 Cal. App. 3d 698, 81 Cal. Rptr. 900, 1969 Cal. App. LEXIS 1318.

15. Evidence

Threats made long prior to commission of the homicide by the defendant are admissible to show malice. The competency of such evidence is unaffected by the lapse of time, although its weight may be impaired. People v. Cronin (Cal. Oct. 1, 1867), 34 Cal. 191, 1867 Cal. LEXIS 238.

Bare existence of hatred, ill will, and the like, does not amount to legal malice, but evidence of previous hatred and ill will is always allowed in cases of homicide as tending to prove active or legal malice at time homicide was committed. People v. Taylor (Cal. Oct. 1, 1858), 36 Cal. 255, 1858 Cal. LEXIS 185.

Testimony as to threats made by the defendant is competent to show malice, though made a long time prior to commission of the homicide. People v. Hong Ah Duck (Cal. Sept. 20, 1882), 61 Cal. 387, 1882 Cal. LEXIS 631, overruled, People v. Agnew (Cal. Nov. 29, 1940), 16 Cal. 2d 655, 107 P.2d 601, 1940 Cal. LEXIS 345; People v. Brown (Cal. June 15, 1888), 76 Cal. 573, 18 P. 678, 1888 Cal. LEXIS 937; People v. Dement (Cal. May 24, 1957), 48 Cal. 2d 600, 311 P.2d 505, 1957 Cal. LEXIS 210.

Express malice is proved, if the evidence proves beyond a reasonable doubt that the killing was wilful, deliberate, and premeditated. People v. Cox (Cal. May 25, 1888), 76 Cal. 281, 18 P. 332, 1888 Cal. LEXIS 875.

Threats by the defendant against the victim previous to a reconciliation between them may be shown in evidence to prove malice. People v. Hyndman (Cal. July 19, 1893), 99 Cal. 1, 33 P. 782, 1893 Cal. LEXIS 607.

The effect of threats made by the defendant against the victim, previous to a reconciliation between them, as evidence of malice depends upon whether the reconciliation on the part of the defendant was in good faith. People v. Hyndman (Cal. July 19, 1893), 99 Cal. 1, 33 P. 782, 1893 Cal. LEXIS 607.

Evidence of threats made by the defendant against the life of the decedent prior to the murder is admissible as tending to show malice. People v. Chaves (Cal. Sept. 20, 1898), 122 Cal. 134, 54 P. 596, 1898 Cal. LEXIS 547.

In order to sustain conviction of murder it is not necessary to show personal enmity on part of defendant against deceased, and evidence of difficulties, either past or present and pending, is admissible to show state of mind of defendant and that he acted with malice. People v. Fleming (Cal. June 1, 1933), 218 Cal. 300, 23 P.2d 28, 1933 Cal. LEXIS 492.

Evidence of malice, as defined in this section, and of the intention with which the assault was committed, is competent in a prosecution for second degree murder. People v. Pollock (Cal. App. Mar. 29, 1939), 31 Cal. App. 2d 747, 89 P.2d 128, 1939 Cal. App. LEXIS 704.

Evidence that the victim was strangled supports a finding that the defendant acted with malice aforethought. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

Evidence that the defendants' blood lust had been stirred and that they were willing to slay, and did slay without provocation, indicated malice. People v. Isby (Cal. Nov. 18, 1947), 30 Cal. 2d 879, 186 P.2d 405, 1947 Cal. LEXIS 212.

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Establishment of motive for commission of homicide is not indispensable to support conviction. People v. Dessauer (Cal. Mar. 7, 1952), 38 Cal. 2d 547, 241 P.2d 238, 1952 Cal. LEXIS 202, cert. denied, (U.S. 1952), 344 U.S. 858, 73 S. Ct. 96, 97 L. Ed. 666, 1952 U.S. LEXIS 1697

While threats made by defendant against deceased are admissible in evidence in murder prosecution to show malice, threats against another person are only admitted under circumstances which show some connection with injury inflicted on deceased, and where sufficient connection is shown such threats are admissible. People v. Merkounis (Cal. May 25, 1956), 46 Cal. 2d 540, 297 P.2d 999, 1956 Cal. LEXIS 210.

Prior acts and conduct of decedent and defendant in murder case are competent evidence to show malice and state of mind on defendant's part. People v. Grasso (Cal. App. 1st Dist. June 19, 1956), 142 Cal. App. 2d 407, 298 P.2d 131, 1956 Cal. App. LEXIS 1996.

Requisite malice required for murder is demonstrated when evidence shows deliberate intention to take life of another human being. People v. Keeling (Cal. App. 1st Dist. June 20, 1957), 152 Cal. App. 2d 4, 312 P.2d 407, 1957 Cal. App. LEXIS 1840.

Manner in which victim is killed and circumstances attending killing may indicate presence of malice aforethought required for establishing murder. People v. Torres (Cal. App. 2d Dist. Apr. 3, 1963), 214 Cal. App. 2d 734, 29 Cal. Rptr. 706, 1963 Cal. App. LEXIS 2667.

Malice aforethought at the time of the commission of an offense is an essential element of second degree murder, but evidence of diminished capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have the specific mental state (malice aforethought) needed for conviction. People v. Harris (Cal. App. 5th Dist. May 21, 1970), 7 Cal. App. 3d 922, 87 Cal. Rptr. 46, 1970 Cal. App. LEXIS 2224.

Evidence of a deliberate intention unlawfully to kill a fellow human being, while rarely direct evidence, may include circumstantial evidence derived from all the circumstances of the attempt, including the defendant's actions. The act of firing toward a victim at a close, but not point blank, range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill, the fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance, nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind. People v. Oates (Cal. App. 4th Dist. Aug. 31, 2004), 121 Cal. App. 4th 1414, 18 Cal. Rptr. 3d 344, 2004 Cal. App. LEXIS 1459, modified, (Cal. App. 4th Dist. Sept. 17, 2004), 2004 Cal. App. LEXIS 1559, review granted, unpublished, (Cal. Dec. 1, 2004), 21 Cal. Rptr. 3d 890, 101 P.3d 956, 2004 Cal. LEXIS 11344.

In a trial for murder under Pen C §§ 187(a), 188, 189, sufficient evidence established defendant's identity. The evidence supported inferences that defendant was seen near the victim's apartment an hour or two prior to the murder, giving a false account for his presence and in a position where to observe the victim sunbathing and that the identity of the murderer was the same as in similar murders. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

Evidence of premeditation and deliberation was sufficient to support a first degree murder verdict under Pen C §§ 187(a), 188, 189 because (1) with regard to planning, there was evidence that defendant noticed the victim sunbathing in a bikini up to two hours prior to the murder, giving defendant ample time to consider and plan the crime prior to a return to the scene; (2) with regard to motive, evidence of other crimes committed by defendant indicated animus against young white women; and (3) with regard to method, clustered stab wounds supported an inference of a deliberate killing. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

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In a street racing case, the evidence was sufficient to find that defendants acted with conscious disregard for life and therefore to convict them for the second degree murders of the occupants of a car with which they crashed. Defendants, whose cars had been modified to engage in street races, consumed beer and then raced side by side on a residential street, reaching speeds of up to 80 to 87 miles per hour, and ran through a stop sign that they must have known was there. People v. Canizalez (Cal. App. 2d Dist. July 20, 2011), 197 Cal. App. 4th 832, 128 Cal. Rptr. 3d 565, 2011 Cal. App. LEXIS 946, modified, (Cal. App. 2d Dist. Aug. 18, 2011), 2011 Cal. App. LEXIS 1084.

There was sufficient evidence in the record to support the jury's verdicts finding defendants guilty of the second degree murder of their 17-year-old daughter, who suffered from type 1 diabetes and died from complications related to the disease. A rational trier of fact could have found that defendants were aware that their failure to obtain medical treatment for their daughter endangered her life, and that they failed to obtain medical treatment for her in conscious disregard of that risk. People v. Latham (Cal. App. 4th Dist. Feb. 7, 2012), 203 Cal. App. 4th 319, 137 Cal. Rptr. 3d 443, 2012 Cal. App. LEXIS 110.

There was sufficient evidence in the record to support the jury's verdicts finding defendants guilty of the second degree murder of their 17-year-old daughter. Evidence that the daughter displayed clearly visible signs of an extremely serious medical condition supported the inference that defendants were aware of the life threatening nature of her condition. People v. Latham (Cal. App. 4th Dist. Feb. 7, 2012), 203 Cal. App. 4th 319, 137 Cal. Rptr. 3d 443, 2012 Cal. App. LEXIS 110.

There was sufficient evidence in the record to support the jury's verdicts finding defendants guilty of the second degree murder of their 17-year-old daughter. Evidence that several different people told defendants that their daughter needed medical attention in the days prior to her death supported the inference that defendants were aware of, and consciously disregarded, the risk to their daughter's life of failing to obtain medical treatment. People v. Latham (Cal. App. 4th Dist. Feb. 7, 2012), 203 Cal. App. 4th 319, 137 Cal. Rptr. 3d 443, 2012 Cal. App. LEXIS 110.

Although far from overwhelming, there was some evidence from which the jury could have inferred that defendants were unconcerned with their daughter's fate, even after she had suffered cardiac arrest. This evidence supported the jury's verdict finding defendants guilty of second degree murder. People v. Latham (Cal. App. 4th Dist. Feb. 7, 2012), 203 Cal. App. 4th 319, 137 Cal. Rptr. 3d 443, 2012 Cal. App. LEXIS 110.

In an implied malice/DUI murder case, it was error to admit personal-tragedy testimony from employees of a group that opposed drunk driving because the tragic aftermaths of the DUI crashes experienced by the witnesses and their family members were wholly unrelated to the charged offense, including whether defendant acted with the requisite implied malice. Further, the testimony was highly prejudicial, as each witness described in detail the drunk driving accidents involving their family members and the tragic consequences. People v. Covarubias (Cal. App. 4th Dist. May 12, 2015), 236 Cal. App. 4th 942, 186 Cal. Rptr. 3d 873, 2015 Cal. App. LEXIS 402.

Evidence was sufficient to show that defendant was one of the people who shot into a crowd at a party because a witness saw a person with defendant's distinct hairstyle point and fire a gun at the house, although there was no evidence that defendant fired the shot that killed a victim, the jury could have convicted defendant as an aider and abettor or as a coconspirator and did not have to find that he fired the fatal shot to convict him of second degree murder. People v. Edwards (Cal. App. 6th Dist. Oct. 15, 2015), 241 Cal. App. 4th 213, 193 Cal. Rptr. 3d 696, 2015 Cal. App. LEXIS 906, review granted, depublished, (Cal. Jan. 27, 2016), 197 Cal. Rptr. 3d 521, 364 P.3d 410, 2015 Cal. LEXIS 795, cert. denied, (U.S. Feb. 21, 2017), 137 S. Ct. 1095, 197 L. Ed. 2d 203, 2017 U.S. LEXIS 1277.

Substantial evidence established that defendant acted with implied malice when he hit and killed two pedestrians with his truck because he chose to drive despite the fact that he was experiencing sleepiness from methamphetamine withdrawal, was aware of withdrawal effects, had prior driving under the influence convictions, and had participated in two substance abuse treatment programs. People v. Jimenez (Cal. App. 5th Dist. Dec. 11, 2015), 242 Cal. App. 4th 1337, 197 Cal. Rptr. 3d 1, 2015 Cal. App. LEXIS 1110.

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For purposes of a second degree murder conviction, there was sufficient evidence that the shooter acted with malice because bystanders testified that defendant shot the victim multiple times before the victim's companion ever fired his gun; defendant walked through a gate and just started shooting at least six times. People v. Vasquez (Cal. App. 3d Dist. Apr. 11, 2016), 246 Cal. App. 4th 1019, 201 Cal. Rptr. 3d 262, 2016 Cal. App. LEXIS 322.

Evidence did not support an instruction on involuntary manslaughter because it showed defendant was either not guilty based on self-defense or was guilty of malice murder; defendant knew of the risk to a non-target victim because he was 10 to 15 feet from the target when he saw the target pull out a revolver and fired first, aiming toward the target with the non-target victim blocking his aim. People v. Vasquez (Cal. App. 3d Dist. Apr. 11, 2016), 246 Cal. App. 4th 1019, 201 Cal. Rptr. 3d 262, 2016 Cal. App. LEXIS 322.

Evidence was sufficient to find that a minor had the malice required for second degree murder, even without her admissions as to intent, in part because it showed that her newborn baby died from a sharp wound to his neck that severed his carotid artery and trachea and extended into his spine, that there had been two or three strikes, and that he was alive when his throat was slashed. In re M.S. (Cal. App. 2d Dist. Mar. 11, 2019), 244 Cal. Rptr. 3d 580, 32 Cal. App. 5th 1177, 2019 Cal. App. LEXIS 203, modified, (Cal. App. 2d Dist. Apr. 3, 2019), 2019 Cal. App. LEXIS 306.

16. Instructions

In prosecution for murder, instruction, "that killing being proved, law implies malice, and it devolves upon defendant to repel presumption" is correct in principle. People v. March (Cal. Oct. 1, 1856), 6 Cal. 543, 1856 Cal. LEXIS 199.

A charge that "when a person deliberately, premeditatedly, and unlawfully kills another, he is presumed to do so with express malice," was sufficiently favorable to the defendant. People v. Cox (Cal. May 25, 1888), 76 Cal. 281, 18 P. 332, 1888 Cal. LEXIS 875.

Upon a charge of assault with intent to commit murder, it is proper to instruct the jury as to the statutory definition of murder contained in this section and § 187. People v. Mendenhall (Cal. Jan. 13, 1902), 136 Cal. 344, 67 P. 325, 1902 Cal. LEXIS 803.

An instruction defining malice in the terms of § 7 is not appropriate in defining murder, and should be omitted, but the giving of it is not prejudicial where, at the request of the prosecution and of the defendant, special instructions are given defining the malice mentioned in this section, and the jury is instructed that unless the evidence shows the elements of the crime charged as there defined, they must acquit the defendant. People v. Waysman (Cal. App. July 3, 1905), 1 Cal. App. 246, 81 P. 1087, 1905 Cal. App. LEXIS 62.

Instruction that jury might consider evidence of previous difficulties between parties for the purpose of determining their state of mind at time of assault, as well as for purpose of showing malice, is not erroneous. People v. Bradfield (Cal. App. June 14, 1916), 30 Cal. App. 721, 159 P. 443, 1916 Cal. App. LEXIS 108.

Where the evidence was sufficient to leave to the jury the question as to whether the homicide was murder rather than a killing as the result of violent passion engendered in mutual combat, an instruction defining malice as used in the law of homicide, in amplification of this section, was properly given. People v. Leddy (Cal. App. Dec. 21, 1928), 95 Cal. App. 659, 273 P. 110, 1928 Cal. App. LEXIS 545.

A portion of an instruction was not subject to the criticism that it failed to inform the jury of the necessity for the presence of malice, express or implied, where said portion could not have misled the jury, which was elsewhere fully and correctly instructed on the essentials of first and second degree murder. People v. Boros (Cal. Aug. 23, 1938), 12 Cal. 2d 27, 82 P.2d 368, 1938 Cal. LEXIS 362.

Instruction that malice aforethought does not imply pre-existing hatred or enmity towards individual injured, is correct, and is properly given even though there may be no evidence of hatred or enmity on part of accused toward

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decident. People v. Coleman (Cal. App. Mar. 19, 1942), 50 Cal. App. 2d 592, 123 P.2d 557, 1942 Cal. App. LEXIS 976

Instruction given by court during course of trial and telling jury that testimony as to another assault would be received "solely as it might indicate abandoned and malignant heart" was not erroneous. People v. Zankich (Cal. App. 2d Dist. Feb. 9, 1961), 189 Cal. App. 2d 54, 11 Cal. Rptr. 115, 1961 Cal. App. LEXIS 2147.

Standard instruction on malice stating that it could be presumed under certain circumstances did not violate due process of law by permitting presumption of malice to overcome presumption of innocence where all instructions fully informed jury of law on matters involved, where prosecution relied on evidence introduced in court rather than on any presumption to show defendant's malice, and where, in any event, defendant requested instruction complained of. People v. Graham (Cal. App. 2d Dist. Apr. 25, 1961), 191 Cal. App. 2d 521, 12 Cal. Rptr. 893, 1961 Cal. App. LEXIS 2086, cert. denied, (U.S. Sept. 1, 1961), 368 U.S. 864, 82 S. Ct. 112, 7 L. Ed. 2d 61, 1961 U.S. LEXIS 756.

It is proper in murder case to give instruction on presumption of innocence along with statutory definition of malice as presumption of guilt of murder. People v. Terry (Cal. Apr. 19, 1962), 57 Cal. 2d 538, 21 Cal. Rptr. 185, 370 P.2d 985, 1962 Cal. LEXIS 201, cert. denied, (U.S. 1963), 375 U.S. 960, 84 S. Ct. 446, 11 L. Ed. 2d 318, 1963 U.S. LEXIS 52.

Instruction in prosecution for homicide which states that killing is with malice if circumstances show abandoned and malignant heart is unnecessary and invites confusion, because it fails to state that malice is also implied when no considerable provocation for killing is shown. People v. Hudgins (Cal. App. 2d Dist. Aug. 17, 1965), 236 Cal. App. 2d 578, 46 Cal. Rptr. 199, 1965 Cal. App. LEXIS 853, vacated, (U.S. Mar. 13, 1967), 386 U.S. 265, 87 S. Ct. 1035, 18 L. Ed. 2d 43, 1967 U.S. LEXIS 2039.

Term "malice aforethought" imports something more than definition of malice in Pen Code, § 7, and this definition should not be read to jury in murder case. People v. Conley (Cal. Mar. 15, 1966), 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 1966 Cal. LEXIS 258.

While inclusion in an instruction on second degree murder of a definition thereof referring to circumstances showing "an abandoned or malignant heart" has been disapproved for future use as unnecessary and undesirable, its inclusion in instructions upon second degree murder does not constitute error. People v. Schaefer (Cal. Aug. 20, 1969), 71 Cal. 2d 761, 80 Cal. Rptr. 1, 457 P.2d 841, 1969 Cal. LEXIS 286.

In the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt. In the case of felony murder, which is automatically fixed at first degree by operation of Pen C § 189, defendant's state of mind is entirely irrelevant and need not be proved at all, since malice is not an element of felony murder. Thus, first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

With respect to a homicide that is committed by one of the means listed in Pen C § 189 (murder), such statute is merely a degree-fixing measure. There must first be independent proof beyond a reasonable doubt that a crime was murder, i.e., an unlawful killing with malice aforethought (Pen C §§ 187, 188), before § 189 can operate to fix the degree thereof at murder in the first degree. Thus, if a killing is murder within the meaning of §§ 187 and 188, and is by one of the means enumerated in § 189, the use of such means makes the killing first degree murder as a matter of law. However, a killing by one of the means enumerated in the statute is not first degree murder unless it is first established that it is murder. If the killing was not murder, it cannot be first degree murder, and a killing cannot become murder in the absence of malice aforethought. Without a showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in the statute. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

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In felony-murder cases the prosecution need only prove defendant's intent to commit the underlying felony. The "conclusive presumption" of malice is no more than a procedural fiction that masks the substantive reality that, as a matter of law, malice is not an element of felony murder. Since the felony-murder rule does not in fact raise a presumption of the existence of an element of the crime, it does not violate the due process requirement for proof beyond a reasonable doubt of each element of the crime charged. Similarly, the felony-murder doctrine does not violate the rule that a statutory presumption affecting the People's burden of proof in criminal cases is invalid unless there is a rational connection between the fact proved and the fact presumed. *People v. Dillon* (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

Defendant's conviction of second degree murder under instructions that mirrored Pen C § 188 (malice aforethought necessary to make unlawful killing murder may be express or implied), but did not require the jury to unanimously agree on its theory of malice, did not violate defendant's due process rights. The alternative formulations of malice contained in § 188 are deeply rooted in judicial history and encompass comparable notions of culpability. Therefore, the jury was not required to unanimously agree on its theory of malice in finding defendant guilty of second degree murder. Using as guideposts the mental states involved in a decision by the United States Supreme Court that jury unanimity was not necessary in a first degree murder prosecution where theories of both premeditated murder and felony murder were advanced, it is clear that express and implied malice are also morally on a par. On the one hand, a person who kills intentionally, with express malice, is less culpable than someone who kills with premeditation and deliberation. On the other hand, the mental states associated with implied malice, abandoned heart and inadequate provocation, are more blameworthy than the mindset needed for felony murder, insofar as felony murder does not require any intent to kill. Because the range of culpability between express and implied malice is narrower than the culpability levels deemed equivalent in the Supreme Court decision, express and implied malice met the test for moral equivalence. *People v. Brown* (Cal. App. 4th Dist. May 31, 1995), 35 Cal. App. 4th 708, 41 Cal. Rptr. 2d 321, 1995 Cal. App. LEXIS 500.

In a capital homicide prosecution, in discussing the principles of law relating to murder, the trial court properly instructed on two theories of second degree murder, express and implied. (Pen C §§ 188, 189.) Both of the trial court's instructions represented correct statements of the law. Moreover, the instructions properly and clearly informed the jury there were two alternate theories of second degree murder, each requiring different elements of proof. The record indicated that, after first defining the elements of second degree express malice murder, the court then told the jury, "Murder in the second degree is also ..." and then explained the elements of implied malice murder. In the absence of any evidence jurors were bewildered by the notion of alternative theories of second degree murder liability, one cannot conclude on the record that the trial court's instructions confused the jury. *People v. Frye* (Cal. July 30, 1998), 18 Cal. 4th 894, 77 Cal. Rptr. 2d 25, 959 P.2d 183, 1998 Cal. LEXIS 4658, cert. denied, (U.S. Mar. 22, 1999), 526 U.S. 1023, 119 S. Ct. 1262, 143 L. Ed. 2d 358, 1999 U.S. LEXIS 1975, overruled in part, *People v. Doolin* (Cal. Jan. 5, 2009), 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11, 2009 Cal. LEXIS 2.

District court's denial of a petition for a writ of habeas corpus was reversed, and the matter was remanded to the district court with instructions to grant the writ; because the trial court erroneously instructed the jury that the offense of second degree murder was a general intent crime, the jury could have convicted petitioner of second degree murder even if they believed that he acted in self defense, which deprived defendant of his due process rights. *Ho v. Carey* (9th Cir. Cal. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11224.

Petitioner was entitled to writ of habeas corpus because trial court did not inform jury that it had erred in its definition of second-degree murder based on implied malice, nor did it state that general intent was not an element of that crime. Therefore, the trial court's erroneous instruction on the elements of murder in the second degree under California law was a constitutional error because it violated petitioner's right to due process. *Ho v. Newland* (9th Cir. Cal. Feb. 26, 2003), 322 F.3d 625, 2003 U.S. App. LEXIS 3454, op. withdrawn, (9th Cir. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11229, sub. op., (9th Cir. Cal. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11224.

In a trial for felony murder, defendant was not entitled to a lesser-included-offense instruction on second degree murder based upon express malice because there was no substantial evidence that would have absolved

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defendant of felony murder, but not of express malice. Although defendant did not declare a robbery or demand money, a robbery attempt was strongly suggested by the facts that he put a plastic bag on a store's counter and more or less simultaneously pointing a gun at the proprietor. People v. Jenkins (Cal. App. 2d Dist. June 20, 2006), 140 Cal. App. 4th 805, 44 Cal. Rptr. 3d 788, 2006 Cal. App. LEXIS 909, modified, (Cal. App. 2d Dist. July 13, 2006), 2006 Cal. App. LEXIS 1077.

In a trial for multiple murders under Pen C §§ 187(a), 188, 189, the evidence did not warrant a sua sponte lesser included offense instruction on second degree murder, because the evidence of premeditation was overwhelming and defendant relied on speculation in claiming that the entry to the victims' home could have been at their invitation. Further, any evidence that defendant killed in a sudden, unpremeditated explosion of violence was so insubstantial as to render harmless any error in failing to give the instruction. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

Because the term "natural consequences" in the CALCRIM No. 520 definition of implied malice does not refer to the natural and probable consequences theory of accomplice liability, the trial court, in giving that instruction, had no sua sponte obligation to identify a target offense in a second degree murder case that did not involve an accomplice. People v. Martinez (Cal. App. 2d Dist. Aug. 20, 2007), 154 Cal. App. 4th 314, 64 Cal. Rptr. 3d 580, 2007 Cal. App. LEXIS 1359.

In a case in which defendant was found not guilty of murder but guilty of voluntary manslaughter based on evidence that he struck the victim in the face with the butt of a shotgun, causing the victim to fall, hit his head on the sidewalk, and die, the trial court properly concluded that the evidence would not support defendant's conviction for involuntary manslaughter, even though defendant testified that he hit the victim in an automatic response to the victim's lunge at the shotgun and did not aim for the victim's face and did not intend to kill the victim, because an assault with a deadly weapon or with a firearm was inherently dangerous. Accordingly, the trial court did not err in declining to instruct the jury on involuntary manslaughter as a lesser included offense of murder. People v. Garcia (Cal. App. 2d Dist. Apr. 21, 2008), 162 Cal. App. 4th 18, 74 Cal. Rptr. 3d 912, 2008 Cal. App. LEXIS 583, overruled in part, People v. Bryant (Cal. June 3, 2013), 56 Cal. 4th 959, 157 Cal. Rptr. 3d 522, 301 P.3d 1136, 2013 Cal. LEXIS 4695

It is no longer proper to instruct a jury that when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without intent to kill, that the resultant crime is involuntary manslaughter. This instruction is incorrect because a defendant who unlawfully kills without express malice due to voluntary intoxication can still act with implied malice, which voluntary intoxication cannot negate, in the wake of the 1995 amendment to Pen C § 22(b), and to the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, defendant would be guilty of second-degree murder. People v. Turk (Cal. App. 4th Dist. July 17, 2008), 164 Cal. App. 4th 1361, 80 Cal. Rptr. 3d 473, 2008 Cal. App. LEXIS 1106

In a case where a jury found defendant not guilty of first-degree murder and guilty of second-degree murder, trial court did not err in failing to instruct the jury sua sponte regarding involuntary manslaughter stemming from voluntary intoxication, or in instructing the jury pursuant to CALCRIM No. 625 regarding voluntary intoxication, where evidence indicated that prior to the killing, defendant had consumed some unknown amount of alcohol resulting in a level of intoxication short of the grossly intoxicated state of unconsciousness. People v. Turk (Cal. App. 4th Dist. July 17, 2008), 164 Cal. App. 4th 1361, 80 Cal. Rptr. 3d 473, 2008 Cal. App. LEXIS 1106.

Because shooting at an occupied vehicle under Pen C § 246, is assaultive in nature, and hence cannot serve as the underlying felony for purposes of the felony-murder rule. in a case in which defendant was convicted of second-degree murder, the trial court erred in instructing the jury on second-degree felony murder with shooting at an occupied vehicle under Pen C § 246, the underlying felony. However, the error was harmless under Cal. Const., art. VI, § 13, because no juror could have found that defendant participated in the shooting, either as a shooter or as an aider and abettor, without also finding that he committed an act that was dangerous to life and did so knowing of the danger and with conscious disregard for life, which was a valid theory of malice, and the trial court had

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instructed the jury on conscious-disregard-for-life malice as a possible basis of murder People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

In a case in which defendant was convicted of second degree murder after she stabbed her boyfriend in the chest during an altercation, the trial court did not err in failing to sua sponte instruct the jury on voluntary manslaughter as a lesser included offense of murder on the theory that defendant killed without malice in the commission of an inherently dangerous assaultive felony, as such a killing was not voluntary manslaughter. People v. Bryant (Cal. June 3, 2013), 56 Cal. 4th 959, 157 Cal. Rptr. 3d 522, 301 P.3d 1136, 2013 Cal. LEXIS 4695

Although the trial court's voluntary intoxication instruction constituted error, the instructional error did not require reversal of defendant's murder convictions. By convicting defendant of three counts of first degree murder in light of the intoxication evidence, the jury impliedly resolved that defendant did not act rashly but rather he deliberated and premeditated. People v. Rios (Cal. App. 6th Dist. Dec. 27, 2013), 222 Cal. App. 4th 704, 165 Cal. Rptr. 3d 908, 2013 Cal. App. LEXIS 1047, review denied, ordered not published, (Cal. Apr. 16, 2014), 2014 Cal. LEXIS 2860.

In a case in which defendant was convicted of three counts of first degree murder, the trial court's voluntary intoxication instruction constituted error, although the error did not require reversal. The instruction failed to properly inform the jury that it could consider evidence of defendant's voluntary intoxication on the issue whether or not defendant killed with express malice. People v. Rios (Cal. App. 6th Dist. Dec. 27, 2013), 222 Cal. App. 4th 704, 165 Cal. Rptr. 3d 908, 2013 Cal. App. LEXIS 1047, review denied, ordered not published, (Cal. Apr. 16, 2014), 2014 Cal. LEXIS 2860.

Defendant was not entitled to a sua sponte instruction on involuntary manslaughter in a prosecution for the murder of a victim who was beaten and suffocated because there was no evidence that defendant failed to understand the risk when she repeatedly beat the victim on the head with the large broom handle with great force, causing trauma that was a contributing cause of death, and left the scene only after an accomplice forced a gag down the victim's throat and the victim stopped moving. People v. Brothers (Cal. App. 2d Dist. Apr. 21, 2015), 236 Cal. App. 4th 24, 186 Cal. Rptr. 3d 98, 2015 Cal. App. LEXIS 332.

In a trial for murder and attempted murder based on a shooting committed by another individual, it was reversible error to instruct that the jury need not agree on the same theory of murder because the alternatives were different degrees of murder, either first degree felony murder or second degree malice murder. The appropriate remedy was to reverse the conviction for first degree murder and allow the prosecution to either retry the case or accept a reduction of the offense to second degree murder. People v. Johnson (Cal. App. 1st Dist. June 30, 2015), 238 Cal. App. 4th 313, 189 Cal. Rptr. 3d 411, 2015 Cal. App. LEXIS 578, vacated, review granted, depublished, and transferred, (Cal. Sept. 30, 2015), 193 Cal. Rptr. 3d 46, 356 P.3d 779, 2015 Cal. LEXIS 7215.

In a prosecution for defendant's first degree murder of her former boyfriend, the trial court should have instructed on voluntary manslaughter and second degree murder premised on a provocation/heat of passion theory because the evidence was sufficient to raise a factual question whether, when defendant shot the victim, she was acting under the heat of passion provoked by the victim's repeated threats to take custody of her son away from her. People v. Wright (Cal. App. 1st Dist. Dec. 15, 2015), 242 Cal. App. 4th 1461, 196 Cal. Rptr. 3d 115, 2015 Cal. App. LEXIS 1118, modified, (Cal. App. 1st Dist. Jan. 6, 2016), 2016 Cal. App. LEXIS 5

Failure to instruct on heat of passion due to provocation was harmless error, even if the jury theoretically could have found that provocation or heat of passion negated premeditation and deliberation, because a special circumstance finding that defendant lay in wait demonstrated that the jury did not rely solely on premeditation and deliberation to find first degree murder. People v. Wright (Cal. App. 1st Dist. Dec. 15, 2015), 242 Cal. App. 4th 1461, 196 Cal. Rptr. 3d 115, 2015 Cal. App. LEXIS 1118, modified, (Cal. App. 1st Dist. Jan. 6, 2016), 2016 Cal. App. LEXIS 5.

Prosecutor's statement as a whole correctly described the elements of implied malice murder, even though the statement that the law would imply an intent to kill was not reflected in the statutory or case law, further, the trial court's correct instruction rendered any error harmless. People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192.

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200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816, cert. denied, (U.S. Jan. 9, 2017), 137 S. Ct. 623, 196 L. Ed. 2d 532, 2017 U.S. LEXIS 591.

In a trial for defendant's murder of his mother, the instructions on consciousness of guilt and the limited use of evidence of mental impairment should have been modified to allow the jury to consider evidence of defendant's mental illness in determining whether certain untruthful statements were knowingly made, and therefore evidenced consciousness of guilt, however, there was no miscarriage of justice. People v. McGehee (Cal. App. 3d Dist. Apr. 26, 2016), 246 Cal. App. 4th 1190, 201 Cal. Rptr. 3d 714, 2016 Cal. App. LEXIS 329.

In a trial for defendant's murder of his mother, an instruction was not required on involuntary manslaughter as a lesser included offense because intent to kill, regardless of whether defendant was delusional, was established by the facts that he stabbed his mother ten times with a kitchen knife and that eight of the wounds would have been independently fatal. Evidence that defendant believed his mother was a demon was properly reserved for the sanity phase questions of whether the delusion existed and, if so, whether it exonerated him. People v. McGehee (Cal. App. 3d Dist. Apr. 26, 2016), 246 Cal. App. 4th 1190, 201 Cal. Rptr. 3d 714, 2016 Cal. App. LEXIS 329.

With respect to an attempted murder charged against defendant, a trial court erred in instructing the jury it could consider evidence of defendant's mental disabilities only for the limited purpose of deciding whether he harbored the intent to kill because it precluded the jury from considering evidence of his mental disabilities in deciding whether he harbored express malice with respect to his claim of imperfect self-defense. People v. Ocegueda (Cal. App. 6th Dist. June 9, 2016), 247 Cal. App. 4th 1393, 203 Cal. Rptr. 3d 233, 2016 Cal. App. LEXIS 456, modified, (Cal. App. 6th Dist. June 22, 2016), 2016 Cal. App. LEXIS 496, modified, (Cal. App. 6th Dist. July 8, 2016), 2016 Cal. App. LEXIS 557.

Instructing on the culpability of aiders and abettors with former CALJIC No. 3.00 was not error because that instruction generally stated a correct rule of law and its "equally guilty" language did not mislead the jury. Even if the jury could have found that an accomplice to the murder had not acted with premeditation, the jury was instructed on felony murder and found true the special circumstance of kidnapping, which alone established defendants' guilt of first degree murder. People v. Daveggio and Michaud (Cal. Apr. 26, 2018), 231 Cal. Rptr. 3d 646, 415 P.3d 717, 4 Cal. 5th 790, 2018 Cal. LEXIS 2981, cert. denied, (U.S. Oct. 1, 2018), 139 S. Ct. 213, 202 L. Ed. 2d 145, 2018 U.S. LEXIS 4910.

17. Defenses

Because imperfect self-defense has not been eliminated, the statutorily-defined mens rea of malice has not been expanded, and there is nothing in the language of Pen C §§ 187 and 188 that suggests the legislature intended to extend imperfect self-defense claims to defendants whose actual belief in the need to use self-defense is based on a delusion. Therefore, the reviewing court is free to interpret the doctrine of imperfect self-defense as being inapplicable to such defendants. People v. Mejia-Lenares (Cal. App. 5th Dist. Jan. 26, 2006), 135 Cal. App. 4th 1437, 38 Cal. Rptr. 3d 404, 2006 Cal. App. LEXIS 93.

Pen C § 28 specifically allows evidence of mental illness at the guilt phase of a trial, where relevant to show that the accused did not harbor malice aforethought, and has no impact on the imperfect self-defense doctrine. The determination that a delusion, unsupported by any basis in reality, cannot sustain an imperfect self-defense claim, does not preclude all mentally ill defendants from using evidence of mental illness to assert imperfect self-defense. People v. Mejia-Lenares (Cal. App. 5th Dist. Jan. 26, 2006), 135 Cal. App. 4th 1437, 38 Cal. Rptr. 3d 404, 2006 Cal. App. LEXIS 93.

It was error to instruct the jury in a second degree murder case that it could not consider evidence of defendant's voluntary intoxication in deciding whether he acted in imperfect self-defense because voluntary intoxication is relevant to express malice; no prejudice resulted in part because a conclusion that defendant had no right to imperfect self-defense was likely, given that he entered the victim's apartment unannounced by kicking in the front

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door while the victim and his partner sat on the couch with their young child on the floor in front of them. 2016 Cal. App. LEXIS 536.

Notes to Unpublished Decisions**1. Double Jeopardy****1. Double Jeopardy**

Unpublished decision: District court erred when it denied a state inmate's habeas corpus petition in full because the record showed that a state appeals court decision on the inmate's double jeopardy claim was contrary to the U.S. Supreme Court's decision in *Morris v. Mathews*: (1) the inmate contended that his retrial was tainted when a state prosecutor introduced his original information into the evidence, which information contained two charges, including an assault charge, of which he had previously been acquitted; (2) in order for the double jeopardy violation to constitute reversible error under *Morris*, the inmate had to demonstrate a reasonable probability that he would not have been convicted of a non-jeopardy-barred offense, absent the presence of the jeopardy-barred offenses at his retrial; (3) the record revealed that the jury at the retrial convicted the inmate of all of the charges in the original information, including the two double jeopardy-barred charges, and that the state prosecutor relied heavily upon the assault charge to establish malice, which was a required element of second degree murder in California; and (4) the inmate was entitled to federal habeas relief with regard to his second degree murder conviction because it was unlikely that he would have been convicted of that charge absent the introduction of the original information, which opened the door to the jury's consideration of the assault charge during the retrial. *Damian v. Vaughn* (9th Cir. Cal. June 21, 2006), 186 Fed. Appx. 775, 2006 U.S. App. LEXIS 15869.

Research References & Practice Aids**Cross References:**

"Malice" and "maliciously": Pen C § 7 subd 4.

Evidence of voluntary intoxication with regard to malice: Pen C § 22.

Diminished capacity, insanity: Pen C § 25.

Persons capable of committing crimes: Pen C § 26.

Diminished capacity, diminished responsibility, and irresistible impulse: Pen C § 28.

Prohibition against expert testimony as to requisite mental state: Pen C § 29.

"Murder": Pen C § 187.

Degrees of murder: Pen C § 189.

Punishment for murder: Pen C §§ 190 et seq.

"Manslaughter": Pen C § 192.

Excusable homicide: Pen C § 195.

Justifiable homicide: Pen C §§ 196, 197.

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Bare fear may not justify killing: Pen C § 198.

Presumption in favor of one who uses deadly force against intruder Pen C § 198.5.

Insanity hearing: *Pen C § 1026*.

Jurisprudences

Cal Jur 3d (Rev) Criminal Law §§ 201 et seq.

Law Review Articles:

Criminal responsibility for death of co-felon. 7 Cal. W. L. Rev. 522.

Admissibility of declarations concerning mental state. 4 CLR 145.

Implied malice—What does the future hold? 13 Crim Just J 59.

Killing without intent: involuntary or voluntary manslaughter? 24 Forum 4.

Dead or alive: Did the California Legislature abolish "imperfect self-defense"? 3 Res Ipsa Loquitur 1 (SF Law Schl)

Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness. 43 Hastings Const. L.Q. 1.

Note & Comment: A Low Threshold of Guilt: Interpreting California's Fetal Murder Statute In *People v. Taylor*. 39 Loy. L.A. L. Rev. 1447.

Requirement of manslaughter instructions where evidence adduced showing defendant's diminished capacity and intoxication. 4 San Diego L. Rev. 173.

Distinction between first and second degrees. 19 S.C. L. Rev. 417.

Intent to kill as affecting degree of murder. 24 S.C. L. Rev. 288.

Old Wine in Old Bottles: California Mental Defenses at the Dawn of the 21st Century. 32 Sw. U. L. Rev. 75.

Lying in wait murder. 6 Stan. L. Rev. 345.

Intent to kill. 6 Stan. L. Rev. 350.

Instructions on intent. 6 Stan. L. Rev. 355.

Mens rea and murder by torture. 10 Stan. L. Rev. 672.

Language of murder—"malice aforethought." 14 UCLA L. Rev. 1306.

Reversible error in first degree murder convictions: The Modesto Rule re-examined. 7 U.S.F. L. Rev. 1

Treatises:

Cal Criminal Defense Prac., ch 142, "Crimes Against the Person"

Witkin & Epstein, Criminal Law (4th ed), Crimes Against The Person §§ 169, 170, 171, 103, 110, 107, 108, 109, 262, 263, 262, 267, 268, 271, 270, 269.

Witkin Procedure (4th) Pleading § 416

Jury Instructions

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Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 520, Murder With Malice Aforethought.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2720, Assault by Prisoner Serving Life Sentence.

Hierarchy Notes:

Cal Pen Code Pt. 1, Tit 8, Ch 1

Deering's California Codes Annotated
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1. *Cal Pen Code § 189*

Client/Matter: -None-

Search Terms: Penal Code Sec. 188

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Sources: CA, Related Federal

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Deering's California Codes are current through Chapters 1-70, 72-127, 130-133, 149, 157, 159, 161, and 215 of the 2019 Regular Session, including all legislation effective September 4, 2019 or earlier.

Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > *Part 1 Of Crimes and Punishments (Titles 1 — 17)* > *Title 8 Of Crimes Against the Person (Chs. 1 — 11)* > *Chapter 1 Homicide (§§ 187 — 199)*

§ 189. Degrees of murder; Liability for murder

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

(1) "Destructive device" has the same meaning as in Section 16460.

(2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.

(3) "Weapon of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

History

Enacted 1872. Amended Code Amdts 1873–74 ch 614 § 16; Stats 1949 1st Ex Sess ch 16 § 1, effective January 6, 1950; Stats 1969 ch 923 § 1; Stats 1970 ch 771 § 3, effective August 19, 1970; Stats 1981 ch 404 § 7; Stats 1982 ch 949 § 1, effective September 13, 1982, ch 950 § 1, effective September 13, 1982; amendment adopted by voters, Prop. 115 § 9, effective June 6, 1990; Stats 1993 ch 609 § 1 (SB 310), ch 610 § 4 (AB 6), effective

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September 30, 1993, operative until January 1, 1994, ch 610 § 4.5 (AB 6), effective September 30, 1993, operative January 1, 1994, ch 611 § 4 (SB 60), effective September 30, 1993, operative until January 1, 1994, ch 611 § 4.5 (SB 60), effective September 30, 1993, operative January 1, 1994; Stats 1999 ch 694 § 1 (AB 1574); Stats 2002 ch 606 § 1 (AB 1838), effective September 17, 2002; Stats 2010 ch 178 § 51 (SB 1115), effective January 1, 2011, operative January 1, 2012; Stats 2018 ch 423 § 42 (SB 1494), effective January 1, 2019; Stats 2018 ch 1015 § 3 (SB 1437), effective January 1, 2019 (ch 1015 prevails).

Annotations

Notes

Historical Derivation:**Editor's Notes—****Amendments:****Note—****Historical Derivation:**

Crimes and Punishment Act § 21 (Stats 1850 ch 99 § 21), as amended Stats 1956 ch 139 § 2.

Editor's Notes—

Both Chs 949 (SB 1342) and 950 (AB 2392) of Stats 1982 contained identical provisions respecting armor piercing bullets.

Senate Bill 1080 was enacted as Stats 2010 ch 711 and becomes operative on January 1, 2012.

Assembly Bill 6 of the 1993–94 Regular Session was enacted as Chapter 610, becoming effective September 30, 1993.

(See also Cal Digest of Official Reports 3d Series, Homicide.)

Amendments:**1873–74 Amendment:**

Substituted “burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree” for “or burglary, is murder of the first degree; and all other kinds of murder are of the second degree” at the end of the section.

1949 Amendment:

Deleted “or” before, and added “or any act punishable under Section 288” after, “mayhem”.

1969 Amendment:

(1) Amended the first paragraph by (a) adding “a bomb” before “poison”; (b) deleting “or” after “poison”; and (c) adding “of” after “perpetration”; and (2) added the second paragraph.

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1970 Amendment:

Substituted (1) "destructive device or explosive" for "bomb" in the first paragraph; and (2) "'destructive device' shall mean any destructive device as defined in Section 12301, and 'explosive' shall mean any explosive as defined in Section 12000 of the Health and Safety Code" for "'bomb' includes any device, substance, or preparation, other than fixed ammunition or fireworks regulated under Part 2 (commencing with Section 12500) of Division 11 of the Health and Safety Code, which is designed to cause an explosion and is capable of causing death or serious bodily injury" in the second paragraph.

1981 Amendment:

Added the third paragraph.

1982 Amendment:

Added "knowing use of ammunition designed primarily to penetrate metal or armor," in the first paragraph.

1990 Amendment:

Amended the first paragraph by (1) adding "kidnapping, train wrecking,;" and (2) substituting "286, 288, 288a, or 289" for "288".

1993 Amendment (§ 4):

Added "carjacking," after "arson, rape," in the first paragraph. (As amended Stats 1993 ch 611, compared to the section as it read prior to 1993. This section was also amended by two earlier chapters, chs 609 and 610. See Gov C § 9605.)

1993 Amendment (§ 4.5):

Amended the first paragraph by (1) adding "or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death,;" (2) substituting ". All" for "; and all" at the end of the first sentence; and (3) substituting "means" for "shall mean" both times it appears in the second paragraph.

1999 Amendment:

Added "206," after "Section" in the first paragraph.

2002 Amendment:

Added (1) "a weapon of mass destruction" in the first sentence; and (2) the third paragraph.

2010 Amendment:

Substituted "Section 16460" for "Section 12301" in the second paragraph.

2018 Amendment (ch 1015):

Added designations (a), (b), (c), (c)(1)-(c)(3), and (d); in (a), substituted "that" for "which" preceding "is perpetrated", "that" for "which" preceding "is committed", and "or murder that" for "or any murder which"; added "the following definitions apply:" in the introductory language of (c); in (c)(1), substituted "has the same meaning as" for "means any destructive device as defined" and the period for ", and" at the end; substituted "has the same meaning as" for "means any explosive as defined" in (c)(2); deleted "As used in this section," at the beginning of (c)(3); substituted "is not" for "shall not be" in (d); and added (e) and (f).

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Note—

Stats 2018 ch 1015 provides:

SECTION 1. The Legislature finds and declares all of the following:

- (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
- (b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
- (c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
- (d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
- (e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.
- (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

Stats 2010 ch 178 provides:

SEC. 107. This act shall only become operative if Senate Bill 1080 is enacted and becomes operative on January 1, 2012, and that bill would reorganize and make other nonsubstantive changes to the deadly weapons provisions in the Penal Code, in which case this act shall also become operative on January 1, 2012.

Stats 1982 ch 949 provides:

SEC. 6. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Stats 1993 ch 611 provides:

SECTION 63. This bill shall become operative only if Assembly Bill 6 of the 1993–94 Regular Session is enacted and becomes effective on or before January 1, 1994.

Proposition 115, effective June 6, 1990, provides:

SECTION 1. (a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.

(b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of

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accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.

(c) The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.

(d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act.

SEC. 29. If any provision of this measure or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

SEC. 30. The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Commentary

Law Revision Commission Comments:

2010—

Section 189 is amended to reflect nonsubstantive reorganization of the statutes governing control of deadly weapons.

Notes to Decisions

1. Generally
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8. First Degree Murder: Intent
9. First Degree Murder: Malice
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- 13.Lying in Wait
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- 37.Questions of Law and Fact
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42. Disclosure

43. Sentencing

44. Rights of Defendant

1. Generally

The classification of murders of different degrees of atrocity into two kinds does not render the lesser crime any other than murder. People v. Foren (Cal. July 1, 1864), 25 Cal. 361, 1864 Cal. LEXIS 45.

The legislature in dividing the crime of murder into two degrees recognized that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment; it did not attempt to define murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. People v. Keefer (Cal. May 12, 1884), 65 Cal. 232, 3 P. 818, 1884 Cal. LEXIS 498.

Murder, as defined in § 187, includes both degrees. People v. Hyndman (Cal. July 19, 1893), 99 Cal. 1, 33 P. 782, 1893 Cal. LEXIS 607; People v. Ung Ting Bow (Cal. Feb. 29, 1904), 142 Cal. 341, 75 P. 899, 1904 Cal. LEXIS 939; People v. Suesser (Cal. Mar. 2, 1904), 142 Cal. 354, 75 P. 1093, 1904 Cal. LEXIS 942; People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300.

Insanity of defendant cannot be used for purpose of reducing his crime from murder in first degree to murder in second degree; if responsible at all in this respect, he is responsible in same degree as sane man, and if he is not responsible at all he is entitled to acquittal in both degrees. People v. Troche (Cal. Dec. 27, 1928), 206 Cal. 35, 273 P. 767, 1928 Cal. LEXIS 446, cert. denied, (U.S. Dec. 9, 1929), 280 U.S. 524, 50 S. Ct. 87, 74 L. Ed. 592, 1929 U.S. LEXIS 485.

Malice is an essential element of murder whether it be of the first or of the second degree. People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

Presence or absence of malice is only one factor to be considered by jury on issue of degree, in homicide case. People v. Steward (Cal. App. 4th Dist. Dec. 16, 1957), 156 Cal. App. 2d 177, 318 P.2d 806, 1957 Cal. App. LEXIS 1397.

Except when common-law-felony-murder doctrine applies, essential element of murder is intent to kill or intent, with conscious disregard for life, to commit acts likely to kill. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295; Taylor v. Superior Court of Alameda County (Cal. Dec. 2, 1970), 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P.2d 131, 1970 Cal. LEXIS 232, overruled, People v. Antick (Cal. Aug. 26, 1975), 15 Cal. 3d 79, 123 Cal. Rptr. 475, 539 P.2d 43, 1975 Cal. LEXIS 332.

When murder is established under Pen Code, §§ 187 and 188, § 189 may properly be invoked to determine degree of that murder; thus, though malice aforethought may not be implied under § 189 to make killing murder unless defendant or his accomplice commits killing in perpetration of inherently dangerous felony, when murder is otherwise established, § 189 may be invoked to determine its degree. People v. Gilbert (Cal. Dec. 15, 1965), 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 228, vacated, (U.S. June 12, 1967), 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

When murder is established under Pen Code, §§ 187 and 188, § 189 may properly be invoked to determine degree of that murder; thus, though malice aforethought may not be implied under § 189 to make killing murder unless defendant or his accomplice commits killing in perpetration of inherently dangerous felony, when murder is otherwise established, § 189 may be invoked to determine its degree. People v. Gilbert (Cal. Dec. 15, 1965), 63

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Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 228, vacated, (U.S. June 12, 1967), 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

The manner and means employed to accomplish a killing are important considerations in determining the degree of the murder. People v. Lookadoo (Cal. Mar. 30, 1967), 66 Cal. 2d 307, 57 Cal. Rptr. 608, 425 P.2d 208, 1967 Cal. LEXIS 305.

If a person purposely and of his deliberate and premeditated malice attempts to kill one person but by mistake and inadvertence kills another instead, the law transfers the intent and the homicide so committed is murder of the first degree. People v. Sears (Cal. Mar. 13, 1970), 2 Cal. 3d 180, 84 Cal. Rptr. 711, 465 P.2d 847, 1970 Cal. LEXIS 265.

Before the question of whether a killing is murder in the first degree because committed by one of the means enumerated in Pen Code, § 189, can arise, it must first be established that the killing was with malice aforethought, so as to constitute the killing a murder. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

If a killing is murder within the meaning of Pen Code, § 187, defining murder, and Pen Code, § 188, defining malice, and is committed by one of the means enumerated in Pen Code, § 189, designating degrees of murder, the use of such means makes the killing first degree murder as a matter of law. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

Felony-murder rule operates to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of all felonies inherently dangerous to human life, and to posit the existence of malice aforethought and to classify the offense as murder of the first degree in homicides which are the direct causal result of those six felonies specifically enumerated in Pen C § 189. People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

A homicide committed during the heat of passion justifiably engendered is not murder in the first degree; depending upon the surrounding circumstances, including the extent of the provocation and whether there was time for temper to cool, such a homicide may be murder of the second degree or voluntary manslaughter. People v. Nero (Cal. App. 4th Dist. Sept. 3, 1971), 19 Cal. App. 3d 904, 97 Cal. Rptr. 145, 1971 Cal. App. LEXIS 1335.

When a murder occurs during an attack on a group, a defendant's intent to kill need not be directed at any one individual. It is enough to support a conviction of murder in the first degree if the premeditation is directed at the group. People v. Orabuena (Cal. App. 2d Dist. Mar. 25, 1976), 56 Cal. App. 3d 540, 128 Cal. Rptr. 474, 1976 Cal. App. LEXIS 1380.

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. In order to support a finding that a murder is first degree, the People bear the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. People v. Rowland (Cal. App. 3d Dist. June 25, 1982), 134 Cal. App. 3d 1, 184 Cal. Rptr. 346, 1982 Cal. App. LEXIS 1830.

In a prosecution for first degree murder (Pen C § 187), robbery in an inhabited dwelling (under former Pen C § 213.5; see now Pen C § 213), attempted rape (Pen C §§ 261, 664), and three counts of burglary (Pen C § 459), in which the jury was instructed on a single theory of first degree murder-felony murder-the court's failure to require a finding that the murder was premeditated and deliberate did not deny defendant equal protection of the laws. A defendant who committed felony murder during the course of certain felonies was eligible for capital punishment whereas a defendant who committed deliberate and premeditated murder, without more, was not, and thus one with less criminal intent might be punished more severely than one with more. However, a death penalty law that made the felony murderer but not the simple murderer death-eligible did not violate equal protection principles. Further, the jury found, in accordance with then existing law, that, with respect to the burglary and robbery special circumstances, defendant intended to kill the victim. People v. Taylor (Cal. Dec. 31, 1990), 52 Cal. 3d 719, 276 Cal.

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Rptr. 391, 801 P.2d 1142, 1990 Cal. LEXIS 5663, cert. denied, (U.S. Oct. 7, 1991), 502 U.S. 843, 112 S. Ct. 136, 116 L. Ed. 2d 103, 1991 U.S. LEXIS 5551.

Defendant was properly tried and convicted of felony murder (Pen C § 189) even though he was charged with murder (Pen C § 187) and the charging language made no reference to felony murder, nor to any underlying felony, such as robbery. An information charging murder is sufficient to charge either a violation of Pen C § 187, or Pen C § 189. Whether murder is committed with malice, or in the context of felony murder, the crime committed is still murder. Moreover, there was sufficient notice of felony murder, where there was substantial evidence of robbery-murder presented at the preliminary hearing at which defendant was represented by the same attorneys who represented him at trial; prior to trial, the court informed prospective jurors that felony murder might be involved, and no counsel objected to the court's remarks or suggested the remarks were inapplicable to the case. Almost immediately after trial began, during prosecution examination of the first witness, the prosecutor stated his intention to rely on the felony-murder theory. During trial there was substantial evidence of robbery and that defendant intended to aid in a robbery. People v. Scott (Cal. App. 2d Dist. Apr. 24, 1991), 229 Cal. App. 3d 707, 280 Cal. Rptr. 274, 1991 Cal. App. LEXIS 388, cert. denied, (U.S. Apr. 6, 1992), 503 U.S. 977, 112 S. Ct. 1603, 118 L. Ed. 2d 316, 1992 U.S. LEXIS 2245.

The felony-murder rule in California serves two purposes. First, whenever a killing occurs as a direct causal result of the commission or attempt to commit a felony inherently dangerous to human life, the rule classifies the killing as murder instead of manslaughter. It thus dispenses with the need to prove malice aforethought. Second, whenever the felony is one listed in Pen C § 189, the rule classifies the murder as one of the first degree. In this context, felony murder substitutes for proof of premeditation. People v. Scott (Cal. App. 2d Dist. Apr. 24, 1991), 229 Cal. App. 3d 707, 280 Cal. Rptr. 274, 1991 Cal. App. LEXIS 388, cert. denied, (U.S. Apr. 6, 1992), 503 U.S. 977, 112 S. Ct. 1603, 118 L. Ed. 2d 316, 1992 U.S. LEXIS 2245.

Evidence indicating that defendant possessed the weapon and ammunition used to kill a murder victim; that earlier he had committed felony offenses against her, for which she had brought a criminal complaint against him; that he also had burned down her house and torched her car; that following the murder he fled from a police roadblock; that after his arrest he made false statements to account for his whereabouts on the night of the crime; together with numerous other facts presented into evidence, warranted the jury in finding defendant guilty of first degree murder under Pen C §§ 187 and 189. People v. Stanley (Cal. July 6, 1995), 10 Cal. 4th 764, 42 Cal. Rptr. 2d 543, 897 P.2d 481, 1995 Cal. LEXIS 3767, modified, (Cal. Sept. 13, 1995), 11 Cal. 4th 219d, 1995 Cal. LEXIS 5683.

California's lying-in-wait special circumstance, Pen C § 189, does not violate U.S. Const. amend. VIII because it is sufficiently specific as a death penalty selection factor. Morales v. Woodford (9th Cir. Cal., 336 F.3d 1136, 2003 U.S. App. LEXIS 14925), modified, (9th Cir. Cal. July 28, 2003), 388 F.3d 1159, 2003 U.S. App. LEXIS 27917.

Provocative act murder doctrine applied, and defendant was properly convicted of first-degree murder, where defendant fled police at high speeds and in a reckless manner and, as a result, the police struck and killed an innocent motorist. People v. Lima (Cal. App. 4th Dist. Apr. 14, 2004), 118 Cal. App. 4th 259, 12 Cal. Rptr. 3d 815, 2004 Cal. App. LEXIS 675.

2. Construction with Other Law

Pen C § 209 (a) violates Cal Const Art I § 17 to the extent it purports to punish a juvenile kidnapper under age 16 more severely than if he or she had committed murder with special circumstances under Pen C §§ 189, 190.2. Therefore, in a kidnapping case, a sentence of life without parole for a 14-year-old offender who suffered from post-traumatic stress disorder was reversed. In re Nunez (Cal. App. 4th Dist. Apr. 30, 2009), 173 Cal. App. 4th 709, 93 Cal. Rptr. 3d 242, 2009 Cal. App. LEXIS 647, modified, (Cal. App. 4th Dist. May 27, 2009), 2009 Cal. App. LEXIS 853.

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Defendant's prior Arizona murder conviction properly supported the prior-murder special-circumstance allegation under Pen C § 190.2(a)(2), where the Arizona offense would have been punishable as first-degree murder in California, as the prior robbery and killing occurred during the course of a continuous transaction. Under California and Arizona law, all of the elements of robbery were the same, including the intent to deprive permanently, and the elements of California robbery for California felony murder were thus established by defendant's guilty plea to the charge of Arizona robbery contained in defendant's indictment. People v. Bacon (Cal. Oct. 21, 2010), 50 Cal. 4th 1082, 116 Cal. Rptr. 3d 723, 240 P.3d 204, 2010 Cal. LEXIS 10686, modified, (Cal. Dec. 15, 2010), 2010 Cal. LEXIS 12592, cert. denied, (U.S. May 16, 2011), 563 U.S. 995, 131 S. Ct. 2457, 179 L. Ed. 2d 1222, 2011 U.S. LEXIS 3777.

Any error in admitting a State gang expert's testimony was harmless where, given the eyewitness testimony, video surveillance recording, and defendant's post-offense statements and conduct, it was clear that a rational jury would have found him guilty of the cold-blooded deliberate and premeditated murder of the victim absent the error; defendant invoked the name of a criminal street gang during the initial confrontation, and after retrieving his firearm from his truck and re-engaging the victim, he followed the victim into the street where the victim apparently thought they would engage in a fist fight, but, instead, defendant shot him twice. People v. Blessett (Cal. App. 3d Dist. Apr. 30, 2018), 232 Cal. Rptr. 3d 164, 22 Cal. App. 5th 903, 2018 Cal. App. LEXIS 385, modified, (Cal. App. 3d Dist. May 24, 2018), 2018 Cal. App. LEXIS 481.

3. Admissibility of Evidence

Because substantial evidence of a logical nexus between a burglary/robbery and a murder existed as required, either of two theories — that defendants killed the victim or that the victim died accidentally as a result of being bound — was sufficient to support the judgment of felony murder, and it was no defense under Pen C § 189 even if the jury believed that defendants did not want to kill the victim. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

In a trial under Pen C §§ 187(a), 189, 12022.53(d) for defendant's murder of his ex-girlfriend, admitting the ex-girlfriend's testimonial statement to police regarding a prior incident of domestic violence did not violate the Confrontation Clause because defendant forfeited his right to confront the victim when he killed her. Under the equitable doctrine of forfeiture by wrongdoing, a defendant is deemed to have lost the right to object on confrontation grounds to the admission of out-of-court statements of a witness whose unavailability the defendant caused; applicability does not hinge on the wrongdoer's motive. People v. Gles (Cal. Mar. 5, 2007), 40 Cal. 4th 833, 55 Cal. Rptr. 3d 133, 152 P.3d 433, 2007 Cal. LEXIS 1913, vacated, (U.S. June 25, 2008), 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488, 2008 U.S. LEXIS 5264, transferred, (Cal. Oct. 1, 2008), 2008 Cal. LEXIS 11595.

In an attempted murder trial involving an accident defense, there was no error in allowing the prosecution to introduce a video recording to show that defendant's pistol was operable, despite evidence that a modification reduced the force required to squeeze the trigger; there was also no error in allowing photographs illustrating a possible path that the bullet could have taken or in denying defendant's motion for a jury view. People v. Jasso (Cal. App. 6th Dist. Dec. 13, 2012), 211 Cal. App. 4th 1354, 150 Cal. Rptr. 3d 464, 2012 Cal. App. LEXIS 1270.

Any Miranda error in admitting the statement of a 17-year-old defendant was harmless because the statements were not essential to the case and were overshadowed by grisly physical and forensic evidence that defendant murdered his aunt by stabbing her 28 times during a sexual assault. People v. Gutierrez (Cal. App. 2d Dist. Sept. 24, 2012), 209 Cal. App. 4th 646, 147 Cal. Rptr. 3d 249, 2012 Cal. App. LEXIS 1000, review granted, depublished, (Cal. Jan. 3, 2013), 150 Cal. Rptr. 3d 567, 290 P.3d 1171, 2013 Cal. LEXIS 231, rev'd, (Cal. May 5, 2014), 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421, 324 P.3d 245, 2014 Cal. LEXIS 3135.

No Miranda violation arose from the admission of a murder defendant's post-invocation videotaped statements to show sanity because it was permissible casual conversation, not interrogation, when the guarding officers used conversation on neutral topics to calm the potentially explosive situation with a suspect who had been extremely

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agitated. People v. Andreasen (Cal. App. 4th Dist. Mar. 5, 2013), 214 Cal. App. 4th 70, 153 Cal. Rptr. 3d 641, 2013 Cal. App. LEXIS 162.

4. Aiding and Abetting

Defendant was properly found guilty of first-degree murder as a principal under an aiding and abetting theory because the evidence was more than sufficient for the jury to have concluded that he instigated the victim's killing, assisted in its planning, and advised and encouraged his brother to carry it out. People v. Lopez (Cal. June 13, 2013), 56 Cal. 4th 1028, 157 Cal. Rptr. 3d 570, 301 P.3d 1177, 2013 Cal. LEXIS 4702, cert. denied, (U.S. Apr. 7, 2014), 572 U.S. 1047, 134 S. Ct. 1788, 188 L. Ed. 2d 759, 2014 U.S. LEXIS 2534, overruled in part, People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816.

Substantial evidence supported defendant's first-degree murder conviction on an aiding and abetting theory because evidence of defendant's involvement in a conspiracy to kill the victim also demonstrated that defendant aided and abetted the commission of his murder. People v. Maciel (Cal. Aug. 8, 2013), 57 Cal. 4th 482, 160 Cal. Rptr. 3d 305, 304 P.3d 983, 2013 Cal. LEXIS 6648, modified, (Cal. Oct. 2, 2013), 2013 Cal. LEXIS 7980, cert. denied, (U.S. Apr. 21, 2014), 572 U.S. 1065, 134 S. Ct. 1884, 188 L. Ed. 2d 921, 2014 U.S. LEXIS 2653.

In a case in which defendant was convicted of five first-degree murders, sufficient evidence supported an implied finding that four of the murders were the natural and probable consequences of an agreement to kill the first victim where defendant was aware that other individuals lived in the home and was aware that the murder would occur at night, when residents would likely be present. Thus, it was reasonably foreseeable that when the perpetrators killed the first victim, they would also kill any other individuals present, particularly because they were told not to leave any witnesses. People v. Maciel (Cal. Aug. 8, 2013), 57 Cal. 4th 482, 160 Cal. Rptr. 3d 305, 304 P.3d 983, 2013 Cal. LEXIS 6648, modified, (Cal. Oct. 2, 2013), 2013 Cal. LEXIS 7980, cert. denied, (U.S. Apr. 21, 2014), 572 U.S. 1065, 134 S. Ct. 1884, 188 L. Ed. 2d 921, 2014 U.S. LEXIS 2653.

Aider-and-abettor liability for first degree felony murder is not limited by the holding that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. People v. Chiu (Cal. June 2, 2014), 59 Cal. 4th 155, 172 Cal. Rptr. 3d 438, 325 P.3d 972, 2014 Cal. LEXIS 3760.

Petitioner was not entitled to habeas relief on his insufficient evidence claim because substantial evidence supported petitioner's conviction for first degree murder because the prosecution presented evidence of motive, opportunity, and forensics tying petitioner to the scene, as well as testimony about past violence between petitioner and the victim. Mordick v. Valenzuela (C.D. Cal. Aug. 18, 2017), 2017 U.S. Dist. LEXIS 134396, rev'd, (9th Cir. Cal. June 27, 2019), 2019 U.S. App. LEXIS 19242.

Because it is possible to violate Pen. Code, § 4500, without committing murder in the first degree, the latter offense is not included in the former. Accordingly, defendant was properly convicted of both first-degree murder and aggravated assault by a life prisoner. People v. Delgado (Cal. Feb. 27, 2017), 214 Cal. Rptr. 3d 223, 389 P.3d 805, 2 Cal. 5th 544, 2017 Cal. LEXIS 1539.

For purposes of robbery-murder aider and abettor special circumstance, the evidence was insufficient to support a finding that defendant was a major participant who acted with reckless indifference to human life because he was across the street in the parking lot when the shooting took place, and there was no evidence he instructed the shooters to use lethal force or had the opportunity to stop the shooting; the fact that he fled with the others did not support an inference that he necessarily understood a killing had occurred. In re Bennett (Cal. App. 4th Dist. Sept. 5, 2018), 237 Cal. Rptr. 3d 610, 26 Cal. App. 5th 1002, 2018 Cal. App. LEXIS 790.

Conviction for second degree murder was reversed because the trial court's instruction in response to a question during deliberations allowed the jury to find, for purposes of aider/abettor liability, that defendant formed the requisite intent after the shots were fired. In response to the question about how long the commission of the crime continued, the court told the jury to consider conduct after the offense, thus essentially saying that the commission

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of the crime was still ongoing when defendant and the shooter reached a friend's apartment and included defendant's acts of disposing of the gun and securing a ride home. People v. Fleming (Cal. App. 2d Dist. Sept. 27, 2018), 238 Cal. Rptr. 3d 429, 27 Cal. App. 5th 754, 2018 Cal. App. LEXIS 869.

Defendant was properly convicted of second degree murder as an aider and abettor, even if the jury believed defendant's testimony that after beating the victim with his fists, he left when another person began beating the victim with a deadly or dangerous weapon. As amended, this section has not eliminated murder liability for aiders and abettors, but is consistent with case law finding second degree murder proportional to their culpability under the natural and probable consequences doctrine. People v. Gentile (Cal. App. 4th Dist. May 30, 2019), 247 Cal. Rptr. 3d 784, 35 Cal. App. 5th 932, 2019 Cal. App. LEXIS 500, modified, (Cal. App. 4th Dist. June 20, 2019), 36 Cal. App. 5th 360b, 2019 Cal. App. LEXIS 569.

5. Distinction Between Degrees

To constitute murder in the first degree, the unlawful killing must be accompanied with a clear intent to take life; this is the great and distinguishing feature between murder in the first, and murder in the second degree. People v. Foren (Cal. July 1, 1864), 25 Cal. 361, 1864 Cal. LEXIS 45.

The difference between first and second degree murder is: That in first degree murder the killing must be deliberate and premeditated, while in second degree murder the killing is not deliberate and premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given to take life. In the other case there is no deliberate, premeditated, preconceived design to kill. In both, however, the killing must have been unlawful and with malice. People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239.

The difference between first and second degree murder is basically in the quantum of personal turpitude of the offenders, but is to be measured by the character of the particular homicide. People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300.

Proof of malicious intent without further proof that it was "wilful, deliberate, and premeditated," would establish second degree murder, but not first degree murder. People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300; People v. Stansbury (Cal. App. 5th Dist. June 25, 1968), 263 Cal. App. 2d 499, 69 Cal. Rptr. 827, 1968 Cal. App. LEXIS 2230.

It is error to give an instruction that if a specific intent to take life exists at the time of an unlawful killing, the killing "would of course be murder of the first degree," which completely eliminates the statutory difference between first and second degree murder. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

It is error to instruct that it is not less murder because the act is suddenly formed after the intent to commit the homicide is formed, and that it is sufficient that the malicious intention precedes and accompanies the fact of homicide, where such instruction refers to first degree murder, as such statements destroy the statutory difference between the degrees of murder and authorize conviction of first degree murder on proof of facts amounting only to second degree murder. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

Instructions that there need be no appreciable space of time between the intention to kill and the act of killing, and that a man may do a thing deliberately from a moment's reflection as well as after pondering over the subject for a month or a year, when considered with other erroneous instructions relative to the degree of the offense, substantially delete the only difference between first and second degree murder. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

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Instructions fully and fairly advised jury concerning distinction between first and second degree murder and also regarding meaning of deliberation and premeditation, where they gave statutory definition of murder and its classification as first degree murder if the killing was "willful, deliberate and premeditated" with malice aforethought, defined "deliberate" as meaning formed or arrived at or determined on as a result of careful thought and weighing of considerations for and against proposed course of action, stated that law does not require that thought of killing be pondered over any specified length of time in order for killing to be considered deliberate and premeditated and that true test is not duration of time but rather extent of reflection, and defined second degree murder as killing a human being with malice aforethought, but without deliberation and premeditation and not perpetrated by means of lying in wait. People v. Byrd (Cal. Feb. 4, 1954), 42 Cal. 2d 200, 266 P.2d 505, 1954 Cal. LEXIS 167, cert. denied, (U.S. 1954), 348 U.S. 848, 75 S. Ct. 73, 99 L. Ed. 668, 1954 U.S. LEXIS 1867, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274.

Distinguishing factor between first and second degree murder is that in former the killing must be "wilful, deliberate, and premeditated"; this means defendant must have weighed in his mind and considered course of action he was taking and, after having considered reasons for and against, chose to kill his victim. People v. Robillard (Cal. Dec. 29, 1960), 55 Cal. 2d 88, 10 Cal. Rptr. 167, 358 P.2d 295, 1960 Cal. LEXIS 138, cert. denied, (U.S. 1961), 365 U.S. 886, 81 S. Ct. 1043, 6 L. Ed. 2d 199, 1961 U.S. LEXIS 1367, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274, overruled in part, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

Difference between first and second degree murder is basically in quantum of personal turpitude of offenders. People v. Wolff (Cal. Aug. 31, 1964), 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959, 1964 Cal. LEXIS 258.

The difference between first and second degree murder is basically one of the quantum of the personal turpitude of the offender; however, this quantum is measured by the character of the particular homicide involved. People v. Caylor (Cal. App. 2d Dist. Feb. 20, 1968), 259 Cal. App. 2d 191, 66 Cal. Rptr. 448, 1968 Cal. App. LEXIS 1962.

The critical factor in distinguishing the degrees of a homicide is the perpetrator's mental state. If a diminished capacity renders him incapable of entertaining either malice or an intent to kill, his offense is mitigated to a lesser crime. Although a finding that he was unconscious would establish the ultimate facts that he lacked both the ability to entertain malice and an intent to kill, the absence of either or both of such may, nevertheless, be found even though his mental state had not deteriorated into unconsciousness. People v. Ray (Cal. Apr. 17, 1975), 14 Cal. 3d 20, 120 Cal. Rptr. 377, 533 P.2d 1017, 1975 Cal. LEXIS 274, overruled in part, People v. Blakeley (Cal. June 2, 2000), 23 Cal. 4th 82, 96 Cal. Rptr. 2d 451, 999 P.2d 675, 2000 Cal. LEXIS 4414.

In a trial for multiple murders under Pen C §§ 187(a), 188, 189, the evidence did not warrant a sua sponte lesser included offense instruction on second degree murder, because the evidence of premeditation was overwhelming and defendant relied on speculation in claiming that the entry to the victims' home could have been at their invitation. Further, any evidence that defendant killed in a sudden, unpremeditated explosion of violence was so insubstantial as to render harmless any error in failing to give the instruction. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

In a capital murder trial arising from a drive-by shooting, defendants were not entitled to an instruction on second degree murder resulting from implied malice because there was no evidence that defendants killed without express malice; the victims were shot with armor-piercing shells fired from an assault-type rifle, each victim was hit multiple times, and each defendant made a statement after the murders implying intent to kill. People v. Nunez and Satele (Cal. July 1, 2013), 57 Cal. 4th 1, 158 Cal. Rptr. 3d 585, 302 P.3d 981, 2013 Cal. LEXIS 5478, cert. denied, (U.S. Jan. 13, 2014), 571 U.S. 1133, 134 S. Ct. 904, 187 L. Ed. 2d 789, 2014 U.S. LEXIS 549, cert. denied, (U.S. Jan. 13, 2014), 571 U.S. 1132, 134 S. Ct. 903, 187 L. Ed. 2d 789, 2014 U.S. LEXIS 591.

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6. First Degree Murder: Generally

To constitute first degree murder, a homicide not perpetrated by means of poison, or lying in wait, or torture, nor committed in the perpetration of or attempt to perpetrate any of the enumerated felonies, must come within the classification of "any other kind of wilful, deliberate, premeditated killing." People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300.

The general words "or any other kind of wilful, deliberate, or premeditated killing," following the specifically enumerated instances of killing which are declared to constitute murder in the first degree, must be construed to include only killings of the same general kind or character as those specifically mentioned. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

Where there is no element of poison, lying in wait, or perpetration or attempted perpetration of any crimes mentioned in this section, killing must have been wilful, deliberate and premeditated, or by means of torture, in order to sustain verdict of murder of first degree. People v. Heslen (Cal. Jan. 18, 1946), 27 Cal. 2d 520, 165 P.2d 250, 1946 Cal. LEXIS 328.

It is error to instruct that the homicide would be first degree murder if the accused, in a sudden violent quarrel growing out of the protests of the victim against the commission by the accused of any unlawful act, however trivial, killed the victim with a deadly weapon. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

Instructions on deliberation and intent are proper in a homicide case where the jury is told that to constitute first degree murder the killing must be by torture as defined, or wilful act accompanied by malice together with a clear and deliberate intent to take life, that the intent must be the result of deliberation and must be formed on preexisting reflection and not under such condition as to preclude deliberation, that the true test is not the duration of time but rather the extent of the reflection, and that to constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of the killing and the reasons for and against such a choice, and, having in mind the consequences, decide to and commit the unlawful act causing death. People v. Daugherty (Cal. May 5, 1953), 40 Cal. 2d 876, 256 P.2d 911, 1953 Cal. LEXIS 242, cert. denied, (U.S. Dec. 1, 1953), 346 U.S. 827, 74 S. Ct. 47, 98 L. Ed. 352, 1953 U.S. LEXIS 1802.

Corpus delicti of first degree murder consists of two elements, namely, death of victim and existence of some criminal agency as cause. People v. Cooper (Cal. Mar. 4, 1960), 53 Cal. 2d 755, 3 Cal. Rptr. 148, 349 P.2d 964, 1960 Cal. LEXIS 250.

In construing criminal statutes, ejusdem generis rule of construction is applied with rigidity; thus, in construing this section, more general words "or any other kind of wilful, deliberate, premeditated killing," following the specifically enumerated instances of killing which are declared to constitute first degree murder, must be construed to include only killings of same general kind or character as those specifically mentioned. People v. Wolff (Cal. Aug. 31, 1964), 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959, 1964 Cal. LEXIS 258.

In order for homicide not perpetrated by means of poison, lying in wait, or torture, or in perpetration of any of felonies enumerated in this section to be first degree murder under section, it must come within classification of "any other kind of wilful, deliberate, and premeditated killing." People v. Wolff (Cal. Aug. 31, 1964), 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959, 1964 Cal. LEXIS 258.

For defendant to be convicted of first degree murder for killing committed by another, killing must be attributable to act of defendant or his accomplice. People v. Gilbert (Cal. Dec. 15, 1965), 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 228, vacated, (U.S. June 12, 1967), 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

This statute is not unconstitutionally overbroad in defining first degree murder. McGautha v. California (U.S. May 3, 1971), 402 U.S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711, 1971 U.S. LEXIS 107.

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In enacting Pen C § 189, relating to degrees of murder, the Legislature decreed that any person who undertakes to commit any of the enumerated felonies will be guilty of murder in the first degree if it results in the loss of human life. People v. Brunt (Cal. App. 2d Dist. Apr. 17, 1972), 24 Cal. App. 3d 945, 101 Cal. Rptr. 457, 1972 Cal. App. LEXIS 1180.

The use by the Legislature of the terms "willful, deliberate and premeditated" in conjunction indicates its intent to require as an essential element of first degree murder substantially more reflection or more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill. People v. Cruz (Cal. Jan. 24, 1980), 26 Cal. 3d 233, 162 Cal. Rptr. 1, 605 P.2d 830, 1980 Cal. LEXIS 135.

The felony-murder rule does not make the basic felony the source of a presumption (assumption, deduction of inference) of premeditation or malice. Rather, it dispenses with premeditation and malice as elements of first degree murder. It is a special expression of state policy designed as a deterrent to the use of deadly force in the course of the enumerated felonies, embracing accidental or negligent as well as deliberate killings. People v. Oliver (Cal. App. 2d Dist. May 30, 1985), 168 Cal. App. 3d 920, 214 Cal. Rptr. 587, 1985 Cal. App. LEXIS 2152.

To prove first degree murder of any kind, the prosecution must first establish a murder within Pen C § 187, that is, an unlawful killing with malice aforethought. Thereafter, pursuant to Pen C § 189, the prosecution must prove the murder was perpetrated by one of the specified statutory means, including lying in wait, or by any other kind of willful, deliberate, and premeditated killing. People v. Stanley (Cal. July 6, 1995), 10 Cal. 4th 764, 42 Cal. Rptr. 2d 543, 897 P.2d 481, 1995 Cal. LEXIS 3767, modified, (Cal. Sept. 13, 1995), 11 Cal. 4th 219d, 1995 Cal. LEXIS 5683.

Pen C § 190.2(a)(21) defines a special circumstance as follows: "The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." This special circumstance is defined in the same terms as the third category of first degree murder defined in Pen C § 189. Read together, Pen C §§ 189 and 190.2(a)(21) provide that any intentional murder committed by shooting out of a vehicle is punishable either by death or life without parole, but not by 25 years to life. People v. Rodriguez (Cal. App. 2d Dist. Aug. 20, 1998), 66 Cal. App. 4th 157, 77 Cal. Rptr. 2d 676, 1998 Cal. App. LEXIS 727.

Trial court did not err in refusing to exclude victim impact evidence in connection with defendant's trial for first degree murder, and under either the Due Process Clause or the Ex Post Facto Clause, defendant's claim of error failed; even assuming decisional law imposed greater restriction on the admissibility of victim impact evidence at the time of defendant's crimes in comparison to the time of trial, the application of current law had no constitutional significance. People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275, cert. denied, (U.S. Feb. 22, 2005), 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.

Defendant cited no authority for circumscribing the scope of victim impact evidence under Pen C § 190.3, factor (b), in connection with defendant's trial for first degree murder; the court found that (1) the effects of defendant's assault, however long ago, would have been enduring, (2) there was nothing unduly inflammatory, fundamentally unfair, or otherwise prejudicial under Ev C § 352 in the victim statements, (3) certain statements were properly limited, (4) the statements did not go beyond the scope of admissible victim impact testimony, and (5) family members of the victims were properly allowed to testify. People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275, cert. denied, (U.S. Feb. 22, 2005), 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.

Under Pen C § 189, a murder is of the first degree if committed in the perpetration of, or attempt to perpetrate any of certain enumerated felonies, one of which is burglary; under this provision, a killing is committed in the perpetration of an enumerated felony if the killing and the felony are parts of one continuous transaction. People v. Horning (Cal. Dec. 16, 2004), 34 Cal. 4th 871, 22 Cal. Rptr. 3d 305, 102 P.3d 228, 2004 Cal. LEXIS 11890, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 45, 163 L. Ed. 2d 77, 2005 U.S. LEXIS 6140.

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Evidence was sufficient to support the jury's finding that defendant committed murder in the first degree, and its finding true the two special circumstance allegations and the allegation that he personally used a firearm, where, among other things, defendant's fingerprints appeared on two car ownership documents found in the victim's car shortly after the killing, and, when arrested, defendant possessed the victim's gun, which had been seen in the victim's house as recently as a day or so before the killing. People v. Horning (Cal. Dec. 16, 2004), 34 Cal. 4th 871, 22 Cal. Rptr. 3d 305, 102 P.3d 228, 2004 Cal. LEXIS 11890, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 45, 163 L. Ed. 2d 77, 2005 U.S. LEXIS 6140.

Trial court did not err by not sua sponte instructing the jury that a murder was complete when the fatal blow was struck, even if the victim lingered, because this was an incorrect statement of the law; thus, defendant's first degree murder conviction under Pen C §§ 187(a), 189, could be based on her conduct as an aider and abettor after the fatal blow, but before the victim died, because she was not then an accessory after the fact within the meaning of Pen C § 32. People v. Celis (Cal. App. 2d Dist. July 18, 2006), 141 Cal. App. 4th 466, 46 Cal. Rptr. 3d 139, 2006 Cal. App. LEXIS 1084.

There was sufficient evidence to sustain defendant's convictions for first degree murder, where the jury could have reasonably inferred from the evidence that defendant, believing his wife to be unfaithful, perceiving himself to have been mocked by his mother-in-law, and afraid that both wife and mother-in-law were plotting to kill him, took an ornamental knife normally kept in the upstairs bedroom, and went downstairs with it, specifically intending to kill both women. People v. Nazeri (Cal. App. 4th Dist. Aug. 25, 2010), 187 Cal. App. 4th 1101, 114 Cal. Rptr. 3d 730, 2010 Cal. App. LEXIS 1485.

Evidence was sufficient to establish defendant's guilt of first-degree murder, robbery, and assault with a deadly weapon where multiple witnesses identified defendant in court as the perpetrator of the crimes at the two markets, and their identifications of defendant were neither physically impossible nor inherently incredible. Inconsistencies in the witnesses' initial descriptions of the perpetrator and any suggestiveness in the lineups or photo arrays they were shown were matters affecting the witnesses' credibility, which was for the jury to resolve. People v. Elliott (Cal. Feb. 2, 2012), 53 Cal. 4th 535, 137 Cal. Rptr. 3d 59, 269 P.3d 494, 2012 Cal. LEXIS 1040, cert. denied, (U.S. Oct. 29, 2012), 568 U.S. 981, 133 S. Ct. 527, 184 L. Ed. 2d 345, 2012 U.S. LEXIS 8399.

In jury selection for a capital murder trial, there was no error in granting the prosecutor's for-cause challenges based on prospective jurors' conflicting, ambiguous, or emotional statements about their death penalty views. People v. Williams (Cal. May 6, 2013), 56 Cal. 4th 630, 156 Cal. Rptr. 3d 214, 299 P.3d 1185, 2013 Cal. LEXIS 4004, cert. denied, (U.S. Feb. 24, 2014), 571 U.S. 1197, 134 S. Ct. 1279, 188 L. Ed. 2d 298, 2014 U.S. LEXIS 1629.

In jury selection for a capital murder case, no Batson/Wheeler violation arose from the prosecutor's use of five peremptory challenges against female, African-American prospective jurors. The record did not support a finding that the trial court itself was biased and thus that no deference was due to its evaluation of race-neutral reasons; the court was not persuaded by arguments that the trial judge had not taken notes as to two prospective jurors, had no independent recollection concerning those jurors at the time of the Batson/Wheeler motions, and commented that the peremptory challenges were expected and that the judge had found black women to be very reluctant to impose the death penalty. People v. Williams (Cal. May 6, 2013), 56 Cal. 4th 630, 156 Cal. Rptr. 3d 214, 299 P.3d 1185, 2013 Cal. LEXIS 4004, cert. denied, (U.S. Feb. 24, 2014), 571 U.S. 1197, 134 S. Ct. 1279, 188 L. Ed. 2d 298, 2014 U.S. LEXIS 1629.

7. First Degree Murder: Mental State

Where two men quarrel and fight upon the spur of the moment for some sudden insult or offense, the party killing his adversary is not guilty of first degree murder, although he was the assailant, because the killing is not the result of previous consideration or design upon his part. People v. Moore (Cal. July 1, 1857), 8 Cal. 90, 1857 Cal. LEXIS 303.

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Under the former statute, defining murder in the first degree as consisting of wilful, premeditated, unlawful killing, the intent to kill was required to exist. *People v. Bealoba* (Cal. 1861), 17 Cal. 389, 1861 Cal. LEXIS 73.

The adjectives "wilful," "deliberate," and "premeditated" are cumulative and express the same idea. *People v. Pool* (Cal. 1865), 27 Cal. 572, 1865 Cal. LEXIS 61; *People v. Oltey* (Cal. Mar. 31, 1936), 5 Cal. 2d 714, 56 P.2d 193, 1936 Cal. LEXIS 457, overruled in part, *People v. Cook* (Cal. Feb. 10, 1983), 33 Cal. 3d 400, 189 Cal. Rptr. 159, 658 P.2d 86, 1983 Cal. LEXIS 150.

To constitute murder of the first degree there must be a wilful, deliberate and premeditated killing, as well as malice aforethought. *People v. Elmore* (Cal. Feb. 4, 1914), 167 Cal. 205, 138 P. 989, 1914 Cal. LEXIS 443; *People v. Erno* (Cal. Jan. 15, 1925), 195 Cal. 272, 232 P. 710, 1925 Cal. LEXIS 369; *People v. Arnold* (Cal. Oct. 11, 1926), 199 Cal. 471, 250 P. 168, 1926 Cal. LEXIS 296; *People v. Howard* (Cal. Dec. 31, 1930), 211 Cal. 322, 295 P. 333, 1930 Cal. LEXIS 335; *People v. Ross* (Cal. App. Sept. 18, 1939), 34 Cal. App. 2d 574, 93 P.2d 1019, 1939 Cal. App. LEXIS 143.

The phrase "malicious intent" is not synonymous with the phrase "wilful, deliberate, and premeditated" intent. *People v. Holt* (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153 P.2d 21, 1944 Cal. LEXIS 300; *People v. Thomas* (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

A homicide is murder of the first degree when the accused, as the result of deliberation and premeditation, intended to take unlawfully the life of another. *People v. Martinez* (Cal. Mar. 7, 1952), 38 Cal. 2d 556, 241 P.2d 224, 1952 Cal. LEXIS 203.

Use of "wilful, deliberate and premeditated" indicates that legislature meant, by reiteration, to emphasize its intent to require, as element of first degree murder, considerably more reflection than mere amount of thought necessary to form intention. *People v. Caldwell* (Cal. Jan. 28, 1955), 43 Cal. 2d 864, 279 P.2d 539, 1955 Cal. LEXIS 392.

Context of word "wilful" in this section, in describing one kind of first degree murder as "wilful, deliberate, and premeditated killing," shows that requisite intent is not merely, e.g., to commit act of discharging gun, but includes intent to kill human being as objective or result of such act. *People v. Gorshen* (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296, overruled in part, *People v. Welmore* (Cal. Sept. 26, 1978), 22 Cal. 3d 318, 149 Cal. Rptr. 265, 583 P.2d 1308, 1978 Cal. LEXIS 290, overruled in part, *People v. Blakeley* (Cal. June 2, 2000), 23 Cal. 4th 82, 96 Cal. Rptr. 2d 451, 999 P.2d 675, 2000 Cal. LEXIS 4414.

Mental state of one acting with malice aforethought must be distinguished from that state of mind described as wilful, deliberate, and premeditated, which encompasses the mental state of one carefully weighing the course of action he is about to take and choosing to kill his victim after considering reasons for and against it. *People v. Conley* (Cal. Mar. 15, 1966), 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911, 1966 Cal. LEXIS 258.

By using "wilful, deliberate, and premeditated" in conjunction, the Legislature indicates its intent to require, as an essential element of first degree murder, substantially more reflection, that is, more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intent to kill. *People v. Goedecke* (Cal. Feb. 23, 1967), 65 Cal. 2d 850, 56 Cal. Rptr. 625, 423 P.2d 777, 1967 Cal. LEXIS 394; *People v. Nicolaus* (Cal. Feb. 23, 1967), 65 Cal. 2d 866, 56 Cal. Rptr. 635, 423 P.2d 787, 1967 Cal. LEXIS 395, overruled in part, *People v. Welmore* (Cal. Sept. 26, 1978), 22 Cal. 3d 318, 149 Cal. Rptr. 265, 583 P.2d 1308, 1978 Cal. LEXIS 290.

The use of the words "wilful, deliberate and premeditated" killing in Pen C § 189, limiting and defining murder in the first degree, requires, as an element of such crime, substantially more reflection than may be involved in the mere formation of a specific intent to kill. *People v. Risenhoover* (Cal. Dec. 23, 1968), 70 Cal. 2d 39, 73 Cal. Rptr. 533, 447 P.2d 925, 1968 Cal. LEXIS 217, cert. denied, (U.S. 1969), 396 U.S. 857, 90 S. Ct. 123, 24 L. Ed. 2d 108, 1969 U.S. LEXIS 1055.

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Defendant was found guilty of first degree murder, Cal. Penal Code §§ 187(a) and 189, forcible lewd act upon a child under the age of 14 years, Cal. Penal Code § 288(b), two counts of anal or genital penetration with a foreign object, Cal. Penal Code § 289(a), and two counts of assault with a deadly weapon causing great bodily injury, Cal. Penal Code § 245(a)(1), which were all perpetrated against the 11-year-old victim, and the record failed to reflect substantial evidence that defendant's ingestion of cocaine and alcohol rendered him unconscious and, additionally, the manner of the killing and defendant's own statements prior to the crimes were inconsistent with any suggestion that defendant was unconscious, through voluntary intoxication, when he committed the acts in question and the jury had already found that defendant had formed the requisite specific intent to commit the sexual offenses; thus, the evidence failed in all respects to support a finding of unconsciousness, and the trial court did not err in declining to instruct the jury on involuntary manslaughter, Cal. Penal Code § 192(b). People v. Heard (Cal. Aug. 28, 2003), 31 Cal. 4th 946, 4 Cal. Rptr. 3d 131, 75 P.3d 53, 2003 Cal. LEXIS 6374, cert. denied, (U.S. Mar. 8, 2004), 541 U.S. 910, 124 S. Ct. 1618, 158 L. Ed. 2d 257, 2004 U.S. LEXIS 1966.

Because a state trial court committed numerous evidentiary errors and a state appellate court unreasonably applied federal law when it held that those errors, when viewed collectively, were harmless, a state inmate convicted of first degree murder under Pen C § 192(a), rather than second degree murder or voluntary manslaughter under Pen C § 189, was entitled to habeas corpus relief; the evidentiary errors deprived him of a fair trial on the central issues, which was his state of mind at the time of the homicide. Parle v. Runnels (N.D. Cal. Aug. 31, 2006), 448 F. Supp. 2d 1158, 2006 U.S. Dist. LEXIS 65810, aff'd, (9th Cir. Cal. Oct. 10, 2007), 505 F.3d 922, 2007 U.S. App. LEXIS 23734.

In a trial for the murder of an accomplice under the provocative act doctrine, the felony-murder portion of Pen C § 189 did not preclude a conviction for first degree murder rather than second degree murder. Unlike the felonies that qualified under the felony-murder rule for first degree murder, the underlying felony was premeditated attempted murder under Pen C §§ 664 and 187, a crime that required both express malice and premeditation. People v. Concha (Cal. App. 2d Dist. Mar. 18, 2008), 160 Cal. App. 4th 1441, 73 Cal. Rptr. 3d 522, 2008 Cal. App. LEXIS 372, modified, (Cal. App. 2d Dist. Apr. 16, 2008), 2008 Cal. App. LEXIS 555, review granted, depublished, (Cal. July 30, 2008), 81 Cal. Rptr. 3d 613, 189 P.3d 879, 2008 Cal. LEXIS 9374, rev'd, superseded, (Cal. Nov. 12, 2009), 47 Cal. 4th 653, 101 Cal. Rptr. 3d 141, 218 P.3d 660, 2009 Cal. LEXIS 11598.

8. First Degree Murder: Intent

If the victim was killed by the defendant in the attempt to murder a third person, though without malice or ill will against the victim, the homicide is as much first degree murder as if the fatal blow had reached the person intended. People v. Suesser (Cal. Mar. 2, 1904), 142 Cal. 354, 75 P. 1093, 1904 Cal. LEXIS 942.

If it would have been murder for the defendant to have killed the companion of the deceased, and in the execution of such attempt he unintentionally killed the deceased, the unlawful intent was transferred from the person intended to be killed by the given act to the person actually killed, and the law applied with equal force and effect to the killing of the latter. People v. Larios (Cal. Feb. 28, 1934), 220 Cal. 236, 30 P.2d 404, 1934 Cal. LEXIS 527.

Intent is a necessary element in first degree murder. People v. Murphy (Cal. May 17, 1934), 1 Cal. 2d 37, 32 P.2d 635, 1934 Cal. LEXIS 324; People v. Lami (Cal. Sept. 26, 1934), 1 Cal. 2d 497, 36 P.2d 192, 1934 Cal. LEXIS 404.

Intent need not be proved where homicide occurs in course of commission of any of crimes of arson, rape, robbery, burglary, or mayhem. People v. Cook (Cal. May 20, 1940), 15 Cal. 2d 507, 102 P.2d 752, 1940 Cal. LEXIS 240.

A mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

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Deliberate intent is not an essential element of murder as such; it is an essential element of one class only of first degree murder and is not an element of second degree murder. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

In arriving at the intention of a defendant charged with first degree murder, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time. People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

Where a person purposely and of his deliberate and premeditated malice attempts to kill one person but by mistake or inadvertence kills another instead the law transfers felonious intent from object of his assault and the homicide so committed is first degree murder. People v. Sutic (Cal. Sept. 22, 1953), 41 Cal. 2d 483, 261 P.2d 241, 1953 Cal. LEXIS 294.

To establish defendant's guilt of first degree murder on theory that he committed killing during perpetration of one of felonies enumerated in this section, prosecution must prove that he harbored specific intent to commit one of enumerated felonies. People v. Sears (Cal. May 21, 1965), 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P.2d 938, 1965 Cal. LEXIS 291, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087; People v. Risenhoover (Cal. Dec. 23, 1968), 70 Cal. 2d 39, 73 Cal. Rptr. 533, 447 P.2d 925, 1968 Cal. LEXIS 217, cert. denied, (U.S. 1969), 396 U.S. 857, 90 S. Ct. 123, 24 L. Ed. 2d 108, 1969 U.S. LEXIS 1055.

Except when the felony-murder doctrine applies, an essential element of murder is an intent to kill or an intent with conscious disregard of life to commit acts likely to kill. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

Under the doctrine of transferred intent, when a person purposefully attempts to kill one person but by mistake kills another instead, the law transfers the felonious intent from the object of the assault to the actual victim; the crime is exactly what it would have been if the person against whom the intent to kill was directed had been in fact killed. People v. Clayton (Cal. App. 3d Dist. Feb. 3, 1967), 248 Cal. App. 2d 345, 56 Cal. Rptr. 413, 1967 Cal. App. LEXIS 1638.

To convict a defendant of first degree murder on the theory that he committed the killing during the perpetration of one of the felonies enumerated in Pen C § 189, the People must prove that he harbored the specific intent to commit one of the enumerated felonies. People v. Brunt (Cal. App. 2d Dist. Apr. 17, 1972), 24 Cal. App. 3d 945, 101 Cal. Rptr. 457, 1972 Cal. App. LEXIS 1180.

Under the doctrine of "transferred intent," the felonious intent of a person who purposefully attempts to kill one person but by mistake or inadvertence kills another instead is transferred from the object of the assault to the actual victim, i.e., the crime is exactly what it would have been if the person to whom the intent to kill was directed had been in fact killed. People v. Carlson (Cal. App. 1st Dist. Feb. 20, 1974), 37 Cal. App. 3d 349, 112 Cal. Rptr. 321, 1974 Cal. App. LEXIS 1138.

Although murder is a "specific intent" crime, the specific intent to kill is not an independent element of the crime. The concept of specific intent relates to murder in two ways—the specific intent to kill is a necessary element of first degree murder based on a "willful, deliberate, and premeditated killing" (Pen C § 189), and the specific intent to kill is also necessary to establish express malice. However, it is not a necessary element of second degree murder, nor is it necessary to establish malice, which may be established by showing the specific intent to commit an act from which malice may be implied. People v. Alvarado (Cal. App. 2d Dist. July 18, 1991), 232 Cal. App. 3d 501, 283 Cal. Rptr. 479, 1991 Cal. App. LEXIS 815.

Trial court did not err in declining to instruct the jury as to second degree murder under Pen C §§ 189 and 347 because there was no substantial evidence of an intent merely to injure the victim. The evidence established that

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defendant believed the victim owed him money, deliberately obtained cyanide and placed it in a gin bottle so that the bottle appeared sealed, and had someone deliver the bottle to the victim, knowing that she liked to drink; this course of conduct evidenced at a minimum a conscious disregard for the victim's life, if not a specific intent to kill the victim. People v. Blair (Cal. July 28, 2005), 36 Cal. 4th 686, 31 Cal. Rptr. 3d 485, 115 P.3d 1145, 2005 Cal. LEXIS 8227, cert. denied, (U.S. Apr. 24, 2006), 547 U.S. 1107, 126 S. Ct. 1881, 164 L. Ed. 2d 584, 2006 U.S. LEXIS 3411, overruled in part, People v. Black (Cal. Mar. 27, 2014), 58 Cal. 4th 912, 169 Cal. Rptr. 3d 363, 320 P.3d 800, 2014 Cal. LEXIS 2103.

Defendant's first-degree murder conviction was proper where there was sufficient evidence to support a finding that he personally and intentionally discharged a gun and inflicted great bodily injury or death. The evidence demonstrated that defendant and the victim had an antagonistic relationship for some time prior to the incident, and that on the day of the incident, they engaged in a physical fight, and defendant admitted that at some point during the fight, he managed to push the victim off of him, and went into the guest house to retrieve his gun. People v. Loza (Cal. App. 4th Dist. June 27, 2012), 207 Cal. App. 4th 332, 143 Cal. Rptr. 3d 355, 2012 Cal. App. LEXIS 755.

In a robbery/murder case alleging that defendant drove the getaway car after an accomplice robbed the victim, who developed an irregular heartbeat and died about an hour later, it was reversible error not to instruct that defendant had to intend to aid and abet the robbery at or before the time of the act causing death. The error was prejudicial because jurors could have believed defendant's claim that he did not realize the accomplice might have committed a crime, and decide to help him, until the asportation phase of the robbery. People v. McDonald (Cal. App. 5th Dist. June 25, 2015), 238 Cal. App. 4th 16, 189 Cal. Rptr. 3d 367, 2015 Cal. App. LEXIS 554.

In a capital murder trial, the evidence supported a finding of premeditation as to a nontarget victim because it showed that defendant and his son armed themselves and went in search of the target victim to kill him and that defendant continued with the plan after seeing that several other people were in the house; further, the wounds were consistent with bullets from defendant's gun, and that manner of killing also supported a finding of deliberation. People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816, cert. denied, (U.S. Jan. 9, 2017), 137 S. Ct. 623, 196 L. Ed. 2d 532, 2017 U.S. LEXIS 591.

There was substantial evidence from which a reasonable trier of fact could find that defendant committed premeditated and deliberate first-degree murder where there was evidence he knew the victim was alive, albeit unconscious, at the time he drove to a freeway off-ramp and set her and her car on fire after pouring accelerant around the car's interior and directly onto her while she was unconscious on the backseat floorboard; planning could be inferred from evidence regarding the various materials defendant used to set the car on fire, and, with regard to motive, there was evidence that in the months preceding the killing, defendant had become obsessed and angry with the victim. People v. Brooks (Cal. , 216 Cal. Rptr. 3d 528, 393 P.3d 1, 2 Cal. 5th 674, 2017 Cal. LEXIS 1794), reprinted, sub. op., (Cal. Mar. 20, 2017), 219 Cal. Rptr. 3d 331, 396 P.3d 480, 3 Cal. 5th 1, 2017 Cal. LEXIS 4213, modified, (Cal. May 31, 2017), 2017 Cal. LEXIS 4216, modified, (Cal. June 19, 2017), 2017 Cal. LEXIS 4211.

9. First Degree Murder: Malice

Express malice is necessary to constitute murder in the first degree. People v. Cox (1888) 76 Cal 281, 18 P 332, 1888 Cal LEXIS 875. But see People v. Bonilla (1869) 38 Cal 699, 1869 Cal LEXIS 227, declaring that either express or implied malice support a verdict of guilty in the first degree.

Malice aforethought is not synonymous with deliberation and premeditation, which must accompany a homicide to characterize it as first degree murder. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

The jury may properly conclude that a defendant killed intentionally, with premeditation and deliberation, but did not do so with malice aforethought. Substantial evidence supporting a finding of premeditation and deliberation does

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not in every case show that the defendant also acted with malice aforethought. People v. Cruz (Cal. Jan. 24, 1980), 26 Cal. 3d 233, 162 Cal. Rptr. 1, 605 P.2d 830, 1980 Cal. LEXIS 135.

10. First Degree Murder: Deliberation and Premeditation

Under a former statute defining murder in the first degree, the necessary intent to kill was not required to have existed for any given length of time before the fatal blow; it was sufficient, the killing being unjustified or unexcused by the circumstances, that the intent to kill, if it was formed, was on the instant of killing or doing the act from which death ensued. People v. Beatoba (Cal. 1861), 17 Cal. 389, 1861 Cal. LEXIS 73.

There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. People v. Nichol (Cal. Oct. 1, 1867), 34 Cal. 211, 1867 Cal. LEXIS 240, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296; People v. Williams (Cal. Apr. 1, 1872), 43 Cal. 344, 1872 Cal. LEXIS 84, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296; People v. Cotta (Cal. Oct. 1, 1874), 49 Cal. 166, 1874 Cal. LEXIS 278; People v. Hunt (Cal. Oct. 1, 1881), 59 Cal. 430, 1881 Cal. LEXIS 415; People v. Bennett (Cal. Oct. 18, 1911), 161 Cal. 214, 118 P. 710, 1911 Cal. LEXIS 418; People v. Traichoff (Cal. App. Feb. 26, 1915), 26 Cal. App. 659, 147 P. 1178, 1915 Cal. App. LEXIS 185; People v. Donnelly (Cal. Nov. 9, 1922), 190 Cal. 57, 210 P. 523, 1922 Cal. LEXIS 267; People v. Weeks (Cal. App. Mar. 27, 1930), 104 Cal. App. 708, 286 P. 514, 1930 Cal. App. LEXIS 1079; People v. Fleming (Cal. June 1, 1933), 218 Cal. 300, 23 P.2d 28, 1933 Cal. LEXIS 492; People v. Russo (1933) 133 CA 468, 24 P2d 580, 1933 Cal App LEXIS 666; People v. Larrios (Cal. Feb. 28, 1934), 220 Cal. 236, 30 P.2d 404, 1934 Cal. LEXIS 527; People v. Lewis (1934) 220 C 510, 31 P2d 357, 1934 Cal LEXIS 565; People v. Pivaroff (1934) 138 CA 625, 33 P2d 44, 1934 Cal App LEXIS 713; People v. Campos (Cal. App. Nov. 21, 1935), 10 Cal. App. 2d 310, 52 P.2d 251, 1935 Cal. App. LEXIS 1401; People v. Dale (Cal. Aug. 3, 1936), 7 Cal. 2d 156, 59 P.2d 1014, 1936 Cal. LEXIS 609; People v. Hall (Cal. App. June 15, 1936), 14 Cal. App. 2d 582, 58 P.2d 697, 1936 Cal. App. LEXIS 921; People v. Brite (Cal. Oct. 6, 1937), 9 Cal. 2d 666, 72 P.2d 122, 1937 Cal. LEXIS 443; People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239; People v. Aranda (Cal. Oct. 31, 1938), 12 Cal. 2d 307, 83 P.2d 928, 1938 Cal. LEXIS 401; People v. French (Cal. Feb. 27, 1939), 12 Cal. 2d 720, 87 P.2d 1014, 1939 Cal. LEXIS 225, overruled, People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198; People v. Blackwood (Cal. App. 3d Dist. Dec. 6, 1939), 35 Cal. App. 2d 728, 96 P.2d 982, 1939 Cal. App. LEXIS 493; People v. Smith (Cal. July 16, 1940), 15 Cal. 2d 640, 104 P.2d 510, 1940 Cal. LEXIS 255; People v. Coleman (Cal. App. Mar. 19, 1942), 50 Cal. App. 2d 592, 123 P.2d 557, 1942 Cal. App. LEXIS 976; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227; People v. Honeycutt (Cal. Sept. 20, 1946), 29 Cal. 2d 52, 172 P.2d 698, 1946 Cal. LEXIS 274.

Murder in the first degree, unless committed in perpetrating or attempting to perpetrate arson, rape, robbery, burglary, etc., is the unlawful killing, with malice, and with a deliberate, premeditated, preconceived design to take life, though such design may have been formed in the mind immediately before the mortal wound was given. People v. Long (Cal. July 1, 1870), 39 Cal. 694, 1870 Cal. LEXIS 138; People v. Knapp (Cal. Sept. 18, 1886), 71 Cal. 1, 11 P. 793, 1886 Cal. LEXIS 509; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

The wilful and felonious killing of another does not constitute murder in the first degree; there must be also deliberation and premeditation. People v. Valencia (Cal. Apr. 1, 1872), 43 Cal. 552, 1872 Cal. LEXIS 125.

The deliberation which must precede the killing in order to make murder one of the first degree need not have existed for any given length of time. People v. Machuca (Cal. June 21, 1910), 158 Cal. 62, 109 P. 886, 1910 Cal. LEXIS 338.

It is only necessary that act of killing be preceded by concurrence of will, deliberation and premeditation on part of slayer, and if such is case, killing is murder of first degree no matter how rapidly these acts of mind succeed each

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other or how quickly they may be followed by act of killing. People v. Donnelly (Cal. Nov. 9, 1922), 190 Cal. 57, 210 P. 523, 1922 Cal. LEXIS 267.

To constitute murder in first degree, there need be no appreciable space of time between intention to kill and act of killing; they may be as instantaneous as successive thoughts of mind. People v. Donnelly (Cal. Nov. 9, 1922), 190 Cal. 57, 210 P. 523, 1922 Cal. LEXIS 267; People v. Dale (Cal. Aug. 3, 1936), 7 Cal. 2d 156, 59 P.2d 1014, 1936 Cal. LEXIS 609; People v. Brite (Cal. Oct. 6, 1937), 9 Cal. 2d 666, 72 P.2d 122, 1937 Cal. LEXIS 443.

In order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between intention to kill and act of killing. People v. Fleming (Cal. June 1, 1933), 218 Cal. 300, 23 P.2d 28, 1933 Cal. LEXIS 492.

Premeditation is not controlled by lapse of time, which need be no greater than necessary to formation of intention, and formation of intention and doing of acts in pursuance of that intention may be in rapid succession. People v. Patubo (Cal. Sept. 1, 1937), 9 Cal. 2d 537, 71 P.2d 270, 1937 Cal. LEXIS 422.

Premeditation is not controlled by lapse of time, which need be no greater than necessary to the formation of the intention, and the formation of the intention and the doing of the acts in pursuance of that intention may be in rapid succession. People v. Patubo (Cal. Sept. 1, 1937), 9 Cal. 2d 537, 71 P.2d 270, 1937 Cal. LEXIS 422.

Intent need not be proved where homicide occurs in the course of the commission of any of the crimes of arson, rape, robbery, burglary or mayhem; but where death otherwise results, wilfulness, premeditation and deliberation must be established in order to constitute the crime of first degree murder. People v. Cook (Cal. May 20, 1940), 15 Cal. 2d 507, 102 P.2d 752, 1940 Cal. LEXIS 240; People v. Isby (Cal. Nov. 18, 1947), 30 Cal. 2d 879, 186 P.2d 405, 1947 Cal. LEXIS 212.

The adjective "deliberate" means formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, and is an antonym of hasty, impetuous, rash, or impulsive. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227; People v. Honeycutt (Cal. Sept. 20, 1946), 29 Cal. 2d 52, 172 P.2d 698, 1946 Cal. LEXIS 274.

The law does not undertake to measure the length of the period during which a thought must be pondered before it can ripen into an intent to kill which is deliberate and premeditated, and the true test is not the duration of time but the extent of the reflection. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262; People v. Cornett (Cal. Nov. 1, 1948), 33 Cal. 2d 33, 198 P.2d 877, 1948 Cal. LEXIS 284.

While there is nothing in the applicable Penal Code sections which indicates that the Legislature meant to assign any particular period to the process of deliberation or premeditation in order to bring murder within the first degree, there is likewise nothing in said sections which indicates that the Legislature meant to give the words "deliberate" and "premeditate" any other than their common, well known, dictionary meaning. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

A specific intent to kill does not constitute first degree murder unless such intent is reached by deliberation and premeditation. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

"Premeditate" means to think on and revolve in the mind beforehand, to contrive and design previously. People v. Honeycutt (Cal. Sept. 20, 1946), 29 Cal. 2d 52, 172 P.2d 698, 1946 Cal. LEXIS 274; People v. Edqmon (Cal. App. 3d Dist. Nov. 29, 1968), 267 Cal. App. 2d 759, 73 Cal. Rptr. 634, 1968 Cal. App. LEXIS 1449.

The jury was correctly advised that the adjective "deliberate" and the verb "premeditate" were used in the instructions in their common, well known dictionary meanings; specifically that "deliberate" meant formed, arrived at, or determined on as a result of careful thought and weighing of considerations, and that "premeditate" meant to

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think on and revolve in the mind beforehand, to contrive and design previously. People v. Honeycutt (Cal. Sept. 20, 1946), 29 Cal. 2d 52, 172 P.2d 698, 1946 Cal. LEXIS 274.

A homicide is murder of first degree when the accused, as result of deliberation and premeditation, intended to take unlawfully the life of another. People v. Sutic (Cal. Sept. 22, 1953), 41 Cal. 2d 483, 261 P.2d 241, 1953 Cal. LEXIS 294.

Murder is of first degree regardless of how quickly act of killing follows ultimate formation of intention if that intention has been reached with deliberation and premeditation. People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

Deliberation and premeditation which must accompany homicide to characterize it as first degree murder is not synonymous with malice aforethought. People v. Bush (Cal. App. 2d Dist. Jan. 13, 1960), 177 Cal. App. 2d 117, 2 Cal. Rptr. 29, 1960 Cal. App. LEXIS 2437.

Presence of premeditation or absence thereof is to be determined from consideration of type of weapon employed and manner of its use; nature of wound suffered by deceased; fact that attack was unprovoked and that deceased was unarmed at time of assault; conduct of defendant in disposing of body, his conduct thereafter, and any other evidence from which inference of premeditation may reasonably be drawn. People v. Feasby (Cal. App. 2d Dist. Mar. 9, 1960), 178 Cal. App. 2d 723, 3 Cal. Rptr. 230, 1960 Cal. App. LEXIS 2647; People v. Lewis (Cal. App. 2d Dist. June 17, 1963), 217 Cal. App. 2d 246, 31 Cal. Rptr. 817, 1963 Cal. App. LEXIS 1903.

In a prosecution for murder, evidence of the circumstances at the time of the killing, as well as the circumstances before and after the killing, is competent to show deliberation and premeditation; the manner and means employed to accomplish the killing are also important considerations in determining the degree of murder. People v. Theriot (Cal. App. 1st Dist. June 30, 1967), 252 Cal. App. 2d 222, 60 Cal. Rptr. 279, 1967 Cal. App. LEXIS 1501.

Facts which are ingredients in determining whether a killing was premeditated and deliberate include the following: prior quarrels between the defendant and the deceased; the use of a knife; the fact that the wounds were not wild and unaimed but were in the area of the chest and heart; and the fact that defendant went to get a weapon. People v. Paton (Cal. App. 3d Dist. Oct. 24, 1967), 255 Cal. App. 2d 347, 62 Cal. Rptr. 865, 1967 Cal. App. LEXIS 1281.

First degree murder may be found even though the act of killing quickly follows the formation of the intention to kill if that intent was reached with deliberation and premeditation. People v. Paton (Cal. App. 3d Dist. Oct. 24, 1967), 255 Cal. App. 2d 347, 62 Cal. Rptr. 865, 1967 Cal. App. LEXIS 1281.

The brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation; and if the evidence in a murder case shows no more than the infliction of multiple acts of violence on the victim, it is not sufficient to show that the killing was the result of careful thought and weighing of considerations. People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

In defining first degree murder, the Legislature did not intend to give the words "deliberate" and "premeditated" other than their ordinary dictionary meanings; and the legislative classification of murder in the two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill. People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

In the context of murder in the first degree, the time during which the thought of killing must be pondered before it can ripen into an intent which is truly "deliberate and premeditated" (Pen C § 189) varies with different individuals and different circumstances, the true test being not the duration of time as much as the extent of the reflection. People v. Risenhoover (Cal. Dec. 23, 1968), 70 Cal. 2d 39, 73 Cal. Rptr. 533, 447 P.2d 925, 1968 Cal. LEXIS 217, cert. denied, (U.S. 1969), 396 U.S. 857, 90 S. Ct. 123, 24 L. Ed. 2d 108, 1969 U.S. LEXIS 1055.

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Deliberation means careful consideration and an examination of the reasons for and against a choice or measure; it is an antonym of hasty, impetuous, rash, and impulsive. People v. Edmon (Cal. App. 3d Dist. Nov. 29, 1968), 267 Cal. App. 2d 759, 73 Cal. Rptr. 634, 1968 Cal. App. LEXIS 1449.

When it is claimed that a killing is by a wilful deliberation and premeditation other than poisoning, lying in wait, or by torture, there is the necessity of an appraisal involving something more than objective facts; there must be reflection and it must be substantially more than may be involved in a specific intent to kill. People v. Edmon (Cal. App. 3d Dist. Nov. 29, 1968), 267 Cal. App. 2d 759, 73 Cal. Rptr. 634, 1968 Cal. App. LEXIS 1449.

Under Pen C § 189, providing that murder in the first degree includes any "willful, deliberate, and premeditated killing," the words "deliberate" and "premeditated" are not words of art but are to be construed in their ordinary dictionary meaning. People v. Orabuena (Cal. App. 2d Dist. Mar. 25, 1976), 56 Cal. App. 3d 540, 128 Cal. Rptr. 474, 1976 Cal. App. LEXIS 1380.

In a prosecution for the attempted murder of defendant's half-sister and the murder of her two sons, the evidence was sufficient to sustain first degree murder convictions on a theory of premeditation and deliberation where several of defendant's actions, such as obtaining a kitchen knife in advance of the killings and confining the boys to a closet while assaulting their mother, constituted evidence of planning activity, and, where defendant's demonstrated concern that the boys might jeopardize his escape or assist in his apprehension, provided a motive for their killing. Defendant could have also concluded that the mother was dead and that by killing the boys he would eliminate the only witnesses to his crimes. People v. Haskett (Cal. Feb. 18, 1982), 30 Cal. 3d 841, 180 Cal. Rptr. 640, 640 P.2d 776, 1982 Cal. LEXIS 152.

In a murder prosecution submitted to the trial court for determination based upon the evidence presented at the preliminary hearing, the evidence established that defendant intended to, and did, kill the victim, who was strangled by an electrical cord in defendant's apartment; however, the evidence was insufficient to support a verdict for first degree murder. The record contained little to show planning activity directed toward and explicable as intended to result in the killing, even though defendant concealed the presence of the victim, a female, from his live-in female companion. Further, there was no evidence that defendant knew the victim prior to the night at issue and evidence that he took her home in hopes of a sexual interlude failed to provide a motive for murder. Finally, a deliberate intent to kill, although shown by strangulation with an electrical cord, was a means of establishing malice aforethought and was thus an element of second degree murder in the circumstances of the case. However, the manner of killing was not so particular and exacting as to support a finding of premeditation and deliberation. People v. Rowland (Cal. App. 3d Dist. June 25, 1982), 134 Cal. App. 3d 1, 184 Cal. Rptr. 346, 1982 Cal. App. LEXIS 1830.

In order for a murder to be first degree based on a theory of premeditation and deliberation, the intent to kill must have been formed upon a preexisting reflection and must have been the subject of actual deliberation and forethought. A finding of first degree murder due to premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to preconceived design. People v. Rowland (Cal. App. 3d Dist. June 25, 1982), 134 Cal. App. 3d 1, 184 Cal. Rptr. 346, 1982 Cal. App. LEXIS 1830.

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Pen C § 189 (first degree murder), was amended in 1981 to remove from the elements of deliberation and premeditation the requirement that the defendant maturely and meaningfully reflect on his or her acts. Those elements now are proved when the trier of fact concludes not merely that the defendant harbored an intent to kill,

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but when that intent was the result of forethought and deduction, and when careful thought and a weighing of considerations are demonstrated. Those elements are not negated by evidence that a defendant's mental condition was abnormal or his or her perception of reality delusional unless those conditions resulted in the failure to plan or weigh considerations for and against the proposed course of action. People v. Stress (Cal. App. 4th Dist. Nov. 15, 1988), 205 Cal. App. 3d 1259, 252 Cal. Rptr. 913, 1988 Cal. App. LEXIS 1061.

In a capital homicide prosecution, the trial court's jury instruction concerning first degree murder by lying in wait (Pen C § 189) was adequate. The court instructed according to CALJIC No. 8.25. Even if the instruction was interpreted as relieving the prosecutor of having to independently prove premeditation and deliberation, lying in wait is the functional equivalent of proof of premeditation, deliberation and intent to kill. Thus, a showing of lying in wait obviates the necessity of separately proving premeditation and deliberation, and imposition of a requirement of independent proof of premeditation, deliberation, or intent to kill would be a matter for legislative consideration. The Legislature has made amendments to Pen C § 189, without reflecting any disagreement with the judicial determination that a defendant need only have a mental state equivalent to premeditation and deliberation. People v. Hardy (Cal. Mar. 12, 1992), 2 Cal. 4th 86, 5 Cal. Rptr. 2d 796, 825 P.2d 781, 1992 Cal. LEXIS 974, modified, (Cal. May 14, 1992), 2 Cal. 4th 758a, 1992 Cal. LEXIS 2443, cert. denied, (U.S. Jan. 11, 1993), 506 U.S. 1056, 113 S. Ct. 987, 122 L. Ed. 2d 139, 1993 U.S. LEXIS 174.

In a prosecution for first degree murder, arising from an incident in which the intended victim of a robbery accidentally shot his fiancé while attempting to protect her from defendant who was threatening her with a submachine gun, any error in the trial court's instructions to the jury during voir dire regarding the provocative act theory was immaterial. All of the jury instructions, taken as a whole, stated the rule of the provocative act theory fully and clearly. The fact the trial court did not explain all elements of the doctrine at the beginning of the jury selection process did not devalue the complete written instructions delivered to the jury before they began deliberations, which properly defined all relevant elements of the provocative act doctrine. Jury instructions must be considered in their entirety. Whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court. People v. Kainzrants (Cal. App. 2d Dist. May 22, 1996), 45 Cal. App. 4th 1068, 53 Cal. Rptr. 2d 207, 1996 Cal. App. LEXIS 480.

The evidence was sufficient to support defendant's first degree murder conviction on the provocative act doctrine theory, where defendant, with a submachine gun, attempted to rob a man, the man grabbed his handgun, and, in response to defendant's threat that he would kill the man's fiancée, the man reemerged from the house and accidentally shot and killed his fiancée. The law requires the life-threatening act on which liability is premised to be a proximate cause of death apart from and beyond the underlying felony. The jury could properly find that defendant's threat was a life-threatening act, since he chose to endanger the fiancée's life above and beyond the intended felony against the man and his property. Furthermore, defendant dramatically increased the risk of severe injuries and even death for the fiancée by holding her by the neck and holding a submachine gun to her head. Hence, the act provoking lethal resistance was not the attempted robbery, but the subsequent threat to the fiancée's life, and the man's reaction was neither unreasonable nor unforeseeable. Additionally, from the fact that defendant's gun jammed surprised him, the jury could have concluded that defendant fired the first shot. In any event, a gun battle can be initiated by acts of provocation falling short of firing the first shot. People v. Kainzrants (Cal. App. 2d Dist. May 22, 1996), 45 Cal. App. 4th 1068, 53 Cal. Rptr. 2d 207, 1996 Cal. App. LEXIS 480.

In a murder prosecution in which the evidence did not establish whether defendant or his codefendant, rival gang members, fired the shot that killed the victim, an innocent bystander, the circumstance that it could not be determined who fired the single fatal bullet did not undermine defendant's conviction under either of the two first degree murder theories advanced against him at trial—premeditation and murder by means of intentionally discharging a firearm from a motor vehicle (Pen C § 189). Defendant's act of engaging the codefendant in a gun battle and attempting to murder him was a substantial concurrent, and hence proximate, cause of the bystander's death through operation of the doctrine of transferred intent. All that remained to be proved was defendant's culpable mens rea (premeditation and malice) in order to support his conviction of premeditated first degree murder. Even without a showing of premeditation, if defendant was shown to have intentionally discharged his firearm from

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a motor vehicle with the specific intent to inflict death, then his crime was murder in the first degree by operation of § 189. People v. Sanchez (Cal. Aug. 27, 2001), 26 Cal. 4th 834, 111 Cal. Rptr. 2d 129, 29 P.3d 209, 2001 Cal. LEXIS 5485.

Cal. Penal Code § 189 deliberate and premeditated first degree murder, requiring more than mere intent to kill, was shown where defendant armed himself in the early morning hours with two concealed and loaded handguns, argued with the victim in the apartment they shared, pursued the victim when the victim sought refuge in the apartment offices located in a different apartment in the complex, persisted in the argument as the victim walked back and forth in the hallway, entered the office, locked the door, pulled a handgun from the waistband of his pants, demanded the victim's car keys, fired a shot at the victim's abdomen, and then took active steps to prevent another from summoning medical care without which the victim was sure to die. People v. Koontz (Cal. May 9, 2002), 27 Cal. 4th 1041, 119 Cal. Rptr. 2d 859, 46 P.3d 335, 2002 Cal. LEXIS 2882, cert. denied, (U.S. Jan. 13, 2003), 537 U.S. 1117, 123 S. Ct. 881, 154 L. Ed. 2d 794, 2003 U.S. LEXIS 18.

Substantial evidence supported the jury's finding of premeditation and deliberation because defendant stated that he saw the reflection of his wife's niece in the bathroom mirror before turning around and stabbing her. Because the niece saw defendant in the bathroom covered in his wife's blood and carrying a knife as he attempted to clean up after killing his wife, the jury could infer that defendant killed the niece to prevent her from informing the police and ultimately testifying as a witness against him. People v. San Nicolas (Cal. Dec. 6, 2004), 34 Cal. 4th 614, 21 Cal. Rptr. 3d 612, 101 P.3d 509, 2004 Cal. LEXIS 11655, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 46, 163 L. Ed. 2d 79, 2005 U.S. LEXIS 6148.

In a federal habeas corpus proceeding brought to challenge a state murder conviction, inferences of deliberation and premeditation based upon past acts of domestic violence were sufficient to support a conviction for murder in the first degree under Pen C § 189, and instructions concerning such inferences did not have the effect of permitting a conviction on less than the reasonable doubt standard. Smith v. Piller (N.D. Cal. Aug. 15, 2003), 278 F. Supp. 2d 1060, 2003 U.S. Dist. LEXIS 14443.

Evidence was sufficient to support a conviction of first degree murder by premeditation and deliberation; there was considerable evidence that defendant poured a flammable liquid directly on the victim while she was asleep or half asleep and ignited it after she awoke, and a review of the entire record showed additional evidence from which a rational jury could find beyond a reasonable doubt that defendant committed a premeditated and deliberate murder. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Evidence supported the jury's first degree murder verdict, where the evidence showed that defendant tied the victim's hands with duct tape and blindfolded him before shooting him in the head a single time from within two inches; the jury could reasonably infer a motive-the desire to prevent anybody from identifying defendant. People v. Horing (Cal. Dec. 16, 2004), 34 Cal. 4th 871, 22 Cal. Rptr. 3d 305, 102 P.3d 228, 2004 Cal. LEXIS 11890, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 45, 163 L. Ed. 2d 77, 2005 U.S. LEXIS 6140.

Sufficient evidence supported a conviction for first degree murder under a theory of willful, deliberate, and premeditated murder because planning was suggested by defendant's arming himself prior to the attack, the total vulnerability of the victim, and the previously selected remote spot for the killing. The method of killing also suggests premeditation; the victim suffered three potentially lethal knife wounds, 80 other stab and slash wounds to her body, and four postmortem gunshot wounds. People v. Elliot (Cal. Nov. 28, 2005), 37 Cal. 4th 453, 35 Cal. Rptr. 3d 759, 122 P.3d 968, 2005 Cal. LEXIS 13254, cert. denied, (U.S. Oct. 2, 2006), 549 U.S. 853, 127 S. Ct. 121, 166 L. Ed. 2d 91, 2006 U.S. LEXIS 6687.

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt where the prosecution argued that: (1) the defendant's motive for the killing was to preserve his image as a "tough guy" who didn't "take nothin' from nobody"; (2) as for planning, the defendant decided to get a baseball bat in the garage, went back out to the scene of the confrontation, concealed

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the bat behind his back, and hit the victims from behind without any warning; and (3) the manner of the killing showed premeditation and deliberation because it was not a frenzied attack, resulting from an emotional outburst, but was a cold calculated kind of killing being a swing delivered with tremendous force at a very vulnerable part of the body. Adams v. Castro (N.D. Cal. Nov. 30, 2005), 2005 U.S. Dist. LEXIS 34338, aff'd, (9th Cir. Cal. Mar. 8, 2007), 224 Fed. Appx. 623, 2007 U.S. App. LEXIS 5859.

Evidence of preexisting motive and planning activity was by itself sufficient to support a first degree murder conviction on a theory of premeditation and deliberation under Pen C § 189. The evidence showed that defendant had a motive to kill the victim to prevent her from revealing his planned killing of another victim and that he obtained a cord and lured the victim to a particular place to facilitate his planned strangulation. People v. Jurado (Cal. Apr. 6, 2006), 38 Cal. 4th 72, 41 Cal. Rptr. 3d 319, 131 P.3d 400, 2006 Cal. LEXIS 4391, cert. denied, (U.S. Oct. 10, 2006), 549 U.S. 956, 127 S. Ct. 383, 166 L. Ed. 2d 276, 2006 U.S. LEXIS 7568.

Even if lying-in-wait evidence was insufficient for a conviction under Pen C §§ 187, 189, any error was harmless because there was sufficient evidence of defendant's premeditation and deliberation to sustain the first degree murder conviction on that theory: defendant told the victim to stay where he was, then went and retrieved a loaded shotgun and shot the victim three times. The mere fact that defendant approached initially with the shotgun pointed at the ground did not necessarily negate defendant's deliberation and premeditation. People v. Poindexter (Cal. App. 1st Dist. Oct. 31, 2006), 144 Cal. App. 4th 572, 50 Cal. Rptr. 3d 489, 2006 Cal. App. LEXIS 1716.

Evidence of premeditation and deliberation was sufficient to support a first degree murder verdict under Pen C §§ 187(a), 188, 189 because (1) with regard to planning, there was evidence that defendant noticed the victim sunbathing in a bikini up to two hours prior to the murder, giving defendant ample time to consider and plan the crime prior to a return to the scene; (2) with regard to motive, evidence of other crimes committed by defendant indicated animus against young white women; and (3) with regard to method, clustered stab wounds supported an inference of a deliberate killing. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

Evidence of premeditation and deliberation was sufficient to convict defendant of the murder of defendant's estranged spouse and parent-in-law because it showed that defendant and the spouse, who was then living with another person, had a tempestuous relationship; that it took defendant some time to complete the shootings; that defendant broke into the home in a violent and exacting manner; and that defendant took the time to reset his gun manually twice. People v. Gunder (Cal. App. 3d Dist. May 25, 2007), 151 Cal. App. 4th 412, 59 Cal. Rptr. 3d 817, 2007 Cal. App. LEXIS 846.

Evidence was sufficient for a jury to find that two murders were premeditated and deliberate under Pen C § 189 because it showed that defendant and a codefendant went to a known drug dealer's house to rob the dealer of drugs or money, that defendant carried a loaded gun, and that within seconds of entering the house, defendant was waving a loaded gun at the dealer and another victim, both of whom were unarmed. People v. Tafuya (Cal. Aug. 20, 2007), 42 Cal. 4th 147, 64 Cal. Rptr. 3d 163, 164 P.3d 590, 2007 Cal. LEXIS 8907, cert. denied, (U.S. Apr. 14, 2008), 552 U.S. 1321, 128 S. Ct. 1895, 170 L. Ed. 2d 764, 2008 U.S. LEXIS 3270.

Premeditation and deliberation were proven in a capital murder trial, despite an absence of motive evidence that was individual to the victims. Defendant's purposive actions in driving to seek out various persons and then killing them sufficiently indicated some motive for the killings; the motive might have been related to defendant's feelings about being in a desperate financial state, given that each of shooting locations had some connection, in defendant's mind, to the financial troubles. People v. Halvorsen (Cal. Aug. 30, 2007), 42 Cal. 4th 379, 64 Cal. Rptr. 3d 721, 165 P.3d 512, 2007 Cal. LEXIS 9352.

Methodical infliction of the burn wounds on a 19-month-old child provided sufficient evidence to support a finding of defendant's premeditated and deliberate intent to kill, especially in combination with evidence that defendant continually abused the victim, that defendant took advantage of a parent's absence to inflict the blows and burning

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oil torture that caused death, and that defendant initially dissuaded the parent from seeking medical help by lying to about the nature and extent of the injuries. People v. Whisenhunt (Cal. June 30, 2008), 44 Cal. 4th 174, 79 Cal. Rptr. 3d 125, 186 P.3d 496, 2008 Cal. LEXIS 7900, cert. denied, (U.S. Dec. 1, 2008), 555 U.S. 1053, 129 S. Ct. 638, 172 L. Ed. 2d 623, 2008 U.S. LEXIS 8689.

In a capital murder case, evidence was sufficient to support the jury's finding that killing was premeditated and deliberate, thus constituting murder in the first degree; victim was killed by a single gunshot fired from a gun placed against his head, and this execution-style killing supported a finding of premeditation and deliberation. People v. Romero (Cal. July 14, 2008), 44 Cal. 4th 386, 79 Cal. Rptr. 3d 334, 187 P.3d 56, 2008 Cal. LEXIS 8668, cert. denied, (U.S. Jan. 21, 2009), 555 U.S. 1142, 129 S. Ct. 1010, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 611.

That defendants convicted of first-degree murder participated in a confrontation with the victim during which threats to kill him were uttered, chased the victim for a quarter mile with deadly weapons, and participated in one fashion or another in the repeated and brutal stabbing and beating of the victim after cornering him, proved the reflection in advance and weighing of considerations sufficient to establish that it was clear beyond a reasonable doubt that a rational jury would have found that both defendants premeditated and deliberated. In sum, once the jury found the necessary intent to commit murder, in view of the circumstances, premeditation and deliberation were readily apparent, and, given the facts and findings, the trial court's error in failing to instruct the jury that "for a defendant to be found guilty of first degree murder, he personally had to have acted willfully, deliberately and with premeditation when he committed the attempted murder" was harmless under the Neder standard. People v. Concha (Cal. App. 2d Dist. Mar. 11, 2010), 182 Cal. App. 4th 1072, 107 Cal. Rptr. 3d 272, 2010 Cal. App. LEXIS 324, modified, (Cal. App. 2d Dist. Mar. 30, 2010), 2010 Cal. App. LEXIS 428, modified, (Cal. App. 2d Dist. Mar. 30, 2010), 2010 Cal. App. LEXIS 536.

Record contained ample evidence to support defendant's conviction for first-degree premeditated murder where: (1) the jury reasonably could have inferred from his accomplice's testimony that, before shooting the victim, defendant had decided to rob the victim and, further, that defendant had decided to kill the victim after robbing him; (2) other evidence at trial reasonably supported the inference that defendant lured the victim to an isolated area to rob and kill him as part of a plan to obtain all the victim's worldly possessions; and (3) a reasonable jury could have inferred that defendant brought the victim to his accomplice, whom defendant had met in prison, in order to obtain the accomplice's assistance in committing the robbery and murder. The victim was killed by three gunshot wounds, one of which was immediately fatal, and the close-range shooting, without any provocation or evidence of a struggle, reasonably supported an inference of premeditation and deliberation. People v. Thompson (Cal. May 24, 2010), 49 Cal. 4th 79, 109 Cal. Rptr. 3d 549, 231 P.3d 289, 2010 Cal. LEXIS 4884, cert. denied, (U.S. Jan. 10, 2011), 562 U.S. 1146, 131 S. Ct. 919, 178 L. Ed. 2d 767, 2011 U.S. LEXIS 128.

In a capital murder trial, a finding of premeditation and deliberation under Pen C § 189 was reinforced by evidence of the shared characteristics of the murder victims, the common circumstances preceding and causing their deaths, and the sheer number of murders. The evidence showed that defendant, who had expressed enmity toward prostitutes in general, killed six prostitutes, four of them were bound, most were nude from the waist down, and all may have been asphyxiated; a reasonable jury could infer that, as to the second, third, fourth, and fifth victims, defendant had engaged in a preconceived, deliberate plan to sexually brutalize and kill street prostitutes. People v. Solomon (Cal. July 15, 2010), 49 Cal. 4th 792, 112 Cal. Rptr. 3d 244, 234 P.3d 501, 2010 Cal. LEXIS 6753, cert. denied, (U.S. Feb. 22, 2011), 562 U.S. 1232, 131 S. Ct. 1500, 179 L. Ed. 2d 328, 2011 U.S. LEXIS 1569.

In a case in which a defendant was convicted of the first degree murder of a police officer, the totality of the evidence was sufficient to support the jury's verdict. A rational trier of fact could have concluded defendant, knowing he illegally possessed a firearm, rapidly and coldly formed the idea to kill the officer and therefore acted after a period of reflection rather than on an unconsidered or rash impulse. People v. Brady (Cal. Aug. 9, 2010), 50 Cal. 4th 547, 113 Cal. Rptr. 3d 458, 236 P.3d 312, 2010 Cal. LEXIS 7625, cert. denied, (U.S. May 2, 2011), 563 U.S. 976, 131 S. Ct. 2874, 179 L. Ed. 2d 1191, 2011 U.S. LEXIS 3531.

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In a case in which a defendant was convicted of the first degree murder of a police officer, a rational trier of fact could have found that defendant feared his firearm would be discovered and decided to use it before the officer became aware of its existence. People v. Brady (Cal. Aug. 9, 2010), 50 Cal. 4th 547, 113 Cal. Rptr. 3d 458, 236 P.3d 312, 2010 Cal. LEXIS 7625, cert. denied, (U.S. May 2, 2011), 563 U.S. 976, 131 S. Ct. 2874, 179 L. Ed. 2d 1191, 2011 U.S. LEXIS 3531.

In a trial for three murders, the evidence supported findings that defendant had the premeditation and deliberation required for first degree murder, based on inferences that he rapidly and coolly concluded he needed to eliminate the victims as witnesses. People v. Booker (Cal. Jan. 20, 2011), 51 Cal. 4th 141, 119 Cal. Rptr. 3d 722, 245 P.3d 366, 2011 Cal. LEXIS 465.

There was sufficient evidence from which a jury could have found defendant guilty of first-degree murder on a premeditation and deliberation theory where: (1) defendant brought a loaded handgun with him on the night the victim was killed, indicating he had considered the possibility of a violent encounter; (2) the sequence of events, including defendant's pulling the victim from the car and shooting her after his frustrated sexual encounter, along with his statements that he killed her "because he didn't get his nut off" and because "she wouldn't give it up," was more than sufficient for the jury to find that defendant killed the victim because she refused to have sex with him; and (3) the manner of killing was calm and exacting, supporting a conclusion that it was the result of preexisting thought and reflection rather than an unconsidered rash impulse. People v. Lee (Cal. Feb. 24, 2011), 51 Cal. 4th 620, 122 Cal. Rptr. 3d 117, 248 P.3d 651, 2011 Cal. LEXIS 1830, cert. denied, (U.S. Oct. 3, 2011), 565 U.S. 919, 132 S. Ct. 340, 181 L. Ed. 2d 213, 2011 U.S. LEXIS 7104.

Evidence supported two defendants' convictions for the first-degree murders of two teenagers where no evidence was presented of provocation that could have reduced the murders to voluntary manslaughter, and where one of the defendants did and said things both before and after the shooting that indicated his intent to aid and abet the murders. People v. Gonzales and Soliz (Cal. July 28, 2011), 52 Cal. 4th 254, 128 Cal. Rptr. 3d 417, 256 P.3d 543, 2011 Cal. LEXIS 7683, cert. denied, (U.S. Mar. 26, 2012), 566 U.S. 908, 132 S. Ct. 1794, 182 L. Ed. 2d 622, 2012 U.S. LEXIS 2354, cert. denied, (U.S. Mar. 26, 2012), 566 U.S. 908, 132 S. Ct. 1796, 182 L. Ed. 2d 622, 2012 U.S. LEXIS 2456.

Defendant's conviction for first-degree murder based on a theory of premeditation and deliberation was proper where: (1) the evidence showed that he planned to use violence against the victim; (2) the jury could have reasonably concluded that he planned the precise manner of killing; and (3) the manner of killing itself demonstrated premeditation and deliberation. No one intentionally threw gasoline on a person and set them on fire if he or she did not intend to kill that person. People v. Streeter (Cal. June 7, 2012), 54 Cal. 4th 205, 142 Cal. Rptr. 3d 481, 278 P.3d 754, 2012 Cal. LEXIS 5207.

There was sufficient evidence to support a codefendant's conviction for first-degree murder where there was sufficient evidence that she perpetrated or aided and abetted a premeditated murder. Not only was there was circumstantial evidence that the codefendant helped defendant put the victim into the trunk of their car, there was evidence from which the jury could have concluded that the victim was alive at the time he was placed in the trunk, and the jury could have reasonably inferred that both defendants intended to kill the victim once they reached a different location. People v. Loza (Cal. App. 4th Dist. June 27, 2012), 207 Cal. App. 4th 332, 143 Cal. Rptr. 3d 355, 2012 Cal. App. LEXIS 755.

Substantial evidence supported defendant's conviction for the first degree murder of her boyfriend under the provocative act doctrine, where defendant, who recruited her boyfriend and her brother to assault the intended victim, handed the boyfriend a loaded rifle, but the intended victim wrested the rifle away and shot the boyfriend to death. In producing the rifle, defendant performed acts fraught with grave and inherent danger to human life. People v. Gonzalez (Cal. July 5, 2012), 54 Cal. 4th 643, 142 Cal. Rptr. 3d 893, 278 P.3d 1242, 2012 Cal. LEXIS 6359.

Sufficient evidence supported a first degree murder conviction based on either felony murder (premised on attempted robbery) or premeditated, deliberate murder. The evidence included that defendant and an accomplice

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had been on a robbery spree, they pulled up next to the victim's car, got out of the vehicle, and opened the hood, pretending to have car trouble, and defendant shot the victim as he walked hurriedly back toward his family. People v. Watkins (Cal. Dec. 17, 2012), 55 Cal. 4th 999, 150 Cal. Rptr. 3d 299, 290 P.3d 364, 2012 Cal. LEXIS 11375, modified, (Cal. Feb. 13, 2013), 2013 Cal. LEXIS 2436, modified, (Cal. Feb. 13, 2013), 2013 Cal. LEXIS 954.

Evidence that defendant shot his girlfriend in the face was sufficient to convict him for second degree murder but not first degree murder. His statement that he knew the gun was loaded, that he intentionally cocked the hammer, and that the hammer slipped was the only evidence of his intent and was sufficient to establish implied malice but not premeditation and deliberation. People v. Boatman (Cal. App. 4th Dist. Dec. 4, 2013), 221 Cal. App. 4th 1253, 165 Cal. Rptr. 3d 521, 2013 Cal. App. LEXIS 976.

In a trial for murder by strangulation, there was sufficient evidence of premeditation and deliberation because there was expert testimony that defendant strangled the victim with his hands for one to five minutes and applied approximately 15 to 30 pounds of pressure, supporting an inference that he had ample time to consider the consequences of his actions before choosing to end the victim's life. People v. Shamblin (Cal. App. 4th Dist. Apr. 21, 2015), 236 Cal. App. 4th 1, 186 Cal. Rptr. 3d 257, 2015 Cal. App. LEXIS 331.

Substantial evidence supported defendant's first-degree murder convictions based on a theory of premeditation and deliberation where he had taken a laundry basket with a concealed shotgun to his mother-in-law's home, shot her three times in rapid succession after entering the home, and then, instead of leaving, had stepped over or around her body and proceeded up the stairs to his brother-in-law's room, where he kicked in his brother-in-law's bedroom door and fatally shot him; there was a pattern of hostile, abusive conduct by defendant against his wife, daughter, and brother-in-law, and a rational jury could find he went to the house with the intent to exact retribution or revenge after his wife defied him by leaving with their children. People v. Cage (Cal. Dec. 3, 2015), 62 Cal. 4th 256, 195 Cal. Rptr. 3d 724, 362 P.3d 376, 2015 Cal. LEXIS 9480, cert. denied, (U.S. Oct. 3, 2016), 137 S. Ct. 94, 196 L. Ed. 2d 81, 2016 U.S. LEXIS 5331.

In a trial for first degree murder, reversible Brady error resulted from the prosecution's suppression of a material part of its deal with a key witness because the testimony was central to proving that defendant deliberated and premeditated the murder, rather than acting on an accomplice's command and in fear for his life. Shelton v. Marshall (9th Cir. Cal. Aug. 7, 2015), 796 F.3d 1075, 2015 U.S. App. LEXIS 13826, modified, (9th Cir. Nov. 23, 2015), 806 F.3d 1011, 2015 U.S. App. LEXIS 20276.

Evidence was sufficient to support a jury's finding that defendant committed a premeditated and deliberate murder where the jury could have reasonably concluded that defendant made certain phone calls while the victim, a police officer, was following his vehicle and held onto his gun when he exited the vehicle because he was planning to kill the victim. Furthermore, defendant's and the victim's history of past contentious encounters as well as defendant's comments to the driver of his vehicle provided evidence of a prior relationship and conduct from which the jury could have inferred a motive to kill the victim. People v. Rivera (Cal. May 23, 2019), 247 Cal. Rptr. 3d 363, 441 P.3d 359, 7 Cal. 5th 306, 2019 Cal. LEXIS 3507.

11. First Degree Murder: Conspiracy

Evidence supported defendant's first-degree murder conviction on a conspiracy theory of liability where it showed that he conspired with his brother to kill the victim and was personally responsible for luring her to the alley where she was shot to death. Additionally, defendant was liable for the victim's murder based on the acts taken by his brother to carry out the crime that was the object of the conspiracy. People v. Lopez (Cal. June 13, 2013), 56 Cal. 4th 1028, 157 Cal. Rptr. 3d 570, 301 P.3d 1177, 2013 Cal. LEXIS 4702, cert. denied, (U.S. Apr. 7, 2014), 572 U.S. 1047, 134 S. Ct. 1788, 188 L. Ed. 2d 759, 2014 U.S. LEXIS 2534, overruled in part, People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816.

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Substantial evidence supported defendant's first-degree murder conviction on a theory of conspiracy where the evidence collectively supported an inference that the parties, including defendant, positively or tacitly came to a mutual understanding to murder the victim; as the object of the conspiracy was to kill the victim, his murder satisfied the element of an overt act committed in furtherance of the conspiracy. People v. Maciel (Cal. Aug. 8, 2013), 57 Cal. 4th 482, 160 Cal. Rptr. 3d 305, 304 P.3d 983, 2013 Cal. LEXIS 6648, modified, (Cal. Oct. 2, 2013), 2013 Cal. LEXIS 7980, cert. denied, (U.S. Apr. 21, 2014), 572 U.S. 1065, 134 S. Ct. 1884, 188 L. Ed. 2d 921, 2014 U.S. LEXIS 2653.

There was substantial evidence to find that defendant committed first-degree murder by means of torture and to support a torture-murder special-circumstance finding where a reasonable jury could infer from evidence of defendant's intense possessiveness and all-consuming suspicions that the victim was using him financially and cheating on him with another man, coupled with his dousing her and her car with accelerant and lighting them on fire, that defendant intended to inflict severe pain on the victim for the purpose of revenge; the record indicated that defendant had strangled the victim into unconsciousness but was aware that she was not dead when he set her car on fire. People v. Brooks (Cal. , 216 Cal. Rptr. 3d 528, 393 P.3d 1, 2 Cal. 5th 674, 2017 Cal. LEXIS 1794), reprinted, sub. op., (Cal. Mar. 20, 2017), 219 Cal. Rptr. 3d 331, 396 P.3d 480, 3 Cal. 5th 1, 2017 Cal. LEXIS 4213, modified, (Cal. May 31, 2017), 2017 Cal. LEXIS 4216, modified, (Cal. June 19, 2017), 2017 Cal. LEXIS 4211.

12. Killing by Poison, Lying in Wait, or Torture: Generally

The term "concealed" is not synonymous with "lying in wait"; if a person conceals himself for the purpose of shooting another unawares, he is lying in wait, but a person may, while concealed, shoot another without committing the crime of murder. People v. Miles (Cal. Apr. 1, 1880), 55 Cal. 207, 1880 Cal. LEXIS 233.

Where the defendants, lying in ambush, shot and killed the deceased, who was a member of a posse, knowing nothing of any hostile intent against them, nor whether a warrant had been issued for their arrest, the killing of the deceased was wanton, and a verdict of first degree murder was not erroneous. PEOPLE v. BROWN (Cal. July 1, 1881), 59 Cal. 345, 1881 Cal. LEXIS 379.

Where murder is perpetrated by means of poison, or lying in wait, or torture, it is first degree murder, the means adopted for the unlawful killing furnishing evidence of wilfulness, deliberation, and premeditation. People v. Milton (Cal. Oct. 26, 1904), 145 Cal. 169, 78 P. 549, 1904 Cal. LEXIS 560.

When evidence of poisoning is purely circumstantial, burden rests upon prosecution to show that it is not only consistent with hypothesis of guilt, but is inconsistent with any other reasonable hypothesis. People v. Staples (Cal. July 10, 1906), 149 Cal. 405, 86 P. 886, 1906 Cal. LEXIS 262, limited, People v. Miller (Cal. App. Oct. 21, 1940), 41 Cal. App. 2d 252, 106 P.2d 239, 1940 Cal. App. LEXIS 233.

Where the evidence justified a finding by the jury that the homicide committed by the defendant was "by lying in wait," the killing constituted first degree murder. People v. Vukich (Cal. June 1, 1927), 201 Cal. 290, 257 P. 46, 1927 Cal. LEXIS 470.

One who kills by torture or poison may intend only to inflict suffering, not death, but a killing by such means is murder of the first degree, not because the killing is wilful, deliberate and premeditated, but because this section so defines the crime. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

Where a murder is shown to have been committed by "lying in wait" a showing of specific intent is unnecessary to fix the degree, such offense having been designated as first degree murder by this section. People v. Thomas (Cal. Sept. 18, 1953), 41 Cal. 2d 470, 261 P.2d 1, 1953 Cal. LEXIS 293.

It is proper to instruct jury that murder which is perpetrated by lying in wait is declared by law to be first degree murder and that, if jury should find that defendant committed the crime, it would have no choice but to designate

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offense as first degree murder. People v. Thomas (Cal. Sept. 18, 1953), 41 Cal. 2d 470, 261 P.2d 1, 1953 Cal. LEXIS 293.

If killing is committed by lying in wait, it is murder of first degree and question of premeditation is not further involved. People v. Bvrd (Cal. Feb. 4, 1954), 42 Cal. 2d 200, 266 P.2d 505, 1954 Cal. LEXIS 167, cert. denied, (U.S. 1954), 348 U.S. 848, 75 S. Ct. 73, 99 L. Ed. 668, 1954 U.S. LEXIS 1867, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274.

It is prejudicial error to give instruction on lying in wait where, though there is evidence that defendant was the man who had been sitting in automobile near decedent's shop for some time prior to date of crime, there is no evidence tending to show that defendant made any attempt to conceal himself or to keep his presence in vicinity of shop a secret, and where last time his car was shown to have been parked in vicinity was two days before crime. People v. Merkouris (Cal. May 25, 1956), 46 Cal. 2d 540, 297 P.2d 999, 1956 Cal. LEXIS 210.

To constitute lying in wait, elements of waiting, watching and concealment must be present. People v. Merkouris (Cal. May 25, 1956), 46 Cal. 2d 540, 297 P.2d 999, 1956 Cal. LEXIS 210.

Fact that just before fatal shooting victim discovered presence of defendant, who had concealed himself behind garage, did not prevent crime from being committed by lying in wait. People v. McNeal (Cal. App. 1st Dist. May 14, 1958), 160 Cal. App. 2d 446, 325 P.2d 166, 1958 Cal. App. LEXIS 2138.

Elements necessary to constitute murder by lying in wait are watching, waiting, and concealment from person killed with intention of inflicting bodily injury on such person or killing such person. People v. Atchley (Cal. Dec. 1, 1959), 53 Cal. 2d 160, 346 P.2d 764, 1959 Cal. LEXIS 330, cert. dismissed, (U.S. May 1, 1961), 366 U.S. 207, 81 S. Ct. 1051, 6 L. Ed. 2d 233, 1961 U.S. LEXIS 1233.

Instructions as to killing by lying in wait did not eliminate malice aforethought as essential ingredient of murder so perpetrated where they made clear that though specific intent to kill is not required to commit murder by lying in wait, it was necessary that there be intentional inflicting of bodily injury on person killed under circumstances likely to cause her death. People v. Mason (Cal. May 17, 1960), 54 Cal. 2d 164, 4 Cal. Rptr. 841, 351 P.2d 1025, 1960 Cal. LEXIS 156.

Lying-in-wait is sufficiently shown by proof of concealment and watchful waiting. People v. Rosoto (Cal. Aug. 2, 1962), 58 Cal. 2d 304, 23 Cal. Rptr. 779, 373 P.2d 867, 1962 Cal. LEXIS 263, cert. denied, (U.S. 1963), 372 U.S. 952, 83 S. Ct. 950, 9 L. Ed. 2d 977, 1963 U.S. LEXIS 1915, cert. denied, (U.S. 1963), 372 U.S. 955, 83 S. Ct. 953, 9 L. Ed. 2d 978, 1963 U.S. LEXIS 1927, modified, (Cal. Apr. 29, 1965), 62 Cal. 2d 684, 43 Cal. Rptr. 828, 401 P.2d 220, 1965 Cal. LEXIS 288, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238; People v. Harrison (Cal. May 21, 1963), 59 Cal. 2d 622, 30 Cal. Rptr. 841, 381 P.2d 665, 1963 Cal. LEXIS 192.

To support murder by torture, evidence must demonstrate that assailant's intent was to cause cruel suffering on part of object of attack, either for purposes of revenge, extortion, persuasion, or to satisfy some other untoward propensity. People v. Anderson (Cal. Oct. 1, 1965), 63 Cal. 2d 351, 46 Cal. Rptr. 763, 406 P.2d 43, 1965 Cal. LEXIS 191.

Although suffering alone is not sufficient to establish the requisite intent to murder by torture (Pen C § 189), nevertheless such intent may be inferred from the condition of the decedent's body. People v. Washington (Cal. Sept. 16, 1969), 71 Cal. 2d 1061, 80 Cal. Rptr. 567, 458 P.2d 479, 1969 Cal. LEXIS 305.

Where malice with respect to a killing is implied as a result of the commission of an act whose natural consequences are dangerous to life and which was deliberately committed by a person knowing that his conduct endangered another person's life, and acting with conscious disregard for life, murder by poison is murder in the first degree. On the other hand, malice implied solely as a result of a violation of Pen Code, § 347, making

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poisoning a felony, will support only a second degree murder conviction, so that a killing that constitutes murder solely because it results from violation of Pen Code, § 347, is not first degree murder perpetrated by means of poison, within the meaning of Pen Code, § 189. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

On appeal from a first degree murder conviction, defendant could not successfully argue that a specific intent to kill must be independently shown for murder by lying in wait to be first degree murder. Pen C § 189, defining first degree murder as all murder perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, leaves no doubt that if a murder is perpetrated by means of lying in wait, it need not be independently determined to have been wilful, deliberate, and premeditated. People v. Dickerson (Cal. App. 2d Dist. Feb. 23, 1972), 23 Cal. App. 3d 721, 100 Cal. Rptr. 533, 1972 Cal. App. LEXIS 1248.

Once it has been established that a murder has occurred, the "lying in wait" theory (Pen C § 189) is used to determine its degree. People v. Ward (Cal. App. 2d Dist. Aug. 15, 1972), 27 Cal. App. 3d 218, 103 Cal. Rptr. 671, 1972 Cal. App. LEXIS 842.

In a prosecution for murder where "lying in wait" (Pen C § 189) is present, and the jury has determined that the killing in question amounts to murder, then questions of defendant's wilfulness, deliberation and premeditation are taken from the jury by the force of the statute. People v. Ward (Cal. App. 2d Dist. Aug. 15, 1972), 27 Cal. App. 3d 218, 103 Cal. Rptr. 671, 1972 Cal. App. LEXIS 842.

While concealment is a necessary element for the application of lying in wait theory to a murder, a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise is sufficient. People v. Ward (Cal. App. 2d Dist. Aug. 15, 1972), 27 Cal. App. 3d 218, 103 Cal. Rptr. 671, 1972 Cal. App. LEXIS 842.

In a murder prosecution, the trial court properly instructed the jury on the theory of murder by means of lying in wait, where there was evidence that defendant and a companion left a bar after an argument with the victim, that they were later seen several times driving through the bar parking lot watching the bar door, and that after the victim and a woman left the bar and entered her car, defendant and his companion drove by once more and that defendant then appeared at the door of the parked car and spoke before the victim was aware of his presence and immediately thereafter shot the victim. Thus, there was evidence from which the jury could have concluded that defendant was waiting for the victim with the intention of killing or inflicting injury upon him, and that the killing was accomplished by the means of his watching and waiting in concealment. People v. Benjamin (Cal. App. 5th Dist. Oct. 9, 1975), 52 Cal. App. 3d 63, 124 Cal. Rptr. 799, 1975 Cal. App. LEXIS 1434.

In order to justify a verdict of murder by lying in wait, the prosecution must not only show the elements of waiting, watching, and concealment, but must also show that the defendant performed these acts in order to take his victim unawares and thereby facilitate his attack on the victim. People v. McDermid (Cal. App. 1st Dist. Nov. 19, 1984), 162 Cal. App. 3d 770, 211 Cal. Rptr. 773, 1984 Cal. App. LEXIS 2725, overruled in part, People v. Davis (Cal. June 1, 2009), 46 Cal. 4th 539, 94 Cal. Rptr. 3d 322, 208 P.3d 78, 2009 Cal. LEXIS 4707.

Pen C § 189, which provides that all murder which is perpetrated by means of lying in wait is murder of the first degree, assumes that if the means of the murder are by lying in wait, those means adequately establish the murder as the equivalent to a premeditated murder without any additional evidence of the defendant's mental state. Nonetheless, the prosecution must first establish a murder within the meaning of Pen C § 187, that is, a killing with malice, before the means of the killing take on significance. People v. Hyde (Cal. App. 4th Dist. Apr. 1, 1985), 166 Cal. App. 3d 463, 212 Cal. Rptr. 440, 1985 Cal. App. LEXIS 1848.

In a prosecution for first degree murder, burglary, robbery, and arson, the trial court's instruction to the jury on "lying in wait" was not defective, notwithstanding that it did not inform the jury that physical concealment is a required element of lying in wait. The concealment that is required is that which puts the defendant in a position of

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advantage, from which the fact finder can infer that lying in wait was part of the defendant's plan to take the victim by surprise. It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct; it is not required that he be literally concealed from view before he attacks the victim. People v. Berberena (Cal. App. 1st Dist. Apr. 21, 1989), 209 Cal. App. 3d 1099, 257 Cal. Rptr. 672, 1989 Cal. App. LEXIS 375.

Provocation, no matter the means of proving it, is not a defense to murder by lying in wait or conspiracy to commit murder. Although provocation serves to reduce a murder from first to second degree, second degree murder by lying in wait and conspiracy to commit second degree murder do not exist as crimes in California. People v. Battle (Cal. App. 3d Dist. Aug. 9, 2011), 198 Cal. App. 4th 50, 129 Cal. Rptr. 3d 828, 2011 Cal. App. LEXIS 1035.

13. Lying In Wait

A defendant's statement that he had lain in wait to catch the woman with whom he had been living, irrespective of whether it referred to a particular occasion or other occasions when assertedly he had caught her leaving their home surreptitiously, did not on its face constitute an admission of lying in wait to commit murder. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

In a prosecution for first degree murder, burglary, robbery, and arson, the trial court's instruction that murder preceded by lying in wait is murder of the first degree and that lying in wait is a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret desire to take the person by surprise, did not fail to inform the jury as to the intent element of lying in wait. The jury was also informed that it must find that the victim was murdered either intentionally or by means of an intentional act dangerous to life, performed with knowledge of the danger and conscious disregard therefor. Absent evidence that the murderer entertained an intent while lying in wait to commit an act different from that which immediately thereafter resulted in the victim's murder, the jury may properly infer that both acts were motivated by the same intent. Further, there was no prejudicial harm in the court's use of "secret desire" instead of "secret design." People v. Berberena (Cal. App. 1st Dist. Apr. 21, 1989), 209 Cal. App. 3d 1099, 257 Cal. Rptr. 672, 1989 Cal. App. LEXIS 375.

In a capital homicide prosecution, there was sufficient evidence of lying in wait to justify the giving of a jury instruction (CALJIC No. 8.25). Defendants did not merely plan to kill the victims at a set time and place. The evidence showed defendants drove to the victims' home in the early morning hours, parking on a side street so as to avoid drawing attention to their activities. The jury could reasonably infer that they chose this time of night because it could be expected the victims would be asleep. Defendants used a key obtained from one victim's husband to silently gain access, cutting the chain door lock with bolt cutters. In addition, they rotated the light bulb in the porch light to break the connection. Thus cloaked in darkness, they traversed the hallway to the bedrooms and killed the victims. From this evidence, the jury could reasonably conclude defendants concealed their murderous intention and struck from a position of surprise and advantage, factors which are the hallmark of a murder by lying in wait. It was not necessary to show that defendants actually watched the victims sleeping and waited a moment before attacking them. People v. Hardy (Cal. Mar. 12, 1992), 2 Cal. 4th 86, 5 Cal. Rptr. 2d 796, 825 P.2d 781, 1992 Cal. LEXIS 974, modified, (Cal. May 14, 1992), 2 Cal. 4th 758a, 1992 Cal. LEXIS 2443, cert. denied, (U.S. Jan. 11, 1993), 506 U.S. 1056, 113 S. Ct. 987, 122 L. Ed. 2d 139, 1993 U.S. LEXIS 174.

In a prosecution for first degree murder, the evidence sufficed to support all the elements of lying-in-wait murder (Pen. Code, § 189), and instructions on that theory hence were proper. The jury could reasonably find that defendant sought and obtained a position of advantage before he shot his estranged girlfriend, on testimony of numerous witnesses as to his previous history with the victim, which provided a motive; that he waited until a social worker was talking with the occupants before he approached the house, using a bag of clothes as his excuse; that he parked his truck near the backyard gate, which the jury could reasonably infer was intended to provide escape after he lured the victim there alone and shot her; that he lured her to the front yard, a more isolated area than the house, when she refused to go to the back; and that he concealed on his person a loaded gun well before any alleged argument arose. Even though she resisted long enough to cry for help, and for others to run out and

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witness the shooting, this did not vitiate the lying in wait. People v. Ceja (Cal. Mar. 18, 1993), 4 Cal. 4th 1134, 17 Cal. Rptr. 2d 375, 847 P.2d 55, 1993 Cal. LEXIS 1179.

An instruction given by the trial court in defendant's prosecution for murder by lying in wait (CALJIC No. 8.25) was not defective for failing to require a finding that the act of "lying in wait" was with the intention of killing or physically injuring the victim as opposed to a concealment intended to accomplish some harmless purpose. As defined in Pen C § 189, murder perpetrated by means of lying in wait is not the definitional equivalent of premeditated murder. Murder perpetrated by means of lying in wait is first degree murder even if the accused did not have a premeditated intent to kill. Nothing in Pen C § 189, requires the lying in wait to have been done with the intent to kill, nor does the statute require it to have been done with the intent to injure. All that is required of lying in wait is that the perpetrator exhibit a state of mind equivalent to, but not identical to, premeditation and deliberation. This state of mind is the intent to watch and wait to gain advantage and take the victim unaware in order to facilitate the act which constitutes murder. If the act which the perpetrator intends to commit while lying in wait results in a killing that satisfies the elements of murder, it is immaterial whether the perpetrator intended to kill or injure. People v. Laws (Cal. App. 3d Dist. Jan. 22, 1993), 12 Cal. App. 4th 786, 15 Cal. Rptr. 2d 668, 1993 Cal. App. LEXIS 49.

Denying habeas, the court rejected an argument Pen C § 190.2(a)(15) is unconstitutionally vague, and noted the California Legislature and courts had created a thin but meaningfully distinguishable line between first degree murder lying in wait and special circumstances lying in wait, a distinction not explained when the jury correctly was instructed according to California Jury Instruction Criminal ("CALJIC") 8.81.15 that to find the special circumstance lying in wait "the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends" (but erroneously according to CALJIC 8.25 that first degree murder by means of lying in wait is murder which is immediately preceded by lying in wait). First degree murder lying in wait does not contain a temporal requirement. The killing did not have to be immediately preceded by lying in wait, but could come long after the lying in wait ceases. However no reversal was required; instructions benefitted petitioner by increasing the government's burden. The instruction on special circumstances lying in wait did not unconstitutionally shift the burden of proving lack of a time gap to the defense, but simply explained that under California law in order to constitute special circumstance lying in wait, a killing must follow immediately after the lying in wait. Two other instructions specifically provided that the special circumstance had to be proven by the government. Houston v. Roe (9th Cir. Cal. June 8, 1999), 177 F.3d 901, 1999 U.S. App. LEXIS 11749, cert. denied, (U.S. Feb. 22, 2000), 528 U.S. 1159, 120 S. Ct. 1168, 145 L. Ed. 2d 1078, 2000 U.S. LEXIS 1089.

Substantial evidence supported the jury instruction on first degree murder by lying in wait. The victim told the arson investigator that she was asleep when defendant began to pour gasoline on her, and the arson investigator opined that defendant had poured a flammable liquid on the victim's back as she was sleeping and that the liquid had dripped from her back onto the floor; from such evidence, a reasonable trier of fact could have found beyond a reasonable doubt that defendant had watched and waited until the victim was sleeping and helpless before he poured the flammable liquid on her and ignited it. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Murder by lying in wait requires (1) a concealment of purpose, (2) a substantial period of watching and waiting for a favorable or opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Evidence was sufficient to support the lying-in-wait special-circumstance allegation under Pen C § 190.2(a)(15) and thus to support the lying-in-wait theory of first degree murder under Pen C § 189 where defendant concealed his presence from his ex-girlfriend's mother after he killed his ex-girlfriend, remained silent after she saw him and asked him what had happened, and waited to reveal his presence until the mother was positioned at the top of the stairs in a more vulnerable position. People v. Moon (Cal. Aug. 18, 2005), 37 Cal. 4th 1, 32 Cal. Rptr. 3d 894, 117

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P.3d 591, 2005 Cal. LEXIS 9061, cert. denied, (U.S. Jan. 17, 2006), 546 U.S. 1140, 126 S. Ct. 1146, 163 L. Ed. 2d 1005, 2006 U.S. LEXIS 820.

Substantial evidence supported an instruction on murder by lying in wait where defendant and the victim had telephone conversations while the victim was driving home, and after she arrived, defendant fatally stabbed the victim; his prior threats to the victim did not negate the concealment and surprise elements of murder by lying in wait. People v. Jantz (Cal. App. 2d Dist. Mar. 27, 2006), 137 Cal. App. 4th 1283, 40 Cal. Rptr. 3d 875, 2006 Cal. App. LEXIS 413.

Requirement of a "substantial period" of watching and waiting is a part of the factual matrix required for lying-in-wait first degree murder under Pen C §§ 187, 189. People v. Poindexter (Cal. App. 1st Dist. Oct. 31, 2006), 144 Cal. App. 4th 572, 50 Cal. Rptr. 3d 489, 2006 Cal. App. LEXIS 1716.

Evidence was sufficient to support a lying-in-wait verdict under Pen C §§ 187, 189 because a reasonable jury could have concluded that defendant's statement to the victim, telling him to stay where he was if he wanted to live, was a subterfuge, allowing defendant to go and get his shotgun. In addition to supporting a finding of concealment of purpose, the evidence supported a finding that the lying in wait was for a sufficient period of time, in that it showed a state of mind consistent with premeditation or deliberation. People v. Poindexter (Cal. App. 1st Dist. Oct. 31, 2006), 144 Cal. App. 4th 572, 50 Cal. Rptr. 3d 489, 2006 Cal. App. LEXIS 1716.

Inmate was not entitled to habeas relief under 28 U.S.C.S. § 2254(d) based on enhancement of his first degree murder sentence for lying in wait because the intent distinction drawn by a California court between lying in wait under Pen C §§ 189 and 190.2(a)(15) was not unconstitutionally vague in violation of the Due Process Clause under clearly established federal law. Bradway v. Cate (9th Cir. Cal. Dec. 3, 2009), 588 F.3d 990, 2009 U.S. App. LEXIS 26328.

Evidence that defendant, who had previously said that he would kill the police if his wife called them, engaged in a substantial period of watchful waiting before he shot two police officers who were responding to a domestic abuse report supported an instruction with CALJIC No. 8.25 on lying-in-wait murder under Pen C § 189. Accordingly, there was no violation of defendant's rights to due process and a fair trial under the California and federal Constitutions. People v. Russell (Cal. Nov. 15, 2010), 50 Cal. 4th 1228, 117 Cal. Rptr. 3d 615, 242 P.3d 68, 2010 Cal. LEXIS 11346, modified, (Cal. Dec. 21, 2010), 2010 Cal. LEXIS 13055, modified, (Cal. Dec. 21, 2010), 2010 Cal. LEXIS 13290, cert. denied, (U.S. June 27, 2011), 564 U.S. 1042, 131 S. Ct. 3073, 180 L. Ed. 2d 896, 2011 U.S. LEXIS 4910.

Evidence was sufficient to support a jury's finding that the first-degree murders of two security guards were committed by lying in wait where defendant concealed his purpose and, during the time just before the actual shooting, his physical presence until he suddenly appeared at the door of the security guard shack and began shooting his victims. People v. Livingston (Cal. Apr. 26, 2012), 53 Cal. 4th 1145, 140 Cal. Rptr. 3d 139, 274 P.3d 1132, 2012 Cal. LEXIS 3821.

Evidence was sufficient to support a lying-in-wait theory of first-degree murder and to support a jury's lying-in-wait special-circumstance finding where the evidence: (1) established that defendant concealed his intent to kill the victim; (2) showed that defendant engaged in a substantial period of watching and waiting for an opportune time to act; and (3) reflected that immediately after the period of watching and waiting, defendant launched a surprise attack on the unsuspecting victim from a position of advantage. People v. Streeter (Cal. June 7, 2012), 54 Cal. 4th 205, 142 Cal. Rptr. 3d 481, 278 P.3d 754, 2012 Cal. LEXIS 5207.

Evidence did not support lying-in-wait special-circumstance findings as to defendants who entered a residence by ruse, displayed a gun, bound and blindfolded the victim, and isolated her for several hours before finally killing her; the evidence did not establish that any concealment was contemporaneous with a substantial period of watching and waiting for an opportune time to act. People v. Hajek and Vo (Cal. May 5, 2014), 58 Cal. 4th 1144, 171 Cal. Rptr. 3d 234, 324 P.3d 88, 2014 Cal. LEXIS 3133, modified, (Cal. July 23, 2014), 2014 Cal. LEXIS 5035, cert.

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denied, (U.S. Feb. 23, 2015), 135 S. Ct. 1399, 191 L. Ed. 2d 372, 2015 U.S. LEXIS 996, cert. denied, (U.S. Feb. 23, 2015), 135 S. Ct. 1400, 191 L. Ed. 2d 372, 2015 U.S. LEXIS 1486, overruled in part, People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816.

Sufficient evidence supported defendant's convictions for the first-degree murders of his mother-in-law and brother-in-law on a lying-in-wait theory and the jury's true finding on the lying-in-wait special circumstance because, given that defendant hid a shotgun in a laundry basket containing his and his wife's clothes and took the laundry basket with him up to his mother-in-law's door, a jury could rationally deduce that he planned and undertook a deliberate subterfuge aimed at making his presence appear to be an innocuous offer to return the wife's clothes or request to do laundry so that the mother-in-law would open the door and admit him; a rational jury could also infer that there was some period of watching and waiting at the door. People v. Cage (Cal. Dec. 3, 2015), 62 Cal. 4th 256, 195 Cal. Rptr. 3d 724, 362 P.3d 376, 2015 Cal. LEXIS 9480, cert. denied, (U.S. Oct. 3, 2016), 137 S. Ct. 94, 196 L. Ed. 2d 81, 2016 U.S. LEXIS 5331.

There was substantial evidence that defendant committed murder in the commission of kidnapping where the evidence showed defendant formed an intent to kidnap the victim prior to committing the acts that caused her death; the victim's burning vehicle and charred body were discovered near a freeway off-ramp that was a 15 to 20-minute drive from the place where defendant had confronted and strangled the victim into unconsciousness three hours earlier, and, from that evidence, a jury could reasonably have inferred that defendant formed the intent to kidnap the victim after rendering her unconscious and that he set her and her car on fire only after having formed that intent. People v. Brooks (Cal. , 216 Cal. Rptr. 3d 528, 393 P.3d 1, 2 Cal. 5th 674, 2017 Cal. LEXIS 1794), reprinted, sub. op., (Cal. Mar. 20, 2017), 219 Cal. Rptr. 3d 331, 396 P.3d 480, 3 Cal. 5th 1, 2017 Cal. LEXIS 4213, modified, (Cal. May 31, 2017), 2017 Cal. LEXIS 4216, modified, (Cal. June 19, 2017), 2017 Cal. LEXIS 4211.

There was substantial evidence from which a reasonable trier of fact could find that defendant committed murder in the commission of arson where there was evidence that defendant knew the victim was alive, albeit unconscious, at the time he doused her and the interior of her car with accelerant and set the car on fire; although defendant might have intended to commit arson for the additional purpose of concealing the victim's identity and his role in her killing, concurrent intent to kill and to commit the target felony did not preclude a felony murder theory of first-degree murder, and a jury reasonably could infer that the killing and the arson were parts of one continuous transaction. People v. Brooks (Cal. , 216 Cal. Rptr. 3d 528, 393 P.3d 1, 2 Cal. 5th 674, 2017 Cal. LEXIS 1794), reprinted, sub. op., (Cal. Mar. 20, 2017), 219 Cal. Rptr. 3d 331, 396 P.3d 480, 3 Cal. 5th 1, 2017 Cal. LEXIS 4213, modified, (Cal. May 31, 2017), 2017 Cal. LEXIS 4216, modified, (Cal. June 19, 2017), 2017 Cal. LEXIS 4211.

Instructing on the culpability of aiders and abettors with former CALJIC No. 3.00 was not error because that instruction generally stated a correct rule of law and its "equally guilty" language did not mislead the jury. Even if the jury could have found that an accomplice to the murder had not acted with premeditation, the jury was instructed on felony murder and found true the special circumstance of kidnapping, which alone established guilt of first degree murder without need to prove intent. People v. Daveggio and Michaud (Cal. Apr. 26, 2018), 231 Cal. Rptr. 3d 646, 415 P.3d 717, 4 Cal. 5th 790, 2018 Cal. LEXIS 2981, cert. denied, (U.S. Oct. 1, 2018), 139 S. Ct. 213, 202 L. Ed. 2d 145, 2018 U.S. LEXIS 4910.

14. Torture

The brutal and shocking treatment to which a decedent was subjected during the course of a beating by her husband, and as a result of which she died, constituted torture of an aggravated character within the meaning of the statute, rendering the killing murder in the first degree. People v. Murphy (Cal. May 17, 1934), 1 Cal. 2d 37, 32 P.2d 635, 1934 Cal. LEXIS 324.

In determining whether murder was perpetrated by means of torture, solution must rest on whether assailant's intent was to cause cruel suffering on part of object of attack, either for purpose of revenge, extortion, or persuasion, or to satisfy some other untoward propensity, and not on whether victim merely suffered severe pain.

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People v. Tubby (Cal. June 15, 1949), 34 Cal. 2d 72, 207 P.2d 51, 1949 Cal. LEXIS 141; People v. Martinez (Cal. Mar. 7, 1952), 38 Cal. 2d 556, 241 P.2d 224, 1952 Cal. LEXIS 203; People v. Daugherty (Cal. May 5, 1953), 40 Cal. 2d 876, 256 P.2d 911, 1953 Cal. LEXIS 242, cert. denied, (U.S. Dec. 1, 1953), 346 U.S. 827, 74 S. Ct. 47, 98 L. Ed. 352, 1953 U.S. LEXIS 1802; People v. Cooley (Cal. App. 5th Dist. Dec. 20, 1962), 211 Cal. App. 2d 173, 27 Cal. Rptr. 543, 1962 Cal. App. LEXIS 1496, overruled, People v. Lew (Cal. June 25, 1968), 68 Cal. 2d 774, 69 Cal. Rptr. 102, 441 P.2d 942, 1968 Cal. LEXIS 205; People v. Washington (Cal. Sept. 16, 1969), 71 Cal. 2d 1061, 80 Cal. Rptr. 567, 458 P.2d 479, 1969 Cal. LEXIS 305.

Instructions on torture in the language of a Supreme Court decision defining torture are proper. People v. Daugherty (Cal. May 5, 1953), 40 Cal. 2d 876, 256 P.2d 911, 1953 Cal. LEXIS 242, cert. denied, (U.S. Dec. 1, 1953), 346 U.S. 827, 74 S. Ct. 47, 98 L. Ed. 352, 1953 U.S. LEXIS 1802.

The manner of killing does not necessarily establish torture. People v. Daugherty (Cal. May 5, 1953), 40 Cal. 2d 876, 256 P.2d 911, 1953 Cal. LEXIS 242, cert. denied, (U.S. Dec. 1, 1953), 346 U.S. 827, 74 S. Ct. 47, 98 L. Ed. 352, 1953 U.S. LEXIS 1802.

Murder by strangulation indicates malice, but it does not by itself indicate an intent to make victim suffer. People v. Caldwell (Cal. Jan. 28, 1955), 43 Cal. 2d 864, 279 P.2d 539, 1955 Cal. LEXIS 392.

Physical suffering, a concomitant of almost all violent deaths, is not enough by itself to show murder by torture; there also must be intent that victim shall suffer. People v. Caldwell (Cal. Jan. 28, 1955), 43 Cal. 2d 864, 279 P.2d 539, 1955 Cal. LEXIS 392.

Murder is perpetrated by means of torture when the intent is to cause cruel suffering for the purpose of revenge. People v. Chavez (Cal. Sept. 19, 1958), 50 Cal. 2d 778, 329 P.2d 907, 1958 Cal. LEXIS 193, cert. denied, (U.S. 1959), 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353, 1959 U.S. LEXIS 1621, cert. denied, (U.S. May 18, 1959), 359 U.S. 993, 79 S. Ct. 1126, 3 L. Ed. 2d 982, 1959 U.S. LEXIS 1040.

It is murder by torture where defendants' intent is to inflict grievous pain and suffering on victim for purpose of persuasion. People v. Turville (Cal. Feb. 18, 1959), 51 Cal. 2d 620, 335 P.2d 678, 1959 Cal. LEXIS 285, cert. denied, (U.S. 1959), 360 U.S. 939, 79 S. Ct. 1465, 3 L. Ed. 2d 1551, 1959 U.S. LEXIS 740, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274.

Where killing is perpetrated by means of torture, means used is conclusive evidence of malice and premeditation and crime is first degree murder. People v. Turville (Cal. Feb. 18, 1959), 51 Cal. 2d 620, 335 P.2d 678, 1959 Cal. LEXIS 285, cert. denied, (U.S. 1959), 360 U.S. 939, 79 S. Ct. 1465, 3 L. Ed. 2d 1551, 1959 U.S. LEXIS 740, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274; People v. Pickens (Cal. App. 1st Dist. Feb. 19, 1969), 269 Cal. App. 2d 844, 75 Cal. Rptr. 352, 1969 Cal. App. LEXIS 1707.

Murder by torture is characterized by intent of defendant to inflict grievous pain and suffering on his victim for purposes of revenge, extortion, persuasion or to satisfy some sadistic impulse; fact of victim's pain and suffering is not enough to establish murder by torture unless there is also evidence that defendant possessed intent to cause cruel suffering. People v. Pickens (Cal. App. 1st Dist. Mar. 16, 1961), 190 Cal. App. 2d 138, 11 Cal. Rptr. 795, 1961 Cal. App. LEXIS 2277; People v. Butler (Cal. App. 3d Dist. July 3, 1962), 205 Cal. App. 2d 437, 23 Cal. Rptr. 118, 1962 Cal. App. LEXIS 2149; People v. Pickens (Cal. App. 1st Dist. Feb. 19, 1969), 269 Cal. App. 2d 844, 75 Cal. Rptr. 352, 1969 Cal. App. LEXIS 1707.

Jury was sufficiently apprised of intent required for murder by torture where it was instructed that all murder perpetrated by torture or any other kind of wilful, deliberate and premeditated killing is first degree murder and all other kinds are second degree; that it is murder by torture where accused's intent is to inflict grievous pain and suffering on victim either for revenge, extortion, persuasion, punishment or to satisfy some untoward propensity.

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People v. York (Cal. App. 2d Dist. May 27, 1966), 242 Cal. App. 2d 560, 51 Cal. Rptr. 661, 1966 Cal. App. LEXIS 1155.

A wilful, deliberate and premeditated killing in which the victim was intentionally killed by a method designed to produce pain and suffering sufficient to constitute torture is murder of the first degree. (Pen C § 189.) People v. Wattie (Cal. App. 2d Dist. Aug. 10, 1967), 253 Cal. App. 2d 403, 61 Cal. Rptr. 147, 1967 Cal. App. LEXIS 2362.

The intent to cause a victim to suffer in murder by torture may be inferred from the circumstances of the killing including the condition of the deceased's body and the admissions of a defendant. People v. Wattie (Cal. App. 2d Dist. Aug. 10, 1967), 253 Cal. App. 2d 403, 61 Cal. Rptr. 147, 1967 Cal. App. LEXIS 2362.

When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is first degree murder. People v. Pickens (Cal. App. 1st Dist. Feb. 19, 1969), 269 Cal. App. 2d 844, 75 Cal. Rptr. 352, 1969 Cal. App. LEXIS 1707.

In a murder prosecution, the trial court did not err by giving instructions on first degree murder by torture, where evidence that the defendant beat his infant son on numerous occasions in order to silence the child's crying raised an issue as to whether he carried out an intent to inflict grievous pain and suffering upon the child in order to persuade the child to conform to his desired mode of behavior. People v. Aeschlimann (Cal. App. 2d Dist. Oct. 31, 1972), 28 Cal. App. 3d 460, 104 Cal. Rptr. 689, 1972 Cal. App. LEXIS 772.

Murder by means of torture under Pen C § 189, is murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain; in order to be convicted of murder by means of torture, a defendant need not have had a premeditated intent to kill, but must have the defined intent to inflict pain. Accordingly, the evidence was insufficient to sustain the conviction of a woman for the first-degree murder by torture of her three-year-old stepchild, where the evidence showed that while defendant severely beat her stepchild, and such beatings caused the child's death, there was no evidence to support a finding that defendant did so with coldblooded intent to inflict extreme and prolonged pain, but, rather, that the beatings were a misguided, irrational and totally unjustifiable attempt at discipline. People v. Steger (Cal. Mar. 12, 1976), 16 Cal. 3d 539, 128 Cal. Rptr. 161, 546 P.2d 665, 1976 Cal. LEXIS 238.

Actual awareness of pain by a victim is not a necessary element of first degree murder by torture. Accordingly, in a prosecution of defendant for the murder of her husband on the theory that the killing was perpetrated by torture, a pattern jury instruction on the elements of that crime was correct in reciting that it was unnecessary to show that the victim of torture-murder actually felt pain. A murderer who exhibits a cold-blooded intent to inflict pain for personal gain or satisfaction may not assert the victim's condition rendering him insensitive to pain as a fortuitous defense to his own acts. People v. Wiley (Cal. Oct. 4, 1976), 18 Cal. 3d 162, 133 Cal. Rptr. 135, 554 P.2d 881, 1976 Cal. LEXIS 343.

While murder by torture cannot be inferred solely from the condition of the victim's body or from the mode of assault or injury suffered, and other evidence of intent to cause suffering is required, the evidence was sufficient to permit the trier of fact to find such intent on the part of a defendant charged with the murder of her husband, who died from shock and hemorrhage due to trauma caused by a blunt instrument, where defendant testified she wanted to hit her husband on the hand that had stolen her money, where she told her brother she wanted him to get her money back from her husband, and where she then furnished her brother with a baseball bat and hammer which her brother used to beat the victim. People v. Wiley (Cal. Oct. 4, 1976), 18 Cal. 3d 162, 133 Cal. Rptr. 135, 554 P.2d 881, 1976 Cal. LEXIS 343.

In a homicide prosecution arising out of the death of a 3-year-old girl, the evidence was sufficient to justify an instruction on murder by torture, where the child died from beatings inflicted over a period of weeks, where it was established that she had exhibited no marks of injury prior to the time that defendant moved into the apartment with her mother, where defendant did not testify in his own defense to explain the child's condition, where there was no evidence to suggest that the child's conduct at any time justified or provoked defendant's attacks on her, and where

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evidence that defendant had placed the child's wet pants over her head and forced her to eat her own feces strongly suggested that his conduct was prompted by sadistic impulses toward the helpless victim. People v. Demond (Cal. App. 2d Dist. June 28, 1976), 59 Cal. App. 3d 574, 130 Cal. Rptr. 590, 1976 Cal. App. LEXIS 1633.

In a prosecution for murder by torture of a 3-year-old girl, it was not error for the trial court to admit in evidence photographs of the victim's body, where two doctors had affirmed that the photographs constituted a true and accurate portrayal of the way the victim's body appeared at the time of a physical examination, where one of the doctors was present when many of the photographs were taken, and where the photographs were relevant on the issue of the manner in which the child met her death. It is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect, and there was no showing that the trial court's ruling constituted an abuse of discretion, as it was reasonable to introduce the photographs so that the jury could determine independently whether the objective evidence corroborated or refuted medical testimony describing the child's injuries. People v. Demond (Cal. App. 2d Dist. June 28, 1976), 59 Cal. App. 3d 574, 130 Cal. Rptr. 590, 1976 Cal. App. LEXIS 1633.

To support an instruction for murder by torture under Pen C § 189, there must be evidence that the murder was committed with a wilful, deliberate, and premeditated intent, not necessarily to kill the victim, but to inflict extreme pain. The condition of the body is insufficient by itself to demonstrate the requisite intent; however, it is a circumstance to be considered in conjunction with other circumstances in determining the sufficiency of evidence to support an instruction on murder by torture. People v. Soltero (Cal. App. 2d Dist. May 17, 1978), 81 Cal. App. 3d 423, 146 Cal. Rptr. 457, 1978 Cal. App. LEXIS 1590, cert. denied, (U.S. Oct. 30, 1978), 439 U.S. 933, 99 S. Ct. 325, 58 L. Ed. 2d 328, 1978 U.S. LEXIS 3633.

The term torture denotes the purposeful infliction of pain for personal gain or satisfaction, as opposed to the incidental infliction of pain that accompanies almost all assaults or murders. Thus, a conviction of murder with torture as a special circumstance requires proof of a specific intent to inflict pain. Ortega v. Superior Court (Cal. App. 3d Dist. July 27, 1982), 135 Cal. App. 3d 244, 185 Cal. Rptr. 297, 1982 Cal. App. LEXIS 1900.

In a prosecution for murder (Pen C § 187) the jury was clearly and correctly instructed that first degree murder by torture (Pen C § 189) did not require finding an intent to kill but did require finding an intent to cause cruel pain and suffering from some sadistic purpose, and that the special circumstance of murder involving torture (Pen C § 190.2(a)(18)) required findings of an intent to kill and suffering by the victim, where the difference between a verdict of first degree murder and a verdict on the alleged special circumstance was explained during voir dire, in the court's formal instructions, and in the arguments of both counsel. In addition, the jury had also been instructed that they must find a first degree murder before they could consider the truth of the special circumstance. People v. Davenport (Cal. Dec. 31, 1985), 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861, 1985 Cal. LEXIS 447.

The essential elements of murder perpetrated by means of torture (Pen C § 189) are that the act which caused the death must have involved a high degree of probability of death and that the defendant must have committed the act with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. The defendant need not have an intent to kill the victim, but the intent to inflict torturous pain and suffering on the victim is at the heart of the crime. People v. Davenport (Cal. Dec. 31, 1985), 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861, 1985 Cal. LEXIS 447.

As a corollary to the emphasis on the acts and intention of the perpetrator, it has long been held that awareness of pain by the victim is not an element of first degree murder by torture (Pen C § 189). Furthermore, just as proof that the victim experienced cruel pain is not required, the nature of the victim's wounds is not determinative. It is possible to inflict severe and prolonged pain on another without deliberation or premeditation, but it may not be torture under Pen C § 189. People v. Davenport (Cal. Dec. 31, 1985), 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861, 1985 Cal. LEXIS 447.

Pen C § 190.2(a)(18) providing for a mandatory penalty of life imprisonment or death for a defendant found guilty of a murder which was intentional and which involved infliction of torture, is distinguished from murder by torture

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(Pen C § 189) in that Pen C § 190.2(a)(18), requires that the defendant must have acted with the intent to kill. People v. Davenport (Cal. Dec. 31, 1985), 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861, 1985 Cal. LEXIS 447.

Murder by means of torture under Pen C § 189, is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain. The prosecution need not establish that the defendant intended to kill the victim. Nonetheless, the torture-murder theory of first degree murder does not come into play until it is established that the defendant is guilty of murder, that is, a killing with malice. Thus, the prosecution must at a minimum demonstrate that the victim's death resulted from defendant's intentional act involving a high degree of probability of death which was committed with conscious disregard for human life. People v. James (Cal. App. 4th Dist. Nov. 17, 1987), 196 Cal. App. 3d 272, 241 Cal. Rptr. 691, 1987 Cal. App. LEXIS 2327.

Murder by torture is murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain; the culpable intent is one to cause pain for the purpose of revenge, extortion, persuasion or for any other sadistic purpose. There is no requirement that the victim be aware of the pain; however, there must be a causal relationship between the torturous act and death. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Evidence was sufficient to support a first degree murder conviction on a theory of murder by torture; although defendant maintained that the case fell into the "explosion of violence" category, there was substantial evidence from which a rational jury could have found beyond a reasonable doubt that defendant, who deliberately poured a flammable liquid on the victim and set fire to her and the house she was in, had the requisite intent to inflict extreme pain. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Murder by torture was and is considered among the most reprehensible types of murder because of the calculated nature of the acts causing death, not simply because greater culpability could be attached to murder in which great pain and suffering are caused to the victim; accordingly, the words willful, deliberate, and premeditated intent to inflict extreme and prolonged pain refer only to the requirement that before the trier of fact may convict a defendant of first degree murder by torture there must be found a cold-blooded, calculated intent to inflict such pain for one of the specified purposes. Inasmuch as the legislature has equated this state of mind with the willful, deliberate, premeditated intent to kill that renders other murders sufficiently culpable to be classified as first degree murder, it is unnecessary in torture-murder to also find that the killing itself was willful, deliberate, and premeditated. People v. Cole (Cal. Aug. 16, 2004), 33 Cal. 4th 1158, 17 Cal. Rptr. 3d 532, 95 P.3d 811, 2004 Cal. LEXIS 7573, cert. denied, (U.S. Apr. 25, 2005), 544 U.S. 1001, 125 S. Ct. 1931, 161 L. Ed. 2d 775, 2005 U.S. LEXIS 3568.

Sufficient evidence supported a conviction for first degree murder-by-torture under Pen C § 189, regardless of whether there was a violent struggle or whether the victim suffered for a long time. There was evidence of 81 premortem stab and slash wounds, only three of which were potentially fatal and some of which suggested a meticulous, controlled approach; the evidence also suggested that defendant may have tortured the victim, a bartender, to coerce her into revealing the combination to the bar's floor safe. People v. Elliot (Cal. Nov. 28, 2005), 37 Cal. 4th 453, 35 Cal. Rptr. 3d 759, 122 P.3d 968, 2005 Cal. LEXIS 13254, cert. denied, (U.S. Oct. 2, 2006), 549 U.S. 853, 127 S. Ct. 121, 166 L. Ed. 2d 91, 2006 U.S. LEXIS 6687.

Substantial evidence supported a jury's finding that a killing was a torture murder under Pen C § 189. Defendant continued to hit the victim's face with a stick after the victim ceased to resist and was no longer moving; after driving away, defendant went back and started hitting the victim again while stating that he should have killed the victim; and virtually all of the victim's facial bones were fractured, causing so much bleeding that he was asphyxiated by his own blood. People v. Cook (Cal. Aug. 14, 2006), 39 Cal. 4th 566, 47 Cal. Rptr. 3d 22, 139 P.3d 492, 2006 Cal. LEXIS 9519, cert. denied, (U.S. May 21, 2007), 550 U.S. 962, 127 S. Ct. 2438, 167 L. Ed. 2d 1139, 2007 U.S. LEXIS 5993.

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Required mental state for murder by torture (willful, deliberate, and premeditated intent to cause extreme pain or suffering for a sadistic purpose) could be inferred from facts that 19-month-old victim was brutally kicked or punched, and that after victim was incapacitated, perpetrator methodically poured hot cooking oil on victim, and repositioned victim so as to inflict numerous burns on various portions of the body, including the genital region. People v. Whisenhunt (Cal. June 30, 2008), 44 Cal. 4th 174, 79 Cal. Rptr. 3d 125, 186 P.3d 496, 2008 Cal. LEXIS 7900, cert. denied, (U.S. Dec. 1, 2008), 555 U.S. 1053, 129 S. Ct. 638, 172 L. Ed. 2d 623, 2008 U.S. LEXIS 8689.

In a capital murder case in which defendant threw gasoline on the victim and lit her on fire, there was substantial evidence from which a rational jury could have found beyond a reasonable doubt that the victim's killing constituted torture murder. Defendant was angry at a janitorial services company because he believed the company was withholding his money, and defendant said to the victim, the company's bookkeeper, immediately before lighting her on fire, "This is what you get when you don't give me my money." People v. D'Arcy (Cal. Mar. 11, 2010), 48 Cal. 4th 257, 106 Cal. Rptr. 3d 459, 226 P.3d 949, 2010 Cal. LEXIS 1808, cert. denied, (U.S. Oct. 4, 2010), 562 U.S. 850, 131 S. Ct. 104, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 6259.

In a capital murder case in which defendant threw gasoline on the victim and lit her on fire, the evidence permitted an inference that defendant set the victim on fire with the intent to inflict extreme pain for the purpose of revenge. People v. D'Arcy (Cal. Mar. 11, 2010), 48 Cal. 4th 257, 106 Cal. Rptr. 3d 459, 226 P.3d 949, 2010 Cal. LEXIS 1808, cert. denied, (U.S. Oct. 4, 2010), 562 U.S. 850, 131 S. Ct. 104, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 6259.

In a capital case in which a jury found defendant guilty of the first degree murder of his five-year-old child, there was sufficient evidence from which a reasonable jury could have concluded that defendant's torture of the child was at least a substantial factor in the child's death. Defendant deliberately administered certain drugs to the child, and directed his wife to do the same, with full knowledge that such conduct endangered the child's life and with conscious disregard for that life. People v. Jennings (Cal. Aug. 12, 2010), 50 Cal. 4th 616, 114 Cal. Rptr. 3d 133, 237 P.3d 474, 2010 Cal. LEXIS 7728.

In a capital case in which defendant was convicted of murdering her four-year-old niece, the evidence was sufficient to establish the criminal intent required for mayhem felony murder, murder by torture, and the mayhem and torture felony-murder special circumstances where the victim suffered discrete injuries over an extended period of time, including a serious burn wound on her head, multiple bruises, scars, abrasions, and lacerations all over her body, subdural and subarachnoid hematomas, and the severe scalding that ultimately caused her death, and although direct evidence that defendant actually inflicted the fatal scalding was lacking, powerful direct and circumstantial evidence supported the conclusion that she at least aided and abetted her husband in inflicting the terminal injury. The long course of painful abuse suffered by the victim suggested that defendant and her husband habitually tortured the victim, and defendant had ensured the victim's death by failing to get help, even though defendant admitted she thought the victim was dying when she pulled her from the bathtub, unconscious. People v. Gonzales (Cal. June 2, 2011), 51 Cal. 4th 894, 126 Cal. Rptr. 3d 1, 253 P.3d 185, 2011 Cal. LEXIS 5437, modified, (Cal. Aug. 10, 2011), 2011 Cal. LEXIS 8083.

Combination of instructions on torture and aiding and abetting ensured defendant could not be found guilty of torture as an aider and abettor without proof he knew and shared the actual torturer's specific intent to inflict extreme pain and suffering on the victim. People v. Pearson (Cal. Jan. 9, 2012), 53 Cal. 4th 306, 135 Cal. Rptr. 3d 262, 266 P.3d 966, 2012 Cal. LEXIS 2.

It was error to instruct the jury on torture as a predicate to felony murder because torture was not added to the list of predicate felonies until after defendant's crime. The error was harmless because the jury necessarily convicted defendant of first degree murder on other, proper felony-murder theories. People v. Pearson (Cal. Jan. 9, 2012), 53 Cal. 4th 306, 135 Cal. Rptr. 3d 262, 266 P.3d 966, 2012 Cal. LEXIS 2.

Sufficient evidence supported defendant's first-degree murder conviction based on a torture-murder theory and also supported a torture special-circumstance finding because, given defendant's prior physical abuse of the victim, his attempts to control her by preventing communication with her family, his anger with the victim for leaving him and

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taking his child and concealing her whereabouts, and the repeated threats against the victim's family, the jury could have reasonably concluded that when defendant intentionally set the victim on fire as he had planned, he intended to cause her extreme pain and suffering as punishment or for revenge. People v. Streeter (Cal. June 7, 2012), 54 Cal. 4th 205, 142 Cal. Rptr. 3d 481, 278 P.3d 754, 2012 Cal. LEXIS 5207.

Evidence was sufficient to support defendant's first-degree murder conviction on a theory of torture murder because the jury could reasonably infer from the totality of facts that defendant committed torturous acts before the victim's death, that those acts that had a high probability of killing the victim and did kill her, and that he did so with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain on the victim for a sadistic purpose. Although there was no testimony that the victim's injuries other than those to the genital area and the ligature were inflicted before death, there was evidence that she had been bound and gagged, and had a hood placed over her head. People v. Edwards (Cal. Aug. 22, 2013), 57 Cal. 4th 658, 161 Cal. Rptr. 3d 191, 306 P.3d 1049, 2013 Cal. LEXIS 6897, cert. denied, (U.S. May 27, 2014), 572 U.S. 1137, 134 S. Ct. 2662, 189 L. Ed. 2d 213, 2014 U.S. LEXIS 3627.

Sufficient evidence supported findings of torturous intent when defendant's killed a 73-year-old woman because the medical evidence showed that the victim was bound and gagged and suffered a number of nonlethal wounds before she was strangled and her throat slashed; one defendant had stated an intent to carry out a vengeful and sadistic plan to murder, and the evidence was consistent with a conclusion that the other defendant actively participated in the torture. People v. Hajek and Vo (Cal. May 5, 2014), 58 Cal. 4th 1144, 171 Cal. Rptr. 3d 234, 324 P.3d 88, 2014 Cal. LEXIS 3133, modified, (Cal. July 23, 2014), 2014 Cal. LEXIS 5035, cert. denied, (U.S. Feb. 23, 2015), 135 S. Ct. 1399, 191 L. Ed. 2d 372, 2015 U.S. LEXIS 996, cert. denied, (U.S. Feb. 23, 2015), 135 S. Ct. 1400, 191 L. Ed. 2d 372, 2015 U.S. LEXIS 1486, overruled in part, People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816.

Sufficient evidence supported defendant's torture-murder conviction where there was substantial evidence from which the jury could reasonably have found he was motivated by revenge for the victim's romantic rejection of him, including his acknowledgment that he first struck her because she had terminated their relationship, and where he inflicted gratuitous injuries in addition to the savage fatal beating; he used three separate heavy objects to bludgeon the victim, discarding each in turn as it broke into pieces, and presumably continued the beating long after she was rendered unconscious, and he also gratuitously cut both sides of her face and drove a sharp object into it, and inflicted severe injuries to the area around her vagina. People v. Powell (Cal. Aug. 13, 2018), 236 Cal. Rptr. 3d 316, 422 P.3d 973, 5 Cal. 5th 921, 2018 Cal. LEXIS 5748, cert. denied, (U.S. Mar. 4, 2019), 139 S. Ct. 1292, 203 L. Ed. 2d 417, 2019 U.S. LEXIS 1606.

15. Felony Murder Rule: Generally

A homicide committed in an attempt to commit a felony is murder, whether the homicide be one of the class enumerated in this section or not, and whether the felony was committed or attempted as the result of a conspiracy or not; and in every such case the law superadds the felonious intent to the act of killing. People v. Olsen (Cal. Aug. 3, 1889), 80 Cal. 122, 22 P. 125, 1889 Cal. LEXIS 873, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270; People v. Miller (Cal. July 1, 1898), 121 Cal. 343, 53 P. 816, 1898 Cal. LEXIS 907; People v. Witt (Cal. Apr. 27, 1915), 170 Cal. 104, 148 P. 928, 1915 Cal. LEXIS 367.

If homicide is committed by one of several confederates while engaged in perpetrating crime of robbery in furtherance of common purpose, person or persons engaged with him in perpetration of robbery, but who do not actually do killing, are as accountable to law though their own hands had intentionally fired fatal shot or given fatal blow; such killing is murder of first degree, jury having no option but to return verdict of murder in first degree, whether killing was intentional or accidental. People v. Waller (Cal. Nov. 30, 1939), 14 Cal. 2d 693, 96 P.2d 344, 1939 Cal. LEXIS 375.

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An instruction that certain kinds of murder carry with them conclusive evidence of premeditation, as where the killing is done in the perpetration or attempted perpetration of one of the felonies enumerated in this section, was error. Killing by such means or on such occasions are first degree murders because of the substantive statutory definition of the crime, and attempts to explain the statute in terms of nonexistent "conclusive presumptions" tend more to confuse than to enlighten a jury. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198; People v. Bernard (Cal. May 17, 1946), 28 Cal. 2d 207, 169 P.2d 636, 1946 Cal. LEXIS 205; People v. Honeycutt (Cal. Sept. 20, 1946), 29 Cal. 2d 52, 172 P.2d 698, 1946 Cal. LEXIS 274.

Since the word "perpetrate" has no technical meaning peculiar to the law, it will be assumed to have been understood by the jurors in its ordinary meaning, when used in instructions defining a first degree murder which was committed in an attempt to perpetrate certain felonies; hence a defendant is not prejudiced by the court's failure to define the word. People v. Chavez (Cal. Aug. 10, 1951), 37 Cal. 2d 656, 234 P.2d 632, 1951 Cal. LEXIS 320.

A homicide is committed in the perpetration of a felony if the killing and felony are parts of one continuous transaction. People v. Chavez (Cal. Aug. 10, 1951), 37 Cal. 2d 656, 234 P.2d 632, 1951 Cal. LEXIS 320; People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166; People v. Subia (Cal. App. 5th Dist. Jan. 6, 1966), 239 Cal. App. 2d 245, 48 Cal. Rptr. 584, 1966 Cal. App. LEXIS 1752.

This section obviates the necessity for any technical inquiry as to whether there has been a completion, abandonment or desistance of the felony before the homicide was completed. People v. Chavez (Cal. Aug. 10, 1951), 37 Cal. 2d 656, 234 P.2d 632, 1951 Cal. LEXIS 320; People v. Ketchel (Cal. May 7, 1963), 59 Cal. 2d 503, 30 Cal. Rptr. 538, 381 P.2d 394, 1963 Cal. LEXIS 180, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274, vacated, (Cal. Jan. 24, 1966), 63 Cal. 2d 859, 48 Cal. Rptr. 614, 409 P.2d 694, 1966 Cal. LEXIS 335.

The jury has no option but to return a verdict for murder of first degree, whether the killing was done intentionally or accidentally, if it is committed in the perpetration or attempt to perpetrate the felonies enumerated in this section. People v. Coefield (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

Killing, intentional or otherwise, committed in perpetration of any of the felonies enumerated in this section, constitutes first degree murder. People v. Turville (1959) 51 Cal 2d 620, 335 P2d 678, 1959 Cal LEXIS 285, cert. denied, Turville v. California (1959) 360 US 939, 3 L Ed 2d 1551, 79 S Ct 1465, 1959 US LEXIS 740, overruled on other grounds, People v. Morse (1964) 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33, 1964 Cal LEXIS 274, 12 ALR3d 810; People v. Barreras (1960, Cal App 2d Dist) 181 Cal App 2d 609, 5 Cal Rptr 454, 1960 Cal App LEXIS 2037 disapproved on other grounds People v. Morse (1964) 60 Cal 2d 631, 36 Cal Rptr 201, 388 P2d 33, 1964 Cal LEXIS 274, 12 ALR3d 810); People v. Pollard (Cal. App. 2d Dist. Aug. 17, 1961), 194 Cal. App. 2d 830, 15 Cal. Rptr. 214, 1961 Cal. App. LEXIS 1884.

Where it is claimed that murder is of first degree on theory that it was "committed in the perpetration" of one of the felonies designated in this section, defendant is entitled, on request, to specific instruction directing attention to necessity of proving felony beyond reasonable doubt even though general instruction on reasonable doubt has been given. People v. Whitehorn (Cal. Aug. 5, 1963), 60 Cal. 2d 256, 32 Cal. Rptr. 199, 383 P.2d 783, 1963 Cal. LEXIS 235.

Where design to commit an independent felony is conceived by accused only after delivering fatal blow to his victim, felony-murder doctrine is not applicable. People v. Jeter (Cal. Jan. 23, 1964), 60 Cal. 2d 671, 36 Cal. Rptr. 323, 388 P.2d 355, 1964 Cal. LEXIS 277.

Proof of strict causal relationship between felony and homicide is not required to establish murder as first degree under felony-murder rule; it is sufficient to show that felony and homicide were parts of continuous transaction. People v. Mitchell (Cal. June 5, 1964), 61 Cal. 2d 353, 38 Cal. Rptr. 726, 392 P.2d 526, 1964 Cal. LEXIS 210, cert. denied, Mitchell v. California (U.S. 1966), 384 U.S. 1007, 86 S. Ct. 1985, 16 L. Ed. 2d 1021, 1966 U.S. LEXIS 1184.

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Legislature's decree that any person who undertakes to commit any of certain enumerated felonies will be guilty of first degree murder when undertaking results in loss of human life emanates from extreme risk of harm inherent in felonious conduct involved. People v. Sears (Cal. May 21, 1965), 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P.2d 938, 1965 Cal. LEXIS 291, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087.

Felony-murder rule should not be extended beyond its rational function, and for defendant to be guilty of murder under that rule, killing must be committed by defendant or his accomplice acting in furtherance of their common design. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

Neither common-law rationale of felony-murder rule nor Penal Code supports contention that purpose of rule is to prevent commission of robberies. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

Purpose of felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit; this purpose is not served by punishing them for killings committed by their victims. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

When homicide is committed in perpetration of two crimes, one of which would make homicide first degree murder and other, by itself, would amount to second degree murder, instructions on lesser offense are not required. People v. Teale (Cal. July 16, 1965), 63 Cal. 2d 178, 45 Cal. Rptr. 729, 404 P.2d 209, 1965 Cal. LEXIS 175, rev'd, (U.S. Feb. 20, 1967), 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, 1967 U.S. LEXIS 2198.

To establish felony-murder, prosecution must prove that defendant specifically intended to commit felony. People v. Anderson (Cal. Oct. 1, 1965), 63 Cal. 2d 351, 46 Cal. Rptr. 763, 406 P.2d 43, 1965 Cal. LEXIS 191.

Purpose of felony-murder rule is to deter persons from killing negligently or accidentally by holding them strictly responsible for all killings they commit during perpetration, or attempted perpetration, of any of felonies enumerated in Pen Code, § 189. People v. Talbot (Cal. June 3, 1966), 64 Cal. 2d 691, 51 Cal. Rptr. 417, 414 P.2d 633, 1966 Cal. LEXIS 303, cert. denied, (U.S. Sept. 1, 1967), 385 U.S. 1015, 87 S. Ct. 729, 17 L. Ed. 2d 551, 1967 U.S. LEXIS 2686, overruled in part, People v. Ireland (Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351; People v. Muszalski (Cal. App. 1st Dist. Mar. 29, 1968), 260 Cal. App. 2d 611, 67 Cal. Rptr. 378, 1968 Cal. App. LEXIS 1892, cert. denied, (U.S. 1969), 393 U.S. 1059, 89 S. Ct. 701, 21 L. Ed. 2d 701, 1969 U.S. LEXIS 2843.

Where an unlawful killing occurs in the perpetration of one of the serious felonies listed in Pen C § 189, it is first degree murder. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

The felony-murder doctrine was enacted to protect the community and its residents and obviates rather than requires necessity of technical inquiry as to whether there has been completion, abandonment, or desistance of the felony before homicide was completed. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they may commit, and the rule should not be extended beyond any rational function that it is designed to serve (Pen C § 189.) People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

When men arm themselves with deadly weapons and enter a public market for the purpose of robbing it or even "to case it," they commit an act that involves a high degree of probability that it will result in death, and it is unnecessary to imply malice to invoke the felony murder doctrine since a defendant need not do the killing himself

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to be guilty of murder; he may be vicariously responsible under the rules defining principals and criminal conspiracies; and when a defendant intends to kill or intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective. People v. Bosby (Cal. App. 2d Dist. Nov. 21, 1967), 256 Cal. App. 2d 209, 64 Cal. Rptr. 159, 1967 Cal. App. LEXIS 1844, aff'd, (U.S. June 2, 1969), 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284, 1969 U.S. LEXIS 1435.

To establish a defendant's guilt of first degree murder on the theory that he committed the killing during the perpetration or attempted perpetration of one of the felonies enumerated in Pen Code, § 189, the prosecution must prove that he harbored the specific intent to commit one of such enumerated felonies; and additionally, the evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death; evidence which establishes that the defendant formed the intent only after engaging in the fatal acts cannot support a verdict of first degree murder based on Pen Code, § 189. People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

If a homicide occurs during the commission of one of the six felonies enumerated in Pen C § 189, and the killing has a direct causal relationship to the crime being committed, it is murder in the first degree as a matter of statutory law. People v. Lovato (Cal. App. 5th Dist. Jan. 25, 1968), 258 Cal. App. 2d 290, 65 Cal. Rptr. 638, 1968 Cal. App. LEXIS 2414, disapproved, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

To establish a felony-murder the prosecution must prove that the defendant had a specific intent to commit the felony. People v. Chapman (Cal. App. 3d Dist. Apr. 15, 1968), 261 Cal. App. 2d 149, 67 Cal. Rptr. 601, 1968 Cal. App. LEXIS 1729.

The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. People v. Lillock (Cal. App. 2d Dist. Aug. 30, 1968), 265 Cal. App. 2d 419, 71 Cal. Rptr. 434, 1968 Cal. App. LEXIS 1636, overruled in part, People v. Flood (Cal. July 2, 1998), 18 Cal. 4th 470, 76 Cal. Rptr. 2d 180, 957 P.2d 869, 1998 Cal. LEXIS 4033; People v. Wilson (Cal. Dec. 18, 1969), 1 Cal. 3d 431, 82 Cal. Rptr. 494, 462 P.2d 22, 1969 Cal. LEXIS 219, limited, People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled, People v. Farley (Cal. July 2, 2009), 46 Cal. 4th 1053, 96 Cal. Rptr. 3d 191, 210 P.3d 361, 2009 Cal. LEXIS 6021; People v. Asher (Cal. App. 1st Dist. June 12, 1969), 273 Cal. App. 2d 876, 78 Cal. Rptr. 885, 1969 Cal. App. LEXIS 2235, disapproved, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

To establish guilt of first degree murder under the felony-murder doctrine, the prosecution must prove that the defendant harbored the specific intent to commit one of the felonies enumerated in Pen Code, § 189, and the intent to commit the felony may be inferred from the attendant facts and circumstances. People v. Tolbert (Cal. Apr. 15, 1969), 70 Cal. 2d 790, 76 Cal. Rptr. 445, 452 P.2d 661, 1969 Cal. LEXIS 368, cert. denied, (U.S. July 1, 1972), 406 U.S. 971, 92 S. Ct. 2416, 32 L. Ed. 2d 671, 1972 U.S. LEXIS 2377; People v. Mulqueen (Cal. App. 3d Dist. July 10, 1970), 9 Cal. App. 3d 532, 88 Cal. Rptr. 235, 1970 Cal. App. LEXIS 1969.

Where evidence points indisputably to a homicide in the perpetration of, or attempt to perpetrate, a burglary or one of the other felonies enumerated in Pen Code, § 189, it is proper for the court to advise the jury that defendant either is innocent or is guilty of murder in the first degree. People v. Mabry (Cal. June 26, 1969), 71 Cal. 2d 430, 78 Cal. Rptr. 655, 455 P.2d 759, 1969 Cal. LEXIS 266, cert. denied, (U.S. July 1, 1972), 406 U.S. 972, 92 S. Ct. 2417, 32 L. Ed. 2d 672, 1972 U.S. LEXIS 2382.

The felony murder rule does not apply where the underlying felony is "a necessary ingredient of the homicide" or its elements "were necessary elements in the homicide", and such rule is to be applied only when the underlying felony is "independent of the homicide." People v. Calzada (Cal. App. 2d Dist. Dec. 17, 1970), 13 Cal. App. 3d 603, 91 Cal. Rptr. 912, 1970 Cal. App. LEXIS 1271.

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The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

Once a person has embarked on a course of conduct for one of the felonious purposes enumerated in Pen C § 189, distinguishing between first and second degree murder, a death resulting from his commission of that felony will be first degree murder, regardless of the circumstances. People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

Once a person perpetrates or attempts to perpetrate one of the enumerated felonies in Pen C § 189, then in the judgment of the legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof. The key factor as indicated in the enumerated felonies is that they are undertaken for a felonious purpose independent of the homicide. People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

Felony-murder instructions were proper where the murder charge was based on a homicide occurring in the course of defendants' alleged attempt to escape from custody by force and violence; the felony involved, attempted escape from custody by force and violence, was not an integral part of the homicide. People v. Lynn (Cal. App. 1st Dist. Mar. 2, 1971), 16 Cal. App. 3d 259, 94 Cal. Rptr. 16, 1971 Cal. App. LEXIS 1584.

Proof of the underlying felony is essential to conviction under the felony-murder rule. People v. Rhodes (Cal. App. 2d Dist. Nov. 9, 1971), 21 Cal. App. 3d 10, 98 Cal. Rptr. 249, 1971 Cal. App. LEXIS 1051.

Under the felony-murder doctrine, the intent required for a conviction of murder is imported from the specific intent to commit the concomitant felony, and, therefore, the doctrine must be limited to those cases in which an intent to commit that felony can be shown from the evidence. People v. Brunt (Cal. App. 2d Dist. Apr. 17, 1972), 24 Cal. App. 3d 945, 101 Cal. Rptr. 457, 1972 Cal. App. LEXIS 1180.

The requirement for application of the felony-murder rule that the two acts be part of one continuous transaction was satisfied in a murder prosecution by evidence that defendant shot his accomplice during an attempted robbery in a business office. People v. Johnson (Cal. App. 4th Dist. Nov. 10, 1972), 28 Cal. App. 3d 653, 104 Cal. Rptr. 807, 1972 Cal. App. LEXIS 781.

In a prosecution on several counts of murder, each of which was committed in the course of a robbery, it was not error for the court to refuse instructions on second degree murder or manslaughter where defendant denied any involvement in the crimes and claimed an alibi as to each count. Under those circumstances defendant was either guilty of felony murder or entitled to acquittal. People v. Duren (Cal. Apr. 2, 1973), 9 Cal. 3d 218, 107 Cal. Rptr. 157, 507 P.2d 1365, 1973 Cal. LEXIS 186.

The felony murder statute (Pen C § 189) is not unconstitutional on the ground statutory presumptions in criminal cases are invalid unless there is a rational connection between the fact proved and the fact presumed, and that proof of robbery has no rational connection with premeditation and malice. The felony murder rule does not make the basic felony the source of a presumption of premeditation or malice, rather, it dispenses with premeditation and malice as elements of first degree murder; the felony murder rule is a "highly artificial concept," a special expression of state policy designed as a deterrent to the use of deadly force in the course of the enumerated felonies, embracing accidental or negligent as well as deliberate killings. People v. Johnson (Cal. App. 3d Dist. Mar. 20, 1974), 38 Cal. App. 3d 1, 112 Cal. Rptr. 834, 1974 Cal. App. LEXIS 1032.

In a murder trial involving a male victim found with his head bludgeoned, his throat cut from ear to ear, and his genitals excised, the fact that the victim may have died from the bludgeoning before the castration was performed did not preclude submission of the case to the jury on the theory of first-degree murder based on mayhem. The castration was the motivation of the killing and, with the bludgeoning, was part of a continuous transaction; in any

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event, the killing occurred in an attempt to perpetrate mayhem, such attempt being itself a felony that, under Pen C § 189, can form the basis for the application of the felony-murder doctrine. People v. Jentry (Cal. App. 5th Dist. May 10, 1977), 69 Cal. App. 3d 615, 138 Cal. Rptr. 250, 1977 Cal. App. LEXIS 1449.

The language "in the perpetration of" a felony in Pen C § 189, which sets forth the first degree felony-murder rule, does not require a strict causal relation between the felony and the killing; it is sufficient if both are parts of one continuous transaction. People v. Fuller (Cal. App. 5th Dist. Nov. 21, 1978), 86 Cal. App. 3d 618, 150 Cal. Rptr. 515, 1978 Cal. App. LEXIS 2109.

The purpose of Pen C § 189, which sets forth the felony-murder rule, is to deter felons from killing negligently or accidentally. People v. Fuller (Cal. App. 5th Dist. Nov. 21, 1978), 86 Cal. App. 3d 618, 150 Cal. Rptr. 515, 1978 Cal. App. LEXIS 2109.

The first degree felony-murder rule is a creature of statute (Pen C § 189), and is not an uncodified common law rule subject to judicial abrogation. Although a closely balanced question, the evidence of present legislative intent was sufficient to outweigh the contrary implications of the language of § 189 and its predecessors. The California Code Commission, acting in 1872, apparently believed that its version of § 189 codified the felony-murder rule as to the listed felonies, even though it may have misread the relevant law, and the Legislature adopted § 189 in the form proposed by the commission. Pursuant to rules of statutory construction, the Legislature thus acted with the same intent as the commission when it adopted § 189. Nothing in the ensuing history of the statute suggested that the Legislature acted with any different intent when it subsequently amended the statute in various respects. Accordingly, it was inferred that the Legislature still believed that § 189 codified the first degree felony-murder rule. This belief was controlling. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

With respect to a homicide that is committed by one of the means listed in Pen C § 189 (murder), such statute is merely a degree-fixing measure. There must first be independent proof beyond a reasonable doubt that a crime was murder, i.e., an unlawful killing with malice aforethought (Pen C §§ 187, 188), before § 189 can operate to fix the degree thereof at murder in the first degree. Thus, if a killing is murder within the meaning of §§ 187 and 188, and is by one of the means enumerated in § 189, the use of such means makes the killing first degree murder as a matter of law. However, a killing by one of the means enumerated in the statute is not first degree murder unless it is first established that it is murder. If the killing was not murder, it cannot be first degree murder, and a killing cannot become murder in the absence of malice aforethought. Without a showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in the statute. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

When the evidence points indisputedly to a homicide committed in the course of a felony listed in Pen C § 189, the trial court is justified in advising the jury that defendant is either innocent or guilty of first degree murder. People v. Turner (Cal. Nov. 21, 1984), 37 Cal. 3d 302, 208 Cal. Rptr. 196, 690 P.2d 669, 1984 Cal. LEXIS 128, overruled, People v. Anderson (Cal. Oct. 13, 1987), 43 Cal. 3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306, 1987 Cal. LEXIS 444.

The felony- murder rule is a creature of statute, cannot be judicially abrogated, and does not deny due process of law by relieving the prosecution of the burden of proving malice, inasmuch as malice is not an element of the crime of felony murder. People v. Turner (Cal. Nov. 21, 1984), 37 Cal. 3d 302, 208 Cal. Rptr. 196, 690 P.2d 669, 1984 Cal. LEXIS 128, overruled, People v. Anderson (Cal. Oct. 13, 1987), 43 Cal. 3d 1104, 240 Cal. Rptr. 585, 742 P.2d 1306, 1987 Cal. LEXIS 444.

In a prosecution for first degree murder with special circumstances alleged, the trial court erroneously instructed the jury that murder perpetrated during the commission of a kidnaping is first degree murder. Pen C § 189, the felony murder statute, classifies as first degree murder a killing "which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [lewd or lascivious

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acts with a child under 14].” Kidnaping is not listed in § 189. People v. Bigelow (Cal. Dec. 27, 1984), 37 Cal. 3d 731, 209 Cal. Rptr. 328, 691 P.2d 994, 1984 Cal. LEXIS 143.

The felony-murder rule does not raise a conclusive presumption of malice and does not thereby deny a defendant convicted under it of due process of law. People v. Anderson (Cal. Feb. 21, 1985), 38 Cal. 3d 58, 210 Cal. Rptr. 777, 694 P.2d 1149, 1985 Cal. LEXIS 249.

The purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or accidentally. First-degree felony murder encompasses a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol, and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable. People v. Hernandez (Cal. App. 1st Dist. June 14, 1985), 169 Cal. App. 3d 282, 215 Cal. Rptr. 166, 1985 Cal. App. LEXIS 1995.

The merger doctrine did not preclude application of the felony-murder rule in a prosecution for first degree felony murder based on the fact, during the course of an armed robbery, one of the victims died from a heart attack. Although ordinarily the felony-murder rule is inapplicable when based on a felony which is an integral part of and included in fact within the homicide, nevertheless, the doctrine may apply even if the underlying felony was included within the facts of the homicide and was integral thereto, if that felony was committed with an independent felonious purpose. In the case of armed robbery, there is such a purpose, i.e., to acquire money or property belonging to another. People v. Hernandez (Cal. App. 1st Dist. June 14, 1985), 169 Cal. App. 3d 282, 215 Cal. Rptr. 166, 1985 Cal. App. LEXIS 1995.

The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. This deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the felonies enumerated in the felony-murder rule, then he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof. People v. Rose (Cal. App. 4th Dist. June 24, 1986), 182 Cal. App. 3d 813, 227 Cal. Rptr. 570, 1986 Cal. App. LEXIS 1752.

The statutory scheme of the 1978 death penalty law making felony murder but not simple murder death eligible does not violate the federal Constitution. People v. Bonillas (Cal. May 1, 1989), 48 Cal. 3d 757, 267 Cal. Rptr. 895, 771 P.2d 844, 1989 Cal. LEXIS 1158, cert. denied, (U.S. Oct. 16, 1989), 493 U.S. 922, 110 S. Ct. 288, 107 L. Ed. 2d 267, 1989 U.S. LEXIS 4932.

A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen C § 189) constitutes at least second degree murder. A felony is inherently dangerous to human life when there is a high probability that it will result in death. People v. Patterson (Cal. Sept. 7, 1989), 49 Cal. 3d 615, 262 Cal. Rptr. 195, 778 P.2d 549, 1989 Cal. LEXIS 1604.

Although the Penal Code does not expressly set forth any provision for second degree felony murder, the perpetration of some felonies, exclusive of those enumerated in Pen C § 189 (first degree murder when perpetrated by specified means or during commission of specified felonies), may provide the basis for a murder conviction under the felony-murder rule. However only such felonies as are in themselves inherently dangerous to human life can support the application of the felony-murder rule. People v. Landry (Cal. App. 6th Dist. Aug. 10, 1989), 212 Cal. App. 3d 1428, 261 Cal. Rptr. 254, 1989 Cal. App. LEXIS 822.

In a prosecution for murder, the trial court erred in instructing the jury that a killing committed in the course of a kidnapping for the purpose of robbery is statutorily defined as a first degree felony murder, since that crime is not one listed within Pen C § 189 (first degree murder). However, the error was harmless, since the jury's other conclusions removed the likelihood of harm to defendant: the jury found true special circumstances allegations of

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robbery and kidnapping, and it found defendant guilty of the crime of kidnapping for the purpose of robbery. Thus, the jury necessarily concluded that the murder was committed in the course of a robbery, a crime within § 189. Also, the instruction was harmless, as it actually benefited defendant, since it required the prosecution to prove the element of kidnapping, which element the statute does not require. People v. Harris (Cal. App. 1st Dist. July 11, 1990), 221 Cal. App. 3d 1528, 271 Cal. Rptr. 299, 1990 Cal. App. LEXIS 741, cert. denied, (U.S. Oct. 7, 1991), 502 U.S. 874, 112 S. Ct. 212, 116 L. Ed. 2d 170, 1991 U.S. LEXIS 4929.

Under the felony-murder rule, one may be held liable for first degree murder for a killing committed during the course of a qualifying felony (Pen C § 189). The rule is not limited to killings that seem a probable result of the underlying felony. It includes a variety of unintended homicides resulting from reckless behavior, ordinary negligence, or pure accident. The rule embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol. It condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable. No independent proof of malice is required in felony-murder cases. By operation of § 189 the killing is deemed to be first degree murder as a matter of law. People v. Anderson (Cal. App. 1st Dist. Sept. 13, 1991), 233 Cal. App. 3d 1646, 285 Cal. Rptr. 523, 1991 Cal. App. LEXIS 1056.

Under the felony-murder doctrine, the jury must find the perpetrator had the specific intent to commit one of the felonies enumerated in Pen C § 189, even where that felony is a crime such as rape. The killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. People v. Proctor (Cal. Dec. 28, 1992), 4 Cal. 4th 499, 15 Cal. Rptr. 2d 340, 842 P.2d 1100, 1992 Cal. LEXIS 6123, aff'd sub. nom., Tuilaepa v. California (U.S. June 30, 1994), 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750, 1994 U.S. LEXIS 5084.

The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life. A person who kills is guilty of murder if he or she acts with malice aforethought. The felony-murder doctrine, the ostensible purpose of which is to deter those engaged in felonies from killing negligently or accidentally, operates to posit the existence of that crucial mental state—and thereby to render irrelevant evidence of actual malice or the lack thereof—when the killer is engaged in a felony involving an inherent danger to human life that renders logical an imputation of malice on the part of all who commit it. The felony-murder rule applies to both first and second degree murder. Application of the first degree felony-murder rule is invoked by the perpetration of one of the felonies enumerated in Pen C § 189. The felonies that can support a conviction of second degree felony-murder are restricted to those felonies that are inherently dangerous to human life. In determining whether a felony is inherently dangerous, the court looks to the elements of the felony in the abstract, not to the particular facts of the case, that is, not to the defendant's specific conduct. For purposes of the second degree felony-murder doctrine, an inherently dangerous felony is an offense carrying a high probability that death will result. People v. Hansen (Cal. Dec. 30, 1994), 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P.2d 1022, 1994 Cal. LEXIS 6590, overruled in part, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

A felony-murder instruction may not properly be given when it is based upon a felony that is an integral part of the homicide and that the evidence produced by the prosecution shows to be an offense included in fact within the offense charged. Thus, felony murder may only be used where the underlying felony is independent and not an integral part of the homicide; otherwise it merges with the homicide. There is a very significant difference between a death resulting from an assault with a deadly weapon, where the purpose of the conduct was the very assault that resulted in death, and a death resulting from conduct for an independent felonious purpose, such as robbery or rape, which happened to be accomplished by a deadly weapon and, therefore, technically included an assault with a deadly weapon. Where an assault occurs as part of a burglary with intent to commit an assault, there is no felonious purpose independent of assault. Where an assault occurs as part of a robbery, there is the separate felonious purpose to deprive the victim of property. As with robbery, where an assault occurs as part of a kidnapping, there is the separate felonious purpose to move the victim without his or her consent. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

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In a felony-murder prosecution of two defendants, there was sufficient evidence to establish an independent felonious purpose for the underlying felony of kidnapping apart from any assault that may have been a part of the kidnapping. Defendants forced the victim into a car and drove him away; they may have wanted to kidnap, threaten, or scare the victim. Since one of the defendants was angry at the victim and thought the victim had stolen his stereo, defendants most likely kidnapped him to get information as to what had happened to the stereo. The threat to kill the victim overheard by witnesses was consistent with and supported those possibilities. Thus, even if defendants had an intent to kill the victim, there was strong evidence to show that they had a concurrent intent to kidnap that was not incidental. Indeed, in order to convict defendants under the felony-murder theory, the jury had to find that they had the specific intent to commit kidnapping. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

In a felony-murder prosecution of two defendants based on the underlying felony of kidnapping, the trial court did not err in failing sua sponte to instruct the jury that an aider and abettor's liability for felony murder depends on a finding that the killing was a natural and probable consequence of the felony aided and abetted. Accomplices are liable for felony murder even if the killing was not a natural and probable consequence. This rule is in accord with the general principle that felons are liable for felony murder without any strict causal relation and even if the death is accidental or wholly unforeseeable. Furthermore, even if it were applicable to felony murder, this instruction must be sought by defense counsel where applicable, and defendants' counsel did not do so. Moreover, any failure to give the instruction was harmless since no reasonable jury could have concluded the murder was not a natural and probable consequence of the kidnapping, since the victim was kidnapped forcefully and violently out of anger and with the threat of death. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

First degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable. Moreover, first degree felony murder does not require a strict causal relation between the felony and the killing. The only nexus required is that both are part of one continuous transaction. Unlike the felony-murder theory, the question of guilt as an aider and abettor is one of legal causation, i.e., whether the perpetrator's criminal act is the probable and natural consequence of a criminal act encouraged or facilitated by the aider and abettor. In contrast, felony murder is not limited to foreseeable deaths. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

A murder is of the first degree when committed in the perpetration of, or attempt to perpetrate, several enumerated felonies, including rape and lewd conduct. A killing is committed in the perpetration of an enumerated felony if the killing and the felony are parts of one continuous transaction. The reach of the felony-murder special circumstance is equally broad. Here, the medical evidence supported defendant's conviction. People v. Earp (Cal. June 24, 1999), 20 Cal. 4th 826, 85 Cal. Rptr. 2d 857, 978 P.2d 15, 1999 Cal. LEXIS 3901, cert. denied, (U.S. Mar. 6, 2000), 529 U.S. 1005, 120 S. Ct. 1272, 146 L. Ed. 2d 221, 2000 U.S. LEXIS 1779.

Conspiracy felony-murder applies only to conspiracies to commit the offenses listed in Penal C § 189, and felony-murder may not be based on an underlying felony assault conspiracy. Here, the trial court committed reversible error when it erroneously instructed on the theory of conspiracy felony murder, it not appearing beyond a reasonable doubt that the jury did not rely on that instruction. People v. Baker (Cal. App. 2d Dist. May 25, 1999), 72 Cal. App. 4th 531, 85 Cal. Rptr. 2d 362, 1999 Cal. App. LEXIS 520.

Special circumstances in Pen C § 190.2 do not apply to conspiracy to murder. People v. Hernandez (Cal. June 2, 2003), 30 Cal. 4th 835, 134 Cal. Rptr. 2d 602, 69 P.3d 446, 2003 Cal. LEXIS 3493, modified, (Cal. Aug. 13, 2003), 2003 Cal. LEXIS 5689, overruled in part, People v. Riccardi (Cal. July 16, 2012), 54 Cal. 4th 758, 144 Cal. Rptr. 3d 84, 281 P.3d 1, 2012 Cal. LEXIS 6497.

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California courts have discussed the broad construction of the phrase "in the perpetration of" in Cal. Penal Code § 189 for the scope of the felony–murder rule, have found that such comports with the legislative intent behind such theory, and is consistent with the so called "escape rule" found to have been specifically drafted into Cal. Penal Code § 190.2(a)(17) to expand, not to constrict, the scope of the felony–murder–based special circumstances. People v. Portillo (Cal. App. 4th Dist. Apr. 4, 2003), 107 Cal. App. 4th 834, 132 Cal. Rptr. 2d 435, 2003 Cal. App. LEXIS 495.

Convictions in federal court for violating the Travel Act, 18 USCS § 1952, did not bar defendants' prosecution in California for kidnapping and murder because the acts to be proven were not the same acts for which defendants were convicted in federal court. People v. Friedman (Cal. App. 2d Dist. Aug. 27, 2003), 111 Cal. App. 4th 824, 4 Cal. Rptr. 3d 273, 2003 Cal. App. LEXIS 1318.

Felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place; under California law, there must be a logical nexus—that is, more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller, and evidence that the killing facilitated or aided the underlying felony is relevant but is not essential. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

For purposes of felony murder, the requisite temporal relationship between the felony and the homicidal act exists even if the nonkiller is not physically present at the time of the homicide, as long as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of one continuous transaction. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

For a nonkiller to be responsible for a homicide committed by a co-felon under the felony-murder rule, there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death, and the court therefore rejects the assumption that the "in furtherance" and "jointly engaged" formulations articulate opposing standards of felony-murder liability; the latter does not mean that mere coincidence of time and place between the felony and the homicide is sufficient, and the former does not require that the killer intended the homicidal act to aid or promote the felony. Rather, cases have merely used different words to convey the same concept: to exclude homicidal acts that are completely unrelated to the felony for which the parties have combined, and to require instead a logical nexus between the felony and the homicide beyond a mere coincidence of time or place. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

Felony-murder rule does not require proof that the homicidal act furthered or facilitated the felony, only that a logical nexus exist between the two. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

Merger doctrine did not preclude a jury instruction on second-degree felony murder with a predicate of negligently discharging a firearm. Defendant had fired a gun in order to scare men who were dismantling his car; because his purpose was collateral to an intent to cause injury, use of the second-degree felony-murder rule was appropriate. People v. Robertson (Cal. Aug. 19, 2004), 34 Cal. 4th 156, 17 Cal. Rptr. 3d 604, 95 P.3d 872, 2004 Cal. LEXIS 7589, overruled, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Substantial evidence supported not only defendant's convictions for attempted rape and attempted robbery, but also the jury's findings on attempted rape-murder, attempted robbery-murder, and burglary-murder special circumstance allegations, where in the course of a residential burglary defendant beat to death a frail, elderly woman and he also attempted to rob and sexually assault her; prosecution presented evidence that defendant entered the victim's house by forcing open a bedroom window and that the house was ransacked, that the victim was found unconscious on the floor of her residence, naked below the waist, and when police encountered defendant at the victim's house, his belt was unfastened and his pants were buttoned only at the top. People v.

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Wallace (Cal. Aug. 14, 2008), 44 Cal. 4th 1032, 81 Cal. Rptr. 3d 651, 189 P.3d 911, 2008 Cal. LEXIS 9774, modified, (Cal. Oct. 22, 2008), 2008 Cal. LEXIS 12312, cert. denied, (U.S. May 4, 2009), 556 U.S. 1223, 129 S. Ct. 2160, 173 L. Ed. 2d 1159, 2009 U.S. LEXIS 3350.

All assaultive-type crimes, which are those that involve a threat of immediate violent injury, merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction. In determining whether a crime merges, a court looks to its elements and not the facts of the case, and, accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive. People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Because shooting at an occupied vehicle under Pen C § 246, is assaultive in nature, and hence cannot serve as the underlying felony for purposes of the felony-murder rule, in a case in which defendant was convicted of second-degree murder, the trial court erred in instructing the jury on second-degree felony murder with shooting at an occupied vehicle under Pen C § 246, the underlying felony. However, the error was harmless under Cal. Const., art. VI, § 13, because no juror could have found that defendant participated in the shooting, either as a shooter or as an aider and abettor, without also finding that he committed an act that was dangerous to life and did so knowing of the danger and with conscious disregard for life, which was a valid theory of malice, and the trial court had instructed the jury on conscious-disregard-for-life malice as a possible basis of murder. People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Second-degree felony-murder rule is based on statute, specifically Pen C § 188's definition of implied malice, and hence is constitutionally valid. People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Defendant's argument that there was insufficient evidence that, at the time of a victim's shooting, the victim was in possession of any property, or that defendant took any property from him, ignored the substantial evidence from which a reasonable jury could find that the victim's killing occurred during the commission of a robbery where the testimony of defendant's accomplice provided direct evidence that defendant took personal items from the victim before killing him because the accomplice testified that before the shooting defendant told the victim to take off his clothes, which he did, and that after the shooting defendant returned to a truck and threw some things into the back of it, including the victim's clothing and some small items that might have been the victim's wallet or some change. Moreover, the victim's body was found with no shirt or jacket, which further supported the inference that personal items were taken from him, and even if the accomplice's grand jury testimony was inconsistent, because it was admitted for its truth, whether the jury accepted the accomplice's trial testimony exclusively, his grand jury testimony exclusively, or a combination of both, the testimony provided substantial evidence that a robbery took place. People v. Thompson (Cal. May 24, 2010), 49 Cal. 4th 79, 109 Cal. Rptr. 3d 549, 231 P.3d 289, 2010 Cal. LEXIS 4884, cert. denied, (U.S. Jan. 10, 2011), 562 U.S. 1146, 131 S. Ct. 919, 178 L. Ed. 2d 767, 2011 U.S. LEXIS 128.

For purposes of the felony-murder rule, a robbery or burglary continues, at a minimum, until the perpetrator reaches a place of temporary safety, but reaching a place of temporary safety does not, in and of itself, terminate felony-murder liability so long as the felony and the killing are part of one continuous transaction. People v. Wilkins (Cal. App. 4th Dist. Jan. 7, 2011), 191 Cal. App. 4th 780, 119 Cal. Rptr. 3d 691, 2011 Cal. App. LEXIS 14, review granted, unpublished, (Cal. May 11, 2011), 124 Cal. Rptr. 3d 827, 251 P.3d 940, 2011 Cal. LEXIS 4421, rev'd, superseded, (Cal. Mar. 7, 2013), 56 Cal. 4th 333, 153 Cal. Rptr. 3d 519, 295 P.3d 903, 2013 Cal. LEXIS 1507.

Evidence was sufficient to support defendant's convictions for first-degree murder, robbery, and attempted carjacking and to support a jury's robbery-murder special circumstance finding where: (1) a witness identified defendant as the gunman who walked swiftly toward her and who looked back at the body of the murder victim; (2) defendant admitted to a gang member that he killed a man during a failed carjacking at the scene of the victim's murder; and (3) there was also substantial circumstantial evidence of defendant's taking of the murder victim's car keys. From evidence that defendant killed the victim and at the time of the killing took substantial property from the victim, the jury could reasonably infer that defendant killed the victim to accomplish the taking and thus committed

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the offense of robbery. People v. Nelson (Cal. Jan. 20, 2011), 51 Cal. 4th 198, 120 Cal. Rptr. 3d 406, 246 P.3d 301, 2011 Cal. LEXIS 463, cert. denied, (U.S. Oct. 3, 2011), 565 U.S. 854, 132 S. Ct. 183, 181 L. Ed. 2d 93, 2011 U.S. LEXIS 6034.

In a capital case in which defendant was convicted of mayhem felony murder, the merger doctrine had no logical application; because the medical testimony was that the victim could have survived had she been given prompt medical care, even though defendant's scalding of her with hot bath water would have scarred her for life, the mayhem need not have resulted in a murder. People v. Gonzales (Cal. June 2, 2011), 51 Cal. 4th 894, 126 Cal. Rptr. 3d 1, 253 P.3d 185, 2011 Cal. LEXIS 5437, modified, (Cal. Aug. 10, 2011), 2011 Cal. LEXIS 8083.

There was sufficient evidence to support a codefendant's conviction for first-degree murder where there was sufficient evidence that she aided and abetted felony murder based on kidnapping. There was evidence from which the jury could have concluded that the victim was alive at the time he was placed in the trunk of the defendants' car, that it was only after arriving at another location that defendant placed the plastic and more duct tape on the victim, and that it was this that caused the victim's death. People v. Loza (Cal. App. 4th Dist. June 27, 2012), 207 Cal. App. 4th 332, 143 Cal. Rptr. 3d 355, 2012 Cal. App. LEXIS 755.

Defendant's confession was rendered involuntary by the fact that the detective repeatedly told defendant that his admission to killing the victim during a robbery would not, by itself, trigger a life sentence; the promises of leniency were false under the felony murder rule and clearly caused defendant to confess. People v. Westmoreland (Cal. App. 1st Dist. Feb. 5, 2013), 213 Cal. App. 4th 602, 153 Cal. Rptr. 3d 267, 2013 Cal. App. LEXIS 88, modified, (Cal. App. 1st Dist. Mar. 1, 2013), 2013 Cal. App. LEXIS 160, review granted, depublished, and transferred, (Cal. May 15, 2013), 156 Cal. Rptr. 3d 436, 300 P.3d 517, 2013 Cal. LEXIS 4389.

Jury necessarily found defendant guilty of first degree felony murder because it was instructed on felony murder based on robbery and found true robbery-murder special-circumstance allegations as to three murders; it was not necessary to address an argument as to an instruction on aiding and abetting atural and probable consequences. People v. Romero and Self (Cal. Aug. 27, 2015), 62 Cal. 4th 1, 191 Cal. Rptr. 3d 855, 354 P.3d 983, 2015 Cal. LEXIS 5759, modified, (Cal. Oct. 14, 2015), 2015 Cal. LEXIS 7766, cert. denied, (U.S. Mar. 21, 2016), 136 S. Ct. 1466, 194 L. Ed. 2d 576, 2016 U.S. LEXIS 1898.

Ireland merger doctrine did not bar defendant's convictions for torture-murder and mayhem-murder because the merger doctrine is inapplicable to first-degree felony murder. People v. Powell (Cal. Aug. 13, 2018), 236 Cal. Rptr. 3d 316, 422 P.3d 973, 5 Cal. 5th 921, 2018 Cal. LEXIS 5748, cert. denied, (U.S. Mar. 4, 2019), 139 S. Ct. 1292, 203 L. Ed. 2d 417, 2019 U.S. LEXIS 1606.

No unconstitutional vagueness was implicated in a second degree felony-murder conviction under former law because scientific expert evidence established that the underlying felony of manufacturing methamphetamine was inherently dangerous to human life, often resulting in fire or explosion and thus causing a high probability of death. A previously published appellate decision, which applied the same analysis and reached the same result, ensured uniformity and gave due process notice. In re White (Cal. App. 4th Dist. Apr. 30, 2019), 246 Cal. Rptr. 3d 670, 34 Cal. App. 5th 933, 2019 Cal. App. LEXIS 394.

16. Felony Murder Rule: Mental State

Person who kills another in perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem is guilty of first degree murder by force of this provision, regardless of any question whether killing was intentional or unintentional. People v. Milton (Cal. Oct. 26, 1904), 145 Cal. 169, 78 P. 549, 1904 Cal. LEXIS 560; People v. Denman (Cal. Dec. 31, 1918), 179 Cal. 497, 177 P. 461, 1918 Cal. LEXIS 784; People v. Reid (Cal. Apr. 29, 1924), 193 Cal. 491, 225 P. 859, 1924 Cal. LEXIS 333; People v. Lindley (Cal. July 30, 1945), 26 Cal. 2d 780, 161 P.2d 227, 1945 Cal. LEXIS 193, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270; People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198; People

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v. Peterson (Cal. Sept. 24, 1946), 29 Cal. 2d 69, 173 P.2d 11, 1946 Cal. LEXIS 277, cert. denied, (U.S. June 23, 1947), 331 U.S. 861, 67 S. Ct. 1751, 91 L. Ed. 1867, 1947 U.S. LEXIS 2055.

Infliction of injuries, though unintentionally, that caused death in perpetration of burglary or rape is first degree murder and it is immaterial whether defendant used his hand or fists or something more inherently dangerous. People v. Cheary (Cal. Apr. 9, 1957), 48 Cal. 2d 301, 309 P.2d 431, 1957 Cal. LEXIS 183.

Under felony murder doctrine, intent required for conviction of murder is imported from specific intent to commit concomitant felony. People v. Sears (Cal. May 21, 1965), 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P.2d 938, 1965 Cal. LEXIS 291, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087.

To presume intent to maim from act or type of injury inflicted, and then to transfer such presumed intent to support felony murder conviction, artificially extends fiction; doctrine of felony murder must be limited to those cases in which intent to commit felony can be shown from evidence. People v. Sears (Cal. May 21, 1965), 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P.2d 938, 1965 Cal. LEXIS 291, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087.

Unintentional killings are first degree murder when committed by felons while perpetrating any of the crimes denounced in Pen Code, § 189. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

The felony-murder doctrine imputes malice aforethought to the felon who kills another in the commission of one of the enumerated felonies defined in Pen Code, § 189. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

Under the felony-murder doctrine, malice is not a necessary requirement; the only criminal intent required is the specific intent to commit the particular felony; a killing which is perpetrated during the course of one of the felonies enumerated in Pen Code, § 189, is murder of the first degree regardless of whether it was intentional or accidental. People v. Fortman (Cal. App. 2d Dist. Dec. 15, 1967), 257 Cal. App. 2d 45, 64 Cal. Rptr. 669, 1967 Cal. App. LEXIS 2446.

The felony-murder rule operates to posit the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of all felonies inherently dangerous to human life, and to posit the existence of malice aforethought and to classify the offense as murder of the first degree in homicides which the direct causal result of the six felonies specifically enumerated in Pen Code, § 189. People v. Ireland (Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351.

Under the felony murder doctrine, a killing, whether intentional or unintentional, is murder in the first degree if committed in the perpetration or attempt to perpetrate any of the six felonies designated in Pen Code, § 189; the ordinary elements of first degree murder, malice and premeditation, are eliminated by the doctrine; and the only criminal intent required is the specific intent to commit the felony. People v. Baglin (Cal. App. 2d Dist. Apr. 3, 1969), 271 Cal. App. 2d 411, 76 Cal. Rptr. 863, 1969 Cal. App. LEXIS 2396.

The felony-murder doctrine applies whether a killing is wilful, deliberate, and premeditated or merely accidental, and whether or not the killing is planned as a part of the commission of the felony. People v. Jackson (Cal. App. 2d Dist. May 22, 1969), 273 Cal. App. 2d 248, 78 Cal. Rptr. 20, 1969 Cal. App. LEXIS 2162.

Under the felony-murder doctrine, the intent required for the conviction of murder is imputed from the specific intent to commit the concomitant felony. People v. Stines (Cal. App. 4th Dist. Dec. 22, 1969), 2 Cal. App. 3d 970, 82 Cal. Rptr. 850, 1969 Cal. App. LEXIS 1480.

The net effect of the imputation of malice by means of the felony-murder rule is to eliminate the possibility of finding unlawful killings resulting from the commission of a felony to be manslaughter, rather than murder. People v. Burton

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(Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

Pen C § 189, imposes strict liability for death committed in the course of one of the enumerated felonies, whether the killing was caused intentionally, negligently, or merely accidentally. Malice is imputed and need not be shown. People v. Fuller (Cal. App. 5th Dist. Nov. 21, 1978), 86 Cal. App. 3d 618, 150 Cal. Rptr. 515, 1978 Cal. App. LEXIS 2109.

With respect to a homicide resulting from the commission of or attempt to commit one of the felonies listed in Pen C § 189 (murder), such statute has been generally treated as not only a degree-fixing device, but also as a codification of the felony-murder rule. No independent proof of malice is required in such cases; by operation of the statute the killing is deemed to be first degree murder as a matter of law. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

In felony-murder cases the prosecution need only prove defendant's intent to commit the underlying felony. The "conclusive presumption" of malice is no more than a procedural fiction that masks the substantive reality that, as a matter of law, malice is not an element of felony murder. Since the felony-murder rule does not in fact raise a presumption of the existence of an element of the crime, it does not violate the due process requirement for proof beyond a reasonable doubt of each element of the crime charged. Similarly, the felony-murder doctrine does not violate the rule that a statutory presumption affecting the People's burden of proof in criminal cases is invalid unless there is a rational connection between the fact proved and the fact presumed. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

The "conclusive presumption" of malice in felony-murder cases does not violate equal protection, even though defendants charged with murder other than felony murder are allowed to reduce their degree of guilt by evidence negating the element of malice, since the two kinds of murder are not the same crime, and since malice is not an element of felony murder. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

In the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt. In the case of felony murder, which is automatically fixed at first degree by operation of Pen C § 189, defendant's state of mind is entirely irrelevant and need not be proved at all, since malice is not an element of felony murder. Thus, first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. People v. Dillon (Cal. Sept. 1, 1983), 34 Cal. 3d 441, 194 Cal. Rptr. 390, 668 P.2d 697, 1983 Cal. LEXIS 226.

The only intent required for conviction under the felony-murder rule (Pen C § 189) is the intent to commit the underlying felony. Thus, in a prosecution for attempted robbery and murder, defendant, who killed a man in the course of the attempted robbery, was properly convicted under the felony-murder rule, where the facts indisputably showed that defendant intended to commit the underlying crime of robbery. People v. Schafer (Cal. App. 2d Dist. Feb. 19, 1987), 189 Cal. App. 3d 786, 234 Cal. Rptr. 565, 1987 Cal. App. LEXIS 1409.

No showing of an intent to kill is required to support a conviction based on the felony-murder rule (Pen C § 189) absent a special circumstance allegation. The intent to kill requirement imposed by Pen C § 190.2(b), with respect to felony-murder special circumstance convictions, is interpreted to avoid violation of the prohibition against cruel and unusual punishment under U.S. Const., 8th Amend.; it is not applicable to cases without special circumstances. The purpose of the felony-murder rule is to deter those engaged in felonies from killing negligently or accidentally. It would be inconsistent with this purpose to superimpose an intent to kill requirement on the felony-murder rule. People v. Schafer (Cal. App. 2d Dist. Feb. 19, 1987), 189 Cal. App. 3d 786, 234 Cal. Rptr. 565, 1987 Cal. App. LEXIS 1409.

The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life. Under well-settled principles of criminal liability a

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person who kills, whether or not he is engaged in an independent felony at the time, is guilty of murder if he acts with malice aforethought. The felony-murder doctrine, whose ostensible purpose is to deter those engaged in felonies from killing negligently or accidentally operates to posit the existence of that crucial mental state, and thereby to render irrelevant evidence of actual malice or the lack thereof, when the killer is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it. The felony-murder rule applies to both first and second degree murder. Application of the first degree felony-murder rule is invoked by the perpetration of one of the felonies enumerated in Pen C § 189. The felonies that can support a conviction of second degree murder, based upon a felony-murder theory, have been restricted to those felonies that are inherently dangerous to human life. People v. Tabios (Cal. App. 3d Dist. Oct. 5, 1998), 67 Cal. App. 4th 1, 78 Cal. Rptr. 2d 753, 1998 Cal. App. LEXIS 840, overruled, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Drive-by-shooting clause added to Pen C § 189 is not an enumerated felony for purposes of the felony-murder rule, and although premeditation is not required to establish first degree murder under this clause, a specific intent to kill is required; thus, the trial court erred in giving felony-murder instructions on the first degree murder charges under Pen C § 187, but the error was harmless because the prosecutor emphasized the requirement of finding an intent to kill and the instructions accurately advised the jury that a specific intent to kill had to be proven by the prosecution. People v. Chavez (Cal. App. 5th Dist. May 3, 2004), 118 Cal. App. 4th 379, 12 Cal. Rptr. 3d 837, 2004 Cal. App. LEXIS 690.

Nonkiller's liability for felony murder does not depend on the killer's subjective motivation but on the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to commit. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

It was unnecessary to consider whether there was sufficient evidence to prove that a murder was the result of premeditation and deliberation because the evidence was sufficient to support a finding that defendants entered the victim's residence with the intent to commit a felony therein, robbed her and attempted to rape her, and that, pursuant to Pen C § 189, the victim was murdered in the course of those crimes. Although the victim might have willingly invited the two defendants into her house, defendants' intent to commit the crimes at the time they entered the house could be inferred from the fact that they committed the crimes. People v. Letner and Tobin (Cal. July 29, 2010), 50 Cal. 4th 99, 112 Cal. Rptr. 3d 746, 235 P.3d 62, 2010 Cal. LEXIS 7290, cert. denied, (U.S. Apr. 18, 2011), 563 U.S. 939, 131 S. Ct. 2097, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3073.

In a trial felony murder case, there was no error in refusing to instruct on the requirement of a logical nexus between the victim's death and the underlying felonies or on proximate causation as set forth in the standard causation instruction because the case involved a single perpetrator; application of the felony-murder rule thus lay outside the context of causation principles. People v. Huynh (Cal. App. 4th Dist. Dec. 20, 2012), 212 Cal. App. 4th 285, 151 Cal. Rptr. 3d 170, 2012 Cal. App. LEXIS 1296, cert. denied, (U.S. Oct. 7, 2013), 571 U.S. 912, 134 S. Ct. 278, 187 L. Ed. 2d 201, 2013 U.S. LEXIS 6507.

Felony-murder special circumstance enhancement imposing life without the possibility of parole was not vague as applied to the actual perpetrator of the killing, even though the sentence for felony murder in the absence of a special circumstance finding was life sentence with the possibility of parole. Pen C §§ 189, 190, and 190.2 provided notice of the sentencing possibilities, and the felony-murder offense was distinct from the special circumstance in that the latter required an additional showing that the intent to commit the felony was independent of the killing. People v. Andreasen (Cal. App. 4th Dist. Mar. 5, 2013), 214 Cal. App. 4th 70, 153 Cal. Rptr. 3d 641, 2013 Cal. App. LEXIS 162.

17. Provocative Act Murder

Evidence was sufficient to support defendant's first-degree murder conviction based on the provocative act murder doctrine because, far beyond committing a simple armed robbery, defendant taunted, terrorized, and toyed with the

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victims for an extended period of time. His demeanor suggested peculiar instability and a propensity for gratuitous violence, and led one of the victims to believe that he was prepared to kill whether or not the victim complied with his demands. People v. Baker-Riley (Cal. App. 2d Dist. July 2, 2012), 207 Cal. App. 4th 631, 143 Cal. Rptr. 3d 737, 2012 Cal. App. LEXIS 775.

In a trial for the provocative act murder of defendant's accomplice, who was shot by a rival gang member, no instruction was required relating to the shooter's use of self-defense. People v. Mejia (Cal. App. 2d Dist. Nov. 30, 2012), 211 Cal. App. 4th 586, 149 Cal. Rptr. 3d 815, 2012 Cal. App. LEXIS 1224.

Pen C § 189 may be used to elevate an implied malice provocative act murder to first degree so long as the provocative act that prompts the third party's use of lethal force occurs during the commission of a § 189 felony. People v. Mejia (Cal. App. 2d Dist. Nov. 30, 2012), 211 Cal. App. 4th 586, 149 Cal. Rptr. 3d 815, 2012 Cal. App. LEXIS 1224.

Evidence was sufficient to convict defendant of first degree provocative act murder, even though he was not present at the armed home-invasion robbery during which one of the victims killed an accomplice, because defendant planned, directed, and supervised the crime and malice could be imputed to him as the mastermind. A surviving accomplice's taunting and terrorizing the robbery victims resulted in the death and was sufficiently provocative of lethal resistance to find implied malice. People v. Johnson (Cal. App. 2d Dist. Nov. 19, 2013), 221 Cal. App. 4th 623, 164 Cal. Rptr. 3d 505, 2013 Cal. App. LEXIS 931.

18. Killing by Victim or Police Officer

Section requires that felon or his accomplice commit killing, for if he does not, killing is not committed to perpetrate felony; to include within section a killing committed by victim to thwart a felony would expand meaning of words "murder ... which is committed in the perpetration ... [of] robbery ..." beyond common understanding. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

Defendants who initiate gun battles may be found guilty of murder if their victims resist and kill. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

When defendant or his accomplice, with conscious disregard for life, intentionally commits act likely to cause death, and his victim or police officer kills in reasonable response to act, defendant is guilty of murder, and killing is attributable, not merely to commission of felony, but to intentional act of defendant or his accomplice committed with conscious disregard of life. People v. Gilbert (Cal. Dec. 15, 1965), 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 228, vacated, (U.S. June 12, 1967), 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

Police officer's killing of another in performance of his duty cannot be considered independent intervening cause for which defendant is not liable where killing is reasonable response to dilemma thrust on policeman by intentional act of defendant or his accomplice. People v. Gilbert (Cal. Dec. 15, 1965), 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P.2d 365, 1965 Cal. LEXIS 228, vacated, (U.S. June 12, 1967), 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, 1967 U.S. LEXIS 1086.

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When defendant or his accomplice, with a conscious disregard for life, intentionally commits an act likely to cause death and his victim kills in reasonable response to such act, defendant is guilty of murder; the victim's self-defensive killing is a reasonable response to the dilemma thrust on him by the intentional act of defendant or his accomplice and cannot be considered an independent intervening cause for which defendant is not liable. People v. Dolbeer (Cal. App. 1st Dist. Mar. 29, 1963), 214 Cal. App. 2d 619, 29 Cal. Rptr. 573, 1963 Cal. App. LEXIS 2652.

In determining criminal liability for a killing committed by a resisting victim, the central inquiry is whether the conduct of defendant or his accomplices sufficiently provoked lethal resistance to support a finding of implied malice; and if a trier of fact concludes that the death of an alleged accomplice in robbery proximately resulted from the acts of defendant's accomplices, done with conscious disregard for human life, the natural consequences of which were dangerous to life, then defendant may be convicted of first degree murder. Taylor v. Superior Court of Alameda County (Cal. Dec. 2, 1970), 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P.2d 131, 1970 Cal. LEXIS 232, overruled, People v. Antick (Cal. Aug. 26, 1975), 15 Cal. 3d 79, 123 Cal. Rptr. 475, 539 P.2d 43, 1975 Cal. LEXIS 332.

Under the first degree felony-murder rule set forth in Pen C § 189, once a person has embarked on a course of conduct for one of the enumerated felonious purposes, a death resulting from his commission of that felony will be first degree murder, regardless of the circumstances. The purpose of the rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. People v. Worthington (Cal. App. 3d Dist. Mar. 15, 1974), 38 Cal. App. 3d 359, 113 Cal. Rptr. 322, 1974 Cal. App. LEXIS 1059.

In a prosecution for a homicide resulting when a police officer killed defendant's accomplice who had initiated a gun battle with police to escape apprehension for a burglary he and defendant had recently committed, defendant could not be convicted under the felony-murder doctrine, where the immediate cause of death was the officer's act. Nor could defendant be convicted of murder on the theory of vicarious liability, notwithstanding that the accomplice acted with malice, where the accomplice's malicious conduct resulted in only his own, rather than another person's, death, and hence could not constitute murder. (Overruling Taylor v. Superior Court of Alameda County (1970) 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P.2d 131, 1970 Cal. LEXIS 232, to the extent that it holds that the homicide victim's conduct which may have contributed to his death could have been properly considered in assessing defendant's liability therefor.) People v. Antick (Cal. Aug. 26, 1975), 15 Cal. 3d 79, 123 Cal. Rptr. 475, 539 P.2d 43, 1975 Cal. LEXIS 332, overruled in part, People v. McCoy (Cal. June 25, 2001), 25 Cal. 4th 1111, 108 Cal. Rptr. 2d 188, 24 P.3d 1210, 2001 Cal. LEXIS 3791.

Ordinarily an accused cannot be charged as vicariously liable for the death of his partner in crime at the hands of the intended victim. Consequently, it was proper for the trial court to grant defendant's motion pursuant to Pen C § 995, to dismiss a count of an information charging the crime of murder, where, while there was substantial evidence to support the conclusion that defendant and deceased were at the time of the shooting jointly engaged in a felonious entry of the intended victim's apartment for the purpose of committing forcible rape, killing of the deceased by the victim was not in furtherance of an object of the felony. Further, the killing did not come within the doctrine holding an accused vicariously liable when he or his accomplice, with a conscious disregard for life, intentionally commits an act likely to cause death, and his victim or a police officer kills in reasonable response to such act. People v. Conely (Cal. App. 2d Dist. May 13, 1975), 48 Cal. App. 3d 805, 123 Cal. Rptr. 252, 1975 Cal. App. LEXIS 1157.

In a juvenile court proceeding that arose when defendant and an accomplice committed armed robbery (Pen C § 211), after which the victim gained possession of the accomplice's gun and killed him, the evidence was insufficient to sustain the petition's murder allegation (Pen C § 187), where it showed no life-threatening acts on defendant's part, other than those implicit in the crime of armed robbery, that proximately caused the accomplice's death. Although an ineffectual blow landed by defendant while the victim and the accomplice were struggling for the gun was a malicious act taken in conscious disregard for life, it did not provoke the victim's lethal resistance, who testified that he had already decided to fight for the gun and to use it, and was thus not the proximate cause of the death. Defendant's conduct prior to the scuffle also failed to meet the stated standard where the threats he voiced, although helping to provoke the victim's lethal response, were already inherent in a dangerous felony, and where there was no evidence that defendant had assented to his accomplice's decision to move the victim further into

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isolation after the robbery, a possible indication of an unconditional intent to kill. In re R. (Cal. July 3, 1980), 27 Cal. 3d 496, 165 Cal. Rptr. 837, 612 P.2d 927, 1980 Cal. LEXIS 186.

There was substantial evidence that defendants were liable for the murder of a co-felon killed by police during a shoot-out because defendants' malicious conduct of fleeing in a dangerous high-speed chase, confronting the officers with a dangerous weapon when the chase ended, and further preparing to shoot it out with the deputies was a proximate cause of the co-felon's death, and because all of the acts were reasonably in furtherance of the robbery, as their evident purpose was to permit the robbers to escape. People v. Caldwell (Cal. June 14, 1984), 36 Cal. 3d 210, 203 Cal. Rptr. 433, 681 P.2d 274, 1984 Cal. LEXIS 185.

19. Arson

The word "arson," as used in this section, included wilful burnings of the type described in former Pen C § 448a (see now Pen C §§ 451, 452), as well as those set forth in former Pen C § 447a (see now Pen C § 450). People v. Chavez (Cal. Sept. 19, 1958), 50 Cal. 2d 778, 329 P.2d 907, 1958 Cal. LEXIS 193, cert. denied, (U.S. 1959), 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353, 1959 U.S. LEXIS 1621, cert. denied, (U.S. May 18, 1959), 359 U.S. 993, 79 S. Ct. 1126, 3 L. Ed. 2d 982, 1959 U.S. LEXIS 1040.

Photographs showing bodies of persons killed in a fire should be excluded in a prosecution for murder by means of arson where their principal effect would be to inflame the jurors against defendant because of the horror of the crime. People v. Chavez (Cal. Sept. 19, 1958), 50 Cal. 2d 778, 329 P.2d 907, 1958 Cal. LEXIS 193, cert. denied, (U.S. 1959), 358 U.S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353, 1959 U.S. LEXIS 1621, cert. denied, (U.S. May 18, 1959), 359 U.S. 993, 79 S. Ct. 1126, 3 L. Ed. 2d 982, 1959 U.S. LEXIS 1040.

In preliminary hearing on charges of arson and murder, though it could be inferred from evidence that defendant procured decedent to burn defendant's insured cafe and it appeared that decedent died from burns suffered while starting fire, Pen Code, § 189, making killing committed in perpetration of arson first degree murder, did not apply, and defendant could not be held criminally responsible for death of his alleged coconspirator. Woodruff v. Superior Court of Los Angeles County (Cal. App. 2d Dist. Oct. 29, 1965), 237 Cal. App. 2d 749, 47 Cal. Rptr. 291, 1965 Cal. App. LEXIS 1313.

It is not murder for an accomplice to kill himself accidentally while engaged in the commission of arson and his principal may not be charged with such offense inasmuch as the accidental killing of one's self does not constitute an unlawful killing within the meaning of Pen C § 187, particularly in view of the rule that the felony-murder doctrine was enacted to protect the public, not for the benefit of the lawbreaker. People v. Jennings (Cal. App. 4th Dist. July 5, 1966), 243 Cal. App. 2d 324, 52 Cal. Rptr. 329, 1966 Cal. App. LEXIS 1679.

In a prosecution for murder based on deaths resulting from arson, that a third person might have, but did not, rescue the victims cannot lessen defendant's responsibility for the consequences of his acts. People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

The Legislature did not intend the word "arson," as used in the first degree felony-murder provisions of Pen C § 189, to apply to the burning of those items enumerated in former Pen C § 449a (see now Pen C §§ 451, 452), proscribing the wilful or malicious burning of an automobile among other things. People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

Felony-murder predicated on the commission of arson or the burning of a motor vehicle requires proof only of intent to set the fire that resulted in the victim's death. People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

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In a prosecution of defendant for felony-murder, in which the evidence was such as to support a conclusion defendant intended either to kill through the device of a deadly weapon, or that his purpose was restricted to causing destruction by means of arson (defendant threw a Molotov cocktail into a house and a guest therein perished), the trial court properly refused a defense instruction stating that if the purpose of defendant was to kill someone inside the house, even if the intended victim was a different person from the actual victim, and arson was the means intended to accomplish the killing, then the felony-murder rule did not apply. People v. Oliver (Cal. App. 2d Dist. May 30, 1985), 168 Cal. App. 3d 920, 214 Cal. Rptr. 587, 1985 Cal. App. LEXIS 2152.

Death row inmate, who had committed arson by setting fire to the victim's house with the intent of driving the victim out of the house so the inmate could shoot him, was entitled to reversal of a federal district court order denying him habeas corpus relief because the state court erred in judicially enlarging a prior interpretation of the felony-murder special circumstances statute, former Pen C § 190.2(a)(17); California Supreme Court had previously held that a defendant was not qualified for the death penalty under that statute where a felony whose sole object was to facilitate or conceal the primary crime of murder was incidental. Where the inmate claimed, as his theory of defense, that the arson was incidental to the intended crime of murder, he was entitled to an instruction based on the then-existing judicial interpretation of the statute; a refusal to give the instruction denied him his due process right to a fair warning of what constituted criminal conduct, and the error was not harmless. Clark v. Brown (9th Cir. Cal. May 30, 2006), 450 F.3d 898, 2006 U.S. App. LEXIS 13320, cert. denied, (U.S. Nov. 6, 2006), 549 U.S. 1027, 127 S. Ct. 555, 166 L. Ed. 2d 423, 2006 U.S. LEXIS 8505.

In a capital murder trial, the evidence was insufficient to support an arson-murder special circumstance because the arson did not involve an inhabited structure or property; the evidence established that the victim was placed in the trunk of her car and shot several times, after which the car was set on fire, and no evidence was presented that the car was used for dwelling purposes. Defendant was still eligible for the death penalty based on a robbery-murder finding. People v. Debose (Cal. June 5, 2014), 59 Cal. 4th 177, 172 Cal. Rptr. 3d 606, 326 P.3d 213, 2014 Cal. LEXIS 3764, cert. denied, (U.S. Dec. 8, 2014), 135 S. Ct. 760, 190 L. Ed. 2d 634, 2014 U.S. LEXIS 8156.

20. Burglary

Where evidence showed that killing took place during attempt of defendant to commit burglary, it was proper to instruct jury that if death of person results from act of another or such other was engaged in perpetrating or attempting to perpetrate burglary, fact that killing was accidental is immaterial. People v. Hadley (Cal. May 11, 1917), 175 Cal. 118, 165 P. 442, 1917 Cal. LEXIS 633.

Where it was admitted in a prosecution for burglary and for murder committed while attempting to commit burglary, that one defendant fired the shot that killed an officer, and that the other defendant was his confederate, and a principal in the commission of the burglary, the latter was brought squarely within the provisions of this section providing that all murder committed in the perpetration or the attempt to perpetrate robbery or burglary is murder in the first degree. People v. Green (Cal. Dec. 30, 1932), 217 Cal. 176, 17 P.2d 730, 1932 Cal. LEXIS 360.

Killing in perpetration of burglary is first degree murder regardless of whether person actually killed was person defendant intended to assault and regardless of whether killing was intentional or accidental. People v. Morlock (Cal. Feb. 7, 1956), 46 Cal. 2d 141, 292 P.2d 897, 1956 Cal. LEXIS 162.

Court did not err in instructing jury that murder committed in perpetration of burglary is first degree murder, though killing occurred about twenty hours after defendant entered house of deceased's daughter. People v. Mason (Cal. May 17, 1960), 54 Cal. 2d 164, 4 Cal. Rptr. 841, 351 P.2d 1025, 1960 Cal. LEXIS 156.

Felony-murder rule applied (and instruction thereon was proper) in homicide case arising out of killing during perpetration of burglary, despite defendant's claim that pertinent part of felony-murder statute (Pen Code, § 189) reads same presently as it did when it was enacted in 1872, but that burglary statute enacted same year differed substantially from present burglary statute (Pen Code, § 459), where evidence showed that defendant was guilty of

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burglary even as defined in 1872, and where, in any event, burglary statute was amended four years after its enactment to read essentially as it now does and Supreme Court held that crime of burglary referred to in felony-murder statute was committed when amended burglary statute was violated. People v. Talbot (Cal. June 3, 1966), 64 Cal. 2d 691, 51 Cal. Rptr. 417, 414 P.2d 633, 1966 Cal. LEXIS 303, cert. denied, (U.S. Sept. 1, 1967), 385 U.S. 1015, 87 S. Ct. 729, 17 L. Ed. 2d 551, 1967 U.S. LEXIS 2686, overruled in part, People v. Ireland (Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351.

The felony-murder rule includes burglary even though the felony element of the burglary is an integral ingredient of the homicide itself. People v. Muszalski (Cal. App. 1st Dist. Mar. 29, 1968), 260 Cal. App. 2d 611, 67 Cal. Rptr. 378, 1968 Cal. App. LEXIS 1892, cert. denied, (U.S. 1969), 393 U.S. 1059, 89 S. Ct. 701, 21 L. Ed. 2d 701, 1969 U.S. LEXIS 2843.

An instruction on first degree felony murder is improper when the underlying felony is burglary based upon an intention to assault the victim of the homicide with a deadly weapon. (Overruling People v. Hamilton (1961) 55 Cal. 2d 881, 13 Cal. Rptr. 649, 362 P.2d 473, 1961 Cal. LEXIS 269, and People v. Talbot (1966) 64 Cal. 2d 691, 51 Cal. Rptr. 417, 414 P.2d 633, 1966 Cal. LEXIS 303), to the extent they are inconsistent herewith). People v. Wilson (Cal. Dec. 18, 1969), 1 Cal. 3d 431, 82 Cal. Rptr. 494, 462 P.2d 22, 1969 Cal. LEXIS 219, limited, People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled, People v. Farley (Cal. July 2, 2009), 46 Cal. 4th 1053, 96 Cal. Rptr. 3d 191, 210 P.3d 361, 2009 Cal. LEXIS 6021.

The first degree felony-murder doctrine can serve its purpose of deterring felons from killing negligently or accidentally only when applied to a felony independent of the homicide, and where a person enters a building with intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. People v. Sears (Cal. Mar. 13, 1970), 2 Cal. 3d 180, 84 Cal. Rptr. 711, 465 P.2d 847, 1970 Cal. LEXIS 265.

The felony-murder rule would apply to a burglary undertaken with the independent felonious purpose of acquiring another person's property, even if the burglary were accomplished with a deadly weapon. People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

As applied to a killing in the commission of a burglary, the murder-felony rule is not limited to burglaries of an inherently dangerous type. People v. Earl (Cal. App. 1st Dist. Jan. 10, 1973), 29 Cal. App. 3d 894, 105 Cal. Rptr. 831, 1973 Cal. App. LEXIS 1243, overruled, People v. Duran (Cal. Feb. 27, 1976), 16 Cal. 3d 282, 127 Cal. Rptr. 618, 545 P.2d 1322, 1976 Cal. LEXIS 221.

In a murder prosecution, tried without a jury, the trial court properly applied the provision of Pen C § 189, that murder committed in the perpetration or attempt to perpetrate burglary is murder of the first degree, where defendant was discovered attempting to break into a locked automobile, and in the ensuing struggle hit a security officer, inflicting injuries from which the officer died, and where the court found that the attempted break-in was for the purpose of theft, thus making the attempt one to commit burglary under the provisions of Pen C § 459. People v. Thomas (Cal. App. 2d Dist. Jan. 15, 1975), 44 Cal. App. 3d 573, 117 Cal. Rptr. 855, 1975 Cal. App. LEXIS 959.

Where the underlying offense is assault with a deadly weapon, the felony-murder rule is not to be applied. Even though burglary is one of the felonies specifically enumerated for first degree felony murder (Pen C § 189), the felony-murder rule is inapplicable if the intended felony was assault with a deadly weapon. People v. Shockley (Cal. App. 4th Dist. Apr. 3, 1978), 79 Cal. App. 3d 669, 145 Cal. Rptr. 200, 1978 Cal. App. LEXIS 1543.

A burglar who kills after entering to steal does so in the perpetration of burglary within the meaning of the felony-murder rule embodied in Pen C § 189. People v. Brady (Cal. App. 3d Dist. Mar. 12, 1987), 190 Cal. App. 3d 124, 235 Cal. Rptr. 248, 1987 Cal. App. LEXIS 1481.

In a trial for multiple crimes, including six murders, there was sufficient evidence of burglary under Pen C § 459 in five of the murders, supporting felony murder convictions under Pen C § 189. There was ample evidence

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establishing that defendant entered each residence with the intent to commit theft, considering defendant's modus operandi and that the other similar burglaries that clearly were theft related. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

Merger doctrine that precludes a felony murder instruction when the underlying offense is felonious assault does not apply when the underlying offense is burglary. People v. Farley (Cal. July 2, 2009), 46 Cal. 4th 1053, 96 Cal. Rptr. 3d 191, 210 P.3d 361, 2009 Cal. LEXIS 6021, cert. denied, (U.S. Jan. 25, 2010), 559 U.S. 907, 130 S. Ct. 1285, 175 L. Ed. 2d 1079, 2010 U.S. LEXIS 924.

Felony murder instruction under Pen C § 189, based on burglary under Pen C § 459, was proper because vandalism under former Pen C § 594(b)(1) was a proper basis for burglary and the assaults on the victims were not alleged as target offenses of the burglary. People v. Farley (Cal. July 2, 2009), 46 Cal. 4th 1053, 96 Cal. Rptr. 3d 191, 210 P.3d 361, 2009 Cal. LEXIS 6021, cert. denied, (U.S. Jan. 25, 2010), 559 U.S. 907, 130 S. Ct. 1285, 175 L. Ed. 2d 1079, 2010 U.S. LEXIS 924.

In a felony murder trial arising from a collision that occurred after defendant left the scene of a burglary, there was sufficient evidence to establish that the death of the other car's driver occurred as part of a continuous transaction from the commission of the burglary before defendant was able to obtain a position of temporary safety, even though no one was home when the burglary was committed and defendant was not chased from the scene. From the evidence, it could reasonably have been determined that defendant was on the porch of the victim's residence at around 4:30 a.m.; that his attention was caught by aloud noise, leading to his flight from the scene; and that when he was spotted by police four miles from the scene, he feared he was about to be caught—his subsequent maniacal driving at speeds up to 100 plus miles per hour spoke loudly of his fear of apprehension. People v. Russell (Cal. App. 4th Dist. Aug. 23, 2010), 187 Cal. App. 4th 981, 114 Cal. Rptr. 3d 668, 2010 Cal. App. LEXIS 1465.

For purposes of felony murder liability, it was reasonable to conclude a homicide and burglary were part of one continuous transaction because defendant was in flight from the scene of the burglary with his license plates secreted when an unsecured stolen stove fell off of his truck, causing the death of another motorist. People v. Wilkins (Cal. App. 4th Dist. Jan. 7, 2011), 191 Cal. App. 4th 780, 119 Cal. Rptr. 3d 691, 2011 Cal. App. LEXIS 14, review granted, depublished, (Cal. May 11, 2011), 124 Cal. Rptr. 3d 827, 251 P.3d 940, 2011 Cal. LEXIS 4421, rev'd, superseded, (Cal. Mar. 7, 2013), 56 Cal. 4th 333, 153 Cal. Rptr. 3d 519, 295 P.3d 903, 2013 Cal. LEXIS 1507.

In a trial for felony murder/burglary, the trial court correctly refused to instruct the jury that a burglary was complete upon the perpetrator reaching a place of temporary safety. People v. Wilkins (Cal. App. 4th Dist. Jan. 7, 2011), 191 Cal. App. 4th 780, 119 Cal. Rptr. 3d 691, 2011 Cal. App. LEXIS 14, review granted, depublished, (Cal. May 11, 2011), 124 Cal. Rptr. 3d 827, 251 P.3d 940, 2011 Cal. LEXIS 4421, rev'd, superseded, (Cal. Mar. 7, 2013), 56 Cal. 4th 333, 153 Cal. Rptr. 3d 519, 295 P.3d 903, 2013 Cal. LEXIS 1507.

Evidence was sufficient to support defendant's first-degree murder conviction on a theory of burglary murder based on entry with the intent to commit theft because the bedroom in which the victim's body was found had been ransacked, including dresser drawers that were open and the contents of a purse strewn on the floor, and the victim's daughter testified that following the victim's death, she never again saw certain identified pieces of the victim's jewelry. People v. Edwards (Cal. Aug. 22, 2013), 57 Cal. 4th 658, 161 Cal. Rptr. 3d 191, 306 P.3d 1049, 2013 Cal. LEXIS 6897, cert. denied, (U.S. May 27, 2014), 572 U.S. 1137, 134 S. Ct. 2662, 189 L. Ed. 2d 213, 2014 U.S. LEXIS 3627.

Evidence was sufficient to support defendant's first-degree murder conviction on a theory of burglary murder based on entry with the intent to commit penetration with a foreign object because the victim suffered injuries to her vaginal and rectal areas consistent with penetration by a mousse can found on her bed, and there was other circumstantial evidence that the victim had been penetrated by the mousse can. The jury was also aware that

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defendant subsequently brutally penetrated another victim with a moussé can. People v. Edwards (Cal. Aug. 22, 2013), 57 Cal. 4th 658, 161 Cal. Rptr. 3d 191, 306 P.3d 1049, 2013 Cal. LEXIS 6897, cert. denied, (U.S. May 27, 2014), 572 U.S. 1137, 134 S. Ct. 2662, 189 L. Ed. 2d 213, 2014 U.S. LEXIS 3627.

21. Sexual Offenses

Defendant may not successfully urge that conviction of first degree murder is improper on ground that evidence shows a killing arising out of an assault with intent to commit rape, which is not one of felonies enumerated in this section, since such an assault is merely an aggravated form of an attempted rape, which is one of the enumerated felonies and differs from the other felonies in that an assault need not be shown. People v. Rupp (Cal. Aug. 14, 1953), 41 Cal. 2d 371, 260 P.2d 1, 1953 Cal. LEXIS 282, overruled in part, People v. Cook (Cal. Feb. 10, 1983), 33 Cal. 3d 400, 189 Cal. Rptr. 159, 658 P.2d 86, 1983 Cal. LEXIS 150.

Where a killing is shown to have been committed in an attempt to commit rape, which is first degree murder, a finding of premeditation and deliberation is unnecessary. People v. Rupp (Cal. Aug. 14, 1953), 41 Cal. 2d 371, 260 P.2d 1, 1953 Cal. LEXIS 282, overruled in part, People v. Cook (Cal. Feb. 10, 1983), 33 Cal. 3d 400, 189 Cal. Rptr. 159, 658 P.2d 86, 1983 Cal. LEXIS 150.

In a prosecution for murder while attempting to commit rape, malice is shown by nature of attempted crime, and the law fixes on offender the intent which makes any killing in perpetration of or attempt to perpetrate such a felony first degree murder. People v. Rupp (Cal. Aug. 14, 1953), 41 Cal. 2d 371, 260 P.2d 1, 1953 Cal. LEXIS 282, overruled in part, People v. Cook (Cal. Feb. 10, 1983), 33 Cal. 3d 400, 189 Cal. Rptr. 159, 658 P.2d 86, 1983 Cal. LEXIS 150.

Prosecution must prove that defendant had specific intent to commit rape in order to prove defendant guilty of first degree murder in attempt to commit, or in commission of, rape. People v. Cheary (Cal. Apr. 9, 1957), 48 Cal. 2d 301, 309 P.2d 431, 1957 Cal. LEXIS 183; People v. Craig (Cal. 1957), 49 Cal. 2d 313, 316 P.2d 947, 1957 Cal. LEXIS 263.

Once it is established that defendant was mentally able to premeditate murder and rape involved, evidence supports finding that murder was first degree. People v. Kemp (Cal. Mar. 2, 1961), 55 Cal. 2d 458, 11 Cal. Rptr. 361, 359 P.2d 913, 1961 Cal. LEXIS 226, cert. denied, (U.S. Apr. 1, 1961), 368 U.S. 932, 82 S. Ct. 359, 7 L. Ed. 2d 194, 1961 U.S. LEXIS 108.

In felony murder prosecution, proof of attempt to commit rape is all that is necessary to fix degree of offense as first degree murder. People v. Subia (Cal. App. 5th Dist. Jan. 6, 1966), 239 Cal. App. 2d 245, 48 Cal. Rptr. 584, 1966 Cal. App. LEXIS 1752.

A killing in the process of a violation of Pen C § 288, proscribing lewd or lascivious acts against children, constitutes a felony murder under Pen C § 189, defining degrees of murder, and thus constitutes murder in the first degree. People v. Ward (Cal. App. 2d Dist. Mar. 14, 1968), 260 Cal. App. 2d 79, 66 Cal. Rptr. 893, 1968 Cal. App. LEXIS 1825.

Under the felony-murder doctrine, the intent required for a conviction of murder is imported from the specific intent to commit the concomitant felony; thus in a prosecution for first degree murder under a felony-murder rape theory, the requisite intent was a specific intent to commit rape. People v. Fain (Cal. Mar. 13, 1969), 70 Cal. 2d 588, 75 Cal. Rptr. 633, 451 P.2d 65, 1969 Cal. LEXIS 355.

Under the felony-murder rule (Pen C § 189) a killing is first degree murder if committed in the perpetration or attempt to perpetrate rape; where a defendant attempts to coerce his victim into intercourse with him; fails to accomplish his purpose while she is alive, and kills her to satisfy his desires with her corpse, the killing is first degree murder. People v. Goodridge (Cal. Apr. 17, 1969), 70 Cal. 2d 824, 76 Cal. Rptr. 421, 452 P.2d 637, 1969 Cal. LEXIS 370.

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A showing of less than actual rape constitutes a sufficient basis for an instruction on first degree murder in the attempt to perpetrate rape, particularly upon proof of injury to the genital area. People v. Mosher (Cal. Dec. 12, 1969), 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659, 1969 Cal. LEXIS 215.

Proposition 115 ("Crime Victims Justice Reform Act"), enacted by the voters in June 1990, cannot be applied retrospectively insofar as its provisions change the legal consequences of criminal behavior to the detriment of defendants. The provisions of Proposition 115 that may not be applied retrospectively include Prop. 115, § 9 (amending Pen C § 189), which adds crimes to the list of felonies supporting a conviction of first degree murder; those portions of § 10 (amending Pen C § 190.2), which add new special circumstances justifying the death penalty; that portion of § 10 (codified at Pen C § 190.1), which provides that an accomplice, for felony-murder special circumstances to be found true, must have been a major participant and have acted with reckless indifference to human life; § 11 (adding Pen C § 190.41), which provides that the corpus delicti of a felony-based special circumstance need not be proved independently of the defendant's extrajudicial statement; § 12 (amending Pen C § 190.5), which subjects persons between the ages 16 and 18 to the penalty of life without possibility of parole for first degree murder with special circumstances; §§ 13 and 14 (adding Pen C §§ 206, 206.1), which define the new crime of torture; and § 26 (adding Pen C § 1385.1), which precludes a judge from striking a special circumstance that has been admitted or found to be true. Retrospective application would violate the constitutional rule against ex post facto legislation, since each of these provisions appears to define conduct as a crime, to increase punishment for a crime, or to eliminate a defense. Tapia v. Superior Court (Cal. Apr. 1, 1991), 53 Cal. 3d 282, 279 Cal. Rptr. 592, 807 P.2d 434, 1991 Cal. LEXIS 1210.

For purposes of the felony-murder rule (Pen C § 189), a murder is deemed to occur in the commission of rape even after the rape is completed, so long as the rape and murder are part of a continuous transaction. That the rape technically has been completed is irrelevant for purposes of the felony-murder doctrine. Rather, the question is whether, under the facts of the case, the relationship between the rape and the murder is sufficiently close to justify an enhanced punishment. This relationship may be satisfied where the culprit had control over the victim between the rape and murder. Therefore, for the purpose of felony murder, the commission of rape may be deemed to continue so long as the culprit maintains control over the victim. People v. Castro (Cal. App. 3d Dist. Aug. 5, 1994), 27 Cal. App. 4th 578, 32 Cal. Rptr. 2d 529, 1994 Cal. App. LEXIS 809.

Although defendant contended that the verdict form was fatally ambiguous because it was unclear whether the jury found him guilty of first degree murder on a rape-felony-murder theory, Cal. Penal Code § 189, or whether it found true the rape-felony-murder special circumstance, Cal. Penal Code § 190.2(a)(17)(C), any error was harmless beyond a reasonable doubt; the jury found in its verdict that defendant committed the murder in the commission of rape, while there was no reasonable doubt that the rape was not merely incidental to the victim's murder as the evidence showed that defendant tied the victim's hands and feet, had intercourse with her and ejaculated inside her, and had done the same thing previously to someone else whom he did not kill, so that it was clear that defendant obtained perverse sexual gratification from raping the mothers of his girlfriends, whether or not he killed them. People v. Jones (Cal. Mar. 17, 2003), 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468, 64 P.3d 762, 2003 Cal. LEXIS 1544, cert. denied, (U.S. Oct. 14, 2003), 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286, 2003 U.S. LEXIS 7524.

In a case in which defendant was convicted of first degree murder, forcible rape, and forcible sodomy, the trial court did not prejudicially err in essentially expanding the scope of felony-murder sex offenses to include a homicide that occurred after the sex offenses were complete, but before defendant reached a place of temporary safety; the inclusion of language of the escape rule in the trial court's answer to a jury inquiry clarifying its instructions reasonably defined the outer limits of the "continuous-transaction" theory consistent with case authority. People v. Portillo (Cal. App. 4th Dist. Apr. 4, 2003), 107 Cal. App. 4th 834, 132 Cal. Rptr. 2d 435, 2003 Cal. App. LEXIS 495.

Trial court committed harmless error when it instructed the jury that it could find defendant guilty of first degree felony murder based on the predicate felony of sodomy. Although Pen C § 189 did not list sodomy among the types of sex offenses that would support a conviction of first degree felony murder at the time defendant murdered the victim, the jury unanimously found defendant guilty of first degree murder on the valid theory that the killing

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occurred during the commission of a robbery or burglary. People v. Haley (Cal. Aug. 26, 2004), 34 Cal. 4th 283, 17 Cal. Rptr. 3d 877, 96 P.3d 170, 2004 Cal. LEXIS 7807.

Severance of a sodomy murder trial from a separate charge of forcible rape was properly denied. The court noted that this claim failed, in part, because of how the case was pled and tried; sodomy murder was the sole special circumstance and under Pen C § 189, sodomy could not be used to prove first degree felony murder when the capital crime occurred in 1990; hence, rape murder was the sole felony-murder theory of first degree murder. People v. Stitely (Cal. Mar. 21, 2005), 35 Cal. 4th 514, 26 Cal. Rptr. 3d 1, 108 P.3d 182, 2005 Cal. LEXIS 2827, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 865, 126 S. Ct. 164, 163 L. Ed. 2d 151, 2005 U.S. LEXIS 5667.

Evidence was sufficient, for purposes of the felony murder rule and special circumstances alleged, to establish that defendant committed rape and burglary, where the victims' bodies bore signs of having suffered traumatic sexual assault, and seminal fluid discovered on a nightgown was consistent with defendant's type; defendant's commission of crimes in close, temporal proximity, combined with a very similar modus operandi in each incident, strongly indicated that he entered the victims' residences with the requisite felonious intent for burglary, and he was arrested driving one victim's stolen car, containing belongings of all of the victims. People v. Carter (Cal. Aug. 15, 2005), 36 Cal. 4th 1114, 32 Cal. Rptr. 3d 759, 117 P.3d 476, 2005 Cal. LEXIS 8908, cert. denied, (U.S. Apr. 24, 2006), 547 U.S. 1099, 126 S. Ct. 1881, 164 L. Ed. 2d 570, 2006 U.S. LEXIS 3308.

Sufficient evidence supported a special-circumstance finding of attempted rape and therefore a first degree murder conviction under Pen C §§ 187, 189, even though there was not physical evidence of a sexual assault, because the jury could reasonably infer that defendant had the specific intent to have nonconsensual intercourse with the victim by force and that his actions went beyond mere preparation. The record established that defendant had an escalating sexual interest in the victim and that he fabricated a reason for remaining at his work site near her home after other workers had left for the day; further, poke wounds and slash wound on the victim's breasts supported a conclusion that defendant attempted to rape her and stabbed her to death when she resisted having sex with him. People v. Guerra (Cal. Mar. 2, 2006), 37 Cal. 4th 1067, 40 Cal. Rptr. 3d 118, 129 P.3d 321, 2006 Cal. LEXIS 2872, cert. denied, (U.S. Jan. 22, 2007), 549 U.S. 1182, 127 S. Ct. 1149, 166 L. Ed. 2d 998, 2007 U.S. LEXIS 1210, overruled in part, People v. Rundle (Cal. Apr. 3, 2008), 43 Cal. 4th 76, 74 Cal. Rptr. 3d 454, 180 P.3d 224, 2008 Cal. LEXIS 3795.

Even if defendant passively stood by while a cofelon killed the victim, any error by the trial court in failing to instruct the jury on nonkiller liability under the felony-murder rule was harmless, where the evidence overwhelmingly demonstrated that defendant directly and actively participated in the rape and kidnapping of the victim. People v. Dominguez (Cal. Aug. 28, 2006), 39 Cal. 4th 1141, 47 Cal. Rptr. 3d 575, 140 P.3d 866, 2006 Cal. LEXIS 9977, modified, (Cal. Nov. 1, 2006), 2006 Cal. LEXIS 13326, cert. denied, (U.S. Mar. 5, 2007), 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236, 2007 U.S. LEXIS 2917.

Evidence was sufficient to support defendant's convictions for a murder and rape because defendant was observed on the steps to the victim's apartment at the time of the murder, the crime fit the pattern of five other murders with which defendant was charged, DNA evidence strongly connected defendant to the crime, and that defendant was unknown to the victim, supporting an inference that sexual intercourse occurred against her will. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

Evidence was sufficient to support a finding that defendant killed a victim in the course of rape or attempted rape for purposes of felony murder and the rape-murder special circumstance under Pen C §§ 189, 190.2, even though the victim's decomposed body provided no evidence of a sexual assault, because a finding of an intent to rape rested on more than the victim's nudity. The other evidence included defendant's pattern of raping (as well as robbing) other victims after luring them home in similar circumstances. People v. Kelly (Cal. Dec. 6, 2007), 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548, 2007 Cal. LEXIS 13795, modified, (Cal. Feb. 20, 2008), 2008 Cal. LEXIS 1904, cert. denied, (U.S. Nov. 10, 2008), 555 U.S. 1020, 129 S. Ct. 564, 172 L. Ed. 2d 445, 2008 U.S. LEXIS 8193.

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In a case in which a jury convicted defendant of first degree murder and the jury found that defendant committed the murder during the course of rape, the trial court properly admitted evidence of defendant's other sexual offenses, which were similar in a number of respects to each other and to the murder. People v. Story (Cal. Apr. 9, 2009), 45 Cal. 4th 1282, 91 Cal. Rptr. 3d 709, 204 P.3d 306, 2009 Cal. LEXIS 3659.

Evidence that defendant admitted having had sex with the victim, that he was the last person seen with her before she was murdered, and that he had committed a similar rape was sufficient for a first degree murder conviction under Pen C §§ 187(a), 189, and a rape special circumstance finding under Pen C § 190.2(a)(17)(C); thus, defendant's conviction did not violate his right to due process of law under the Fourteenth Amendment, and under Cal Const Art I § 15. People v. Lewis (Cal. July 16, 2009), 46 Cal. 4th 1255, 96 Cal. Rptr. 3d 512, 210 P.3d 1119, 2009 Cal. LEXIS 6028, cert. denied, (U.S. Feb. 22, 2010), 559 U.S. 945, 130 S. Ct. 1516, 176 L. Ed. 2d 124, 2010 U.S. LEXIS 1316.

Despite the absence of genital trauma or semen, sufficient evidence supported a finding that defendant raped a 12-year-old victim, committed a lewd act on her by force, or attempted to do either, for purposes of a felony-murder theory under Pen C §§ 190.2(a)(17), 261(a)(2), 288(a), 189; the victim was discovered with her shorts and panties around her left knee, a nearly identical state of undress to another victim; her legs were spread open, with bloodstains on her thighs consistent with hand prints; and defendant specifically told the police he instructed her to remove her shorts and then "kind of helped" her in doing so, supporting a finding that the victim was alive when defendant sexually assaulted her. People v. Booker (Cal. Jan. 20, 2011), 51 Cal. 4th 141, 119 Cal. Rptr. 3d 722, 245 P.3d 366, 2011 Cal. LEXIS 465.

Defendant's attack on the sufficiency of the evidence to support a felony-murder theory of first-degree murder and an attempted-rape special circumstance lacked merit where there was sufficient evidence from which the jury could have concluded that he forcibly attempted to rape the victim and killed her because she was resisting his attempt to have sexual intercourse with her. People v. Lee (Cal. Feb. 24, 2011), 51 Cal. 4th 620, 122 Cal. Rptr. 3d 117, 248 P.3d 651, 2011 Cal. LEXIS 1830, cert. denied, (U.S. Oct. 3, 2011), 565 U.S. 919, 132 S. Ct. 340, 181 L. Ed. 2d 213, 2011 U.S. LEXIS 7104.

Evidence was sufficient to find that an inmate murdered another inmate to advance or carry out the commission of oral copulation and therefore to support a special circumstance finding. The evidence showed that defendant, displeased at a fourth person being placed in the cell, brutally beat the victim, ordered the victim to kiss his penis, discussed sexual acts between himself or other inmates and the victim, and ultimately strangled the victim to death. People v. Dement (Cal. Nov. 28, 2011), 53 Cal. 4th 1, 133 Cal. Rptr. 3d 496, 264 P.3d 292, 2011 Cal. LEXIS 12151, overruled in part, People v. Rangel (Cal. Mar. 28, 2016), 62 Cal. 4th 1192, 200 Cal. Rptr. 3d 265, 367 P.3d 649, 2016 Cal. LEXIS 1816.

In a trial for murder in the course of sodomy and oral copulation, there was a prima facie showing of death by criminal agency, even though the manner and cause of death were "undetermined." An inference of criminal agency was supported by the facts that the body was found wrapped in a blanket; defendant's modus operandi was to drug young, heterosexual males and then sexually assault them; there was semen in the heterosexual victim's anus and mouth and on his shirt; diazepam was in the victim's body and prescription receipts for the drug were in defendant's car; and the tire tracks from defendant's rental van matched tire tracks where the body was found. People v. Huynh (Cal. App. 4th Dist. Dec. 20, 2012), 212 Cal. App. 4th 285, 151 Cal. Rptr. 3d 170, 2012 Cal. App. LEXIS 1296, cert. denied, (U.S. Oct. 7, 2013), 571 U.S. 912, 134 S. Ct. 278, 187 L. Ed. 2d 201, 2013 U.S. LEXIS 6507.

In a trial for murder in the course of sodomy and oral copulation, defendant was not entitled to a lesser included offense instruction on second degree implied malice murder, in part because there was no evidence that defendant knew his conduct endangered the life of the victim and nonetheless acted with conscious disregard for life and no substantial evidence that the killing was other than a murder committed in the perpetration of sodomy and oral copulation. People v. Huynh (Cal. App. 4th Dist. Dec. 20, 2012), 212 Cal. App. 4th 285, 151 Cal. Rptr. 3d 170, 2012 Cal. App. LEXIS 1296, cert. denied, (U.S. Oct. 7, 2013), 571 U.S. 912, 134 S. Ct. 278, 187 L. Ed. 2d 201, 2013 U.S. LEXIS 6507.

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Evidence was sufficient to prove the oral copulation and sodomy of a murder victim: the evidence linking defendant to the crimes included that his semen was on the victim's shirt; a finding that the victim was alive at the time of the sexual assault was supported by the fact that there was diazepam metabolite in his body; and the absence of trauma to the victim's anus or rectum did not negate a finding of penetration, given that one of the effects of benzodiazepine was to relax the muscles of the anus and rectum. People v. Huynh (Cal. App. 4th Dist. Dec. 20, 2012), 212 Cal. App. 4th 285, 151 Cal. Rptr. 3d 170, 2012 Cal. App. LEXIS 1296, cert. denied, (U.S. Oct. 7, 2013), 571 U.S. 912, 134 S. Ct. 278, 187 L. Ed. 2d 201, 2013 U.S. LEXIS 6507.

Evidence was sufficient to prove that a rape/murder victim did not consent to sex with defendant on the night she was killed because the forensic pathologist testified that the victim's injuries could have rendered her unconscious, which would have explained the absence of vaginal trauma. People v. Harris (Cal. Aug. 26, 2013), 57 Cal. 4th 804, 161 Cal. Rptr. 3d 364, 306 P.3d 1195, 2013 Cal. LEXIS 6952.

There was sufficient evidence to support a conviction for felony murder because the victim was found bearing the indicators of rape and, even if the intercourse occurred after the murder, there was substantial evidence that defendant formed the intent to rape before or as he strangled the victim and that the physical attack was a direct act toward the commission of rape. People v. Shamblin (Cal. App. 4th Dist. Apr. 21, 2015), 236 Cal. App. 4th 1, 186 Cal. Rptr. 3d 257, 2015 Cal. App. LEXIS 331.

Defendant did not just sexually assault the victim while she was in a diabetic coma, he failed to seek medical assistance for the victim knowing she was in dire physical condition. There was a sufficient connection between that omission and his sex crimes to satisfy the causation requirement for felony murder. People v. Drew (Cal. App. 4th Dist. Aug. 29, 2017), 222 Cal. Rptr. 3d 541, 14 Cal. App. 5th 1049, 2017 Cal. App. LEXIS 754, review denied, ordered not published, (Cal. Nov. 29, 2017), 2017 Cal. LEXIS 9347.

Evidence was sufficient to support defendant's conviction for rape-murder where there was substantial evidence of forcible rape because: (1) defendant's DNA was found in a vaginal swab; (2) defendant's sperm was found in and outside the victim's vagina; (3) when her body was discovered, the victim was still wearing a sweatshirt, blouse, and bra on her upper body, but her lower body was nude; (4) the victim's brassiere had been pushed above her nipples; (5) blood stains on the victim's jeans, which were found lying near her body, suggested defendant had, with bloody fingers, unbuttoned the pants, put his hands inside the pockets, and pulled the pants off; and (6) the victim had blood stains on her thighs and severe trauma to her genitals. People v. Powell (Cal. Aug. 13, 2018), 236 Cal. Rptr. 3d 316, 422 P.3d 973, 5 Cal. 5th 921, 2018 Cal. LEXIS 5748, cert. denied, (U.S. Mar. 4, 2019), 139 S. Ct. 1292, 203 L. Ed. 2d 417, 2019 U.S. LEXIS 1606.

22. Robbery: Generally

A homicide committed in the commission or attempt to commit robbery is murder of the first degree, even if the shooting of the victim preceded by a short interval of time the actual taking of money from the person of the victim. People v. King (Cal. May 8, 1939), 13 Cal. 2d 521, 90 P.2d 291, 1939 Cal. LEXIS 272.

Where the defendant was engaged in the execution of his plan to commit robbery at the time he shot a bank janitor, and each of his several acts, at and after the moment he asked the janitor for a ride in the janitor's automobile, was overt and done in pursuance of the ultimate object to rob the bank, the fact that the murder was committed at a place far removed from the bank which the defendant intended to rob did not affect the character of the offense; neither did the fact that the janitor attacked the defendant before he was shot, nor that as a result of such attack the defendant's pistol was accidentally discharged. People v. Perry (Cal. Oct. 5, 1939), 14 Cal. 2d 387, 94 P.2d 559, 1939 Cal. LEXIS 349.

Where the deceased is killed by one defendant while the defendants are perpetrating or attempting to perpetrate a robbery, the killing constitutes first degree murder. People v. Miller (Cal. Oct. 15, 1951), 37 Cal. 2d 801, 236 P.2d 137, 1951 Cal. LEXIS 336.

Cal Pen Code § 189

Where, in order to facilitate his escape after robbing a store and as part of one continuous transaction, defendant hit the clerk on the head with a gun which at that moment discharged, causing the clerk's death, evidence supports a verdict of first degree murder. People v. Coefield (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

Where murder committed in the perpetration of a robbery is charged, evidence of other robberies which is relevant to show a common scheme or plan is admissible although there is other proof of the defendant's participation in the robbery resulting in the killing. People v. Coefield (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

A killing is not first degree murder in perpetration of robbery, notwithstanding killer takes money from victim's wallet after striking the fatal blows, if thought of taking money occurs to him only after the attack has terminated. People v. Camine (Cal. Aug. 14, 1953), 41 Cal. 2d 384, 260 P.2d 16, 1953 Cal. LEXIS 283.

When killing is not committed by robber or by his accomplice, but by his victim, malice aforethought is not attributable to robber, for killing is not committed by him in perpetration or attempt to perpetrate robbery. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295; Taylor v. Superior Court of Alameda County (Cal. Dec. 2, 1970), 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P.2d 131, 1970 Cal. LEXIS 232, overruled, People v. Antick (Cal. Aug. 26, 1975), 15 Cal. 3d 79, 123 Cal. Rptr. 475, 539 P.2d 43, 1975 Cal. LEXIS 332.

In murder case where defendant claimed killing of his robbery victim was accidental, court properly instructed that murder committed in perpetration or attempt to perpetrate robbery is first degree murder, whether killing was intentional, unintentional, or accidental. People v. Clark (Cal. June 17, 1965), 62 Cal. 2d 870, 44 Cal. Rptr. 784, 402 P.2d 856, 1965 Cal. LEXIS 304.

Sufficient instructions on specific intent for murder committed during perpetration of robbery were given where jury was told that murder is of first degree if committed in perpetration of or attempt to perpetrate robbery, robbery was defined, and jury was instructed as to union of act and specific intent that must exist. People v. Bauer (Cal. App. 5th Dist. Apr. 21, 1966), 241 Cal. App. 2d 632, 50 Cal. Rptr. 687, 1966 Cal. App. LEXIS 1281.

A homicide committed in the perpetration of a robbery is murder in the first degree. (Pen C § 189.) People v. Sievers (Cal. App. 1st Dist. Oct. 9, 1967), 255 Cal. App. 2d 34, 62 Cal. Rptr. 841, 1967 Cal. App. LEXIS 1236.

In prosecutions for robbery and murder, if the jury found that the murder was perpetrated during the course of an attempted robbery, findings of malice and deliberation and premeditation were not necessary. (Pen Code, § 189.) People v. Fortman (Cal. App. 2d Dist. Dec. 15, 1967), 257 Cal. App. 2d 45, 64 Cal. Rptr. 669, 1967 Cal. App. LEXIS 2446.

When one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of the attempted crime and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder in the first degree. People v. Baglin (Cal. App. 2d Dist. Apr. 3, 1969), 271 Cal. App. 2d 411, 76 Cal. Rptr. 863, 1969 Cal. App. LEXIS 2396.

The felony-murder doctrine is not limited to those deaths which are foreseeable, and thus, in a robbery-murder, the trial properly refused defendants' requested instruction on foreseeability; as long as the homicide is the direct causal result of the robbery, the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery. People v. Stamp (Cal. App. 2d Dist. Dec. 1, 1969), 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, 1969 Cal. App. LEXIS 1403, cert. denied, (U.S. Dec. 1, 1970), 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46, 1970 U.S. LEXIS 878.

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Even though a person killed in the perpetration of or attempt at robbery, was suffering from a predisposing physical condition, so long as the condition, regardless of its cause, was not the only substantial factor bringing about his death, that condition, and the robber's ignorance or it, in no way destroys the robber's criminal responsibility under the felony-murder doctrine. People v. Stamp (Cal. App. 2d Dist. Dec. 1, 1969), 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, 1969 Cal. App. LEXIS 1403, cert. denied, (U.S. Dec. 1, 1970), 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46, 1970 U.S. LEXIS 878.

In the case of armed robbery, as well as the other felonies enumerated in Pen C § 189, there is an independent felonious purpose, namely in the case of robbery to acquire money or property belonging to another. Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning that if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances People v. Burton (Cal. Dec. 28, 1971), 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793, 1971 Cal. LEXIS 226, overruled in part, People v. Lessie (Cal. Jan. 28, 2010), 47 Cal. 4th 1152, 104 Cal. Rptr. 3d 131, 223 P.3d 3, 2010 Cal. LEXIS 587.

Although the felony-murder rule may not be invoked in a robbery-homicide case unless the killing is by the robber or his accomplice, it is applicable where the person killed is an accomplice and not the robbery victim. People v. Johnson (Cal. App. 4th Dist. Nov. 10, 1972), 28 Cal. App. 3d 653, 104 Cal. Rptr. 807, 1972 Cal. App. LEXIS 781.

Defendant was properly convicted of first degree felony murder, where, during the course of an armed robbery, one of the victims died from a heart attack, even though defendant did not shoot or initiate any life-threatening violence against the victim. The felony- murder doctrine is applicable when there is substantial evidence to prove that a robbery caused a victim's fatal heart attack. As long as the homicide is the direct causal result of the robbery, the felony- murder rule applies, whether or not the death was a natural or probable consequence of the robbery. People v. Hernandez (Cal. App. 1st Dist. June 14, 1985), 169 Cal. App. 3d 282, 215 Cal. Rptr. 166, 1985 Cal. App. LEXIS 1995.

Defendant's first degree murder conviction, obtained on a felony-murder theory when the jury found that the murder occurred as a result of his robbery of the victim, was barred by the doctrine of collateral estoppel, where the jury in an earlier proceeding had convicted him of first degree murder for the same incident, but had rejected the special circumstances that the murder had occurred in the course of the robbery. The felony-murder instruction (which only requires that the murder occur "as a result of" the robbery) was only slightly different from the special circumstances instruction (which specifies that the murder occur "in the commission of" the robbery), and the definition of felony murder under Pen C § 189, is virtually indistinguishable from the language used in Pen C § 190.2(a)(17), to define special circumstances. People v. Asbury (Cal. App. 2d Dist. Oct. 16, 1985), 173 Cal. App. 3d 362, 218 Cal. Rptr. 902, 1985 Cal. App. LEXIS 2631.

Felony murder encompasses murder committed in the perpetration or attempted perpetration of robbery (Pen C § 189), but does not apply when the robbery is committed in the perpetration of a murder. A murder is not considered to have been committed in the course of a robbery when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder. However, a concurrent intent to commit a robbery justifies a felony-murder instruction. People v. McLead (Cal. App. 4th Dist. Nov. 27, 1990), 225 Cal. App. 3d 906, 276 Cal. Rptr. 187, 1990 Cal. App. LEXIS 1245.

Liability for first degree murder from any killing committed in the perpetration of robbery extends to all persons jointly engaged at the time of the killing in the perpetration of, or an attempt to perpetrate, the crime of robbery when one of them kills while acting in furtherance of the common design. People v. Pulido (Cal. May 29, 1997), 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235, 1997 Cal. LEXIS 2548.

A killing committed by a robber during his or her flight from the scene of the crime, and before reaching a place of temporary safety, is first degree felony murder under Pen C § 189. People v. Pulido (Cal. May 29, 1997), 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235, 1997 Cal. LEXIS 2548.

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Defendant who killed and robbed a victim in the course of stealing his motor home was properly convicted of first-degree murder and robbery and sentenced to death. People v. Schmeck (Cal. Aug. 25, 2005), 37 Cal. 4th 240, 33 Cal. Rptr. 3d 397, 118 P.3d 451, 2005 Cal. LEXIS 9350, modified, (Cal. Oct. 12, 2005), 2005 Cal. LEXIS 11169, modified, (Cal. Oct. 12, 2005), 2005 Cal. LEXIS 11739.

In a felony–murder case where the theory of liability for robbery most strongly supported by the evidence was conspiracy, as defendants presented a withdrawal defense that, if believed by the jury, would have permitted them to be convicted of conspiracy to commit robbery but not of the murder, the trial court erred in failing to provide the verdict forms for the lesser included offense of conspiracy. People v. Nguyen (Cal. App. 1st Dist. Aug. 14, 2003), 111 Cal. App. 4th 184, 4 Cal. Rptr. 3d 211, 2003 Cal. App. LEXIS 1234, review denied, ordered not published, (Cal. Nov. 12, 2003), 2003 Cal. LEXIS 8673.

Evidence supported a finding of first degree felony murder, where the jury could reasonably have found that defendant took the victim's gun and a collection of coins from inside the victim's house. People v. Horing (Cal. Dec. 16, 2004), 34 Cal. 4th 871, 22 Cal. Rptr. 3d 305, 102 P.3d 228, 2004 Cal. LEXIS 11890, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 45, 163 L. Ed. 2d 77, 2005 U.S. LEXIS 6140.

Sufficient evidence supported a conviction for first degree felony murder premised on an attempted robbery because the victim, a bartender, was found stabbed and slashed repeatedly, next to the bar's floor safe with the contents of her purse strewn about the floor. Defendant's conduct leading up to the murder supported a finding of a plan to gain entry into the bar after it closed and then rob the bartender of the day's receipts. People v. Elliot (Cal. Nov. 28, 2005), 37 Cal. 4th 453, 35 Cal. Rptr. 3d 759, 122 P.3d 968, 2005 Cal. LEXIS 13254, cert. denied, (U.S. Oct. 2, 2006), 549 U.S. 853, 127 S. Ct. 121, 166 L. Ed. 2d 91, 2006 U.S. LEXIS 6687.

In a trial for first degree murder, any error was harmless when the trial court refused to instruct the jury on heat-of-passion voluntary manslaughter under Pen C § 192(a) because the jury necessarily determined the killing was first degree murder, not manslaughter, under other properly given instructions. The jury found true the special circumstance allegation that defendant killed the victim in the course of a robbery, which dictated a finding of first degree felony murder under Pen C § 189, and the corresponding felony-murder instruction, which was properly given. People v. Demetrulias (Cal. July 10, 2006), 39 Cal. 4th 1, 45 Cal. Rptr. 3d 407, 137 P.3d 229, 2006 Cal. LEXIS 8352, cert. denied, (U.S. Feb. 20, 2007), 549 U.S. 1222, 127 S. Ct. 1282, 167 L. Ed. 2d 102, 2007 U.S. LEXIS 2303.

Defendant who fatally stabbed a man while attempting to rob him was properly convicted of first degree murder under Pen C §§ 187, 189, with a robbery special circumstance under Pen C § 190.2(a)(17)(A), and sentenced to death. People v. Demetrulias (Cal. July 10, 2006), 39 Cal. 4th 1, 45 Cal. Rptr. 3d 407, 137 P.3d 229, 2006 Cal. LEXIS 8352, cert. denied, (U.S. Feb. 20, 2007), 549 U.S. 1222, 127 S. Ct. 1282, 167 L. Ed. 2d 102, 2007 U.S. LEXIS 2303.

Evidence was sufficient to support a finding that defendant killed a victim in the course of robbery for purposes of the felony-murder rule under Pen C §§ 189, 211 and a robbery-murder special circumstance under Pen C § 190.2(a)(17), because the victim's vehicle was found in Mexico, where defendant went after killing the victim and before being arrested and two of the victim's checks were on defendant's person at the time of arrest. Although defendant had a pattern of taking property from some women by guile rather than force or fear, that circumstance did not make the jury's verdict unreasonable. People v. Kelly (Cal. Dec. 6, 2007), 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548, 2007 Cal. LEXIS 13795, modified, (Cal. Feb. 20, 2008), 2008 Cal. LEXIS 1904, cert. denied, (U.S. Nov. 10, 2008), 555 U.S. 1020, 129 S. Ct. 564, 172 L. Ed. 2d 445, 2008 U.S. LEXIS 8193.

In a case in which defendant was convicted of first degree murder and two counts of attempted second degree robbery, defendant's sentence for the attempted robbery of the murder victim had to be stayed, where the evidence supported the prosecution's theory that the murder was committed as part of the attempted robberies. People v. Neely (Cal. App. 2d Dist. Aug. 13, 2009), 176 Cal. App. 4th 787, 97 Cal. Rptr. 3d 913, 2009 Cal. App. LEXIS 1333.

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Evidence supported a jury's robbery-murder special-circumstance finding where the prosecution was under no obligation to prove that defendant had successfully completed a robbery because both his first degree felony-murder conviction and the special circumstance finding could properly be premised on a finding that he had attempted to rob the attempted murder victim. The verdict form's failure to reference an attempted commission of robbery did not serve to limit the charges against defendant, nor did the jury's return of that form restrict its finding to one of a completed robbery, and the evidence at trial was sufficient to prove a murder occurred during the attempted commission of a robbery. People v. Jackson (Cal. Mar. 3, 2014), 58 Cal. 4th 724, 168 Cal. Rptr. 3d 635, 319 P.3d 925, 2014 Cal. LEXIS 1555, cert. denied, (U.S. Nov. 17, 2014), 135 S. Ct. 677, 190 L. Ed. 2d 404, 2014 U.S. LEXIS 7740.

23. Robbery: Mental State

A killing in the perpetration or attempt to perpetrate a robbery is murder in the first degree, even though it resulted from the accidental discharge of a revolver during a struggle. People v. Bostic (Cal. May 29, 1914), 167 Cal. 754, 141 P. 380, 1914 Cal. LEXIS 528; People v. Goodwin (Cal. Oct. 18, 1937), 9 Cal. 2d 711, 72 P.2d 551, 1937 Cal. LEXIS 447.

Proof of intent, deliberation, or premeditation on part of slayers to commit murder of first degree is not necessary in prosecution for murder, where evidence shows that homicide was committed by one of participants in perpetration of or attempt to commit robbery. People v. Arnold (Cal. Oct. 11, 1926), 199 Cal. 471, 250 P. 168, 1926 Cal. LEXIS 296.

Where homicide is committed in perpetration of robbery, it is not necessary that there be intent to kill, and hence it is of no consequence that offenders may then be too drunk to deliberate or premeditate. People v. Rye (Cal. Mar. 23, 1949), 33 Cal. 2d 688, 203 P.2d 748, 1949 Cal. LEXIS 229.

Where it is indisputably established that a murder was committed in the perpetration of robbery, the offense is first degree murder regardless of whether the killing was intentional or accidental. People v. Riley (Cal. Apr. 28, 1950), 35 Cal. 2d 279, 217 P.2d 625, 1950 Cal. LEXIS 335.

Where defendant is accused of murder committed in the perpetration of a robbery, it is proper to instruct that the only criminal intent which the prosecution has to show is a specific intent to rob the victim and that it is not required to prove a deliberate or premeditated killing or to prove any intent to kill. People v. Coe (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

When one enters a place with a deadly weapon for the purpose of committing a robbery, malice is shown by the nature of the attempted crime, and the law fixes on the offender the intent which makes any killing in the perpetration of or attempt to perpetrate robbery a murder of the first degree, regardless of whether the killing was intentional or accidental. People v. Coe (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

Proof of intent to kill and a malicious killing is not necessary when it is shown that the defendant entered a place with a deadly weapon for the purpose of committing robbery. People v. Coe (Cal. Oct. 26, 1951), 37 Cal. 2d 865, 236 P.2d 570, 1951 Cal. LEXIS 345, limited, People v. Haston (Cal. Aug. 19, 1968), 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P.2d 91, 1968 Cal. LEXIS 238.

Any murder committed in the perpetration of robbery is murder in the first degree irrespective of intention. Sampsel v. California (9th Cir. Cal. Sept. 18, 1951), 191 F.2d 721, 1951 U.S. App. LEXIS 2602, cert. denied, (U.S. 1952), 342 U.S. 929, 72 S. Ct. 369, 96 L. Ed. 692, 1952 U.S. LEXIS 2520.

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Killing is not first degree murder in perpetration of robbery, notwithstanding killer takes money from victim's wallet after striking fatal blows, if thought of taking money occurs to him only after attack has terminated. People v. Carmine (Cal. Aug. 14, 1953), 41 Cal. 2d 384, 260 P.2d 16, 1953 Cal. LEXIS 283.

Killing committed during course of robbery is first degree murder whether killing is wilful, deliberate, and premeditated, or merely accidental, and whether or not killing is planned as part of commission of robbery. People v. Mitchell (Cal. June 5, 1964), 61 Cal. 2d 353, 38 Cal. Rptr. 726, 392 P.2d 526, 1964 Cal. LEXIS 210, cert. denied, Mitchell v. California (U.S. 1966), 384 U.S. 1007, 86 S. Ct. 1985, 16 L. Ed. 2d 1021, 1966 U.S. LEXIS 1184; People v. Lookadoo (Cal. Mar. 30, 1967), 66 Cal. 2d 307, 57 Cal. Rptr. 608, 425 P.2d 208, 1967 Cal. LEXIS 305; People v. Asher (Cal. App. 1st Dist. June 12, 1969), 273 Cal. App. 2d 876, 78 Cal. Rptr. 885, 1969 Cal. App. LEXIS 2235, disapproved, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198; People v. Stamp (Cal. App. 2d Dist. Dec. 1, 1969), 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, 1969 Cal. App. LEXIS 1403, cert. denied, (U.S. Dec. 1, 1970), 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46, 1970 U.S. LEXIS 878; People v. Mulqueen (Cal. App. 3d Dist. July 10, 1970), 9 Cal. App. 3d 532, 88 Cal. Rptr. 235, 1970 Cal. App. LEXIS 1969.

Under felony-murder rule, killing committed in perpetration of robbery is first degree murder, even when killing is accidental or unintentional. People v. Clark (Cal. June 17, 1965), 62 Cal. 2d 870, 44 Cal. Rptr. 784, 402 P.2d 856, 1965 Cal. LEXIS 304.

The intent to rob formed subsequently to the infliction of mortal wounds is not sufficient to support a finding of first degree felony-murder. People v. Gonzales (Cal. Apr. 26, 1967), 66 Cal. 2d 482, 58 Cal. Rptr. 361, 426 P.2d 929, 1967 Cal. LEXIS 319.

When one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of the attempted crime, and the law fixes on the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree; the law presumes malice aforethought on the basis of the commission of the felony. People v. Ketchel (Cal. July 7, 1969), 71 Cal. 2d 635, 79 Cal. Rptr. 92, 456 P.2d 660, 1969 Cal. LEXIS 277.

When one enters a place with a deadly weapon for the purpose of committing robbery, malice is shown by the nature of the attempted crime and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder in the first degree. People v. Baqlin (Cal. App. 2d Dist. Apr. 3, 1969), 271 Cal. App. 2d 411, 76 Cal. Rptr. 863, 1969 Cal. App. LEXIS 2396.

Under the rule that in felony-murder cases malice aforethought is presumed on the basis of the commission of a felony inherently dangerous to human life, no intentional act is necessary other than the attempt to or the actual commission of the felony itself; thus, when a robber enters a place with a deadly weapon with the intent to commit robbery, malice is shown by the nature of the crime. People v. Stamp (Cal. App. 2d Dist. Dec. 1, 1969), 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, 1969 Cal. App. LEXIS 1403, cert. denied, (U.S. Dec. 1, 1970), 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46, 1970 U.S. LEXIS 878.

In a prosecution for a killing that was committed during a robbery, it was not error for the court to fail to instruct sua sponte that the felony-murder rule was inapplicable if the intent to steal was not formed at the time of the attack. People v. Brunt (Cal. App. 2d Dist. Apr. 17, 1972), 24 Cal. App. 3d 945, 101 Cal. Rptr. 457, 1972 Cal. App. LEXIS 1180.

The felony-murder doctrine presumes malice aforethought from the commission of, or the attempt to commit, any of the felonies listed in Pen C § 189. People v. Johnson (Cal. App. 4th Dist. Nov. 10, 1972), 28 Cal. App. 3d 653, 104 Cal. Rptr. 807, 1972 Cal. App. LEXIS 781.

Under the felony-murder rule of Pen C § 189, a killing committed in the course of a robbery or an attempted robbery is first degree murder whether the killing is wilful, deliberate and premeditated, or merely accidental or

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unintentional, and whether or not the killing was planned as part of the commission of the robbery. People v. Johnson (Cal. App. 4th Dist. Nov. 10, 1972), 28 Cal. App. 3d 653, 104 Cal. Rptr. 807, 1972 Cal. App. LEXIS 781.

A federal Court of Appeals applied too strict a harmless error standard in ruling a jury instruction was not harmless error, after a California trial judge instructed the jury, in a first-degree murder prosecution, that defendant could be convicted if the jury concluded, among other matters, that he, with knowledge of his confederate's unlawful purpose in robbing a victim, helped the confederate (the instruction having erroneously omitted the requirement of intent or purpose of encouraging or facilitating the confederate's crime). California v. Roy (U.S. Nov. 4, 1996), 519 U.S. 2, 117 S. Ct. 337, 136 L. Ed. 2d 266, 1996 U.S. LEXIS 6589.

In a capital murder trial, the evidence was sufficient to support a felony-murder theory and special-circumstance findings under Pen C §§ 187, 189, 190.2(a)(17)(A), (G), based on robbery and burglary, despite the absence of direct evidence that defendant formed the intent to steal before or during, rather than after, the fatal shootings; the circumstantial evidence included that defendant needed money for delinquent truck payments, that defendant armed himself with a loaded gun, that defendant shot each victim twice, one at close range; and that was defendant calm and smiling when leaving the scene of the shootings. Imposition of the death penalty was not disproportionate under these facts. People v. Tafoya (Cal. Aug. 20, 2007), 42 Cal. 4th 147, 64 Cal. Rptr. 3d 163, 164 P.3d 590, 2007 Cal. LEXIS 8907, cert. denied, (U.S. Apr. 14, 2008), 552 U.S. 1321, 128 S. Ct. 1895, 170 L. Ed. 2d 764, 2008 U.S. LEXIS 3270.

Sufficient evidence that defendant had the intent to commit robbery supported a conviction for murder in the course of robbery or murder perpetrated in the commission of a kidnapping for robbery under Pen C § 189. The evidence of intent included that defendant forced the victim at gunpoint from his automobile and into the trunk of the vehicle and that defendant intentionally aided and abetted two codefendants in taking the victim's wallet. People v. Burney (Cal. July 30, 2009), 47 Cal. 4th 203, 97 Cal. Rptr. 3d 348, 212 P.3d 639, 2009 Cal. LEXIS 7742, cert. denied, (U.S. Mar. 1, 2010), 559 U.S. 978, 130 S. Ct. 1702, 176 L. Ed. 2d 192, 2010 U.S. LEXIS 2112.

24. Robbery: Killing During Flight or Escape

Where a defendant who was fleeing from the scene of a robbery, upon being pursued by an officer, fired upon and mortally wounded him, the crime of robbery had not been completed at the time of the shooting and the murder was committed in the perpetration of such crime. People v. Dowell (Cal. Apr. 23, 1928), 204 Cal. 109, 266 P. 807, 1928 Cal. LEXIS 638, cert. dismissed, (U.S. Oct. 1, 1928), 278 U.S. 660, 49 S. Ct. 7, 73 L. Ed. 568, 1928 U.S. LEXIS 656.

A killing was committed in the perpetration of robbery and before its completion, and constituted first degree murder, where, after the robbery of a store, the robbers fled with stolen goods and were immediately pursued by a citizen whom one of the robbers shot and killed at a location in plain view of the store, which was not more than 125 feet from the place of the shooting, and the robbers shortly after the murder returned to their stopping place located two or three blocks from the place robbed, and there divided the spoils. People v. Boss (Cal. Aug. 30, 1930), 210 Cal. 245, 290 P. 881, 1930 Cal. LEXIS 373.

The fact that a killing or the acts resulting in death took place a considerable time after a robbery does not preclude a conviction of murder in the perpetration of the robbery, where such killing or acts resulting in death were part of a continuous integrated attempt to escape after perpetration of the robberies. People v. Rye (Cal. Mar. 23, 1949), 33 Cal. 2d 688, 203 P.2d 748, 1949 Cal. LEXIS 229.

Robbery, unlike burglary, is not confined to fixed locus, and escape with loot, by means of arms, necessarily is as important to execution of plan as getting possession of property; where homicide was committed while defendant was in hot flight with stolen property and in belief that officer was about to arrest him for robbery defense of felonious possession which was challenged immediately on forcible taking was part of plan of robbery and was res

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gestae of the crime. People v. Kendrick (Cal. June 8, 1961), 56 Cal. 2d 71, 14 Cal. Rptr. 13, 363 P.2d 13, 1961 Cal. LEXIS 276.

Killing committed in connection with conduct intended to facilitate escape after robbery and as part of one continuous transaction constitutes murder of first degree. People v. Ketchel (Cal. May 7, 1963), 59 Cal. 2d 503, 30 Cal. Rptr. 538, 381 P.2d 394, 1963 Cal. LEXIS 180, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274, vacated, (Cal. Jan. 24, 1966), 63 Cal. 2d 859, 48 Cal. Rptr. 614, 409 P.2d 694, 1966 Cal. LEXIS 335.

A robbery may be a continuing crime, spread over distance and time; the robbers' escape with the loot is as important to execution of the plan as gaining its possession; and a killing committed in the course of conduct intended to facilitate escape after the robbery and as part of one continuous transaction constitutes felony-murder. People v. Chapman (Cal. App. 3d Dist. Apr. 15, 1968), 261 Cal. App. 2d 149, 67 Cal. Rptr. 601, 1968 Cal. App. LEXIS 1729.

A killing committed in connection with conduct intended to facilitate escape after a robbery and as part of one continuous transaction constitutes murder of the first degree. People v. Jackson (Cal. App. 2d Dist. May 22, 1969), 273 Cal. App. 2d 248, 78 Cal. Rptr. 20, 1969 Cal. App. LEXIS 2162.

In determining whether the first degree felony-murder rule under Pen C § 189, should apply, flight following a felony is considered part of the same transaction as long as the felon has not reached a place of temporary safety. Whether the defendant has reached such a place of safety is a question of fact for the jury. People v. Fuller (Cal. App. 5th Dist. Nov. 21, 1978), 86 Cal. App. 3d 618, 150 Cal. Rptr. 515, 1978 Cal. App. LEXIS 2109.

Whether relying on a theory of felony murder or a theory of implied malice murder, all 12 jurors found the required "conscious disregard for human life" for implied malice murder because the jury found that defendants aided and abetted an attempted robbery by accomplices who had loaded weapons, covered their faces, and yelled for the victims to get to the ground. People v. Johnson (Cal. App. 1st Dist. Jan. 14, 2016), 243 Cal. App. 4th 1247, 197 Cal. Rptr. 3d 353, 2016 Cal. App. LEXIS 25.

25. Robbery: Participants

If several are associated together in commission of robbery and one of associates does not intend to take life and prohibits others from taking life, yet if one of his associates takes life while they are engaged in robbery and in furtherance of common purpose rob, he is as much guilty of murder in first degree as those on hand who had given fatal blow. People v. Vasquez (Cal. 1875), 49 Cal. 560, 1875 Cal. LEXIS 32.

Record contained sufficient evidence to convict defendant of first-degree murder where his postcrime actions and statements clearly supported the conclusion that he was the direct perpetrator of the murder because, in the week following the victim's shooting, defendant, with an accomplice's help, methodically disposed of the victim's property, and the fact that defendant knew the location of, and entry code to, the victim's storage facility reasonably supported the inference that he gained that information from the victim before the murder as part of a plan to obtain the victim's property after he killed him. Moreover, defendant gave conflicting stories after the shooting about the victim's whereabouts and boasted to one witness about leaving someone floating in the lake, and another witness heard defendant implore his accomplice to get the witness and her family to go along with "our story." People v. Thompson (Cal. May 24, 2010), 49 Cal. 4th 79, 109 Cal. Rptr. 3d 549, 231 P.3d 289, 2010 Cal. LEXIS 4884, cert. denied, (U.S. Jan. 10, 2011), 562 U.S. 1146, 131 S. Ct. 919, 178 L. Ed. 2d 767, 2011 U.S. LEXIS 128.

Evidence contained sufficient evidence to convict defendant as an aider and abettor to first-degree murder on either a felony-murder or a premeditated-and-deliberate-murder theory where: (1) the condition of the victim's body supported the inference a robbery took place; (2) an accomplice's testimony stood as direct evidence that defendant committed the robbery, but it also provided circumstantial evidence that the accomplice could have

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committed the robbery, because it established that he was with the victim and defendant when the victim was robbed and killed; and (3) regardless of who was the actual shooter, the evidence reasonably supported the inference that defendant assisted the robbery and murder by providing the gun because, as one witness testified, defendant had said he was going to bring a gun and, as another witness testified, defendant was cleaning a gun the day after the shooting. The evidence reasonably supported the inference that defendant intentionally maneuvered the witness into going to an isolated area where defendant and the accomplice carried out their plan to rob and kill him. People v. Thompson (Cal. May 24, 2010), 49 Cal. 4th 79, 109 Cal. Rptr. 3d 549, 231 P.3d 289, 2010 Cal. LEXIS 4884, cert. denied, (U.S. Jan. 10, 2011), 562 U.S. 1146, 131 S. Ct. 919, 178 L. Ed. 2d 767, 2011 U.S. LEXIS 128.

26. Second Degree Murder: Generally

Every kind of murder, other than murder of the first degree, which is murder at common law, is murder in the second degree. People v. Sanchez (Cal. 1864), 24 Cal. 17, 1864 Cal. LEXIS 162.

Where death results from the performance of an unlawful abortion, the crime is second degree murder. Ex parte Wolff (Cal. Nov. 1, 1880), 57 Cal. 94, 1880 Cal. LEXIS 503; People v. Wright (Cal. Jan. 9, 1914), 167 Cal. 1, 138 P. 349, 1914 Cal. LEXIS 419; People v. Powell (Cal. Aug. 19, 1949), 34 Cal. 2d 196, 208 P.2d 974, 1949 Cal. LEXIS 154.

Murder of the second degree may be defined as an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

This section does not define every homicide other than first degree murder as murder of the second degree. People v. Parman (Cal. July 11, 1939), 14 Cal. 2d 17, 92 P.2d 387, 1939 Cal. LEXIS 298.

A defendant's rights are not prejudiced by the failure of the trial court to instruct the jury on murder in the second degree, where the jury is instructed on that question in the language of this section, and is given an instruction to the effect that if the killing was wilful, deliberate and premeditated the case falls within the first degree, and, if not, within the second degree. People v. Rameriz (Cal. Oct. 1, 1934), 1 Cal. 2d 559, 36 P.2d 628, 1934 Cal. LEXIS 412.

The court did not err in failing to instruct regarding second degree murder, where the evidence showed that the homicide was committed in the perpetration of robbery. People v. West (Cal. Feb. 23, 1932), 215 Cal. 87, 8 P.2d 463, 1932 Cal. LEXIS 380.

Where the evidence shows that the defendant is either guilty of murder in the perpetration or attempt to perpetrate robbery or is not guilty, it is not error to refuse to instruct the jury that they may find a verdict of second degree murder or of manslaughter. People v. Rogers (Cal. Aug. 7, 1912), 163 Cal. 476, 126 P. 143, 1912 Cal. LEXIS 432.

Where the intention to kill is proved by the circumstances preceding or connected with the homicide, there is no question of implied malice; and unless the express malice is affirmatively proved, the defendant cannot be convicted of murder in the first degree, even though his commission of the homicide is proved, and there is no evidence that it is manslaughter or that the killing was justified or excusable. In such a case, the verdict should be guilty of murder in the second degree. People v. Knapp (Cal. Sept. 18, 1886), 71 Cal. 1, 11 P. 793, 1886 Cal. LEXIS 509.

An unlawful killing done without the provocation and sudden passion which reduces the offense to manslaughter, or done in the commission of an unlawful act the natural consequences of which are dangerous to life, or committed in the attempt to perpetrate a felony other than those mentioned in the description of first degree murder, or under circumstances which show an abandoned and malignant heart, is second degree murder, unless the facts prove the

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existence in the slayer's mind of the specific intent to take life. People v. Doyell (Cal. Apr. 1, 1874), 48 Cal. 85, 1874 Cal. LEXIS 101.

The Act of 1856, dividing the crime of murder into two degrees, and prescribing imprisonment as the punishment for murder in the second degree, did not make murder in the second degree less or other than murder. People v. Haun (Cal. July 1, 1872), 44 Cal. 96, 1872 Cal. LEXIS 159.

Murder of the second degree is an unlawful killing of a human being with malice aforethought, but which is not perpetrated by means of poison, lying in wait, or torture, is not wilful, deliberate, and premeditated, and is not committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

Evidence shows only second degree murder where, though killing was extremely brutal, there is nothing to indicate premeditation, nothing to show that defendant had ever seen victim before murder or to show how killing was committed in perpetration of certain felonies, and where nothing more is shown than infliction of multiple acts of violence on victim. People v. Craig (Cal. 1957), 49 Cal. 2d 313, 316 P.2d 947, 1957 Cal. LEXIS 263.

Defendant is entitled to be found guilty of no more than murder of second degree if his testimony, viewed in light of other evidence, is sufficient to create reasonable doubt as to his guilt of first degree murder. People v. Hudson (Cal. Sept. 20, 1955), 45 Cal. 2d 121, 287 P.2d 497, 1955 Cal. LEXIS 301.

Instruction on second degree murder must necessarily refer to the two degrees of murder, as the crime may only be defined by relating it to first degree murder. People v. Poindexter (Cal. Oct. 24, 1958), 51 Cal. 2d 142, 330 P.2d 763, 1958 Cal. LEXIS 215.

Death resulting from commission of felony such as furnishing, selling or administering narcotics to minor constitutes murder of the second degree. People v. Poindexter (Cal. Oct. 24, 1958), 51 Cal. 2d 142, 330 P.2d 763, 1958 Cal. LEXIS 215.

Decisive factor in determining whether particular homicide is second degree murder or voluntary manslaughter is defendant's state of mind at time crime was committed. People v. Dugger (Cal. App. 1st Dist. Apr. 13, 1960), 179 Cal. App. 2d 714, 4 Cal. Rptr. 388, 1960 Cal. App. LEXIS 2285.

A second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which constitutes an offense included therein (overruling People v. Hamilton (1961) 55 Cal 2d 881, 13 Cal Rptr 649, 362 P2d 473, 1961 Cal LEXIS 269, and People v. Talbot (1966) 64 Cal 2d 691, 51 Cal Rptr 417, 414 P2d 663, 1966 Cal LEXIS 303 to the extent that they contain reasoning or language inconsistent with this opinion). People v. Ireland (Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351; People v. Stines (Cal. App. 4th Dist. Dec. 22, 1969), 2 Cal. App. 3d 970, 82 Cal. Rptr. 850, 1969 Cal. App. LEXIS 1480; People v. Moore (Cal. App. 2d Dist. Mar. 17, 1970), 5 Cal. App. 3d 486, 85 Cal. Rptr. 194, 1970 Cal. App. LEXIS 1455.

Where no evidence was offered in murder case to show that defendant entered store of victim for any purpose other than robbery and it was difficult to conceive of any other purpose, court did not err in failing to instruct on second degree murder. People v. Imbler (Cal. May 17, 1962), 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304, 1962 Cal. LEXIS 219, cert. denied, (U.S. Sept. 1, 1964), 379 U.S. 908, 85 S. Ct. 196, 13 L. Ed. 2d 181, 1964 U.S. LEXIS 300.

It was not error to refuse to instruct jury on elements of second degree murder where there was no evidence that would support verdict of second degree murder, where only theory advanced by prosecution in case was that of murder in first degree predicated on either premeditation or killing in course of robbery, and where only theory advanced by defendant was that while murder was committed he was not perpetrator thereof. People v. Lessard (Cal. Sept. 27, 1962), 58 Cal. 2d 447, 25 Cal. Rptr. 78, 375 P.2d 46, 1962 Cal. LEXIS 271.

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When it is proved that defendant committed killing and nothing further is shown, presumption of law is that killing was malicious and act of murder; in such case, verdict should be murder of second degree. People v. McCartney (Cal. App. 2d Dist. Nov. 20, 1963), 222 Cal. App. 2d 461, 35 Cal. Rptr. 256, 1963 Cal. App. LEXIS 1691; People v. Jones (Cal. App. 2d Dist. Mar. 16, 1964), 225 Cal. App. 2d 598, 37 Cal. Rptr. 454, 1964 Cal. App. LEXIS 1411; People v. Ray (Cal. App. 1st Dist. July 27, 1967), 252 Cal. App. 2d 932, 61 Cal. Rptr. 1, 1967 Cal. App. LEXIS 1585, cert. denied, (U.S. 1968), 393 U.S. 864, 89 S. Ct. 145, 21 L. Ed. 2d 132, 1968 U.S. LEXIS 827.

Homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in this section) constitutes at least second degree murder. People v. Ford (Cal. Feb. 4, 1964), 60 Cal. 2d 772, 36 Cal. Rptr. 620, 388 P.2d 892, 1964 Cal. LEXIS 288, cert. denied, (U.S. May 18, 1964), 377 U.S. 940, 84 S. Ct. 1342, 12 L. Ed. 2d 303, 1964 U.S. LEXIS 1359; People v. Williams (Cal. Oct. 22, 1965), 63 Cal. 2d 452, 47 Cal. Rptr. 7, 406 P.2d 647, 1965 Cal. LEXIS 197; People v. Clayton (Cal. App. 3d Dist. Feb. 3, 1967), 248 Cal. App. 2d 345, 56 Cal. Rptr. 413, 1967 Cal. App. LEXIS 1638; People v. Ireland (Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351; People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

Homicide that is direct causal result of commission of felony inherently dangerous to human life, other than six felonies enumerated in this section, may constitute second degree murder. People v. Schader (Cal. May 11, 1965), 62 Cal. 2d 716, 44 Cal. Rptr. 193, 401 P.2d 665, 1965 Cal. LEXIS 290, overruled in part, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087, overruled in part, Soule v. General Motors Corp. (Cal. Oct. 27, 1994), 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298, 1994 Cal. LEXIS 6027.

Felony-murder doctrine ascribes malice aforethought to the felon who kills in perpetration of inherently dangerous felony. People v. Washington (Cal. May 25, 1965), 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 1965 Cal. LEXIS 295.

Felony murder doctrine cannot be invoked in case in which death resulted from course of conduct involving felonious perpetration of fraud, since grand theft committed in such way is not inherently dangerous to human life; such danger must be determined by statutory definition of felony, not by factual elements of defendant's actual conduct. People v. Phillips (Cal. May 23, 1966), 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P.2d 353, 1966 Cal. LEXIS 288, overruled, People v. Flood (Cal. July 2, 1998), 18 Cal. 4th 470, 76 Cal. Rptr. 2d 180, 957 P.2d 869, 1998 Cal. LEXIS 4033.

A homicide that is a direct causal result of the commission of a felony (other than the six felonies enumerated in Pen Code, § 189) inherently dangerous to human life constitutes second degree murder. People v. Ford (Cal. July 25, 1966), 65 Cal. 2d 41, 52 Cal. Rptr. 228, 416 P.2d 132, 1966 Cal. LEXIS 178, cert. denied, (U.S. Sept. 1, 1967), 385 U.S. 1018, 87 S. Ct. 737, 17 L. Ed. 2d 554, 1967 U.S. LEXIS 2716.

By statute (Pen C §§ 187–189) second degree murder is the unpremeditated killing of a human being, with express or implied malice, which does not fall within homicide committed in the perpetration of one of the offenses enumerated in Pen C § 189. People v. Clayton (Cal. App. 3d Dist. Feb. 3, 1967), 248 Cal. App. 2d 345, 56 Cal. Rptr. 413, 1967 Cal. App. LEXIS 1638.

If a homicide results from the commission of a felony not enumerated in Pen C § 189, it is murder in the second degree as a matter of decisional law. People v. Lovato (Cal. App. 5th Dist. Jan. 25, 1968), 258 Cal. App. 2d 290, 65 Cal. Rptr. 638, 1968 Cal. App. LEXIS 2414, disapproved, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

The giving of a second degree felony-murder instruction in a murder prosecution has the effect of relieving the jury of the necessity of finding one of the elements of the crime of murder, that of malice aforethought. People v. Ireland

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(Cal. Feb. 28, 1969), 70 Cal. 2d 522, 75 Cal. Rptr. 188, 450 P.2d 580, 1969 Cal. LEXIS 351; People v. Moore (Cal. App. 2d Dist. Mar. 17, 1970), 5 Cal. App. 3d 486, 85 Cal. Rptr. 194, 1970 Cal. App. LEXIS 1455.

Only such felonies as are in themselves inherently dangerous to human life can support the application of the second degree felony murder doctrine and, in assessing the peril to human life inherent in any given felony, a court must not look to the particular facts, but to the elements of the felony in the abstract. People v. Cline (Cal. App. 4th Dist. Feb. 28, 1969), 270 Cal. App. 2d 328, 75 Cal. Rptr. 459, 1969 Cal. App. LEXIS 1528.

Death resulting from the commission of a felony such as furnishing, selling, or administering of narcotics to a minor constitutes second degree murder. People v. Cline (Cal. App. 4th Dist. Feb. 28, 1969), 270 Cal. App. 2d 328, 75 Cal. Rptr. 459, 1969 Cal. App. LEXIS 1528.

Only such felonies as are in themselves inherently dangerous to human life can support the application of the felony-murder rule; and in making that assessment, the courts look to the elements of the felony in the abstract, not the particular facts of the case. People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

The burning of a motor vehicle, which usually contains gasoline and which is usually found in close proximity to people, is inherently dangerous to human life; therefore, the wilful and malicious burning of a motor vehicle calls into play the second degree felony-murder rule. People v. Nichols (Cal. Sept. 25, 1970), 3 Cal. 3d 150, 89 Cal. Rptr. 721, 474 P.2d 673, 1970 Cal. LEXIS 197, cert. denied, (U.S. 1971), 402 U.S. 910, 91 S. Ct. 1388, 28 L. Ed. 2d 652, 1971 U.S. LEXIS 2403.

An instruction on the felony-murder rule was prejudicial error, where it was based on a felony that was an integral part of the homicide and constituted an offense included therein, thereby relieving the jury of the necessity of finding the essential element of malice aforethought for second degree murder. People v. Alvarez (Cal. App. 2d Dist. Feb. 25, 1970), 4 Cal. App. 3d 913, 84 Cal. Rptr. 732, 1970 Cal. App. LEXIS 1589.

In a criminal prosecution resulting from the killing of a girl by gunshots fired into her house from a vehicle, the trial court did not err in instructing the jury on a second degree felony-murder theory based on the underlying felony of discharging a firearm at an inhabited dwelling house Pen C § 246). That offense does not "merge" with a resulting homicide within the meaning of the Supreme Court doctrine that the felony-murder rule is not applicable where the only underlying felony was assault, and therefore the offense will support a conviction of second degree felony murder (disapproving the holding to the contrary in People v. Wesley (1970) 10 Cal App 3d 902, 89 Cal Rptr 377, 1970 Cal App LEXIS 1901). The use of certain inherently dangerous felonies, including the discharge of a firearm at an inhabited dwelling house, as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent behind the rule. In this situation, the Legislature has not demanded a showing of actual malice (apart from the statutory requirement that the firearm be discharged "maliciously and willfully") in order to support a second degree murder conviction. Application of the felony-murder rule, when a violation of Pen C § 246, results in the death of a person, is consistent with the traditionally recognized purpose of the second degree felony-murder doctrine, namely the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies. People v. Hansen (Cal. Dec. 30, 1994), 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P.2d 1022, 1994 Cal. LEXIS 6590, overruled in part, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Although the Penal Code does not expressly set forth any provision for second degree felony-murder, nevertheless, certain felonies inherently dangerous to human life, exclusive of those enumerated in Pen Code, § 189, can support application of the felony-murder rule. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

In a murder prosecution in which it appeared that defendant had become involved in a heated argument with the victim, who was not a previous acquaintance of his, and that, allegedly in self-defense, he had killed him with a

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sawed-off shotgun, it was reversible error to give a second degree felony-murder instruction, thus relieving the jury of the necessity of finding the element of malice aforethought, where such instruction was based, not on any of the six underlying felonies enumerated in the degrees-of-murder statute (Pen C § 189), but on the fact that defendant, at the time of the killing, was an ex-felon committing the felony of carrying a concealable weapon (Pen C § 12021). People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198, overruled in part, People v. Flood (Cal. July 2, 1998), 18 Cal. 4th 470, 76 Cal. Rptr. 2d 180, 957 P.2d 869, 1998 Cal. LEXIS 4033.

Those who perpetrate homicide while engaged merely in the commission of the felony of violating either Pen C § 12020 (possession by any person of a weapon such as a sawed-off shotgun) or Pen C § 12021 (possession of a concealable firearm by an ex-felon) may not be convicted of murder unless the existence of the crucial mental state of malice aforethought is actually demonstrated to the trier of fact. People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198, overruled in part, People v. Flood (Cal. July 2, 1998), 18 Cal. 4th 470, 76 Cal. Rptr. 2d 180, 957 P.2d 869, 1998 Cal. LEXIS 4033.

Those who perpetrate homicide while engaged merely in the felony of escape from legal confinement may not be convicted of murder unless the existence of the crucial mental state of malice aforethought is actually demonstrated to the trier of fact. People v. Lopez (Cal. Nov. 4, 1971), 6 Cal. 3d 45, 98 Cal. Rptr. 44, 489 P.2d 1372, 1971 Cal. LEXIS 199.

The felony of escape from a city or county penal facility (Pen C § 4532) is not, when considered in the abstract, an offense inherently dangerous to human life, and therefore cannot properly be used as a basis for the application of the felony-murder doctrine. People v. Lopez (Cal. Nov. 4, 1971), 6 Cal. 3d 45, 98 Cal. Rptr. 44, 489 P.2d 1372, 1971 Cal. LEXIS 199.

The second degree felony-murder rule is basically an adoption of the common law that homicides which occur during the perpetration of any felony constitute murder, but the rule, as applied in this state, is limited by the requirement that the felony must be one that, when viewed in the abstract, is inherently dangerous to human life. People v. Carlson (Cal. App. 1st Dist. Feb. 20, 1974), 37 Cal. App. 3d 349, 112 Cal. Rptr. 321, 1974 Cal. App. LEXIS 1138.

In a homicide prosecution, the trial court erred prejudicially in utilizing the felony-murder rule to find defendant guilty of the second degree murder of his unborn child, where the act that resulted in the death of the fetus was the same act on which the court had based its finding of defendant's guilt of voluntary manslaughter of the mother, and where it had determined that the killing of the mother was without malice and the result of the combination of a sudden quarrel, heat of passion, and mental confusion. Though the fetus was killed by defendant while he was engaged in the commission of a felony inherently dangerous to human life, the felony was not one independent of the homicide as required for application of the felony-murder doctrine. People v. Carlson (Cal. App. 1st Dist. Feb. 20, 1974), 37 Cal. App. 3d 349, 112 Cal. Rptr. 321, 1974 Cal. App. LEXIS 1138.

Grand theft from the person is not, when viewed in the abstract, a felony inherently dangerous to human life which will support application of the second degree felony-murder rule. Though Pen C § 487, expressly defineates the taking of property "from the person of another," as an aggravated form of theft deserving of treatment as a felony in all cases, the offense can readily be perpetrated without any significant hazard to human life. Only in the unusual case would a taking from the person involve a substantial danger of death without the thief using force against his victim, and if he does use force, either to effect the taking or to resist the victim's efforts to retrieve the property, the crime becomes robbery, and will support application of the first degree felony-murder rule under Pen C § 189. People v. Morales (Cal. App. 4th Dist. June 13, 1975), 49 Cal. App. 3d 134, 122 Cal. Rptr. 157, 1975 Cal. App. LEXIS 1191.

Although there is no express statutory provision for second degree felony-murder, a felony other than one of those enumerated in Pen C § 189, making a homicide committed in the perpetration of certain specified felonies first degree murder, may form the basis for a conviction of second degree murder under the felony-murder doctrine.

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However, a nonenumerated felony will support application of the felony-murder rule only if it is one inherently dangerous to human life. People v. Morales (Cal. App. 4th Dist. June 13, 1975), 49 Cal. App. 3d 134, 122 Cal. Rptr. 157, 1975 Cal. App. LEXIS 1191.

In instructing the jury on second degree murder in a homicide prosecution that "malice is express when there is manifested an intention unlawfully to kill a human being," the trial court did not err in failing, sua sponte, to place the word "deliberate" before the word "intention". Malice aforethought as required under Pen C § 187, for a conviction of second degree murder, is not synonymous with the term deliberate as used in defining first degree murder. People v. Washington (Cal. App. 2d Dist. May 24, 1976), 58 Cal. App. 3d 620, 130 Cal. Rptr. 96, 1976 Cal. App. LEXIS 1572.

Pen C § 189, as properly construed in accordance with settled principles of statutory construction embodies the offense of second degree felony murder, the statutory offense being based on the common law felony-murder rule. People v. Taylor (Cal. App. 5th Dist. Nov. 19, 1980), 112 Cal. App. 3d 348, 169 Cal. Rptr. 290, 1980 Cal. App. LEXIS 2459.

With respect to the criminal liability of the perpetrator of a felony for second degree murder under the felony-murder rule embodied in Pen C § 189, the victim's death need only be a direct causal result of the felony and it is not necessary that the felony be the sole cause of the death. Thus, the felony of furnishing or giving away heroin was sufficient to establish the criminal liability of the perpetrator of that offense for second degree felony murder, where the record showed that the recipient of the heroin died of cardiorespiratory arrest as the result of the combined effect of heroin and alcohol. People v. Taylor (Cal. App. 5th Dist. Nov. 19, 1980), 112 Cal. App. 3d 348, 169 Cal. Rptr. 290, 1980 Cal. App. LEXIS 2459.

It is sufficient under the felony-murder rule that the felony and the homicide are part of one continuous transaction. There is no requirement that the homicide occur while the perpetrator of the felony is committing or is engaged in the felony, or that the killing be part of the felony. It is sufficient that the homicide is related to the felony and has resulted as a natural and probable consequence thereof. Thus, in a prosecution for the offenses of furnishing heroin and second degree felony murder in which it was established defendant had committed the felony of furnishing heroin to the murder victim, there was a sufficient basis for defendant's conviction of second degree felony murder, where the record showed that after defendant had handed the heroin to the victim, the victim had immediately begun to inject the heroin, no large amount of time had elapsed between the felony and the homicide that would have allowed for intervening events to occur, and that defendant's act of furnishing the heroin to the victim while the victim was under the influence of alcohol was a direct cause of the victim's death. People v. Taylor (Cal. App. 5th Dist. Nov. 19, 1980), 112 Cal. App. 3d 348, 169 Cal. Rptr. 290, 1980 Cal. App. LEXIS 2459.

It is not necessary for the incurring of criminal liability for second degree felony murder on the basis of the felony of furnishing heroin that there be an administering of the heroin to a victim who dies as a direct result of the heroin by the person perpetrating the felony of furnishing the heroin. The furnisher is liable even if the actual administering of the heroin is by the victim. People v. Taylor (Cal. App. 5th Dist. Nov. 19, 1980), 112 Cal. App. 3d 348, 169 Cal. Rptr. 290, 1980 Cal. App. LEXIS 2459.

In a prosecution for first degree murder, arising out of defendant's shooting of her husband, the trial court erred in not instructing sua sponte as to the lesser included offense of second degree murder, since the jury could have found that defendant did not premeditate but rather acted upon a sudden and unconsidered impulse, even if the jury rejected her testimony that the victim had been accidentally shot during a sudden scuffle, while defendant was attempting to keep him away from her gun. Although the evidence was sufficient to justify a finding of deliberation and premeditation, such a finding was not compelled. Moreover, since no instruction presented the jury with a theory of intentional homicide which was not premeditated and deliberate, such error could not be deemed to be harmless. People v. Wickersham (Cal. Sept. 2, 1982), 32 Cal. 3d 307, 185 Cal. Rptr. 436, 650 P.2d 311, 1982 Cal. LEXIS 223, overruled, People v. Barton (Cal. Dec. 18, 1995), 12 Cal. 4th 186, 47 Cal. Rptr. 2d 569, 906 P.2d 531, 1995 Cal. LEXIS 7014.

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The existence of provocation which is not adequate to reduce the class of the offense from murder to manslaughter may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation. Thus, where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory. People v. Wickersham (Cal. Sept. 2, 1982), 32 Cal. 3d 307, 185 Cal. Rptr. 436, 650 P.2d 311, 1982 Cal. LEXIS 223, overruled, People v. Barton (Cal. Dec. 18, 1995), 12 Cal. 4th 186, 47 Cal. Rptr. 2d 569, 906 P.2d 531, 1995 Cal. LEXIS 7014.

In a prosecution in which defendant was found guilty of both second degree murder (Pen C § 189) and felony child abuse (Pen C § 273a(1)) of her 22-month-old child, the trial court properly applied the felony-murder rule. The underlying felony of child abuse is not an "integral part" of and included in the homicide, but may be committed without inflicting death or without intending to inflict injuries which would result in death, in which case application of the felony-murder rule would effectuate the legislative intent to deter felonious conduct which might result in death. People v. Northrop (Cal. App. 1st Dist. Apr. 23, 1982), 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197, 1982 Cal. App. LEXIS 1688.

Although murder is a "specific intent" crime, the specific intent to kill is not an independent element of the crime. The concept of specific intent relates to murder in two ways—the specific intent to kill is a necessary element of first degree murder based on a "willful, deliberate, and premeditated killing" (Pen C § 189), and the specific intent to kill is also necessary to establish express malice. However, it is not a necessary element of second degree murder, nor is it necessary to establish malice, which may be established by showing the specific intent to commit an act from which malice may be implied. People v. Alvarado (Cal. App. 2d Dist. July 18, 1991), 232 Cal. App. 3d 501, 283 Cal. Rptr. 479, 1991 Cal. App. LEXIS 815.

Second degree murder is the unlawful killing of a human being with malice, but without the additional elements of willfulness, premeditation, and deliberation that would support a conviction of first degree murder. People v. Hansen (Cal. Dec. 30, 1994), 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P.2d 1022, 1994 Cal. LEXIS 6590, overruled in part, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

The offense of discharging a firearm at an inhabited dwelling (Pen C § 246) is an inherently dangerous felony for purposes of the second degree felony-murder rule. The discharge of a firearm at an inhabited dwelling house—by definition, a dwelling "currently being used for dwelling purposes, whether occupied or not" (§ 246)—is a felony the commission of which inherently involves a danger to human life. An inhabited dwelling house is one in which persons reside and where occupants are generally in or around the premises. In firing a gun at such a structure, there always will exist a significant likelihood that an occupant may be present. Although a defendant may be guilty of this felony even if, at the time of the shooting, the residents of the inhabited dwelling happen to be absent, the offense nonetheless is one that, viewed in the abstract, poses a great risk or "high probability" of death. The nature of the other acts proscribed by § 246 reinforces the conclusion that the Legislature viewed the offense of discharging a firearm at an inhabited dwelling as posing a risk of death comparable to that involved in shooting at an occupied building or motor vehicle. Furthermore, application of the second degree felony-murder rule to a homicide resulting from a violation of § 246 serves the fundamental rationale of the felony-murder rule—the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies. People v. Hansen (Cal. Dec. 30, 1994), 9 Cal. 4th 300, 36 Cal. Rptr. 2d 609, 885 P.2d 1022, 1994 Cal. LEXIS 6590, overruled in part, People v. Chun (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

District court's denial of a petition for a writ of habeas corpus was reversed, and the matter was remanded to the district court with instructions to grant the writ; because the trial court erroneously instructed the jury that the offense of second degree murder was a general intent crime, the jury could have convicted petitioner of second degree murder even if they believed that he acted in self defense, which deprived defendant of his due process rights. Ho v. Carey (9th Cir. Cal. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11224.

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In a criminal trial where the evidence showed defendant murdered his lover's roommate after seeing the man on the phone dialing 9-1-1, defendant was convicted of second degree murder. People v. Henderson (Cal. App. 4th Dist. July 17, 2003), 110 Cal. App. 4th 737, 2 Cal. Rptr. 3d 32, 2003 Cal. App. LEXIS 1072.

At murder trial, court did not err when it refused to submit to jury the question of whether operating methamphetamine lab was inherently dangerous felony; nothing in Apprendi changed the long-standing rule that it was a question of law whether a crime was an inherently dangerous felony for the purpose of the felony-murder rule; the felony-murder rule was properly applied in determining defendant's culpability for the death of an accomplice who accidentally killed herself during the manufacture of methamphetamine. People v. Schaefer (Cal. App. 2d Dist. May 17, 2004), 118 Cal. App. 4th 893, 13 Cal. Rptr. 3d 442, 2004 Cal. App. LEXIS 746.

In a case involving a drive-by shooting in which one person was killed and two injured, and in which a 16-year-old defendant was convicted of second-degree murder, defendant's admission that he fired a gun should have been excluded on the ground that it was procured by a false promise of leniency because, to the young and immature defendant, a detective's paternal and solicitous exhortations to learn from his mistake and admit that he had a gun because he was not the killer might have offered hope to avoid the most serious charges. Second-degree felony murder, the only express theory of second-degree murder offered to the jury, was based on the underlying felony of shooting into an occupied vehicle, and because, without the evidence of defendant's statements about the shooting, there was no evidence from which a collateral intent or purpose could be found, it was error to instruct on second-degree felony murder and the murder conviction had to be reversed. People v. Chun (Cal. App. 3d Dist. Sept. 14, 2007), 155 Cal. App. 4th 170, 65 Cal. Rptr. 3d 738, 2007 Cal. App. LEXIS 1537, review granted, depublished, (Cal. Dec. 19, 2007), 69 Cal. Rptr. 3d 677, 173 P.3d 415, 2007 Cal. LEXIS 14426, rev'd, (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

Second-degree felony murder is applicable to an assaultive-type crime, such as when shooting at a person is involved, provided the crime was committed with a purpose independent of and collateral to causing injury. The collateral purpose rule is the proper test of merger in these types of cases. People v. Chun (Cal. App. 3d Dist. Sept. 14, 2007), 155 Cal. App. 4th 170, 65 Cal. Rptr. 3d 738, 2007 Cal. App. LEXIS 1537, review granted, depublished, (Cal. Dec. 19, 2007), 69 Cal. Rptr. 3d 677, 173 P.3d 415, 2007 Cal. LEXIS 14426, rev'd, (Cal. Mar. 30, 2009), 45 Cal. 4th 1172, 91 Cal. Rptr. 3d 106, 203 P.3d 425, 2009 Cal. LEXIS 3184.

27. Second Degree Murder: Deliberation and Premeditation

Murder in the second degree is the unlawful killing with malice, but without a deliberate, premeditated or preconceived design to kill. People v. Long (Cal. July 1, 1870), 39 Cal. 694, 1870 Cal. LEXIS 138; People v. Dovell (Cal. Apr. 1, 1874), 48 Cal. 85, 1874 Cal. LEXIS 101; People v. Moreno (Cal. June 16, 1936), 6 Cal. 2d 480, 58 P.2d 629, 1936 Cal. LEXIS 539; People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

A premeditated intent is not essential to murder in the second degree. People v. Mendenhall (Cal. Jan. 13, 1902), 135 Cal. 344, 67 P. 325, 1902 Cal. LEXIS 803.

To reduce a crime from first degree to second degree murder, the killing need not be done upon the instant that provocation is given, or so soon thereafter that the blood has not had time to cool; if a killing is done without deliberation and premeditation, except in special cases mentioned in the code, it is only murder in the second degree. People v. Maugh's (Cal. May 18, 1906), 149 Cal. 253, 86 P. 187, 1906 Cal. LEXIS 245.

To sustain a conclusion that a homicide was murder of the second degree, it should appear with reasonable certainty that immediately preceding the fatal act the killer had not formed a deliberate intent to take the life of the person whom he thereafter killed, or that such act was not the result of "pre-existing reflection" or "deliberate premeditation." People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239.

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Second degree murder includes not only those killings where intent is implied, but also those where specific intent to kill is present, although in cases involving specific intent span of reflection necessary to constitute premeditated murder is absent. People v. Butts (Cal. App. 3d Dist. Aug. 25, 1965), 236 Cal. App. 2d 817, 46 Cal. Rptr. 362, 1965 Cal. App. LEXIS 879, rev'd, People v. Otwell (Cal. App. 1967), 61 Cal. Rptr. 427.

Second degree murder is unpremeditated murder with malice aforethought. People v. Landrum (Cal. App. 3d Dist. Apr. 19, 1968), 261 Cal. App. 2d 372, 67 Cal. Rptr. 911, 1968 Cal. App. LEXIS 1756.

28. Second Degree Murder: Malice

A person not engaged in the commission of a felony may be guilty of second degree murder, notwithstanding the shooting was unintentional, if the circumstances disclose such a wanton recklessness as to show an abandoned and malignant heart. People v. Hubbard (Cal. App. Oct. 2, 1923), 64 Cal. App. 27, 220 P. 315, 1923 Cal. App. LEXIS 178.

Where it is proved that defendant assaulted decedent with dangerous weapon in manner endangering life and resulting in death, and evidence does not create in jurors' minds reasonable doubt whether defendant's act may have been justified or its criminal character mitigated by influence of passion or terror, no further proof of malice or intent to kill is required to sustain conviction of second degree murder. People v. Watkins (Cal. App. 4th Dist. Feb. 15, 1960), 178 Cal. App. 2d 41, 2 Cal. Rptr. 707, 1960 Cal. App. LEXIS 2557.

To constitute malice necessary to support conviction of second degree murder, actual intent to kill or pre-existing hatred or enmity against victim is not required, but doing of unlawful and felonious act intentionally, deliberately, and without legal cause or excuse is sufficient. People v. Stradwick (Cal. App. 2d Dist. May 8, 1963), 215 Cal. App. 2d 839, 30 Cal. Rptr. 791, 1963 Cal. App. LEXIS 2563.

Malice aforethought by the accused at the time of committing homicide is an essential element of murder of the second degree. People v. Alvarez (Cal. App. 2d Dist. Feb. 25, 1970), 4 Cal. App. 3d 913, 84 Cal. Rptr. 732, 1970 Cal. App. LEXIS 1589.

Substantial evidence supported a jury's finding of second degree murder where a rational trier of fact could and did draw a logical and reasonable inference that the victim, who drowned, did not voluntarily enter the deep end of defendant's pool but was instead forced into the water by defendant, either before or after he beat her to unconsciousness. A rational jury could find that defendant acted with implied malice when he forced an injured, unconscious nonswimmer to remain in the deep end of his swimming pool until she drowned. People v. Bohana (Cal. App. 2d Dist. Oct. 25, 2000), 84 Cal. App. 4th 360, 100 Cal. Rptr. 2d 845, 2000 Cal. App. LEXIS 812.

Ample evidence supported the jury's verdict that defendant was guilty of second degree murder under Pen C §§ 187(a), 188, and 189 where defendant knew her Presa Canario dog was huge, untrained, and bred to fight; she had seen and heard of his numerous and ominous aggressive acts in the months leading up to the fatal attack; she had been warned about the dangers inherent in his lack of training; and her repeated disregard for the obvious dangers culminated in her fatal decision to take her dogs outside her apartment without muzzles, despite knowing she could not control them. Remand was necessary, however, to allow the trial court to consider defendant's new trial motion in light of the appropriate standard for implied malice and in light of the trial court's proper role as the 13th juror. People v. Noel (Cal. App. 1st Dist. May 5, 2005), 128 Cal. App. 4th 1391, 28 Cal. Rptr. 3d 369, 2005 Cal. App. LEXIS 711, review granted, depublished, (Cal. July 27, 2005), 32 Cal. Rptr. 3d 1, 116 P.3d 475, 2005 Cal. LEXIS 8228, rev'd, (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

Trial court erred in granting defendant's motion for a new trial under Pen C § 1181(6) because it used the incorrect standard for subjective awareness when considering implied malice under Pen C §§ 187(a), 188, and 189. The prosecution only had to prove that defendant knew that, by taking two untrained, aggressive dogs outside of her apartment without a muzzle, she was endangering the life of another. People v. Noel (Cal. App. 1st Dist. May 5,

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2005), 128 Cal. App. 4th 1391, 28 Cal. Rptr. 3d 369, 2005 Cal. App. LEXIS 711, review granted, unpublished, (Cal. July 27, 2005), 32 Cal. Rptr. 3d 1, 116 P.3d 475, 2005 Cal. LEXIS 8228, rev'd, (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

In a trial for second degree murder, the trial court should have instructed the jury on imperfect self-defense because the evidence could have allowed a reasonable jury to conclude that defendant actually believed his life was in imminent peril and thus that he did not have the required malice. The evidence was that defendant confronted the victim with an accusation, that the victim then began to choke defendant, and that defendant pulled out a gun and repeatedly shot the victim. People v. Vasquez (Cal. App. 2d Dist. Feb. 15, 2006), 136 Cal. App. 4th 1176, 39 Cal. Rptr. 3d 433, 2006 Cal. App. LEXIS 212.

Evidence was sufficient to establish malice and therefore to convict defendant for second degree murder under Pen C §§ 187, 188, 189. The jury reasonably could have concluded that defendant acted with malice because he intentionally shot the victim twice at close range without provocation. People v. Ramirez (Cal. Aug. 7, 2006), 39 Cal. 4th 398, 46 Cal. Rptr. 3d 677, 139 P.3d 64, 2006 Cal. LEXIS 9294, cert. denied, (U.S. May 29, 2007), 550 U.S. 970, 127 S. Ct. 2877, 167 L. Ed. 2d 1155, 2007 U.S. LEXIS 6130.

In a case in which two dogs owned by defendant and her husband had attacked and killed a female victim in the hallway of an apartment building, the trial court abused its discretion in granting defendant a new trial on a second degree murder charge, where the trial court erroneously concluded both that defendant could not be guilty of murder, based on a theory of implied malice, unless defendant was aware that her conduct created a high probability of death, and that a new trial was justified because the prosecution did not charge her husband with murder. People v. Knoller (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

Conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life. Thus, it was error for the appellate court to hold that a defendant's conscious disregard of the risk of serious bodily injury suffices to sustain a conviction for second degree murder. People v. Knoller (Cal. May 31, 2007), 41 Cal. 4th 139, 59 Cal. Rptr. 3d 157, 158 P.3d 731, 2007 Cal. LEXIS 5488.

Evidence of voluntary intoxication was admissible during a convicted offender's second-degree murder trial to assess the offender's subjective state of mind related to the presence or absence of malice at the time he shot and killed a long-time friend; furthermore, because the prosecutor's theory focused on express malice, evidence of voluntary intoxication was also admissible under Pen C § 22(b). Such evidence, if raised by defense counsel, would have likely created a reasonable doubt about the prisoner's intent, and defense counsel's failure to introduce evidence of the prisoner's intoxication at the time of the offense undermined confidence in the verdict. Miller v. Terhune (E.D. Cal. Aug. 16, 2007), 510 F. Supp. 2d 486, 2007 U.S. Dist. LEXIS 63951.

Driver of a semi-trailer truck was properly indicted for second degree murder under Pen C §§ 187(a), 189, after his brakes failed, resulting in two deaths, because malice could be implied from the fact that he continued to drive the steep winding road after being told that the truck was emitting a continuous cloud of white smoke from its rear left wheels, along with a smell of burning rubber. People v. Superior Court (Costa) (Cal. App. 2d Dist. Apr. 6, 2010), 183 Cal. App. 4th 690, 107 Cal. Rptr. 3d 576, 2010 Cal. App. LEXIS 471.

In a trial for second degree murder, an imperfect self-defense instruction did not have to specify that the sudden escalation concept could apply, negating malice. When the victim charged defendant upon the sound of defendant's accomplice snapping another victim's neck, defendant did not have the right to defend himself from the victim's lawful resort to self-defense and the defense of the other victim. People v. Frandsen (Cal. App. 2d Dist. June 6, 2011), 196 Cal. App. 4th 266, 126 Cal. Rptr. 3d 640, 2011 Cal. App. LEXIS 691.

Verdict based on murder during the course of a kidnapping was a murder committed with malice, which supported a minimum finding of second degree murder. Therefore, after reversing a conviction of first degree murder based on

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instructional error, the court remanded to allow the prosecution to either retry defendant or accept a reduction of the offense to second degree murder. People v. Sanchez (Cal. App. 2d Dist. Nov. 27, 2013), 221 Cal. App. 4th 1012, 164 Cal. Rptr. 3d 880, 2013 Cal. App. LEXIS 959.

Evidence was sufficient to support a conviction for implied malice murder because an expert testified that defendant's blood-alcohol level would have been 24 percent at the time of the accident, defendant, who had completed a first offender drinking driver program, planned and intended to drive home after drinking, and defendant was driving at least 50 to 57 miles per hour on a sharp curve where the critical speed was 32 to 37 miles per hour. People v. Batchelor (Cal. App. 4th Dist. Sept. 16, 2014), 229 Cal. App. 4th 1102, 178 Cal. Rptr. 3d 28, 2014 Cal. App. LEXIS 841, modified, (Cal. App. 4th Dist. Oct. 8, 2014), 2014 Cal. App. LEXIS 905, overruled in part, People v. Hicks (Cal. Dec. 28, 2017), 226 Cal. Rptr. 3d 565, 407 P.3d 409, 4 Cal. 5th 203, 2017 Cal. LEXIS 9834.

Evidence was sufficient to find that defendant, a federal correctional peace officer, acted with implied malice because, while partying, he waved a loaded gun at the victim, overrode the safeties, ordered the victim to hurry up and puke, and discharged the gun, severing the victim's jugular vein. A person acts with implied malice when he or she is under the influence, engages in joking or horseplay with a firearm, and causes the discharge of the firearm killing another person. People v. McNally (Cal. App. 2d Dist. May 21, 2015), 236 Cal. App. 4th 1419, 187 Cal. Rptr. 3d 391, 2015 Cal. App. LEXIS 443.

Evidence was sufficient to show that defendant was one of the people who shot into a crowd at a party because a witness saw a person with defendant's distinct hairstyle point and fire a gun at the house; although there was no evidence that defendant fired the shot that killed a victim, the jury could have convicted defendant as an aider and abettor or as a coconspirator and did not have to find that he fired the fatal shot to convict him of second degree murder. People v. Edwards (Cal. App. 6th Dist. Oct. 15, 2015), 241 Cal. App. 4th 213, 193 Cal. Rptr. 3d 696, 2015 Cal. App. LEXIS 906, review granted, unpublished, (Cal. Jan. 27, 2016), 197 Cal. Rptr. 3d 521, 364 P.3d 410, 2016 Cal. LEXIS 795, cert. denied, (U.S. Feb. 21, 2017), 137 S. Ct. 1095, 197 L. Ed. 2d 203, 2017 U.S. LEXIS 1277.

Whether relying on a theory of felony murder or a theory of implied malice murder, all 12 jurors found the required "conscious disregard for human life" for implied malice murder because the jury found that defendants aided and abetted an attempted robbery by accomplices who had loaded weapons, covered their faces, and yelled for the victims to get to the ground. People v. Johnson (Cal. App. 1st Dist. Jan. 14, 2016), 243 Cal. App. 4th 1247, 197 Cal. Rptr. 3d 353, 2016 Cal. App. LEXIS 25.

In a DUI murder case, the evidence was sufficient to find implied malice; defendant's subjective awareness that her actions were dangerous to human life was shown by her attendance at a victim impact panel that reviewed the consequences of drinking and driving, her signature on a license renewal form that stated a murder charge could be a consequence of DUI, and prior occasions when she was drinking and called taxis. Evidence that she deliberately drove with conscious disregard for human life included that her blood alcohol content was four times over the legal limit. People v. Wolfe (Cal. App. 4th Dist. Feb. 21, 2018), 229 Cal. Rptr. 3d 414, 20 Cal. App. 5th 673, 2018 Cal. App. LEXIS 136.

Evidence was sufficient to find that a minor had the malice required for second degree murder, even without her admissions as to intent, in part because it showed that her newborn baby died from a sharp wound to his neck that severed his carotid artery and trachea and extended into his spine, that there had been two or three strikes, and that he was alive when his throat was slashed. In re M.S. (Cal. App. 2d Dist. Mar. 11, 2019), 244 Cal. Rptr. 3d 580, 32 Cal. App. 5th 1177, 2019 Cal. App. LEXIS 203, modified, (Cal. App. 2d Dist. Apr. 3, 2019), 2019 Cal. App. LEXIS 306.

29. Second Degree Murder: Heat of Passion; Provocation

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No words of reproach, however grievous, are sufficient provocation to reduce offense of intentional homicide with deadly weapon from murder to manslaughter. *People v. Turley* (Cal. Oct. 1, 1875), 50 Cal. 469, 1875 Cal. LEXIS 199, overruled, *People v. Valentine* (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

Murder done in the heat of passion excited by adequate provocation is in the second degree only. *People v. Patubo* (Cal. Sept. 1, 1937), 9 Cal. 2d 537, 71 P.2d 270, 1937 Cal. LEXIS 422.

Where evidence contains no suggestion of provocation, but indicates that defendant was aggressor in quarrel, jury is justified in concluding that there was wilful, deliberate and premeditated intent to take life. *People v. Patubo* (Cal. Sept. 1, 1937), 9 Cal. 2d 537, 71 P.2d 270, 1937 Cal. LEXIS 422.

Provocation of a kind, to a degree, and under circumstances insufficient fully to negative or raise a reasonable doubt as to the idea of both premeditation and malice (thereby reducing the offense to manslaughter), might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation. *People v. Thomas* (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

To reduce homicide from class of murder to that of manslaughter, evidence must be such as reasonably to lead jury to believe that defendant did, or to create reasonable doubt in their minds as to whether or not he did, commit his offense under heat of passion. *People v. Danielly* (Cal. Jan. 25, 1949), 33 Cal. 2d 362, 202 P.2d 18, 1949 Cal. LEXIS 200, cert. denied, (U.S. May 31, 1949), 337 U.S. 919, 69 S. Ct. 1162, 93 L. Ed. 1728, 1949 U.S. LEXIS 2381.

Homicide committed during sudden quarrel, while perpetrator is in throes of violent rage is not first degree murder. *People v. Cartier* (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

Homicide committed during sudden quarrel, while perpetrator is in throes of violent rage may be second degree murder or it may be voluntary manslaughter, dependent on law-invoking definitive facts to be deduced from surrounding circumstances, including character and extent of provocation. *People v. Cartier* (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

In a prosecution for defendant's first degree murder of her former boyfriend, the trial court should have instructed on voluntary manslaughter and second degree murder premised on a provocation/heat of passion theory because the evidence was sufficient to raise a factual question whether, when defendant shot the victim, she was acting under the heat of passion provoked by the victim's repeated threats to take custody of her son away from her. *People v. Wright* (Cal. App. 1st Dist. Dec. 15, 2015), 242 Cal. App. 4th 1461, 196 Cal. Rptr. 3d 115, 2015 Cal. App. LEXIS 1118, modified, (Cal. App. 1st Dist. Jan. 6, 2016), 2016 Cal. App. LEXIS 5.

Defendant, convicted of attempted carjacking and felony murder, was not entitled to relief from multiple punishment; the rule prohibiting multiple convictions based on necessarily included offenses as a judicially created exception to the general rule permitting multiple conviction did not apply because attempted carjacking is not necessarily included within felony murder. Under the elements test for included offenses, murder and first-degree murder can be committed without attempted carjacking. *People v. Diaz* (Cal. App. 5th Dist. Mar. 20, 2018), 230 Cal. Rptr. 3d 499, 21 Cal. App. 5th 538, 2018 Cal. App. LEXIS 257, modified, (Cal. App. 5th Dist. Apr. 10, 2018), 2018 Cal. App. LEXIS 306.

30. Second Degree Murder: Assault; Killing During Fight

Assault with dangerous weapon made in manner to endanger life and resulting in death is sufficient to sustain second degree murder verdict; malice is implied from assault. *People v. Jones* (Cal. App. 2d Dist. Mar. 16, 1964), 225 Cal. App. 2d 598, 37 Cal. Rptr. 454, 1964 Cal. App. LEXIS 1411.

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Where homicide results from assault with deadly weapon and evidence did not create reasonable doubt as to whether defendant's act was justified or its criminal character mitigated by influence of passion, no further proof of malice or intent to kill is required to support second degree murder verdict; of that crime, actual intent to kill is not necessary component, and malice is implied from assault in absence of justifying or mitigating circumstances. Jackson v. Superior Court of San Francisco (Cal. Mar. 1, 1965), 62 Cal. 2d 521, 42 Cal. Rptr. 838, 399 P.2d 374, 1965 Cal. LEXIS 269.

Homicide that is direct causal result of commission of felonious assault is second degree murder. People v. Montgomery (Cal. App. 4th Dist. July 6, 1965), 235 Cal. App. 2d 582, 45 Cal. Rptr. 475, 1965 Cal. App. LEXIS 959.

One who stands by while his companion administers terrific beating and who threatens any bystander who interferes is guilty of second degree murder as aider and abettor where death of victim is reasonable and natural consequence of beating. People v. Butts (Cal. App. 3d Dist. Aug. 25, 1965), 236 Cal. App. 2d 817, 46 Cal. Rptr. 362, 1965 Cal. App. LEXIS 879, rev'd, People v. Otwell (Cal. App. 1967), 61 Cal. Rptr. 427.

Killing done with malice aforethought in perpetration of assault with deadly weapon is second degree murder. People v. Welborn (Cal. App. 3d Dist. June 3, 1966), 242 Cal. App. 2d 668, 51 Cal. Rptr. 644, 1966 Cal. App. LEXIS 1169.

An assault with a dangerous weapon made in a manner to endanger life and resulting in death is sufficient to sustain a verdict of second degree murder, malice being implied from the assault, unless there is evidence to suggest that the crime occurred under circumstances of substantial provocation. People v. Brunk (Cal. App. 2d Dist. Jan. 31, 1968), 258 Cal. App. 2d 453, 65 Cal. Rptr. 727, 1968 Cal. App. LEXIS 2432.

An assault with a dangerous weapon made in a manner endangering life and resulting in death is sufficient to sustain a conviction of second degree murder; malice is implied from the assault. People v. Lewis (Cal. App. 2d Dist. Nov. 13, 1969), 1 Cal. App. 3d 698, 81 Cal. Rptr. 900, 1969 Cal. App. LEXIS 1318.

In a homicide prosecution involving a victim who died of gunshot wounds, the trial court erred in giving a second degree felony-murder instruction, where such instruction was based on the felony of assault with a deadly weapon. People v. Moore (Cal. App. 2d Dist. Mar. 17, 1970), 5 Cal. App. 3d 486, 85 Cal. Rptr. 194, 1970 Cal. App. LEXIS 1455.

Under Pen C §§ 182 and 189 through 190.2, the punishment for conspiracy to commit murder is the punishment for first degree murder without special circumstances. People v. Hernandez (Cal. June 2, 2003), 30 Cal. 4th 835, 134 Cal. Rptr. 2d 602, 69 P.3d 446, 2003 Cal. LEXIS 3493, modified, (Cal. Aug. 13, 2003), 2003 Cal. LEXIS 5689, overruled in part, People v. Riccardi (Cal. July 16, 2012), 54 Cal. 4th 758, 144 Cal. Rptr. 3d 84, 281 P.3d 1, 2012 Cal. LEXIS 6497.

In a case in which defendant, a gang member, drove a vehicle filled with fellow gang members, and one of those members shot a young man who had once associated with a rival gang, the fatal shooting was a natural and probable consequence of a planned physical attack by multiple gang members upon perceived rival gang members, even though the shooting occurred at the start of the confrontation and no assault with fists, baseball bats, knives, or other weapons preceded the shooting, because evidence establishing the gang-related nature of the planned assault showed that escalation of the confrontation to a deadly level was reasonably foreseeable. Thus, the evidence was sufficient to support defendant's conviction for second-degree murder in violation of Pen C §§ 187(a), 189 under the natural and probable consequences doctrine. People v. Ayala (Cal. App. 1st Dist. Feb. 11, 2010), 181 Cal. App. 4th 1440, 105 Cal. Rptr. 3d 575, 2010 Cal. App. LEXIS 169.

31. Second Degree Murder: Motor Vehicle Offenses

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A defendant who was driving an automobile while intoxicated, was engaged in the commission of a felony, and could be convicted of second degree murder. People v. McIntyre (Cal. June 29, 1931), 213 Cal. 50, 1 P.2d 443, 1931 Cal. LEXIS 483.

Failure to stop and render assistance would not render a defendant liable to conviction of second degree murder, since his unlawful act occurred after the killing. People v. McIntyre (Cal. June 29, 1931), 213 Cal. 50, 1 P.2d 443, 1931 Cal. LEXIS 483.

Driving stolen car is a felony and any death occurring in commission of felony other than those felonies enumerated in this section is automatically at least second degree murder; accordingly, killing of police officer may have been at least murder of second degree, particularly where killing had direct causal relation to crime being committed; and where defendant was at time of killing in process of making escape from crimes of stealing articles from several vehicles in designated area, this again would make killing at least second degree murder, as would his killing while in possession of concealed weapon after previous conviction of a felony. People v. Robillard (Cal. Dec. 29, 1960), 55 Cal. 2d 88, 10 Cal. Rptr. 167, 358 P.2d 295, 1960 Cal. LEXIS 138, cert. denied, (U.S. 1961), 365 U.S. 886, 81 S. Ct. 1043, 6 L. Ed. 2d 199, 1961 U.S. LEXIS 1367, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274, overruled in part, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

The underlying felony of defendant's driving a vehicle upon a highway under the influence of a narcotic drug was not a felony included in fact with a homicide resulting when defendant's car shot across the divider and crashed into the victim's car, and the trial court improperly dismissed a felony murder count against defendant, who was also charged with vehicular manslaughter and with violation of former Veh C § 23105 (see now Veh C § 23152), where such felony was not a necessary ingredient of the homicide and its elements were not necessary elements of the homicide, it being complete as soon as defendant commenced to drive on the highway while under the influence of the narcotic. People v. Calzada (Cal. App. 2d Dist. Dec. 17, 1970), 13 Cal. App. 3d 603, 91 Cal. Rptr. 912, 1970 Cal. App. LEXIS 1271.

The general statutory provisions with respect to murder (Pen C §§ 187-190), are not preempted by the more specific statutory provisions applicable to vehicular homicides (Pen C § 1923(a)), since different kinds of culpability or criminal activity are contemplated by such statutory provisions. While a murder prosecution requires a finding of malice, manslaughter is specifically defined as a killing without malice. In addition, a violation of the vehicular manslaughter statute does not necessarily or commonly result in a violation of the general murder statutes. Thus, a second degree murder charge is not precluded in cases of vehicular homicide. People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191.

In a criminal prosecution arising out of a vehicular homicide, there existed a rational ground for concluding that defendant's conduct was sufficiently wanton to hold him on a second degree murder charge where the record disclosed that defendant's blood alcohol level at the time of the collision at issue was more than twice the percentage necessary to support a finding that he was legally intoxicated, that he had been driving at highly excessive speeds through city streets and had had one near miss before colliding with the victims' vehicle, and that he belatedly attempted to brake his car before the collision, suggesting an actual awareness of the great risk of harm which he had created. In combination, such facts reasonably supported a conclusion that defendant acted wantonly and with a conscious disregard for human life. People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191.

In a criminal prosecution for vehicular murder, the People were permitted to show defendant's implied malice by his conduct on the day of the fatal collision and past incidents of speeding and drunk driving. The People's evidence was sufficient to support defendant's conviction. People v. Ortiz (Cal. App. 1st Dist. May 23, 2003), 109 Cal. App. 4th 104, 134 Cal. Rptr. 2d 467, 2003 Cal. App. LEXIS 770.

Defendant's second degree murder conviction based on implied malice was supported by substantial evidence, where defendant drove 70 miles per hour in a 35-mile-per-hour zone, crossed into the opposing traffic lane, caused

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oncoming drivers to avoid him, ran a red light and struck a car in the intersection without even attempting to apply his brakes. Defendant acted with wanton disregard of the near certainty that someone would be killed. People v. Moore (Cal. App. 2d Dist. Aug. 23, 2010), 187 Cal. App. 4th 937, 114 Cal. Rptr. 3d 540, 2010 Cal. App. LEXIS 1461.

In a case arising from a drunk driving collision, the evidence was sufficient to convict defendant of implied-malice second degree murder; defendant consumed 16 drinks, was warned not to drive, turned down rides, and sped away from officers before swerving across two lanes to cause the collision. People v. Johnigan (Cal. App. 2d Dist. June 23, 2011), 196 Cal. App. 4th 1084, 128 Cal. Rptr. 3d 190, 2011 Cal. App. LEXIS 807.

Even if a trial court had erred in refusing to advise the jury in defendant's second trial for second-degree murder that he had been convicted of gross vehicular manslaughter in his first trial, the error was harmless because the evidence in the second trial of his guilt of murder, including implied malice, was overwhelming; there was evidence that defendant knew driving while under the influence of alcohol or drugs was dangerous to human life, ingested PCP on the day of the incident, made the decision to drive his vehicle, drove erratically, and collided with another vehicle, killing a two-year-old child. People v. Hicks (Cal. App. 2d Dist. Dec. 23, 2015), 243 Cal. App. 4th 343, 196 Cal. Rptr. 3d 638, 2015 Cal. App. LEXIS 1154, review granted, unpublished, (Cal. Mar. 23, 2016), 200 Cal. Rptr. 3d 7, 367 P.3d 6, 2016 Cal. LEXIS 1757, aff'd, (Cal. Dec. 28, 2017), 226 Cal. Rptr. 3d 565, 407 P.3d 409, 4 Cal. 5th 203, 2017 Cal. LEXIS 9834.

There was insufficient evidence to support an inference that defendant, as the principal planner of an after-hours robbery of a commercial establishment, was recklessly indifferent to human life for purposes of robbery-murder and burglary-murder special circumstance findings because there was evidence that he planned the crime with an eye to minimizing the possibilities for violence and there appeared to be nothing in the plan that elevated the risk to human life beyond those risks inherent in any armed robbery. People v. Clark (Cal. June 27, 2016), 63 Cal. 4th 522, 203 Cal. Rptr. 3d 407, 372 P.3d 811, 2016 Cal. LEXIS 4576, cert. denied, (U.S. Mar. 6, 2017), 137 S. Ct. 1227, 197 L. Ed. 2d 467, 2017 U.S. LEXIS 1580.

In a trial for first degree murder, the defense should have been permitted to present expert testimony in support of the defense theory that when defendant inflicted 21 stab wounds on the victim, a longtime friend, he was in a peritraumatic dissociative state; the testimony fell short of expressing an opinion that the defendant lacked the required specific intentional state but would properly have provided a basis for the jury to infer that defendant lacked the required mental state. People v. Herrera (Cal. App. 2d Dist. May 16, 2016), 247 Cal. App. 4th 467, 202 Cal. Rptr. 3d 187, 2016 Cal. App. LEXIS 390.

32. Indictment and Information

It is unnecessary in an indictment for murder to state the degree of the offense. People v. Lloyd (Cal. 1858), 9 Cal. 54, 1858 Cal. LEXIS 53.

An indictment charging "murder in the first degree" includes murder in the second degree, and manslaughter. People v. Dolan (Cal. Apr. 1, 1858), 9 Cal. 576, 1858 Cal. LEXIS 157.

It is not necessary that indictment should specifically aver that killing "was wilful, deliberate, and premeditated;" it is sufficient to charge the crime in words of statute. People v. Murray (Cal. Oct. 1, 1858), 10 Cal. 309, 1858 Cal. LEXIS 241.

An indictment for murder is not vitiated by the designation of the offense as "murder in the first degree." People v. Vance (Cal. 1863), 21 Cal. 400, 1863 Cal. LEXIS 142.

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An indictment for murder should not designate the degree of the murder; if the indictment does state the degree of the murder, it does not vitiate it, but the statement of the degree may be treated as surplusage. People v. King (Cal. 1865), 27 Cal. 507, 1865 Cal. LEXIS 56.

An allegation of "express malice" is unnecessary, and, if made, need not be proved in order to justify a verdict of guilty in the first degree. People v. Bonilla (Cal. Oct. 1, 1869), 38 Cal. 699, 1869 Cal. LEXIS 227.

An information need not state the means used to procure death, nor allege that the killing was deliberate and premeditated. People v. Hyndman (Cal. July 19, 1893), 99 Cal. 1, 33 P. 782, 1893 Cal. LEXIS 607.

An information not averring that the killing was "deliberate and premeditated," but based upon the language of § 187, is sufficient to support a conviction of murder in the first degree. People v. Ung Ting Bow (Cal. Feb. 29, 1904), 142 Cal. 341, 75 P. 899, 1904 Cal. LEXIS 939.

An information in the language of § 187 need not specifically allege that the murder was committed in the perpetration or attempt to perpetrate a burglary. People v. Witt (Cal. Apr. 27, 1915), 170 Cal. 104, 148 P. 928, 1915 Cal. LEXIS 367.

An information for murder which substantially follows the language of § 187 is sufficient without including the degree of murder. People v. Mendez (Cal. Sept. 25, 1945), 27 Cal. 2d 20, 161 P.2d 929, 1945 Cal. LEXIS 213.

In a homicide case, the jury may be instructed on felony-murder theories where the information charges murder with premeditation and malice aforethought. People v. Ford (Cal. July 25, 1966), 65 Cal. 2d 41, 52 Cal. Rptr. 228, 416 P.2d 132, 1966 Cal. LEXIS 178, cert. denied, (U.S. Sept. 1, 1967), 385 U.S. 1018, 87 S. Ct. 737, 17 L. Ed. 2d 554, 1967 U.S. LEXIS 2716.

In an information charging murder, it is unnecessary to state the method or degree of the crime. Thus, in a murder prosecution, even though defendant was not charged with robbery, it was not error to allow the prosecution to ask prospective jurors if they would follow an instruction that all murder committed in the perpetration of, or attempt to perpetrate, robbery is murder in the first degree whether it is intentional, unintentional, or accidental, if such instruction were given by the court, and it was immaterial that the statute of limitations on all crimes except the murder may already have run. People v. Risenhoover (Cal. Dec. 23, 1968), 70 Cal. 2d 39, 73 Cal. Rptr. 533, 447 P.2d 925, 1968 Cal. LEXIS 217, cert. denied, (U.S. 1969), 396 U.S. 857, 90 S. Ct. 123, 24 L. Ed. 2d 108, 1969 U.S. LEXIS 1055.

An accusatory pleading charging murder in the short form prescribed by Pen C §§ 951, 952, without specifying the degree of murder adequately apprises the accused of a first degree murder charge. And, under such a charge, he may be convicted of first degree murder on the theory that the killing was committed in the perpetration of one of the felonies specified in Pen C § 189. In re Walker (Cal. Feb. 14, 1974), 10 Cal. 3d 764, 112 Cal. Rptr. 177, 518 P.2d 1129, 1974 Cal. LEXIS 361.

There was no merit to defendant's claim that because he was charged only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder verdict, convicting him of first-degree murder was error because the indictment alleged that the murder was committed under the special circumstances of murder in the course of kidnapping and unlawful penetration by a foreign object. Those allegations provided notice that the prosecutor would proceed under a felony-murder theory. People v. Morgan (Cal. Nov. 15, 2007), 42 Cal. 4th 593, 67 Cal. Rptr. 3d 753, 170 P.3d 129, 2007 Cal. LEXIS 12821, cert. denied, (U.S. Mar. 24, 2008), 552 U.S. 1286, 128 S. Ct. 1715, 170 L. Ed. 2d 523, 2008 U.S. LEXIS 2774.

Information charging that defendant committed murder, in violation of Pen C § 187(a), by murdering two victims willfully, unlawfully, and with malice aforethought did not establish that defendant was charged exclusively with second degree malice murder in violation of § 187 and not with first degree murder in violation of Pen C § 189, given that each murder count charged that defendant committed the murders while engaged in the commission of the crime of robbery and that § 189 specified that such murders were in the first degree. People v. Zamudio (Cal.

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Apr. 21, 2008), 43 Cal. 4th 327, 75 Cal. Rptr. 3d 289, 181 P.3d 105, 2008 Cal. LEXIS 4431, modified, (Cal. June 11, 2008), 2008 Cal. LEXIS 6849, cert. denied, (U.S. Nov. 10, 2008), 555 U.S. 1020, 129 S. Ct. 564, 172 L. Ed. 2d 445, 2008 U.S. LEXIS 8193.

There was no merit to defendant's argument that a trial court lacked jurisdiction to try him for first-degree murder and that the felony-murder instructions erroneously permitted the jury to convict him of an uncharged crime because the charging document charged the offense in the language of the statute defining murder, Pen C § 187. Thus, the offense charged included murder in the first degree and murder in the second degree, and felony murder and premeditated murder were not distinct crimes and did not need to be separately pleaded. People v. Taylor (Cal. Apr. 15, 2010), 48 Cal. 4th 574, 108 Cal. Rptr. 3d 87, 229 P.3d 12, 2010 Cal. LEXIS 2818, cert. denied, (U.S. Nov. 1, 2010), 562 U.S. 1013, 131 S. Ct. 529, 178 L. Ed. 2d 389, 2010 U.S. LEXIS 8636.

There was no error in failing to charge separately felony murder pursuant to Pen C § 189, in addition to charging murder with malice, pursuant to Pen C § 187. People v. Letner and Tobin (Cal. July 29, 2010), 50 Cal. 4th 99, 112 Cal. Rptr. 3d 746, 235 P.3d 62, 2010 Cal. LEXIS 7290, cert. denied, (U.S. Apr. 18, 2011), 563 U.S. 939, 131 S. Ct. 2097, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3073.

In a case in which defendant was convicted of, and sentenced to death for, the first-degree murder of an 11-year-old girl, the allegations in the information gave defendant more than adequate notice the prosecution would pursue a felony-murder theory of first-degree murder because the information charged defendant, in addition to first-degree murder, with the crimes of burglary and robbery, and alleged as special circumstances that defendant murdered the victim during the commission of burglary and robbery. People v. Moore (Cal. Jan. 31, 2011), 51 Cal. 4th 386, 121 Cal. Rptr. 3d 280, 247 P.3d 515, 2011 Cal. LEXIS 967, cert. denied, (U.S. Oct. 3, 2011), 565 U.S. 867, 132 S. Ct. 215, 181 L. Ed. 2d 117, 2011 U.S. LEXIS 7003.

Prosecution was not limited to proving second degree murder where defendant was charged with murder in violation of Pen C § 187(a), not specifically with first degree murder under Pen C § 189, because defendant received adequate notice that the prosecution was attempting to prove first degree murder, and of its theory in support of that offense, given the allegation under Pen C § 190.2. People v. Watkins (Cal. Dec. 17, 2012), 55 Cal. 4th 999, 150 Cal. Rptr. 3d 299, 290 P.3d 364, 2012 Cal. LEXIS 11375, modified, (Cal. Feb. 13, 2013), 2013 Cal. LEXIS 2436, modified, (Cal. Feb. 13, 2013), 2013 Cal. LEXIS 954.

In a case arising from the robbery and murder of a store owner, the information charging malice murder supported defendant's conviction for first degree murder on a felony-murder theory. People v. Contreras (Cal. Dec. 12, 2013), 58 Cal. 4th 123, 165 Cal. Rptr. 3d 204, 314 P.3d 450, 2013 Cal. LEXIS 9746.

There was no error in instructing that the jury could find defendant guilty of first degree murder, even though he was charged in the information only with malice murder. People v. McCurdy (Cal. Aug. 14, 2014), 59 Cal. 4th 1063, 176 Cal. Rptr. 3d 103, 331 P.3d 265, 2014 Cal. LEXIS 5467, cert. denied, (U.S. Mar. 23, 2015), 135 S. Ct. 1560, 191 L. Ed. 2d 648, 2015 U.S. LEXIS 2109.

In a robbery-murder case, the evidence was sufficient that defendant was the shooter and that his brother did not commit the crimes by himself; the evidence included that a witness saw two men fleeing, that the brother's substantial intellectual deficits would have prevented him from committing the crimes alone, that defendant admitted being with the brother that evening, and that the timeline was inconsistent with the brother acting alone. People v. Zaregoza (Cal. July 11, 2016), 204 Cal. Rptr. 3d 131, 374 P.3d 344, 1 Cal. 5th 21, 2016 Cal. LEXIS 4743.

32.5. Evidence: Admissibility

Under California law in the late 1970s and early 1980s, when defendant committed multiple murders, the record supported a finding that he voluntarily waived his Miranda rights; after he confirmed that he understood his rights, he actively participated in a conversation with detectives, and there was no suggestion of physical or psychological

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pressure. Even if he sought to invoke his right to terminate questioning by Costa Mesa questioners, that limited invocation did not bar a Tustin investigator from interrogating him about his Tustin offenses after obtaining a new waiver. People v. Parker (Cal. June 5, 2017), 218 Cal. Rptr. 3d 315, 395 P.3d 208, 2 Cal. 5th 1184, 2017 Cal. LEXIS 3978, cert. denied, (U.S. Feb. 20, 2018), 138 S. Ct. 988, 200 L. Ed. 2d 264, 2018 U.S. LEXIS 1357.

33. Double Jeopardy; Multiple Prosecutions

Premeditation allegation, as part of the enhancement allegation for an attempted murder charge, effectively placed defendant in jeopardy for an "offense" greater than attempted murder, in that he was subject to a term of life rather than a nine-year maximum. Therefore, under double jeopardy principles, a finding of evidentiary insufficiency as to premeditation barred retrial of the penalty allegation. People v. Seel (Cal. Nov. 29, 2004), 34 Cal. 4th 535, 21 Cal. Rptr. 3d 179, 100 P.3d 870, 2004 Cal. LEXIS 11331.

Reversal was not required by an instruction allowing the jury to convict defendant of premeditated first degree murder as an aider and abettor under the natural and probable consequences doctrine because guilty verdicts concerning robbery of each murder victim and burglary and the jury's true findings for each of the murder victims regarding robbery-murder and burglary-murder special circumstances left no doubt that the jury made the findings necessary to support valid guilty verdicts on the murder charges. People v. Covarrubias (Cal. Sept. 8, 2016), 207 Cal. Rptr. 3d 228, 378 P.3d 615, 1 Cal. 5th 838, 2016 Cal. LEXIS 7278.

34. Presumptions; Burden of Proof

The law does not presume a slayer guilty of murder in the first degree from the mere fact of killing. People v. Gibson (Cal. 1861), 17 Cal. 283, 1861 Cal. LEXIS 42.

Prior to adoption of the **Penal Code**, the intent necessary to constitute murder in the first degree could be inferred from the circumstances, as the use of a weapon calculated to produce death. People v. Bealoba (Cal. 1861), 17 Cal. 389, 1861 Cal. LEXIS 73.

Presumptively, every killing is a murder; but so far as the degree is concerned, no presumption arises from the mere fact of the killing, considered apart from the circumstances under which it occurred. People v. Belencia (Cal. Apr. 1, 1863), 21 Cal. 544, 1863 Cal. LEXIS 161, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296.

When a killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder. People v. Howard (Cal. Dec. 31, 1930), 211 Cal. 322, 295 P. 333, 1930 Cal. LEXIS 335; People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

To establish first degree murder burden is on prosecution to produce evidence which satisfies jurors beyond all reasonable doubt that unlawful homicide with malice aforethought was committed by defendant, and that such homicide was of type specifically enumerated in statute as being first degree murder, or was of equal cruelty and aggravation with those enumerated, and was accompanied with deliberate and premeditated attempt to take life. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

Burden of proof is on prosecution in homicide case to prove defendant guilty of first degree murder beyond reasonable doubt; it is not incumbent on defendant to convince jury that his version of what occurred is true. People v. Hudson (Cal. Sept. 20, 1955), 45 Cal. 2d 121, 287 P.2d 497, 1955 Cal. LEXIS 301.

Presumption is that killing was malicious when it is proved that it was committed by defendant and nothing further is shown, but verdict should be second degree murder and not first degree murder. People v. Craig (Cal. 1957), 49 Cal. 2d 313, 316 P.2d 947, 1957 Cal. LEXIS 263; People v. Ray (Cal. App. 1st Dist. July 27, 1967), 252 Cal. App.

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2d 932, 61 Cal. Rptr. 1, 1967 Cal. App. LEXIS 1585, cert. denied, (U.S. 1968), 393 U.S. 864, 89 S. Ct. 145, 21 L. Ed. 2d 132, 1968 U.S. LEXIS 827; People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216; People v. Nabayan (Cal. App. 4th Dist. Sept. 23, 1969), 276 Cal. App. 2d 361, 80 Cal. Rptr. 779, 1969 Cal. App. LEXIS 1814; People v. Lewis (Cal. App. 2d Dist. Nov. 13, 1969), 1 Cal. App. 3d 698, 81 Cal. Rptr. 900, 1969 Cal. App. LEXIS 1318.

To establish murder of the first degree the prosecution had the burden to produce evidence that satisfied the jurors' minds beyond all reasonable doubt that an unlawful homicide with malice aforethought was committed by defendant and that the homicide was of a type specifically enumerated in the statute as being murder of the first degree or was of equal cruelty and aggravation with those enumerated and was accompanied by a deliberate and premeditated intent to take life; and similar considerations applied to the application of former Pen C § 1105, placing on defendant the burden to prove mitigation, justification or excuse after it had been proved that defendant committed the homicide, unless the prosecution's proof tended to show only manslaughter, or that defendant was justified or excused. People v. Theriot (Cal. App. 1st Dist. June 30, 1967), 252 Cal. App. 2d 222, 60 Cal. Rptr. 279, 1967 Cal. App. LEXIS 1501.

Former Pen C § 1105 did not place on a defendant charged with homicide the burden of persuasion, but merely declared a procedural rule imposing on him a duty to go forward with evidence of mitigating circumstances, but if he failed to discharge this duty by raising a reasonable doubt, the presumption of malice would operate and his homicide would be deemed malicious and an act of murder. Thus, in the prosecution of a father for the first degree murder of his daughter, defendant had the burden of going forward with evidence of diminished responsibility. People v. Ray (Cal. App. 1st Dist. July 27, 1967), 252 Cal. App. 2d 932, 61 Cal. Rptr. 1, 1967 Cal. App. LEXIS 1585, cert. denied, (U.S. 1968), 393 U.S. 864, 89 S. Ct. 145, 21 L. Ed. 2d 132, 1968 U.S. LEXIS 827.

Wilfulness, deliberation and premeditation necessary as elements of first degree murder may be inferred from a variety of circumstances including considerations of the method causing death, the means of disposing of the body and efforts to prevent its identification, the conduct of a defendant prior to and after the crime, the lack of provocation, the act of dragging a victim from one place to another where a murderous attack is continued, and the persistence in continuing an ultimately fatal attack. People v. Wattie (Cal. App. 2d Dist. Aug. 10, 1967), 253 Cal. App. 2d 403, 61 Cal. Rptr. 147, 1967 Cal. App. LEXIS 2362.

Although premeditation and deliberation may be shown by circumstantial evidence, in a first degree murder prosecution the People bear the burden of establishing beyond a reasonable doubt that the killing was the result of premeditation and deliberation, and that therefore the killing was first, rather than second, degree murder. People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

When a killing is proved to have been committed by defendant and nothing further is shown, the presumption of law is that it was malicious and an act of murder, but in such case the verdict should be murder of the second degree, and the burden of proving circumstances in mitigation is on the defendant. People v. Brunk (Cal. App. 2d Dist. Jan. 31, 1968), 258 Cal. App. 2d 453, 65 Cal. Rptr. 727, 1968 Cal. App. LEXIS 2432.

It is error to include in the jury instructions in a murder prosecution a standard jury instruction, CALJIC 5.15, telling the jury that to establish the defense of justifiable or excusable homicide, "the burden is on the defendant to raise a reasonable doubt as to his guilt of the charge of murder." Although former Pen C § 1105 (see now Pen C § 189.5), literally mentioned the defendant's "burden of proving" mitigation or justification, it is not interpreted as shifting a burden of persuasion to the defendant, but only as beckoning him to come forward with his evidence. By the time the court instructs the jury, the statute has fulfilled its role in the trial, and it can play no legitimate role in the jury's deliberations. People v. Loqqins (Cal. App. 3d Dist. Feb. 17, 1972), 23 Cal. App. 3d 597, 100 Cal. Rptr. 528, 1972 Cal. App. LEXIS 1241.

In a prosecution of defendant for second degree murder, the inferences of malice drawn by the jury from the circumstances of the case did not violate defendant's due process rights by allowing the state to presume an essential element of murder thereby relieving it of its duty to prove beyond a reasonable doubt every fact necessary

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to constitute the crime charged. Malice is only a characterization of defendant's state of mind when his conduct reaches a certain antisocial level. The trier of fact, using a circumstantial evidence reasoning process involving the application of logic, draws a permissible inference of malice from the facts proved at trial. This permissible inference is different from and distinguishable from a presumption which may relieve the People from satisfying its burden of proof. People v. Love (Cal. App. 4th Dist. Oct. 10, 1980), 111 Cal. App. 3d 98, 168 Cal. Rptr. 407, 1980 Cal. App. LEXIS 2297.

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. In order to support a finding that a murder is first degree, the People bear the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. People v. Rowland (Cal. App. 3d Dist. June 25, 1982), 134 Cal. App. 3d 1, 184 Cal. Rptr. 346, 1982 Cal. App. LEXIS 1830.

Jury was improperly instructed on the first-degree murder theory of lying in wait and lying-in-wait special-circumstances allegations where there was no evidence defendant arrived before the victims or waited in ambush for their arrival, and there was thus no factual basis for an inference that before approaching the victims, he had concealed his bicycle and waited for a time when they would be vulnerable to surprise attack; reversal of the first-degree murder verdict was not required, however, as there was sufficient evidence of the primary prosecution theory of first-degree murder based on premeditation and deliberation, and there was no affirmative indication in the record that the verdict actually did rest on the inadequate ground. People v. Nelson (Cal. Aug. 15, 2016), 205 Cal. Rptr. 3d 746, 376 P.3d 1178, 1 Cal. 5th 513, 2016 Cal. LEXIS 6748, modified, (Cal. Sept. 21, 2016), 2016 Cal. LEXIS 7882.

35. Evidence: Mental State

A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act; but in determining the question of premeditation, the defendant's condition, as drunk or sober, and any other fact tending to show his mental status at the time, is proper for the consideration of the jury. People v. Belencia (Cal. Apr. 1, 1863), 21 Cal. 544, 1863 Cal. LEXIS 161, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296.

Express malice is proved, if the evidence proves beyond a reasonable doubt that the killing was wilful, deliberate, and premeditated. People v. Cox (Cal. May 25, 1888), 76 Cal. 281, 18 P. 332, 1888 Cal. LEXIS 875.

Ruthless disposition of body, following killing, is some evidence as to abandoned or malignant heart on part of slayer. People v. Johnson (Cal. Jan. 19, 1928), 203 Cal. 153, 263 P. 524, 1928 Cal. LEXIS 758.

Intent need not be proved where homicide occurs in course of commission of any of kinds of arson, rape, robbery, burglary or mayhem; but where death otherwise results, wilfulness, premeditation, and deliberation must be established in order to constitute crime of first degree murder. People v. Cook (Cal. May 20, 1940), 15 Cal. 2d 507, 102 P.2d 752, 1940 Cal. LEXIS 240; People v. Isby (Cal. Nov. 18, 1947), 30 Cal. 2d 879, 186 P.2d 405, 1947 Cal. LEXIS 212.

Where there is no substantial evidence from which it can reasonably be inferred that defendant either formed or carried out intent to kill deliberately and with premeditation, in ordinary meaning of those words, and where evidence establishes only that homicide was perpetrated by violent act on spur of moment during hot anger of tempestuous quarrel, conviction of first degree murder cannot be sustained. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

No rule can be laid down as to character or amount of proof necessary to show deliberation and premeditation; each case depends on its own facts. People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

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The nature of the weapon used or acts of malice which, in the usual course of things, would cause death, or great bodily harm, tend to provide a reasonable basis for a conviction of first degree murder. People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

Statements made by deceased to persons other than defendant tending to show existence of hostility toward defendant and to show provocation and passion, are admissible and are not vulnerable to hearsay objection. People v. Brust (Cal. Jan. 29, 1957), 47 Cal. 2d 776, 306 P.2d 480, 1957 Cal. LEXIS 300.

Photographs of defendant taken one or two hours after alleged murder are not relevant to his state of mind at time of killing, and their exclusion is not prejudicial error. People v. Johnston (Cal. Mar. 1, 1957), 48 Cal. 2d 78, 307 P.2d 921, 1957 Cal. LEXIS 168.

Evidence as to condition of deceased's body as shown by photographs is admissible as relevant to intent, motive, and circumstances of killing where testimony is far from clear concerning position of body, cause and nature of some injuries, and whether or not body had been moved before or after death. People v. Craig (Cal. 1957), 49 Cal. 2d 313, 316 P.2d 947, 1957 Cal. LEXIS 263.

Evidence tending to establish prior quarrels between defendant and decedent and making of threats by defendant was competent to show defendant's state of mind. People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

As exception to hearsay rule, evidence may be given under proper circumstances of statements made by murder victim to show fear of defendant. People v. Cooley (Cal. App. 5th Dist. Dec. 20, 1962), 211 Cal. App. 2d 173, 27 Cal. Rptr. 543, 1962 Cal. App. LEXIS 1496, overruled, People v. Lew (Cal. June 25, 1968), 68 Cal. 2d 774, 69 Cal. Rptr. 102, 441 P.2d 942, 1968 Cal. LEXIS 205.

In a homicide prosecution, evidence of the circumstances at the time of the killing, as well as the circumstances before and after the killing, is competent to show deliberation and premeditation. People v. Lookadoo (Cal. Mar. 30, 1967), 66 Cal. 2d 307, 57 Cal. Rptr. 608, 425 P.2d 208, 1967 Cal. LEXIS 305.

The type of evidence sufficient to sustain a finding of premeditation or deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—characterized as “planning activity”; (2) facts about defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive to kill the victim which inference, together with facts of type (1) or (3) would support an inference that the killing was the result of a preexisting reflection and careful thought and weighing of considerations rather than mere unconsidered or rash impulse hastily executed; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that defendant must have intentionally killed according to a preconceived design to take his victim's life in a particular way for a reason reasonably inferable from facts of type (1) or (2). People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

Evidence of circumstances existing at the time of a homicide as well as applicable facts before and after the killing are competent to show the deliberation and premeditation requisite to proof of first degree murder under Pen C § 189. People v. Stansbury (Cal. App. 5th Dist. June 25, 1968), 263 Cal. App. 2d 499, 69 Cal. Rptr. 827, 1968 Cal. App. LEXIS 2230.

Malice may be shown by the extent and severity of the injuries inflicted upon the victim and by the condition in which the victim was left by the attacker. People v. Seastone (Cal. App. 5th Dist. Dec. 29, 1969), 3 Cal. App. 3d 60, 82 Cal. Rptr. 907, 1969 Cal. App. LEXIS 1361.

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Defendant's prior abuse and beatings of a homicide victim may indicate a pattern of conduct tending to identify defendant as the perpetrator of murder. People v. Small (Cal. App. 4th Dist. May 6, 1970), 7 Cal. App. 3d 347, 86 Cal. Rptr. 478, 1970 Cal. App. LEXIS 2166.

In a murder case, the court did not abuse its discretion in admitting photographs of the deceased victim's body, where they were relevant on the issues, of malice and aggravation of the crime and penalty, and tended to clarify the autopsy surgeon's testimony. People v. Murphy (Cal. Nov. 27, 1972), 8 Cal. 3d 349, 105 Cal. Rptr. 138, 503 P.2d 594, 1972 Cal. LEXIS 258, cert. denied, (U.S. Sept. 1, 1973), 414 U.S. 833, 94 S. Ct. 173, 38 L. Ed. 2d 68, 1973 U.S. LEXIS 426.

In a prosecution for first degree murder arising out of the death of defendant's four-year-old nephew while in defendant's care, the evidence sufficiently showed intent, premeditation, and deliberation. Defendant had first attempted to strangle the boy, and, when he did not die from the choking, defendant took him into the bathroom, put the stopper in the tub, drew 12 to 15 inches of water, and held his face down until he appeared to be dead. Defendant admitted his intent was to drown the victim after his unsuccessful strangulation attempt. He also explained his motive was his desire for sexual and physical abuse. Though two doctors stated defendant could not maturely and deliberately reflect on his actions, one of them further stated defendant had the ability to meaningfully reflect on his acts, and the other conceded defendant's acts were consistent with both premeditation and malice aforethought. A third doctor diagnosed defendant's behavior as simply his way of gaining attention, found no sign of psychotic mental ailments, and concluded defendant was aware he committed murder. People v. Mitchell (Cal. App. 4th Dist. May 28, 1982), 132 Cal. App. 3d 389, 183 Cal. Rptr. 166, 1982 Cal. App. LEXIS 1624.

Defendant was found guilty of second degree murder (Penal C §§ 187(a), 189), in the commission of which she used a deadly weapon, a knife (Penal C § 12022(b)). The trial court did not violate defendant's constitutional rights to due process of law and to mount a defense when it excluded evidence that she suffered bruises while living with the victim. That defendant had bruises while living with the victim did not support an inference that he inflicted the bruises, although he may have done so. To conclude that he did would require conjecture or speculation. People v. Bolden (Cal. App. 2d Dist. Apr. 26, 1999), 71 Cal. App. 4th 730, 84 Cal. Rptr. 2d 111, 1999 Cal. App. LEXIS 356, review granted, unpublished, (Cal. Aug. 11, 1999), 88 Cal. Rptr. 2d 281, 982 P.2d 152, 1999 Cal. LEXIS 5316.

In a capital murder trial, evidence was insufficient to support a torture-murder special circumstance finding despite evidence that defendant battered the elderly victim to death with a blunt object, causing great pain and suffering, because a finding of sadistic purpose was not supported by testimony that defendant intended to kill the victim to avoid being identified, by the nature of the wounds, or by the fact that defendant tightly bound the victim's hands and feet; however, reversal of the death penalty was not required because the jury properly considered two other valid special circumstance findings, all the facts and circumstances underlying the murder, and defendant's lengthy criminal record. People v. Mungia (Cal. Aug. 14, 2008), 44 Cal. 4th 1101, 81 Cal. Rptr. 3d 614, 189 P.3d 880, 2008 Cal. LEXIS 9773, cert. denied, (U.S. Mar. 2, 2009), 555 U.S. 1215, 129 S. Ct. 1530, 173 L. Ed. 2d 661, 2009 U.S. LEXIS 1653.

On an attempted murder charge under Pen C §§ 187, 189, 664, defendant's intent to kill the victim was sufficiently established by evidence that defendant repeatedly attempted to stab the unarmed and trapped victim and succeeded in stabbing the victim in the arm and leg. In addition, defendant then fatally stabbed two other victims. People v. Avila (Cal. June 15, 2009), 46 Cal. 4th 680, 94 Cal. Rptr. 3d 699, 208 P.3d 634, 2009 Cal. LEXIS 5194, modified, (Cal. Aug. 12, 2009), 2009 Cal. LEXIS 8077, modified, (Cal. Aug. 12, 2009), 2009 Cal. LEXIS 8417, cert. denied, (U.S. Jan. 11, 2010), 558 U.S. 1126, 130 S. Ct. 1086, 175 L. Ed. 2d 908, 2010 U.S. LEXIS 351.

Defendant's statements to the police provided overwhelming evidence in support of a conviction for deliberate, premeditated first degree murder under Pen C § 189, even without improperly admitted statements from two codefendants. Defendant informed the police that after forcing the victim into the trunk of the victim's car at gunpoint, and again just before he shot the victim, he and his codefendants discussed the need to kill the victim because the victim would be able to identify them and that defendant killed the victim by pointing the gun into the trunk and firing once. People v. Burney (Cal. July 30, 2009), 47 Cal. 4th 203, 97 Cal. Rptr. 3d 348, 212 P.3d 639.

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2009 Cal. LEXIS 7742, cert. denied, (U.S. Mar. 1, 2010), 559 U.S. 978, 130 S. Ct. 1702, 176 L. Ed. 2d 192, 2010 U.S. LEXIS 2112.

In a first degree murder case involving home invasion robbery, there was no error in admitting evidence of a prior home invasion robbery to show intent and common plan and scheme. The crimes were sufficiently similar because both crimes had the main purpose of obtaining drugs; the modus operandi used to gain admission was the same; and defendant was the mastermind, assisted by two accomplices. People v. Johnson (Cal. App. 2d Dist. Nov. 19, 2013), 221 Cal. App. 4th 623, 164 Cal. Rptr. 3d 505, 2013 Cal. App. LEXIS 931.

36. Evidence: Indirect and Circumstantial

Express evidence of a deliberate and premeditated purpose to kill is not necessary to sustain a verdict of first degree murder, where the killing is not denied and such deliberate purpose may be inferred by the jury from proof of such facts and circumstances as would reasonably warrant an inference of its existence. People v. Mahatch (Cal. Nov. 10, 1905), 148 Cal. 200, 82 P. 779, 1905 Cal. LEXIS 659; People v. Machuca (Cal. June 21, 1910), 158 Cal. 62, 109 P. 886, 1910 Cal. LEXIS 338; People v. Erno (Cal. Jan. 15, 1925), 195 Cal. 272, 232 P. 710, 1925 Cal. LEXIS 369; People v. Howard (Cal. Dec. 31, 1930), 211 Cal. 322, 295 P. 333, 1930 Cal. LEXIS 335; People v. Wilhelm (Cal. Sept. 20, 1937), 9 Cal. 2d 567, 71 P.2d 815, 1937 Cal. LEXIS 427; People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443; People v. Hills (Cal. Oct. 3, 1947), 30 Cal. 2d 694, 185 P.2d 11, 1947 Cal. LEXIS 200; People v. Isby (Cal. Nov. 18, 1947), 30 Cal. 2d 879, 186 P.2d 405, 1947 Cal. LEXIS 212; People v. Guldbrandsen (Cal. June 2, 1950), 35 Cal. 2d 514, 218 P.2d 977, 1950 Cal. LEXIS 358; People v. Caritativo (Cal. Feb. 1, 1956), 46 Cal. 2d 68, 292 P.2d 513, 1956 Cal. LEXIS 154, cert. denied, (U.S. Apr. 1, 1956), 351 U.S. 972, 76 S. Ct. 1042, 100 L. Ed. 1490, 1956 U.S. LEXIS 827; People v. Cole (Cal. Oct. 5, 1956), 47 Cal. 2d 99, 301 P.2d 854, 1956 Cal. LEXIS 257.

It is not necessary that there be express evidence of deliberate purpose to take life of another in order to show premeditation and support verdict of murder in first degree, and it is sufficient if facts and circumstances surrounding commission of offense reasonably warrant inference to that effect. People v. Smith (Cal. July 16, 1940), 15 Cal. 2d 640, 104 P.2d 510, 1940 Cal. LEXIS 255.

Where there is no direct evidence in regard to means by which homicide was accomplished, it does not support verdict of first degree murder unless proof of intent is shown by surrounding circumstances. People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

Direct evidence of deliberate and premeditated purpose to kill is not required to sustain conviction of first degree murder; deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish reasonable foundation for such inference, and, where evidence is not in law insufficient, matters rest exclusively within province of jury for determination. People v. Guldbrandsen (Cal. June 2, 1950), 35 Cal. 2d 514, 218 P.2d 977, 1950 Cal. LEXIS 358.

Direct evidence of deliberation and premeditation is not required to justify a conviction of first degree murder; they may be inferred from proof of the facts and circumstances of the crime. People v. Misener (Cal. App. Dec. 23, 1952), 115 Cal. App. 2d 63, 251 P.2d 683, 1952 Cal. App. LEXIS 1769; People v. Byrd (Cal. Feb. 4, 1954), 42 Cal. 2d 200, 266 P.2d 505, 1954 Cal. LEXIS 167, cert. denied, (U.S. 1954), 348 U.S. 848, 75 S. Ct. 73, 99 L. Ed. 668, 1954 U.S. LEXIS 1867, overruled, People v. Green (Cal. Oct. 19, 1956), 47 Cal. 2d 209, 302 P.2d 307, 1956 Cal. LEXIS 270, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274.

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If evidence shows no more than infliction of multiple acts of violence on victim, it would not be sufficient to show that killing was result of careful thought and weighing of considerations. People v. Caldwell (Cal. Jan. 28, 1955), 43 Cal. 2d 864, 279 P.2d 539, 1955 Cal. LEXIS 392.

To establish crime of first degree murder, direct evidence of deliberate and premeditated purpose to kill is not required. People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

Premeditation may be shown by circumstantial evidence, and may evolve from relatively short period of consideration by defendant of what course of action he should follow. People v. Robillard (Cal. Dec. 29, 1960), 55 Cal. 2d 88, 10 Cal. Rptr. 167, 358 P.2d 295, 1960 Cal. LEXIS 138, cert. denied, (U.S. 1961), 365 U.S. 886, 81 S. Ct. 1043, 6 L. Ed. 2d 199, 1961 U.S. LEXIS 1367, overruled, People v. Morse (Cal. Jan. 7, 1964), 60 Cal. 2d 631, 36 Cal. Rptr. 201, 388 P.2d 33, 1964 Cal. LEXIS 274, overruled in part, People v. Satchell (Cal. Nov. 4, 1971), 6 Cal. 3d 28, 98 Cal. Rptr. 33, 489 P.2d 1361, 1971 Cal. LEXIS 198.

Direct evidence of premeditation is not required; it may be inferred from proof of such facts and circumstances as will furnish reasonable foundation for such inferences. People v. Sturgess (Cal. App. 3d Dist. Feb. 26, 1960), 178 Cal. App. 2d 435, 2 Cal. Rptr. 787, 1960 Cal. App. LEXIS 2613; People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166; People v. Feasby (Cal. App. 2d Dist. Mar. 9, 1960), 178 Cal. App. 2d 723, 3 Cal. Rptr. 230, 1960 Cal. App. LEXIS 2647; People v. Saterfield (Cal. Feb. 8, 1967), 65 Cal. 2d 752, 56 Cal. Rptr. 338, 423 P.2d 266, 1967 Cal. LEXIS 383, cert. denied, (U.S. 1967), 389 U.S. 964, 88 S. Ct. 352, 19 L. Ed. 2d 378, 1967 U.S. LEXIS 334.

In prosecution for murder, premeditation and deliberation may be shown by circumstantial evidence. People v. Sears (Cal. May 21, 1965), 62 Cal. 2d 737, 44 Cal. Rptr. 330, 401 P.2d 938, 1965 Cal. LEXIS 291, overruled, People v. Cahill (Cal. June 28, 1993), 5 Cal. 4th 478, 20 Cal. Rptr. 2d 582, 853 P.2d 1037, 1993 Cal. LEXIS 3087.

Guilt of the crime of murder may be established by circumstantial evidence. People v. Sigal (Cal. App. 5th Dist. Mar. 8, 1967), 249 Cal. App. 2d 299, 57 Cal. Rptr. 541, 1967 Cal. App. LEXIS 2225.

Proof of the elements of deliberate and premeditated purpose to kill necessary in a prosecution for first degree murder need not be made by direct evidence but may be inferred from proof of facts and circumstances which furnish a foundation for such inferences, the presence or absence of these elements being determined from a consideration of the type of weapon employed and the manner of its use, the nature of wounds suffered by the deceased, whether there was provocation or not, whether the deceased was armed at the time of the assault, and any other evidence from which an inference of premeditation may reasonably be drawn. People v. Clark (Cal. App. 2d Dist. July 12, 1967), 252 Cal. App. 2d 524, 60 Cal. Rptr. 524, 1967 Cal. App. LEXIS 1531.

The premeditation and deliberation necessary in the proof of a charge of first degree murder may be inferred from a variety of facts and circumstances and need not necessarily be proved by direct evidence. People v. Paton (Cal. App. 3d Dist. Oct. 24, 1967), 255 Cal. App. 2d 347, 62 Cal. Rptr. 865, 1967 Cal. App. LEXIS 1281.

Premeditation and deliberation may be shown by circumstantial evidence and the test is not so much one of duration of time as it is the extent of a defendant's reflection. People v. Edgmon (Cal. App. 3d Dist. Nov. 29, 1968), 267 Cal. App. 2d 759, 73 Cal. Rptr. 634, 1968 Cal. App. LEXIS 1449.

Proof of circumstances occurring at the time of a killing, as well as circumstances before and after the killing, are competent to show deliberation and premeditation. People v. Mulqueen (Cal. App. 3d Dist. July 10, 1970), 9 Cal. App. 3d 532, 88 Cal. Rptr. 235, 1970 Cal. App. LEXIS 1969.

In a murder prosecution in which the evidence did not establish whether defendant or his codefendant, rival gang members, fired the shot that killed the victim, an innocent bystander, the circumstance that it could not be determined who fired the single fatal bullet did not undermine defendant's conviction under either of the two first degree murder theories advanced against him at trial-premeditation and murder by means of intentionally

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discharging a firearm from a motor vehicle (Pen C § 189). Defendant's act of engaging the codefendant in a gun battle and attempting to murder him was a substantial concurrent, and hence proximate, cause of the bystander's death through operation of the doctrine of transferred intent. All that remained to be proved was defendant's culpable mens rea (premeditation and malice) in order to support his conviction of premeditated first degree murder. Even without a showing of premeditation, if defendant was shown to have intentionally discharged his firearm from a motor vehicle with the specific intent to inflict death, then his crime was murder in the first degree by operation of § 189. People v. Sanchez (Cal. Aug. 27, 2001), 26 Cal. 4th 834, 111 Cal. Rptr. 2d 129, 29 P.3d 209, 2001 Cal. LEXIS 5485.

In a trial for murder under Pen C §§ 187(a), 188, 189, sufficient evidence established defendant's identity. The evidence supported inferences that defendant was seen near the victim's apartment an hour or two prior to the murder, giving a false account for his presence and in a position where to observe the victim sunbathing and that the identity of the murderer was the same as in similar murders. People v. Prince (Cal. Apr. 30, 2007), 40 Cal. 4th 1179, 57 Cal. Rptr. 3d 543, 156 P.3d 1015, 2007 Cal. LEXIS 4272, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 301.

In a capital murder trial involving allegations under Pen C § 189, the death penalty was not rendered disproportionate by defendant's immaturity, emotional problems, lack of prior criminal behavior, dysfunctional family background, drinking at the time of the murders, and subsequent remorse; defendant embarked on a brutal and terrifying crime spree spanning several days during which defendant robbed an individual of a car at gunpoint, entered a store and shot all four people, killing two and stealing wallets and money from a cash register, fled to another state and committed attempted murder, robbery, kidnapping, and rape, and assaulted five officers. People v. Loker (Cal. July 28, 2008), 44 Cal. 4th 691, 80 Cal. Rptr. 3d 630, 188 P.3d 580, 2008 Cal. LEXIS 9275.

37. Questions of Law and Fact

The degree of the crime is a question exclusively for the jury in a murder prosecution. People v. Gibson (Cal. 1861), 17 Cal. 283, 1861 Cal. LEXIS 42; People v. Belencia (Cal. Apr. 1, 1863), 21 Cal. 544, 1863 Cal. LEXIS 161, overruled, People v. Gorshen (Cal. Mar. 11, 1959), 51 Cal. 2d 716, 336 P.2d 492, 1959 Cal. LEXIS 296; People v. Foren (Cal. July 1, 1864), 25 Cal. 361, 1864 Cal. LEXIS 45; People v. Hunt (Cal. Oct. 1, 1881), 59 Cal. 430, 1881 Cal. LEXIS 415; People v. Bowman (Cal. Dec. 2, 1889), 81 Cal. 566, 22 P. 917, 1889 Cal. LEXIS 1054; People v. Machuca (Cal. June 21, 1910), 158 Cal. 62, 109 P. 886, 1910 Cal. LEXIS 338; People v. Rico (Cal. May 20, 1919), 180 Cal. 385, 181 P. 663, 1919 Cal. LEXIS 498; People v. Wells (Cal. Feb. 4, 1938), 10 Cal. 2d 610, 76 P.2d 493, 1938 Cal. LEXIS 239; People v. Smith (Cal. July 16, 1940), 15 Cal. 2d 640, 104 P.2d 510, 1940 Cal. LEXIS 255; People v. Mendez (Cal. Sept. 25, 1945), 27 Cal. 2d 20, 161 P.2d 929, 1945 Cal. LEXIS 213.

The question of deliberation and premeditation are for the jury to determine on a trial for murder. People v. Valencia (Cal. Apr. 1, 1872), 43 Cal. 552, 1872 Cal. LEXIS 125; People v. Chew Sing Wing (Cal. Mar. 7, 1891), 88 Cal. 268, 25 P. 1099, 1891 Cal. LEXIS 682; People v. Erno (Cal. Jan. 15, 1925), 195 Cal. 272, 232 P. 710, 1925 Cal. LEXIS 369; People v. Cook (Cal. May 20, 1940), 15 Cal. 2d 507, 102 P.2d 752, 1940 Cal. LEXIS 240; People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262; People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227; People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443; People v. Hills (Cal. Oct. 3, 1947), 30 Cal. 2d 694, 185 P.2d 11, 1947 Cal. LEXIS 200.

In prosecution for murder it is province of jury, under appropriate instructions from court, to determine degree of offense. People v. Martinez (Cal. Dec. 29, 1884), 66 Cal. 278, 5 P. 261, 1884 Cal. LEXIS 756.

While the jury is given the function of ascertaining whether the evidence as to a particular homicide meets the standard of first degree murder under the classification of "any other kind of wilful, deliberate, and premeditated killing," it does not have the power of changing the standard. People v. Holt (Cal. Oct. 31, 1944), 25 Cal. 2d 59, 153

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P.2d 21, 1944 Cal. LEXIS 300; People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

The elements of deliberation and premeditation in first degree murder may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law. People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

While determination of the degree of a murder is generally left to the discretion of the jury, its discretion is not absolute. People v. Tubby (Cal. June 15, 1949), 34 Cal. 2d 72, 207 P.2d 51, 1949 Cal. LEXIS 141.

Question as to whether necessary elements of deliberation and premeditation of crime of first degree murder may be inferred from proof of facts and circumstances is exclusively within province of trier of fact. People v. Cartier (Cal. June 10, 1960), 54 Cal. 2d 300, 5 Cal. Rptr. 573, 353 P.2d 53, 1960 Cal. LEXIS 166.

Despite opinions along line of defendant's specific intent in murder case, trier of facts still draws his own conclusion from facts even if that conclusion be opposite to those who take stand and apparently are qualified as experts on subject. People v. Rittger (Cal. Oct. 6, 1960), 54 Cal. 2d 720, 7 Cal. Rptr. 901, 355 P.2d 645, 1960 Cal. LEXIS 202.

To establish crime of first degree murder, direct evidence of malice or of deliberate and premeditated purpose to kill is not required, but these elements may be inferred from proof of such facts and circumstances as furnish reasonable foundation for such inference; where evidence is not at law insufficient, matter is exclusively within province of jury, as trier of fact, to determine. People v. Cooley (Cal. App. 5th Dist. Dec. 20, 1962), 211 Cal. App. 2d 173, 27 Cal. Rptr. 543, 1962 Cal. App. LEXIS 1496, overruled, People v. Lew (Cal. June 25, 1968), 68 Cal. 2d 774, 69 Cal. Rptr. 102, 441 P.2d 942, 1968 Cal. LEXIS 205; People v. Lewis (Cal. App. 2d Dist. June 17, 1963), 217 Cal. App. 2d 246, 31 Cal. Rptr. 817, 1963 Cal. App. LEXIS 1903; People v. Quicke (Cal. Mar. 20, 1964), 61 Cal. 2d 155, 37 Cal. Rptr. 617, 390 P.2d 393, 1964 Cal. LEXIS 187; People v. Perrotta (Cal. App. 2d Dist. Feb. 6, 1964), 224 Cal. App. 2d 498, 36 Cal. Rptr. 813, 1964 Cal. App. LEXIS 1493; People v. Hillery (Cal. May 3, 1965), 62 Cal. 2d 692, 44 Cal. Rptr. 30, 401 P.2d 382, 1965 Cal. LEXIS 289; People v. Lookadoo (Cal. Mar. 30, 1967), 66 Cal. 2d 307, 57 Cal. Rptr. 608, 425 P.2d 208, 1967 Cal. LEXIS 305; People v. Mulqueen (Cal. App. 3d Dist. July 10, 1970), 9 Cal. App. 3d 532, 88 Cal. Rptr. 235, 1970 Cal. App. LEXIS 1969.

When it is claimed that homicide is of standard of first degree murder under classification of "any other kind of wilful, deliberate, and premeditated killing," there is necessity for appraisal that involves something more than ascertainment of objective facts; this appraisal is primarily jury function and within a wide field of discretion its determination is final. People v. Wolff (Cal. Aug. 31, 1964), 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959, 1964 Cal. LEXIS 258.

In a prosecution for first degree murder, where the evidence is not at law insufficient, whether the necessary elements of deliberation and premeditation may be inferred from the facts and circumstances of the case is a matter exclusively within the province of the trier of fact to determine. People v. Saterfield (Cal. Feb. 8, 1967), 65 Cal. 2d 752, 56 Cal. Rptr. 338, 423 P.2d 266, 1967 Cal. LEXIS 383, cert. denied, (U.S. 1967), 389 U.S. 964, 88 S. Ct. 352, 19 L. Ed. 2d 378, 1967 U.S. LEXIS 334.

Felony-murder trials frequently feature a doubt or conflict on the issue of divisibility or continuity of the several criminal acts and when such doubt or conflict exists, the issue should be submitted to the jury. People v. Chapman (Cal. App. 3d Dist. Apr. 15, 1968), 261 Cal. App. 2d 149, 67 Cal. Rptr. 601, 1968 Cal. App. LEXIS 1729.

Although the "one continuous transaction" analysis is the proper standard for sufficiency of the evidence to support a felony-murder instruction or conviction, to hold that evidence sufficient to show a single continuous transaction justifies an instruction or conviction on felony murder is not to hold that the judge, rather than the jury, decides whether the existence of such a single transaction and, hence, a murder in the perpetration of a felony, was proven beyond a reasonable doubt. Even where substantial evidence supports such a finding, it is for the jury to decide

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whether or not the murder was committed “in the perpetration of” (Pen C § 189) or “while the defendant was engaged in the commission of” (Pen C § 190.2(a)(17)) the specified felony. People v. Sakarias (Cal. Mar. 27, 2000), 22 Cal. 4th 596, 94 Cal. Rptr. 2d 17, 995 P.2d 152, 2000 Cal. LEXIS 2060, cert. denied, (U.S. Oct. 16, 2000), 531 U.S. 947, 121 S. Ct. 347, 148 L. Ed. 2d 279, 2000 U.S. LEXIS 6959.

38. Instructions

Under the statutes as they existed prior to the adoption of the Penal Code, it was not error to instruct the jury that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree, where the evidence was sufficient to warrant a jury in finding the fact that the killing was deliberate and premeditated. People v. Moore (Cal. July 1, 1857), 8 Cal. 90, 1857 Cal. LEXIS 303.

It is neither necessary nor proper for court to give definition of murder in second degree unless there is evidence in case tending to prove that crime was or may have been of that grade in given instance. People v. Byrnes (Cal. July 1, 1866), 30 Cal. 206, 1866 Cal. LEXIS 81.

It is not error to instruct jury fully on law applicable to murder in both degrees, rather than to limit charge to law applicable to manslaughter in excusable homicide, where there is any evidence, however slight, tending to show that offense committed was murder in either degree. People v. Taylor (Cal. Oct. 1, 1868), 36 Cal. 255, 1868 Cal. LEXIS 185.

Court, on trial for murder, should not charge jury that killing being proved, law implies that it was wilful, deliberate, and premeditated, and defendant is guilty of murder in first degree, and thus ignore any evidence tending to show mitigating or extenuating circumstances or to show that homicide was justifiable or excusable. People v. Woody (Cal. 1873), 45 Cal. 289, 1873 Cal. LEXIS 39.

Upon trial of indictment for murder, it is error to instruct jury, that if they find from evidence that defendant killed deceased, as alleged in indictment, or that, being present, he aided others in unlawful killing of deceased and that such killing was with malice aforethought, they will find defendant guilty of murder in first degree. People v. Guance (Cal. July 1, 1880), 57 Cal. 154, 1880 Cal. LEXIS 537.

An instruction is correct where it states “the unlawful killing must be accompanied with a deliberate and clear attempt to take life in order to constitute murder in the first degree. There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.” People v. Hunt (Cal. Oct. 1, 1881), 59 Cal. 430, 1881 Cal. LEXIS 415; People v. Garcia (Cal. Mar. 22, 1935), 2 Cal. 2d 673, 42 P.2d 1013, 1935 Cal. LEXIS 382.

An instruction to the jury that if they find that the defendant did, with malice aforethought, unlawfully kill the victim, then they should find the defendant guilty of first degree murder is erroneous. People v. Grigsby (Cal. Oct. 20, 1880), 62 Cal. 482, 1880 Cal. LEXIS 546.

In trial for murder erroneous instruction to effect that certain act would constitute murder in second degree, whereas it might amount to manslaughter only, is immaterial if defendant is convicted of murder in first degree. People v. O'Neal (Cal. Aug. 26, 1885), 67 Cal. 378, 7 P. 790, 1885 Cal. LEXIS 650.

Instruction to effect that “when killing is shown to be without extenuating circumstances malice is presumed, and that when malice is thus shown, if evidence clearly discloses deliberation or premeditation in act of killing or existence of intention to kill while giving fatal blow, killing constitutes murder in first degree,” is proper instruction. People v. Hamblin (Cal. Nov. 26, 1885), 68 Cal. 101, 8 P. 687, 1885 Cal. LEXIS 756.

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An instruction that if the testimony is believed it would make out the prosecution's case of first degree murder, and that it tended to show that the murder was wilful, deliberate, and premeditated, was a charge to the jury as to matters of fact, in contravention of the constitution. People v. Chew Sing Wing (Cal. Mar. 7, 1891), 88 Cal. 268, 25 P. 1099, 1891 Cal. LEXIS 682.

It is proper for the court to use the language of the statute in defining the degrees of murder. People v. Chaves (Cal. Sept. 20, 1898), 122 Cal. 134, 54 P. 596, 1898 Cal. LEXIS 547.

An instruction that "it is only necessary that the act of killing be preceded by a concurrence of the will, deliberation and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree," is erroneous in not being qualified by stating that the act of killing must be "the result of" such concurrence as well as preceded by it. People v. Maughs (Cal. May 18, 1906), 149 Cal. 253, 86 P. 187, 1906 Cal. LEXIS 245.

Erroneous instruction as to definition of murder of first degree is without prejudice when defendant is convicted of murder of second degree. People v. Besold (Cal. Oct. 9, 1908), 154 Cal. 363, 97 P. 871, 1908 Cal. LEXIS 343.

Rule that court need not charge with respect to lower degree of murder or an included offense, where there is no evidence tending to show commission of lesser crime than murder in first degree, is not confined to those specific homicidal acts particularly enumerated in code definition of murder in first degree, and which carry with them conclusive evidence of deliberation and premeditation, nor is rule confined to those cases where evidence of slaying is direct and positive. People v. Watts (Cal. June 24, 1926), 198 Cal. 776, 247 P. 884, 1926 Cal. LEXIS 421.

It is neither necessary nor proper for court, on trial on indictment for murder, to give definition of manslaughter or tell jury that it may find defendant guilty of manslaughter, unless there is evidence in case tending to prove that crime was or may have been manslaughter. People v. Farrington (Cal. Aug. 25, 1931), 213 Cal. 459, 2 P.2d 814, 1931 Cal. LEXIS 549, cert. denied, (U.S. Apr. 11, 1932), 285 U.S. 530, 52 S. Ct. 456, 76 L. Ed. 926, 1932 U.S. LEXIS 472.

In prosecution for murder, it is proper to refuse to give instruction as to lesser degree, where as to an included lesser offense, if evidence warrants only a verdict of first degree murder in event that accused is guilty at all. People v. Alcalde (Cal. Apr. 26, 1944), 24 Cal. 2d 177, 148 P.2d 627, 1944 Cal. LEXIS 224.

Where the evidence is in substantial conflict and presents a close question as to whether a specific intent to kill was formed with deliberation and premeditation or impetuously in the heat of sudden anger, it is essential that the jury be accurately informed as to the elements of each degree of murder, as well as manslaughter, and as to the burden of proof in relation to them. People v. Thomas (Cal. July 1, 1945), 25 Cal. 2d 880, 156 P.2d 7, 1945 Cal. LEXIS 262.

It is prejudicial error to instruct that if the "specific intent" to take life exists at the time of the killing, "the offense committed would of course be murder of the first degree," although other instructions distinguishing murder of the first and second degrees are given. People v. Bender (Cal. Nov. 1, 1945), 27 Cal. 2d 164, 163 P.2d 8, 1945 Cal. LEXIS 227.

An instruction that the existence of adequate provocation reduces an intentional killing from murder to manslaughter is defective where it does not also advise the jury that the existence of provocation which is not "adequate" to reduce the class of the offense may nevertheless raise a reasonable doubt that the defendant formed the intent to kill on, and carried it out after, deliberation and premeditation. People v. Valentine (Cal. Apr. 30, 1946), 28 Cal. 2d 121, 169 P.2d 1, 1946 Cal. LEXIS 198.

It is not error to instruct that the law does not undertake to measure in units of time the length of the period during which the slayer must deliberate over the killing before he has formed the intent to kill, that the true test is the extent of the reflection and that "thoughts may follow each other with great rapidity and cold calculating judgment may be arrived at quickly," especially where "deliberation" and "premeditation" are properly defined in other instructions.

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People v. Eggers (Cal. Oct. 3, 1947), 30 Cal. 2d 676, 185 P.2d 1, 1947 Cal. LEXIS 199, cert. denied, (U.S. 1948), 333 U.S. 858, 68 S. Ct. 728, 92 L. Ed. 1138, 1948 U.S. LEXIS 2443.

It is error to give an instruction that there need be no appreciable space of time between the intent to kill and the overt act, that a man may do a thing deliberately from a moment's reflection, as well as after pondering over the subject for a month or a year, and that he can premeditate the moment he conceives the purpose, since the instruction eliminates the necessity for deliberation or premeditation in forming the intent, and hence substantially deletes the difference between first and second degree murder. People v. Cornett (Cal. Nov. 1, 1948), 33 Cal. 2d 33, 198 P.2d 877, 1948 Cal. LEXIS 284.

Where a person is accused of murder in the first degree, if the evidence is of such nature as to warrant a verdict for no lesser crime if the defendant is guilty at all, the court should refuse to instruct as to crimes included within the first degree murder, and to do so does no violence to the constitutional inhibition against instructing with respect to matters of fact. People v. Lloyd (Cal. App. July 6, 1950), 98 Cal. App. 2d 305, 220 P.2d 10, 1950 Cal. App. LEXIS 1847.

In a prosecution for murder and assault with intent to commit murder the court errs in instructing the jury that there need be no "considerable" space of time devoted to deliberation or between formation of an intent to kill and the act of killing, and in refusing to give an instruction defining "deliberate" and "premeditated," since the instruction as given leaves no ground for classification of second degree murder. People v. Carmen (Cal. Mar. 1, 1951), 36 Cal. 2d 768, 228 P.2d 281, 1951 Cal. LEXIS 226.

Instruction that evidence is such that defendants are guilty of first degree murder or are innocent is not error where case is tried solely on that theory. People v. Davis (Cal. Mar. 29, 1957), 48 Cal. 2d 241, 309 P.2d 1, 1957 Cal. LEXIS 179.

Where instruction in murder case in effect advised jury that malice was element of first degree murder, but limited malice to express malice as defined by § 188, any error in not also covering implied malice was favorable and not prejudicial to defendant. People v. Cooley (Cal. App. 5th Dist. Dec. 20, 1962), 211 Cal. App. 2d 173, 27 Cal. Rptr. 543, 1962 Cal. App. LEXIS 1496, overruled, People v. Lew (Cal. June 25, 1968), 68 Cal. 2d 774, 69 Cal. Rptr. 102, 441 P.2d 942, 1968 Cal. LEXIS 205.

In prosecution for murder, murder in commission of robbery, and murder in commission of rape, it was not error to refuse instruction requiring jury, in order to render verdict of first degree murder, to agree unanimously on one or more of three theories; it suffices if each juror is convinced beyond reasonable doubt that defendant committed murder in first degree as defined by statute. People v. Nye (Cal. July 12, 1965), 63 Cal. 2d 166, 45 Cal. Rptr. 328, 403 P.2d 736, 1965 Cal. LEXIS 174, cert. denied, (U.S. 1966), 384 U.S. 1026, 86 S. Ct. 1960, 16 L. Ed. 2d 1033, 1966 U.S. LEXIS 1326.

Where the evidence in a murder case is such as would warrant a conviction for manslaughter, it is error to refuse to instruct on this issue, but if the evidence does not warrant such a conviction, instructions thereon may be refused. People v. Gosman (Cal. App. 2d Dist. July 28, 1967), 252 Cal. App. 2d 1004, 60 Cal. Rptr. 921, 1967 Cal. App. LEXIS 1590.

In a prosecution for murder, the court did not err in refusing to give instructions on manslaughter where the evidence presented by defendant tended to show a defense of alibi, and he did not present any evidence that the killing had been without malice or that it resulted from a sudden quarrel or from heat of passion within the meaning of Pen C § 192, defining manslaughter. People v. Gosman (Cal. App. 2d Dist. July 28, 1967), 252 Cal. App. 2d 1004, 60 Cal. Rptr. 921, 1967 Cal. App. LEXIS 1590.

In homicide prosecutions, the fact that the prosecution presents alternative theories of guilt of first degree murder does not require the court to instruct the jury that before returning a verdict of guilty, the jurors must agree,

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unanimously, upon one or more of the theories presented. People v. Seastone (Cal. App. 5th Dist. Dec. 29, 1969), 3 Cal. App. 3d 60, 82 Cal. Rptr. 907, 1969 Cal. App. LEXIS 1361.

A second degree felony-murder instruction may not properly be given where it is based on a felony that is an integral part of the homicide and that is shown by the prosecution's evidence to constitute an offense that is included, in fact, in the charged offense, but such an instruction is proper, where the felony was not committed with intent to inflict injury that would cause death. People v. Mattison (Cal. Feb. 24, 1971), 4 Cal. 3d 177, 93 Cal. Rptr. 185, 481 P.2d 193, 1971 Cal. LEXIS 305.

In a homicide case arising out of the killing of a police officer by defendant, it was not error to instruct on the felony-homicide rule, where defendant was in hot flight with stolen property and in the belief that the officer was about to arrest him for a robbery in which the property was stolen when defendant fatally shot the officer. People v. Salas (Cal. Aug. 18, 1972), 7 Cal. 3d 812, 103 Cal. Rptr. 431, 500 P.2d 7, 1972 Cal. LEXIS 227, cert. denied, (U.S. 1973), 410 U.S. 939, 93 S. Ct. 1401, 35 L. Ed. 2d 605, 1973 U.S. LEXIS 3472.

In a prosecution for homicide apparently perpetrated in the commission of a robbery, it was not error to instruct on the felony-murder rule, even though the killing was apparently separated in time and space from the actual taking of the victim's property, where the jury was warranted in concluding that defendant had not yet won a place of temporary safety after the taking when he fired the fatal shot. People v. Milan (Cal. Mar. 28, 1973), 9 Cal. 3d 185, 107 Cal. Rptr. 68, 507 P.2d 956, 1973 Cal. LEXIS 184.

In the absence of evidence which would support a verdict of murder less than of the first degree, or of manslaughter, or of any lesser necessarily included offense, defendant could not properly assert that factual issues were unfairly taken from the jury by an instruction declaring that he was either guilty of murder in the first degree or innocent. People v. Preston (Cal. Apr. 5, 1973), 9 Cal. 3d 308, 107 Cal. Rptr. 300, 508 P.2d 300, 1973 Cal. LEXIS 192.

The trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence, which includes instructing on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present; however, no instruction is required where there is no evidence from which the jury could conclude that the offense was less than that charged. Thus, in a murder prosecution, even if the charging allegations of the pleading included a lesser offense of assault with a deadly weapon, the trial judge was not under a duty to so instruct where there was overwhelming evidence that someone murdered the victim, and where neither of the defenses employed by defendant would have justified a verdict of assault with a deadly weapon. People v. Benjamin (Cal. App. 5th Dist. Oct. 9, 1975), 52 Cal. App. 3d 63, 124 Cal. Rptr. 799, 1975 Cal. App. LEXIS 1434.

If there is substantial evidence to support convictions of first degree murder by proving deliberation and premeditation or by proving that the homicide was committed in the course of perpetrating one of the felonies designated in Pen C § 189, the jury should be instructed on both and may rely on either theory. People v. Manson (Cal. App. 2d Dist. Aug. 13, 1976), 61 Cal. App. 3d 102, 132 Cal. Rptr. 265, 1976 Cal. App. LEXIS 1800, cert. denied, (U.S. Apr. 25, 1977), 430 U.S. 986, 97 S. Ct. 1686, 52 L. Ed. 2d 382, 1977 U.S. LEXIS 1645.

CALJIC No. 8.25, defining first degree murder by lying in wait (Pen C § 189), contains the substance of all the legal requirements. It is not deficient for failing to track verbatim the language in precedent case law that articulates as elements of this crime a substantial period of lying in wait, attack proceeding from a position of advantage, and attack following immediately after watchful waiting. People v. Ceja (Cal. Mar. 18, 1993), 4 Cal. 4th 1134, 17 Cal. Rptr. 2d 375, 847 P.2d 55, 1993 Cal. LEXIS 1179.

In a felony-murder prosecution of two defendants based on the underlying felony of kidnapping (Pen C § 190.2(a)(17)), the trial court did not err in refusing defendants' request to instruct the jury that the felony-murder theory did not apply if the sole purpose of the kidnapping was to assault the victim. Kidnapping is a felony that is not integral to homicide; even if a kidnapping involves an assault, it also involves an independent felonious intent. Any

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assault that was a part of defendants' kidnapping was for the purpose of moving the victim against his will, an independent felonious purpose. Furthermore, sound policy reasons support this application of the felony murder doctrine: although a defendant embarked on an assault will not be deterred by the felony-murder rule, the rule may reasonably be expected to deter the defendant from engaging in a kidnapping by holding him or her liable for any deaths that result. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

In a felony-murder prosecution of two defendants based on the underlying felony of kidnapping, the trial court did not err in failing sua sponte to instruct the jury on the lesser included offenses of murder and manslaughter. If the jury found that no kidnapping had occurred, then they would necessarily have rejected most of the prosecution's evidence, which showed that the victim was taken by force. Without this evidence there was virtually nothing to show that defendants took any physical action against the victim or harbored any ill feelings against him. Rather, the jury would have been left with the defense evidence, which showed that defendants had nothing at all to do with the assault, and so were not guilty at all. The evidence that showed defendants were responsible for the assault also supported the intent to kidnap. Thus, the two versions of the evidence were clear: either defendants kidnapped the victim and he died in the commission of the kidnapping, or defendants had no intent to kidnap and consequently were not guilty of anything. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

A trial judge in a criminal trial must instruct the jury on the general principles of law that are relevant and raised by the evidence. Furthermore, a trial judge must instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense. First degree murder and voluntary manslaughter are lesser included offenses of the charge of murder. However, when the evidence shows that a homicide was committed in the course of a felony listed in Pen C § 189, the trial judge may instruct the jury that the defendant is guilty of first degree murder or nothing and may properly decline to give instructions on first degree murder and manslaughter. People v. Escobar (Cal. App. 2d Dist. Aug. 19, 1996), 48 Cal. App. 4th 999, 55 Cal. Rptr. 2d 883, 1996 Cal. App. LEXIS 784.

In a first degree murder prosecution arising from a killing committed during a robbery, in which defendant testified that another person had committed the killing and that he later aided the killer in taking the stolen property, no reversible error resulted from the trial court's failure to instruct the jury that defendant was not liable for the murder if he formed the intent to aid and abet the robbery only after the victim was killed. Other evidence indicated that defendant was the actual killer, and the omitted issue was resolved against defendant on other properly given instructions. Specifically, in a modified version of CALJIC No. 8.80.1, the court instructed the jury that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery at the time of the killing. In its special circumstance verdict, consistent with this instruction, the jury found that defendant engaged in, or was an accomplice in, the commission of, or attempted commission of, robbery during the commission of the murder. Thus, by its special circumstance verdict the jury found explicitly, unanimously, and necessarily that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing. People v. Pulido (Cal. May 29, 1997), 15 Cal. 4th 713, 63 Cal. Rptr. 2d 625, 936 P.2d 1235, 1997 Cal. LEXIS 2548.

In a capital homicide prosecution, in discussing the principles of law relating to murder, the trial court properly instructed on two theories of second degree murder, express and implied. (Pen C §§ 188, 189.) Both of the trial court's instructions represented correct statements of the law. Moreover, the instructions properly and clearly informed the jury there were two alternate theories of second degree murder, each requiring different elements of proof. The record indicated that, after first defining the elements of second degree express malice murder, the court then told the jury, "Murder in the second degree is also ..." and then explained the elements of implied malice murder. In the absence of any evidence jurors were bewildered by the notion of alternative theories of second degree murder liability, one cannot conclude on the record that the trial court's instructions confused the jury. People v. Frye (Cal. July 30, 1998), 18 Cal. 4th 894, 77 Cal. Rptr. 2d 25, 959 P.2d 183, 1998 Cal. LEXIS 4688, cert.

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denied, (*U.S. Mar. 22, 1999*), *526 U.S. 1023, 119 S. Ct. 1262, 143 L. Ed. 2d 358, 1999 U.S. LEXIS 1975*, overruled in part, *People v. Doolin (Cal. Jan. 5, 2009), 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11, 2009 Cal. LEXIS 2.*

In a prosecution where the defendant was charged with a fellow gang member's murder (Pen C §§ 187, 189) on the theory that the defendant's actions provoked a response by a rival gang that killed the victim, and where the defendant was also charged with conspiracy to commit murder on the theory that he agreed and conspired with the deceased gang member to murder one or more members of the rival gang by means of a drive-by shooting, the trial court did not err in failing to instruct the jury on premeditation and deliberation with regard to the conspiracy to commit murder charge. Since conspiracy to commit murder is a unitary offense punishable in every instance with the penalty prescribed for first degree murder, there was no occasion or requirement for the jury to further determine the "degree" of the underlying target offense of murder, and thus no need for specific instruction on premeditation and deliberation respecting the conspiracy charge. It logically follows that where two or more persons conspire to commit murder-i.e., intend to agree to conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder-each has acted with a state of mind functionally indistinguishable from the mental state of premeditating the target offense of murder. The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder-hence all murder conspiracies are conspiracies to commit first degree murder. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder under the provisions of Pen C § 182. *People v. Cortez (Cal. Aug. 27, 1998), 18 Cal. 4th 1223, 77 Cal. Rptr. 2d 733, 960 P.2d 537, 1998 Cal. LEXIS 5420.*

Where the defendant was convicted of second degree murder (Pen C §§ 187, 189), assault with a firearm (Pen C § 245 (a)(2)), and weapon use enhancements for both counts (Pen C § 12022.5), and where defendant was sentenced under Pen C § 190(c) for a second degree "drive-by" murder, the trial court's failure to instruct the jury on second degree "drive-by" murder as a separate offense did not require reversal in that Pen C § 190(c) is merely a penalty provision, with no requirement of pleading or proof, and any error is harmless. Pen C § 190(c) provides an increase in the minimum term for the specified crime when the crime is committed under particular circumstances. It does not set out the elements of the crime, but focuses on a circumstance which is not present for all such crimes. From a reading of the language of the entire bill, along with the history of the enactment, and the fact that the voters were told only that they were voting to increase a minimum penalty, there is no basis on which to determine that Pen C § 190(c) is anything other than a penalty provision. *People v. Garcia (Cal. App. 1st Dist. Apr. 30, 1998), 63 Cal. App. 4th 820, 73 Cal. Rptr. 2d 893, 1998 Cal. App. LEXIS 392.*

Where the defendant was convicted of second degree murder (Pen C §§ 187, 189), assault with a firearm (Pen C § 245 (a)(2)), and weapon use enhancements for both counts (Pen C § 12022.5), and where defendant was sentenced under Pen C § 190(c) for a second degree "drive-by" murder, the trial court committed harmless error in failing to instruct the jury on the penalty provision. Regardless of the lack of an express statutory instruction regarding pleading and proof, the jury should have been instructed on the penalty provision. However, in light of all the evidence, there no reasonable probability that the jury would have found the defendant harbored a different intent for each of his shots. Further instructions on the drive-by allegation would not, to a reasonable probability, have resulted in a more favorable outcome for the defendant. *People v. Garcia (Cal. App. 1st Dist. Apr. 30, 1998), 63 Cal. App. 4th 820, 73 Cal. Rptr. 2d 893, 1998 Cal. App. LEXIS 392.*

Petitioner was convicted by a jury of first degree murder for poisoning her ex-husband with arsenic trioxide. The trial court had instructed (CALJIC No. 8.81.19) that poison means any substance introduced into the body by any means which by its chemical action is capable of causing death; and arsenic trioxide is a poison. The state-law determination that arsenic trioxide is a poison as a matter of law and was not an element of the offense to be decided by the jury, and not open to challenge on habeas review. Petitioner did not show any error having substantial and injurious effect or influence in determining the jury's verdict. There was never any disagreement whether arsenic trioxide was poison. The trial court also instructed that "in the crime of first degree murder, the required mental state is malice aforethought"; any alleged defect was irrelevant to the jury's verdict, and could not have had a substantial and injurious effect on the verdict. *Stanton v. Benzler (9th Cir. Cal. June 17, 1998), 146 F.3d 726, 1998 U.S. App. LEXIS 12798.*

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Defendant was found guilty of first degree murder (*Penal C §§ 187, 189*), first degree robbery (*Penal C §§ 211, 212.5*), attempted rape (*Penal C §§ 261, 664*), and first degree burglary (*Penal C § 459*). Defendant contended that an instruction permitted the jury to convict him of burglary, robbery, and felony murder, and to find burglary and robbery special circumstances, without ever considering whether he had the mental states required for the crimes of burglary and robbery. The court held that ample evidence permitted the jury to find beyond a reasonable doubt possession of stolen property and intent to steal. The corroborating evidence was far more extensive than necessary for the instruction. Other instructions cautioned the jurors that they should disregard any instruction that applied to or suggested facts they determined did not exist. *People v. Smithey (Cal. July 1, 1999), 20 Cal. 4th 936, 86 Cal. Rptr. 2d 243, 978 P.2d 1171, 1999 Cal. LEXIS 3907.*

Defendant was found guilty of second degree murder (*Penal C §§ 187(a), 189*), in the commission of which she used a deadly weapon, a knife (*Penal C § 12022(b)*). The trial court did not err in failing to instruct the jury on the lesser included offense of involuntary manslaughter. Counsel believed it was in her client's best interests not to receive lesser included offense instructions. She made a deliberate tactical choice not to have the jury receive such instructions. Thus, defendant was estopped from claiming prejudicial error on appeal from the court's failure to instruct on involuntary manslaughter. Inasmuch as any error was invited, the court would not consider whether the evidence warranted such instruction. *People v. Bolden (Cal. App. 2d Dist. Apr. 26, 1999), 71 Cal. App. 4th 730, 84 Cal. Rptr. 2d 111, 1999 Cal. App. LEXIS 356*, review granted, unpublished, (*Cal. Aug. 11, 1999*), *88 Cal. Rptr. 2d 281, 982 P.2d 152, 1999 Cal. LEXIS 5316.*

Conspiracy felony-murder applies only to conspiracies to commit the offenses listed in *Penal C § 189*, and felony-murder may not be based on an underlying felony assault conspiracy. Here, the trial court committed reversible error when it erroneously instructed on the theory of conspiracy felony murder, it not appearing beyond a reasonable doubt that the jury did not rely on that instruction. *People v. Baker (Cal. App. 2d Dist. May 25, 1999), 72 Cal. App. 4th 531, 85 Cal. Rptr. 2d 362, 1999 Cal. App. LEXIS 520.*

In a prosecution for murder and attempted murder, the trial court erred in instructing the jury with CALJIC No. 8.26 on the theory of conspiracy felony-murder. Conspiracy felony-murder applies only to conspiracies to commit the offenses listed in *Penal C § 189*, and assault with a deadly weapon is not one of the listed offenses. Also, under the merger doctrine stated in *People v. Ireland (1969) 70 Cal 2d 522, 75 Cal Rptr 188, 450 P2d 580, 1969 Cal LEXIS 351, 40 ALR3d 1323*, overruled on other grounds as stated in *Albicker v. Ryan (2009, C.D. Cal.) 2009 U.S. Dist. LEXIS 127238*, felony-murder may not be based on an underlying felony assault conspiracy. *People v. Baker (Cal. App. 2d Dist. Aug. 17, 1999), 74 Cal. App. 4th 243, 87 Cal. Rptr. 2d 803, 1999 Cal. App. LEXIS 757.*

In a murder trial, the court did not err in refusing a request to instruct on the defense of mental disease; defendant elicited no expert testimony that he suffered from a mental disease, defect, or disorder at the time of the offense. A jury convicted defendant of attempted murder, Pen C §§ *664, 187(a)*, and found the attempted murder to be willful, deliberate, and premeditated, §§ *664(a), 187, 189.* *People v. Moore (Cal. App. 3d Dist. Mar. 12, 2002), 96 Cal. App. 4th 1105, 117 Cal. Rptr. 2d 715, 2002 Cal. App. LEXIS 2715.*

In a prosecution of defendant, a gang member, on two counts of first degree murder, the trial court did not improperly instruct the jury about the doctrine of transferred intent; the defense presented no evidence that defendant, who was ordered by a gang leader to kill the first victim, shot the second victim, who was the first victim's girlfriend and was walking with the first victim, by accident, and defense counsel's closing argument made no reference to the transferred intent instruction. *People v. Gomez (Cal. App. 2d Dist. Mar. 21, 2003), 107 Cal. App. 4th 328, 131 Cal. Rptr. 2d 848, 2003 Cal. App. LEXIS 439.*

Defendant waived the issue of prosecutorial misconduct in connection with defendant's trial for first degree murder, but even disregarding the waiver, the court found no error; the prosecutor's statement to "salute" the victim, a police officer, was not on the basis of inflammatory rhetoric but by applying the law set forth in the jury instructions, and the prosecutor did no more than draw from common experience. *People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275*, cert. denied, (*U.S. Feb. 22, 2005*), *543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.*

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Court rejected defendant's complaint that the use of a particular reasonable doubt jury instruction was error in connection with defendant's trial for first degree murder; the court held that (1) because jury instructions did not constitute law, they did not implicate ex post facto concerns or due process, (2) the jury instruction in question had already been upheld as constitutional, and the inclusion or exclusion of the terms "moral evidence" and "moral certainty" neither added nor took away anything of value, (3) the jury instruction correctly stated the government's burden of proof, and (4) trial courts were not mandated to instruct in terms of Pen C § 1096. People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275, cert. denied, (U.S. Feb. 22, 2005), 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.

Court rejected defendant's argument that the use of an instruction concerning the integrity of the jury was error in connection with defendant's trial for first degree murder; the court had previously found no constitutional infirmity under Cal Const Art I § 16 in the instruction, defendant made no argument warranting reconsideration of the court's conclusion, and defendant did not cite to anything indicating that the jurors were improperly influenced. People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275, cert. denied, (U.S. Feb. 22, 2005), 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.

Felony murder instructions were insufficient where the jury was not told that a conviction based on a co-defendant's acts required both a causal and a temporal connection between the felony committed by defendant and the killing by the co-defendant; a duty to instruct arose under Pen C § 1093(f) when defendant requested the instruction. Moreover, because the jury expressed its confusion as to this issue, the trial court should have provided additional instructions pursuant to Pen C § 1138. People v. Dominguez (Cal. App. 6th Dist. Dec. 14, 2004), 124 Cal. App. 4th 1270, 22 Cal. Rptr. 3d 249, 2004 Cal. App. LEXIS 2139, modified, (Cal. App. 6th Dist. Jan. 13, 2005), 2005 Cal. App. LEXIS 53, review granted, depublished, (Cal. Mar. 30, 2005), 27 Cal. Rptr. 3d 1, 109 P.3d 563, 2005 Cal. LEXIS 3483, aff'd in part and rev'd in part, (Cal. Aug. 28, 2006), 39 Cal. 4th 1141, 47 Cal. Rptr. 3d 575, 140 P.3d 866, 2006 Cal. LEXIS 9977.

Petitioner was entitled to writ of habeas corpus because trial court did not inform jury that it had erred in its definition of second-degree murder based on implied malice, nor did it state that general intent was not an element of that crime. Therefore, the trial court's erroneous instruction on the elements of murder in the second degree under California law was a constitutional error because it violated petitioner's right to due process. Ho v. Newland (9th Cir. Cal. Feb. 26, 2003), 322 F.3d 625, 2003 U.S. App. LEXIS 3454, op. withdrawn, (9th Cir. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11229, sub. op., (9th Cir. Cal. June 5, 2003), 332 F.3d 587, 2003 U.S. App. LEXIS 11224.

Petitioner in federal habeas case failed to show that the second degree felony-murder instruction given to the jury by the court, interpreting the statutory element of malice aforethought to include a showing that defendant was engaged in an inherently dangerous felony, was violative of California's guarantee of separation of powers. Moore v. Rowland (N.D. Cal. Jan. 22, 2003), 2003 U.S. Dist. LEXIS 960, aff'd, (9th Cir. Cal. May 19, 2004), 367 F.3d 1199, 2004 U.S. App. LEXIS 9713.

In a criminal trial where defendant confessed to two counts of first degree murder and one count of second degree murder, the court's failure to instruct the jury on the principles of flight as it related to a third party was harmless. People v. Henderson (Cal. App. 4th Dist. July 17, 2003), 110 Cal. App. 4th 737, 2 Cal. Rptr. 3d 32, 2003 Cal. App. LEXIS 1072.

Court reversed defendant's conviction for felony murder because the trial court's jury instruction did not address complicit felony murder but assumed that defendant himself was accused of killing the victim; the court rejected the People's contention that a felony murder conviction could be predicated on the mere fact that a killing by an accomplice occurred "during" the commission of the predicate offense. Rather, defendant could be guilty of felony murder based on a killing by another person only if the killing occurred while they were "jointly engaged" in a rape or attempted rape or the killing occurred in pursuit of the common purpose of perpetrating such a rape. People v. Dominguez (Cal. App. 6th Dist. May 12, 2004), 118 Cal. App. 4th 651, 13 Cal. Rptr. 3d 212, 2004 Cal. App. LEXIS 719, review granted, depublished, and transferred, (Cal. Aug. 18, 2004), 17 Cal. Rptr. 3d 709, 96 P.3d 29, 2004

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Cal. LEXIS 7592, transferred, (Cal. App. 6th Dist. Dec. 14, 2004), 124 Cal. App. 4th 1270, 22 Cal. Rptr. 3d 249, 2004 Cal. App. LEXIS 2139.

Because no prejudice was shown, the court rejected defendant's claim that a limiting instruction on evidence that defendant's girlfriend wanted to kill the victim was error, which required reversal of defendant's conviction under Pen C § 189; such evidence, even if credited, would not have affected the undisputed logical nexus between the felonies and the homicide, and thus the exclusion of the evidence, even if error, could not have been prejudicial, and the jury's findings demonstrated that the homicide was part of a continuous transaction with the felonies. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

At felony murder trial, instructions adequately apprised the jury of the need for a logical nexus between two felonies and a homicide, and the trial court had no duty to clarify the logical-nexus requirement because the evidence did not raise as issue as to the existence of a logical nexus between the felonies and homicide. People v. Cavitt (Cal. June 21, 2004), 33 Cal. 4th 187, 14 Cal. Rptr. 3d 281, 91 P.3d 222, 2004 Cal. LEXIS 5523.

First degree murder defendant was not entitled to a lesser included offense instruction on second degree murder where the evidence demonstrated that all three victims were fatally strangled; the entire course of conduct was inconsistent with any suggestion that the killings were not willful, premeditated, and deliberate; and the evidence additionally demonstrated that each of the murders occurred during the commission of either rape or burglary, a circumstance that in itself established the offenses as first degree murders under the felony-murder doctrine. People v. Carter (Cal. Aug. 15, 2005), 36 Cal. 4th 1114, 32 Cal. Rptr. 3d 759, 117 P.3d 476, 2005 Cal. LEXIS 8908, cert. denied, (U.S. Apr. 24, 2006), 547 U.S. 1099, 126 S. Ct. 1881, 164 L. Ed. 2d 570, 2006 U.S. LEXIS 3308.

Any error in failing to instruct a murder jury on the lesser included offense of second degree murder was harmless beyond a reasonable doubt because a true finding on an attempted-robbery-murder special circumstance established that the jury would have convicted defendant of first degree murder under a felony-murder theory, regardless of whether more extensive instructions were given on second degree murder. People v. Elliot (Cal. Nov. 28, 2005), 37 Cal. 4th 453, 35 Cal. Rptr. 3d 759, 122 P.3d 968, 2005 Cal. LEXIS 13254, cert. denied, (U.S. Oct. 2, 2006), 549 U.S. 853, 127 S. Ct. 121, 166 L. Ed. 2d 91, 2006 U.S. LEXIS 6687.

Any error in a trial court's inadvertent omission of CALJIC No. 2.90, which defined reasonable doubt and explained the presumption of innocence, was harmless because the evidence of defendant's guilt of first-degree murder was strong: (1) defendant was at the apartment at the time of the victim's shooting and was observed fleeing the apartment immediately after the shooting; (2) just after he was shot, the victim identified his assailant in a dying declaration; and (3) defendant and the victim had been feuding for weeks and had been quarrelling just prior to the shooting. Furthermore, none of the arguments of counsel invited jurors to consider facts outside the evidence, and although the jury was not told "reasonable doubt" meant that they could not say that they felt an abiding conviction of the truth of the charge, it was not reasonably probable the inclusion of that arcane definition would have led to a more favorable verdict for defendant, especially considering that the jury was properly instructed that, to convict defendant of murder in the first degree, it had to find each and every element of murder, as well as the elements of premeditation and deliberation, beyond a reasonable doubt and in accordance with the evidence presented. People v. Mayo (Cal. App. 2d Dist. June 14, 2006), 140 Cal. App. 4th 535, 44 Cal. Rptr. 3d 497, 2006 Cal. App. LEXIS 873, cert. denied, (U.S. Mar. 19, 2007), 549 U.S. 1289, 127 S. Ct. 1840, 167 L. Ed. 2d 336, 2007 U.S. LEXIS 3182.

In a trial for felony murder, defendant was not entitled to a lesser-included-offense instruction on second degree murder based upon express malice because there was no substantial evidence that would have absolved defendant of felony murder, but not of express malice. Although defendant did not declare a robbery or demand money, a robbery attempt was strongly suggested by the facts that he put a plastic bag on a store's counter and more or less simultaneously pointing a gun at the proprietor. People v. Jenkins (Cal. App. 2d Dist. June 20, 2006), 140 Cal. App. 4th 805, 44 Cal. Rptr. 3d 788, 2006 Cal. App. LEXIS 909, modified, (Cal. App. 2d Dist. July 13, 2006), 2006 Cal. App. LEXIS 1077.

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Assuming that a jury believed that defendant it convicted of second-degree murder aided and abetted his sons in assaulting the murder victim, the jury also could have believed that it was reasonably foreseeable that death was a natural and probable consequence of that assault where the evidence showed a group of men challenging a single unarmed victim with an assortment of weapons available for their use, and where the assailant stabbed the victim with a knife, a deadly weapon, in the heart. Although defendant denied that the attack on the victim was a fight to the death, that was an argument for the jury, and the trial court thus did not err in instructing the jury that an aider and abettor to assault could be liable for murder if death was a natural and probable consequence of the assault. People v. Karapetyan (Cal. App. 3d Dist. June 27, 2006), 140 Cal. App. 4th 1172, 45 Cal. Rptr. 3d 245, 2006 Cal. App. LEXIS 970.

Because the evidence did not overwhelmingly support a finding that defendant had formed the intent to steal money from the victim before her companion killed the victim, the trial court reversibly erred by instructing only on the crime of felony murder; the trial court should have instructed sua sponte on second degree murder and voluntary manslaughter. People v. Anderson (Cal. App. 1st Dist. July 18, 2006), 141 Cal. App. 4th 430, 45 Cal. Rptr. 3d 910, 2006 Cal. App. LEXIS 1087.

In a trial for the murder of a prostitute by a deputy sheriff, the trial court erred by omitting an instruction that second degree murder included an intentional but unpremeditated murder because the jury could have concluded the emotional, impulsive nature of the killing precluded a finding of premeditation and deliberation but that defendant nevertheless intended to kill. The conviction for first degree murder was not reversed, however, because the error was harmless because the jury was not misled and it was unlikely the jury concluded the killing was intentional but not premeditated. People v. Rogers (Cal. Aug. 21, 2006), 39 Cal. 4th 826, 48 Cal. Rptr. 3d 1, 141 P.3d 135, 2006 Cal. LEXIS 9862, cert. denied, (U.S. Apr. 30, 2007), 550 U.S. 920, 127 S. Ct. 2129, 167 L. Ed. 2d 866, 2007 U.S. LEXIS 4579.

In a prosecution for capital felony murder under Pen C § 189, it was harmless error for the trial court to refuse a lesser-included offense instruction on the offense of involuntary manslaughter under Pen C § 192 because a jury necessarily decided the factual questions posed by the omitted instructions adversely to a habeas corpus petitioner under other properly given instructions as it found petitioner guilty of robbery and burglary and it found true the special circumstance allegations that petitioner killed the victim in the commission of robbery and burglary in violation of Pen C § 211, 459. To render those verdicts, the jury had to find that petitioner had already formed the intent to steal when he entered the victims' apartment and assaulted them, thus necessarily rejecting petitioner's version of the events. Lewis v. Woodford (E.D. Cal. Jan. 22, 2007), 2007 U.S. Dist. LEXIS 4846.

In a first degree trial for murder and kidnapping under Pen C § 189, any error in declined to instruct on the lesser included offense of second degree murder was harmless, even if there was evidence that the victim went with defendant voluntarily and that the murder was a sudden impulse. The jury returned a true finding on a kidnapping-murder special circumstance and therefore necessarily rejected that factual theory. People v. Lancaster (Cal. May 24, 2007), 41 Cal. 4th 50, 58 Cal. Rptr. 3d 608, 158 P.3d 157, 2007 Cal. LEXIS 5275, cert. denied, (U.S. Jan. 7, 2008), 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742, 2008 U.S. LEXIS 277.

There was no error in instructing a jury on both first degree premeditated murder and first degree felony murder, even though the information charged defendant only with malice murder under Pen C § 187 and not with felony murder under Pen C § 189. The information charged both a burglary and a robbery special circumstance under Pen C § 190.2, putting defendant on notice that the prosecution was proceeding on a felony-murder theory. People v. Carey (Cal. May 31, 2007), 41 Cal. 4th 109, 59 Cal. Rptr. 3d 172, 158 P.3d 743, 2007 Cal. LEXIS 5487, cert. denied, (U.S. Nov. 5, 2007), 552 U.S. 1011, 128 S. Ct. 533, 169 L. Ed. 2d 374, 2007 U.S. LEXIS 12101.

There was no error in instructing on first degree murder under Pen C § 189, even though the information charged defendant only with malice murder under Pen C § 187, because the information alleged under Pen C § 190.2 that the murder was committed under the special circumstances of murder in the course of robbery and rape, thus providing notice that the prosecutor would proceed under a felony-murder theory. People v. Kelly (Cal. Dec. 6, 2007), 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548, 2007 Cal. LEXIS 13795, modified, (Cal. Feb. 20,

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2008, 2008 Cal. LEXIS 1904, cert. denied, (U.S. Nov. 10, 2008), 555 U.S. 1020, 129 S. Ct. 564, 172 L. Ed. 2d 445, 2008 U.S. LEXIS 8193.

Trial court was not required to instruct a jury that it had to agree unanimously on whether defendant committed premeditated murder or felony murder because a jury did not need to unanimously agree on whether a defendant committed premeditated or felony murder; in any event, the jury had unanimously found that defendant murdered the victim during the commission of a robbery. People v. Harris (Cal. June 19, 2008), 43 Cal. 4th 1269, 78 Cal. Rptr. 3d 295, 185 P.3d 727, 2008 Cal. LEXIS 7331, cert. denied, (U.S. Jan. 12, 2009), 555 U.S. 1111, 129 S. Ct. 922, 173 L. Ed. 2d 130, 2009 U.S. LEXIS 1.

In a capital murder case where defendant murdered the victim during a robbery, defendant's argument that trial court should have on its own initiative instructed the jury on second degree murder as a lesser included offense was rejected because evidence did not support such an instruction; there was no evidence from which the jury could find that defendant killed the victim with malice, but without premeditation or deliberation. People v. Romero (Cal. July 14, 2008), 44 Cal. 4th 386, 79 Cal. Rptr. 3d 334, 187 P.3d 56, 2008 Cal. LEXIS 8668, cert. denied, (U.S. Jan. 21, 2009), 555 U.S. 1142, 129 S. Ct. 1010, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 611.

Instructing on first degree premeditated murder and felony murder was not error where the information alleged that defendant committed murder with malice, in violation of Pen C § 187(a), and while engaged in the commission of a robbery, in violation of Pen C § 211. The court rejected the argument that by failing to allege that the murder under either theory was first degree murder under Pen C § 189, defendant was effectively charged with murder in the second degree under Pen C § 187. People v. Bramit (Cal. July 16, 2009), 46 Cal. 4th 1221, 96 Cal. Rptr. 3d 574, 210 P.3d 1171, 2009 Cal. LEXIS 6029, cert. denied, (U.S. Nov. 16, 2009), 558 U.S. 1031, 130 S. Ct. 640, 175 L. Ed. 2d 491, 2009 U.S. LEXIS 8245.

In a capital murder trial under Pen C § 189, defendant was not entitled to a lesser included offense instruction on second degree murder because there was overwhelming evidence supporting defendant's conviction for kidnapping the victim. If defendant was guilty of felony murder, that felony murder was of the first degree. People v. Bumev (Cal. July 30, 2009), 47 Cal. 4th 203, 97 Cal. Rptr. 3d 348, 212 P.3d 639, 2009 Cal. LEXIS 7742, cert. denied, (U.S. Mar. 1, 2010), 559 U.S. 978, 130 S. Ct. 1702, 176 L. Ed. 2d 192, 2010 U.S. LEXIS 2112.

Although the trial court did not err by allowing the jury to consider returning a verdict of first degree murder against two defendants for the death of their accomplice under the provocative act doctrine, it appeared that the trial court erred when it instructed the jury on first degree murder for their accomplice's death because the instructions failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation during the course of an attempted murder of their intended victim, who responded in self-defense by stabbing the accomplice to death. People v. Concha (Cal. Nov. 12, 2009), 47 Cal. 4th 653, 101 Cal. Rptr. 3d 141, 218 P.3d 660, 2009 Cal. LEXIS 11598.

In a case in which defendant was convicted of first degree murder on a theory of premeditation and deliberation, the trial court did not err by instructing the jury with CALCRIM No. 522. Although CALCRIM No. 522 did not expressly state provocation was relevant to the issues of premeditation and deliberation, when the jury instructions were read as a whole there was no reasonable likelihood the jury did not understand this concept. People v. Hernandez (Cal. App. 4th Dist. Apr. 16, 2010), 183 Cal. App. 4th 1327, 107 Cal. Rptr. 3d 915, 2010 Cal. App. LEXIS 527.

Trial court did not err in failing to give an instruction on lesser included offenses in connection with a charge of murder against defendant where there was no evidence to support the giving of instructions on the lesser included offenses of second-degree murder or voluntary manslaughter; the only issue was whether defendant was the individual who killed the victim in the course of committing the felonies, because whoever was the perpetrator was guilty of felony murder. People v. Redd (Cal. Apr. 29, 2010), 48 Cal. 4th 691, 108 Cal. Rptr. 3d 192, 229 P.3d 101, 2010 Cal. LEXIS 3749, cert. denied, (U.S. Oct. 4, 2010), 562 U.S. 932, 131 S. Ct. 328, 178 L. Ed. 2d 214, 2010 U.S. LEXIS 7236.

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Because a defendant could be convicted of first-degree murder even though the indictment or information charged only murder with malice in violation of Pen C § 187, there was no merit to defendant's claim that a trial court erred by instructing on first-degree murder because the information simply charged him with murder in violation of Pen C § 187, and did not state the degree of the murder, cite the actual first-degree murder statute, Pen C § 189, or allege the facts necessary for first-degree murder. People v. Tate (Cal. July 8, 2010), 49 Cal. 4th 635, 112 Cal. Rptr. 3d 156, 234 P.3d 428, 2010 Cal. LEXIS 6548, cert. denied, (U.S. Mar. 7, 2011), 562 U.S. 1274, 131 S. Ct. 1605, 179 L. Ed. 2d 506, 2011 U.S. LEXIS 2022.

In a case in which defendant was convicted of two counts of first-degree murder, the trial court did not err in failing to instruct on voluntary manslaughter as to the male victim where there was no evidence warranting such an instruction; although there was some evidence that there was a collision between defendant's car and the victim's car, there was no evidence that the victim was responsible for the collision or that defendant killed him in a heat of passion due to the collision. People v. Verdugo (Cal. Aug. 2, 2010), 50 Cal. 4th 263, 113 Cal. Rptr. 3d 803, 236 P.3d 1035, 2010 Cal. LEXIS 7524, cert. denied, (U.S. Feb. 22, 2011), 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316, 2011 U.S. LEXIS 1446.

In a murder trial under Pen C § 189(a), the failure to instruct on voluntary manslaughter, based on a heat of passion theory, was prejudicial error; the case was relatively weak because the evidence against defendant came from two brothers who had gang affiliations, made inconsistent statements, and might have pinned the crime on defendant in order to conceal their own guilt. The error was not rendered harmless by the fact that the jury necessarily found that defendant acted willfully, deliberately, and with premeditation. People v. Ramirez (Cal. App. 2d Dist. Nov. 12, 2010), 189 Cal. App. 4th 1483, 117 Cal. Rptr. 3d 783, 2010 Cal. App. LEXIS 1936.

In a case in which defendant was convicted of murdering her four-year-old niece, the jury instructions accurately left the jury with the impression that mayhem felony murder had to be first-degree murder and properly informed the jury that mayhem felony murder required the specific intent to commit mayhem. The fact that the instruction on the elements of mayhem mentioned only the intent to vex or annoy did not render the instructions confusing or circular. People v. Gonzales (Cal. June 2, 2011), 51 Cal. 4th 894, 126 Cal. Rptr. 3d 1, 253 P.3d 185, 2011 Cal. LEXIS 5437, modified, (Cal. Aug. 10, 2011), 2011 Cal. LEXIS 8083.

Although defendant convicted of murdering her four-year-old niece argued that the jury instructions did not adequately distinguish between first-degree murder by torture and second-degree torture felony murder, the distinction was accurately noted by defense counsel when he pressed for the second-degree torture felony murder instruction. The difference was plain on the face of the instructions, and defense counsel explained it to the jury as "real simple" in his closing argument. People v. Gonzales (Cal. June 2, 2011), 51 Cal. 4th 894, 126 Cal. Rptr. 3d 1, 253 P.3d 185, 2011 Cal. LEXIS 5437, modified, (Cal. Aug. 10, 2011), 2011 Cal. LEXIS 8083.

Defendant was not denied notice or his due process rights by the fact that the trial court instructed on felony murder under Pen C § 189, even though defendant was not specifically charged with that crime, because adequate notice was provided by a premeditated murder charge under Pen C § 187 and by the evidence at the preliminary hearing and at trial. People v. Ardoin (Cal. App. 1st Dist. June 3, 2011), 196 Cal. App. 4th 102, 130 Cal. Rptr. 3d 1, 2011 Cal. App. LEXIS 685, overruled in part, People v. Dalton (Cal. May 16, 2019), 247 Cal. Rptr. 3d 273, 441 P.3d 283, 7 Cal. 5th 166, 2019 Cal. LEXIS 3266.

In a second degree murder trial under Pen C §§ 187, 189, federal law did not require a lesser included offense instruction on heat of passion/voluntary manslaughter; further, the court was bound by the state appeal court's finding that the victim did not act in a way that would provoke an ordinary person. Le v. Dexter (C.D. Cal. Apr. 14, 2011), 2011 U.S. Dist. LEXIS 52872.

Jury was adequately instructed on the difference between second degree murder and gross vehicular manslaughter while intoxicated; a requested special defense instruction improperly suggested that gross vehicular manslaughter while intoxicated was a lesser included offense to second degree murder, and an instruction on subjective

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awareness would have misstated the law. *People v. Johnigan* (Cal. App. 2d Dist. June 23, 2011), 196 Cal. App. 4th 1084, 128 Cal. Rptr. 3d 190, 2011 Cal. App. LEXIS 807.

In a murder for hire case, the trial court did not err by not giving instructions concerning voluntary manslaughter based on imperfect self-defense and defense of others because the evidence did not support giving such instructions. Although defendant's testimony, as well as that of his mother and sisters, established past abuse by the victim, and defendant's testimony was evidence that he feared the victim would continue the abuse in the future, it did not establish imminence, or that defendant even believed harm was imminent. *People v. Battle* (Cal. App. 3d Dist. Aug. 9, 2011), 198 Cal. App. 4th 50, 129 Cal. Rptr. 3d 828, 2011 Cal. App. LEXIS 1035.

Defendant who thrust a sharp knife toward her boyfriend as he advanced during a heated physical struggle was entitled to a lesser-included-offense instruction on voluntary manslaughter, and failure to give that instruction sua sponte required reversal of a conviction for second degree murder. There are cases in which it is not clear from the circumstances that in committing an inherently dangerous felony, the defendant acted in conscious disregard of life, and in such a case, the defendant is entitled to a jury instruction based on the Garcia theory of voluntary manslaughter. *People v. Bryant* (Cal. App. 4th Dist. Aug. 9, 2011), 198 Cal. App. 4th 134, 129 Cal. Rptr. 3d 808, 2011 Cal. App. LEXIS 1029, review granted, depublished, (Cal. Nov. 16, 2011), 133 Cal. Rptr. 3d 391, 264 P.3d 33, 2011 Cal. LEXIS 12076, rev'd, (Cal. June 3, 2013), 56 Cal. 4th 959, 157 Cal. Rptr. 3d 522, 301 P.3d 1136, 2013 Cal. LEXIS 4695.

Trial court did not err in instructing a jury on an alternative theory of felony murder where, based on the evidence presented, the jury could have reasonably inferred that defendant in fact formed the intent to kidnap the victim prior to committing the act or acts that resulted in the victim's death. *People v. Loza* (Cal. App. 4th Dist. June 27, 2012), 207 Cal. App. 4th 332, 143 Cal. Rptr. 3d 355, 2012 Cal. App. LEXIS 755.

Because provocative act implied malice murders were first-degree murders when they occurred during the course of a felony enumerated in Pen C § 189 that would support a first degree felony-murder conviction, a trial court correctly instructed a jury that, where the underlying felony was robbery, the felony-murder rule of § 189 applied in determining the degree of a provocative act murder. *People v. Baker-Riley* (Cal. App. 2d Dist. July 2, 2012), 207 Cal. App. 4th 631, 143 Cal. Rptr. 3d 737, 2012 Cal. App. LEXIS 775.

In a case in which a jury convicted defendant of the first degree murder of her boyfriend based on the provocative act doctrine, the trial court erred in instructing the jury on the requirements for premeditated and deliberate first degree murder, but the error was harmless. Because the evidence showed beyond a reasonable doubt that a rational jury would have found that defendant personally premeditated and deliberated the attempted murder of the intended victim, the absence of an instruction on this point was harmless. *People v. Gonzalez* (Cal. July 5, 2012), 54 Cal. 4th 643, 142 Cal. Rptr. 3d 893, 278 P.3d 1242, 2012 Cal. LEXIS 6359.

Defendant in a felony murder case was not entitled to a lesser included offense instruction on second degree implied malice murder, despite a reference to Pen C § 187 in the Information, because the case was tried strictly on a first degree felony-murder theory; the accusatory pleading did not refer to malice aforethought; and the prosecutor made clear the theory of the case well in advance of the trial. *People v. Huynh* (Cal. App. 4th Dist. Dec. 20, 2012), 212 Cal. App. 4th 285, 151 Cal. Rptr. 3d 170, 2012 Cal. App. LEXIS 1296, cert. denied, (U.S. Oct. 7, 2013), 571 U.S. 912, 134 S. Ct. 278, 187 L. Ed. 2d 201, 2013 U.S. LEXIS 6507.

In a case in which defendant was convicted of first degree murder under a felony-murder theory that the victim was killed during the commission of a burglary, it was reversible error for the trial court to refuse an instruction on the escape rule. Given the evidence, there was a reasonable probability that a jury properly instructed on the escape rule would have concluded that defendant had reached a place of temporary safety before the fatal act occurred and was not guilty of felony murder. *People v. Wilkins* (Cal. Mar. 7, 2013), 56 Cal. 4th 333, 153 Cal. Rptr. 3d 519, 295 P.3d 903, 2013 Cal. LEXIS 1507, modified, (Cal. May 1, 2013), 2013 Cal. LEXIS 3644.

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In a case in which defendant was convicted of second degree murder after she stabbed her boyfriend in the chest during an altercation, the trial court did not err in failing to sua sponte instruct the jury on voluntary manslaughter as a lesser included offense of murder on the theory that defendant killed without malice in the commission of an inherently dangerous assaultive felony, as such a killing was not voluntary manslaughter. People v. Bryant (Cal. June 3, 2013), 56 Cal. 4th 959, 157 Cal. Rptr. 3d 522, 301 P.3d 1136, 2013 Cal. LEXIS 4695.

Direct aider and abettor instructions were inconsistent with the law because a non-shooter's culpability as a direct aider and abettor had to be based on his own intent, not that of the shooter, yet the instructions essentially informed the jury that if the shooter committed the crime of murder and the non-shooter intended to facilitate the commission of that crime, then both were liable for first degree murder if the jury also believed the shooter premeditated the murder. People v. Ramirez (Cal. App. 4th Dist. Sept. 11, 2013), 219 Cal. App. 4th 655, 162 Cal. Rptr. 3d 128, 2013 Cal. App. LEXIS 725, review granted, depublished, (Cal. Dec. 18, 2013), 165 Cal. Rptr. 3d 249, 314 P.3d 488, 2013 Cal. LEXIS 10456, vacated, transferred, (Cal. July 9, 2014), 174 Cal. Rptr. 3d 80, 328 P.3d 67, 2014 Cal. LEXIS 4973.

Instruction on the natural and probable consequences doctrine was insufficient to support a non-shooter's conviction for first degree murder because the jurors were not required to find that the shooter's premeditation was itself a natural and probable consequence of whatever lesser crime they believed the non-shooter had intended to commit. People v. Ramirez (Cal. App. 4th Dist. Sept. 11, 2013), 219 Cal. App. 4th 655, 162 Cal. Rptr. 3d 128, 2013 Cal. App. LEXIS 725, review granted, depublished, (Cal. Dec. 18, 2013), 165 Cal. Rptr. 3d 249, 314 P.3d 488, 2013 Cal. LEXIS 10456, vacated, transferred, (Cal. July 9, 2014), 174 Cal. Rptr. 3d 80, 328 P.3d 67, 2014 Cal. LEXIS 4973.

In a second trial arising from a drunk driving accident, it was reversible error to instruct in a manner that gave the jury the false impression that defendant would be left entirely unpunished if it did not convict him of murder, when he had been convicted in the first trial for gross vehicular manslaughter. People v. Batchelor (Cal. App. 4th Dist. Sept. 16, 2014), 229 Cal. App. 4th 1102, 178 Cal. Rptr. 3d 28, 2014 Cal. App. LEXIS 841, modified, (Cal. App. 4th Dist. Oct. 8, 2014), 2014 Cal. App. LEXIS 905, overruled in part, People v. Hicks (Cal. Dec. 28, 2017), 226 Cal. Rptr. 3d 565, 407 P.3d 409, 4 Cal. 5th 203, 2017 Cal. LEXIS 9834.

Defendant was not entitled to a sua sponte instruction on involuntary manslaughter in a prosecution for the murder of a victim who was beaten and suffocated because there was no evidence that defendant failed to understand the risk when she repeatedly beat the victim on the head with the large broom handle with great force, causing trauma that was a contributing cause of death, and left the scene only after an accomplice forced a gag down the victim's throat and the victim stopped moving. People v. Brothers (Cal. App. 2d Dist. Apr. 21, 2015), 236 Cal. App. 4th 24, 186 Cal. Rptr. 3d 98, 2015 Cal. App. LEXIS 332.

In a trial for murder and attempted murder based on a shooting committed by another individual, it was reversible error to instruct that the jury need not agree on the same theory of murder because the alternatives were different degrees of murder, either first degree felony murder or second degree malice murder. The appropriate remedy was to reverse the conviction for first degree murder and allow the prosecution to either retry the case or accept a reduction of the offense to second degree murder. People v. Johnson (Cal. App. 1st Dist. June 30, 2015), 238 Cal. App. 4th 313, 189 Cal. Rptr. 3d 411, 2015 Cal. App. LEXIS 578, vacated, review granted, depublished, and transferred, (Cal. Sept. 30, 2015), 193 Cal. Rptr. 3d 46, 356 P.3d 779, 2015 Cal. LEXIS 7215.

Trial court had a sua sponte duty to modify the standard instruction on aider and abettor liability for felony murder to inform the jury that defendant could not be guilty if she did not aid and abet the underlying burglary or kidnapping until after the victim was dead; regardless of the contentions at trial, there was substantial evidence that defendant was not present when the victim was killed and that her joint engagement in the underlying crime did not arise until after the victim died. People v. Hill (Cal. App. 1st Dist. Apr. 16, 2015), 236 Cal. App. 4th 1100, 187 Cal. Rptr. 3d 1, 2015 Cal. App. LEXIS 418.

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Trial court did not err when it refused to advise the jury in defendant's second trial for second-degree murder that he had been convicted of gross vehicular manslaughter, a lesser related offense, in his first trial because the only issue before the second jury was whether he was guilty of second-degree murder, and instructing or otherwise advising the jury that he had previously been convicted of gross vehicular manslaughter reasonably could cause the jury to focus on irrelevant matters rather than focusing on the issue before it. People v. Hicks (Cal. App. 2d Dist. Dec. 23, 2015), 243 Cal. App. 4th 343, 196 Cal. Rptr. 3d 638, 2015 Cal. App. LEXIS 1154, review granted, depublished, (Cal. Mar. 23, 2016), 200 Cal. Rptr. 3d 7, 367 P.3d 6, 2016 Cal. LEXIS 1757, aff'd, (Cal. Dec. 28, 2017), 226 Cal. Rptr. 3d 565, 407 P.3d 409, 4 Cal. 5th 203, 2017 Cal. LEXIS 9834.

39. Verdict and Judgment

Verdict must state whether it be murder in first or second degree. People v. Marquis (Cal. 1860), 15 Cal. 38, 1860 Cal. LEXIS 40.

If the jury find that the slayer deliberately resolved before the homicide to kill the decedent, it is first degree murder, but if they find that there was no deliberate, preconceived intention to kill, except that which is implied from the circumstances showing no considerable provocation to have existed or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, then it is second degree murder. People v. Foren (Cal. July 1, 1864), 25 Cal. 361, 1864 Cal. LEXIS 45.

In trial for murder if jury find defendant guilty, they must expressly state degree of murder in their verdict. People v. Campbell (Cal. Oct. 1, 1870), 40 Cal. 129, 1870 Cal. LEXIS 165.

Failure of verdict of "guilty as charged" under information for murder, to specify degree of murder, vitiates verdict. People v. O'Neil (Cal. Mar. 14, 1889), 78 Cal. 388, 20 P. 705, 1889 Cal. LEXIS 603.

Judgment stating that sentence of defendant was for murder of which he had been convicted was sufficient, though it failed to show degree of murder. People v. McNulty (Cal. Feb. 19, 1892), 93 Cal. 427, 29 P. 61, 1892 Cal. LEXIS 578, writ of error dismissed, (U.S. May 15, 1893), 149 U.S. 645, 13 S. Ct. 959, 37 L. Ed. 882, 1893 U.S. LEXIS 2333.

It is essential to proper announcement of judgment in event of plea of guilty of crime distinguished or divided into degrees, such as murder, that court first determine the degree. People v. Bellon (Cal. July 5, 1919), 180 Cal. 706, 182 P. 420, 1919 Cal. LEXIS 544.

Power to reduce judgment of murder in first degree to murder in second degree or to manslaughter is given to trial court and also to appellate court by § 1181. People v. Shaver (Cal. Oct. 27, 1936), 7 Cal. 2d 586, 61 P.2d 1170, 1936 Cal. LEXIS 679.

Court did not err in failing to designate the type of first degree murder of which it found the defendant guilty, where the only type of first degree murder which the evidence tended to show was wilful, deliberate, and premeditated murder by means other than torture, poison, or lying in wait. People v. Hooper (Cal. Apr. 19, 1950), 35 Cal. 2d 165, 216 P.2d 876, 1950 Cal. LEXIS 324.

There was no inconsistency in the jury's verdict finding one defendant guilty and the other not guilty of a murder charge, where the convicted defendant fired the fatal shot with deliberate intention to kill, and there was a marked difference in the evidence as to the actions of the two defendants. People v. Stembriqoe (Cal. App. Aug. 14, 1950), 99 Cal. App. 2d 15, 221 P.2d 212, 1950 Cal. App. LEXIS 1644.

In a murder case tried to the court, involving two victims, defendant could be convicted of first degree murder of one victim and second degree murder of the other victim where the motivation and intent in the two crimes was distinct. People v. Juarez (Cal. App. 3d Dist. Jan. 29, 1968), 258 Cal. App. 2d 349, 65 Cal. Rptr. 630, 1968 Cal. App. LEXIS 2420.

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In a murder prosecution, the fact that the jury found defendant guilty of first degree murder and his codefendant guilty only of second degree murder did not establish that the jury based its implied finding of premeditation on conjecture, where it was obvious, in the light of the facts, that defendant was the chief investigator and perpetrator of the events, in which his codefendant participated, which culminated in death of the victim. People v. Pickens (Cal. App. 1st Dist. Feb. 19, 1969), 269 Cal. App. 2d 844, 75 Cal. Rptr. 352, 1969 Cal. App. LEXIS 1707.

Defendant convicted of second degree murder in a joint trial with his accomplice who was convicted of voluntary manslaughter could not successfully complain of the inconsistent verdicts. Where the evidence warrants the jury holding the perpetrator of the homicide guilty of murder in the second degree, neither he nor his accomplice may complain about an inconsistent verdict convicting the accomplice of a lesser offense. People v. Ferrel (Cal. App. 3d Dist. May 4, 1972), 25 Cal. App. 3d 970, 102 Cal. Rptr. 372, 1972 Cal. App. LEXIS 1091.

Where it is claimed that a murder is of the first degree on the theory that it was committed in the perpetration of one of the felonies designated in Pen C § 189, the defendant is entitled, upon request, to an instruction directing attention to the necessity of proving the underlying felony beyond a reasonable doubt even though a general instruction on reasonable doubt has been given. However, in order to apply the felony-murder rule, it need not be shown, and the jury should not be instructed, that the death ensued in consequence of the underlying felony. Section 189 does not require a strict causal relationship between the felony and the homicide. The homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction. People v. Tapia (Cal. App. 5th Dist. June 8, 1994), 25 Cal. App. 4th 984, 30 Cal. Rptr. 2d 851, 1994 Cal. App. LEXIS 615.

Defendant was found guilty of second degree murder (Penal C §§ 187(a), 189), in the commission of which she used a deadly weapon, a knife (Penal C § 12022(b)). The court found true the allegations defendant previously had been convicted of two serious or violent felonies (Penal C §§ 667 (a-i), 1170.12), after which the court sentenced defendant to state prison for a triple term of 45 years to life. Although defendant argued that the word "term" in § 667(e)(2)(A) meant determinate terms, defendant's interpretation would lead to absurd results. A first degree murderer with only one prior strike would receive an indeterminate term of 50 years to life under (e)(1), which doubles the minimum term of an indeterminate sentence for a "second strike" defendant. But if the same murderer had two or more strikes, he could receive only an indeterminate term of 25 years to life. Adopting an interpretation which does not limit the use of the work "term" to determinate terms would serve the object of the three strikes law, which is to provide longer sentences for those with histories of serious or violent recidivism. The trial court did not err in imposing a tripled sentence. People v. Bolden (Cal. App. 2d Dist. Apr. 26, 1999), 71 Cal. App. 4th 730, 84 Cal. Rptr. 2d 111, 1999 Cal. App. LEXIS 356, review granted, unpublished, (Cal. Aug. 11, 1999), 88 Cal. Rptr. 2d 281, 982 P.2d 152, 1999 Cal. LEXIS 5316.

Order vacating a habeas corpus petitioner's conviction of second degree murder, Cal. Penal Code §§ 187, 189, and attempted murder, Cal. Penal Code §§ 187, 664, on the basis of newly discovered evidence did not bar retrial. In re Cruz (Cal. App. 2d Dist. Jan. 2, 2003), 104 Cal. App. 4th 1339, 129 Cal. Rptr. 2d 31, 2003 Cal. App. LEXIS 1.

Court found no defect, based on international law or otherwise, in imposing the death penalty against defendant for first degree murder; the delay in the appeal process did not mean that the death penalty was cruel and unusual punishment. People v. Brown (Cal. July 12, 2004), 33 Cal. 4th 382, 15 Cal. Rptr. 3d 624, 93 P.3d 244, 2004 Cal. LEXIS 6275, cert. denied, (U.S. Feb. 22, 2005), 543 U.S. 1155, 125 S. Ct. 1297, 161 L. Ed. 2d 121, 2005 U.S. LEXIS 1585.

Jury's specific finding that defendant, in committing two murders, did act willfully, deliberately, and with premeditation was tantamount to a finding of first degree murder, as defined by Pen C § 189, in the verdict form itself. The statutory mandate of Pen C § 1157 was met even without the express use of the phrase "first degree murder" in the verdict forms. People v. San Nicolas (Cal. Dec. 6, 2004), 34 Cal. 4th 614, 21 Cal. Rptr. 3d 612, 101 P.3d 509, 2004 Cal. LEXIS 11655, cert. denied, (U.S. Oct. 3, 2005), 546 U.S. 829, 126 S. Ct. 46, 163 L. Ed. 2d 79, 2005 U.S. LEXIS 6148.

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Even if error was assumed in a trial court's limiting of opinion evidence regarding imposition of the death penalty during the penalty phase of defendant's capital murder trial, defendant clearly suffered no prejudice where, upon inquiring of defendant's former girlfriend, who was also a prior crime victim of his, outside the jury's presence whether the execution of defendant would have any impact upon her, and learning that it would not, defense counsel elected not to elicit further testimony from the former girlfriend, and had counsel asked such a question of the former girlfriend and received the same response during the testimony that she gave in the presence of the jury, such testimony at best would have been of no help to defendant and more likely would have harmed his case. Furthermore, the trial court's ruling did not reach beyond the former girlfriend's testimony and categorically bar the defense from presenting any plea for mercy from defendant's family and friends, and, even assuming error, it was harmless beyond a reasonable doubt because the defense in fact called defendant's mother, stepfather, aunt, uncle, and two cousins, all of whom testified concerning the grief that defendant's execution would cause them—and all without objection from the prosecution. People v. Williams (Cal. May 5, 2008), 43 Cal. 4th 584, 75 Cal. Rptr. 3d 691, 181 P.3d 1035, 2008 Cal. LEXIS 4818, cert. denied, (U.S. Jan. 21, 2009), 555 U.S. 1140, 129 S. Ct. 1000, 173 L. Ed. 2d 298, 2009 U.S. LEXIS 652.

During the penalty phase of defendant's capital murder trial, the trial court did not err in failing to instruct that a sentence of life imprisonment without the possibility of parole meant that defendant would remain in prison for the remainder of his life where the record did not demonstrate a plausible basis to infer jury concerns or misunderstanding about the consequences of its penalty verdict, and where the California pattern instruction itself adequately informed the jury. The failure to so instruct the jury did not constitute a violation of defendant's rights to due process of law, a fair trial, and a reliable penalty determination. People v. Williams (Cal. May 5, 2008), 43 Cal. 4th 584, 75 Cal. Rptr. 3d 691, 181 P.3d 1035, 2008 Cal. LEXIS 4818, cert. denied, (U.S. Jan. 21, 2009), 555 U.S. 1140, 129 S. Ct. 1000, 173 L. Ed. 2d 298, 2009 U.S. LEXIS 652.

In a case in which defendant was convicted of one count of first degree murder and two counts of attempted premeditated murder, sufficient evidence supported jury findings that, as to the attempted murder counts, defendant personally discharged a firearm causing great bodily injury or death. Reasonable trier of fact could find that the shootings were part of one continuous transaction. People v. Frausto (Cal. App. 2d Dist. Dec. 28, 2009), 180 Cal. App. 4th 890, 103 Cal. Rptr. 3d 231, 2009 Cal. App. LEXIS 2081, modified, (Cal. App. 2d Dist. Jan. 13, 2010), 2010 Cal. App. LEXIS 31.

In a case in which defendant was convicted of one count of first degree murder and two counts of attempted premeditated murder, sufficient evidence supported either a theory that defendant shot all three victims because defendant harbored some malice toward them all or that defendant shot one or more to eliminate witnesses to the principal killing, thus assisting in an escape that he in fact effected. Under these circumstances, it was immaterial that defendant may have fired at the murder victim before or after firing at the surviving victims. People v. Frausto (Cal. App. 2d Dist. Dec. 28, 2009), 180 Cal. App. 4th 890, 103 Cal. Rptr. 3d 231, 2009 Cal. App. LEXIS 2081, modified, (Cal. App. 2d Dist. Jan. 13, 2010), 2010 Cal. App. LEXIS 31.

40. Appellate Review

Trial court's determination that defendant was guilty of no crime greater than manslaughter, and its order reducing second degree murder to that class should be affirmed on appeal, unless reviewing court can say as matter of law that there was no evidence or inference therefrom contrary to those drawn by jury in returning second degree murder verdict. People v. Sheran (Cal. 1957), 49 Cal. 2d 101, 315 P.2d 5, 1957 Cal. LEXIS 251.

Conflicting evidence can reasonably be resolved to justify trial court's determination as to specific intent in first degree murder case; fact that it might also be reasonably resolved to support defendant's contention as to absence of malice aforethought does not warrant interference with that determination. People v. Rittger (Cal. Oct. 6, 1960), 54 Cal. 2d 720, 7 Cal. Rptr. 901, 355 P.2d 645, 1960 Cal. LEXIS 202.

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On appeal in a homicide case, the reviewing court is bound to view the evidence most favorably in support of the jury's judgment as to the degree of the crime, but the jury's discretion is not absolute. People v. Ford (Cal. July 25, 1966), 65 Cal. 2d 41, 52 Cal. Rptr. 228, 416 P.2d 132, 1966 Cal. LEXIS 178, cert. denied, (U.S. Sept. 1, 1967), 385 U.S. 1018, 87 S. Ct. 737, 17 L. Ed. 2d 554, 1967 U.S. LEXIS 2716.

In a prosecution for first degree murder, a determination as to whether the evidence is consistent with defendant's innocence is a function of the trier of fact; on appeal, the test is not whether the evidence may be reconciled with innocence, but whether there is substantial evidence in the record to warrant the inference of guilt drawn by the trier below. People v. Saterfield (Cal. Feb. 8, 1967), 65 Cal. 2d 752, 56 Cal. Rptr. 338, 423 P.2d 266, 1967 Cal. LEXIS 383, cert. denied, (U.S. 1967), 389 U.S. 964, 88 S. Ct. 352, 19 L. Ed. 2d 378, 1967 U.S. LEXIS 334.

On appeal in a homicide case, the reviewing court is bound to view the evidence most favorably in support of the jury's judgment as to the degree of the crime, but the jury's discretion is not absolute; to the extent that the character of a particular homicide is established by the facts in evidence, both the jury and the appellate court are bound to apply the standards fixed by law. People v. Bassett (Cal. Aug. 8, 1968), 69 Cal. 2d 122, 70 Cal. Rptr. 193, 443 P.2d 777, 1968 Cal. LEXIS 232.

The legislative definition of the degrees of murder leaves much to the discretion of the jury in many cases, but that discretion must have a sound factual basis for its exercise, and the evidence on which the determination is made is subject to review on the question of its legal sufficiency to support the verdict; the jury is bound, as is the appellate court, to apply the standards fixed by law and it is the jury's duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion, and mere conjecture, surmise, or suspicion are not the equivalent of reasonable inference and do not constitute proof. People v. Anderson (Cal. Dec. 23, 1968), 70 Cal. 2d 15, 73 Cal. Rptr. 550, 447 P.2d 942, 1968 Cal. LEXIS 216.

On review of the sufficiency of evidence to support the jury determination of the degree of a murder, the reviewing court must resolve the issue in light of the whole record, that is, the entire picture of the defendant put before the jury, and it may not limit its appraisal to isolated bits of evidence selected by the respondent. Not every surface conflict of evidence remains substantial in light of other facts, and thus, it is not enough for the respondent simply to point to some evidence supporting the finding. If the court finds indisputably established facts as to lack of intent that, as a matter of law, overcome inconsistent inferences drawn from other evidence, it must hold that intent is not proved. However, if it finds merely a substantial conflict in the evidence, the jury's determination of the degree of the murder is controlling. People v. Cruz (Cal. Jan. 24, 1980), 26 Cal. 3d 233, 162 Cal. Rptr. 1, 605 P.2d 830, 1980 Cal. LEXIS 135.

In a criminal prosecution arising out of a vehicular homicide, a trial court determination, based on undisputed facts, that no probable cause existed to support a charge of second degree murder constituted a legal conclusion which was subject to independent review on appeal. In such a case, the function of the reviewing court is to determine whether a person of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion that defendant committed the crime charged. People v. Watson (Cal. Nov. 30, 1981), 30 Cal. 3d 290, 179 Cal. Rptr. 43, 637 P.2d 279, 1981 Cal. LEXIS 191.

Reversible error occurred when the trial court granted a jury's request, during deliberations in a murder trial, to revisit the crime scene for a side view but barred defendant and his counsel from being present. The location of the shooter was strongly contested both for the murder charge and for a lying-in-wait special circumstance under Pen C §§ 189 and 190.2(a)(15); the request for the return visit indicated that the jurors had questions about where the shooter was located and whether the prosecution's version of the events should be accepted. People v. Garcia (Cal. July 28, 2005), 36 Cal. 4th 777, 31 Cal. Rptr. 3d 541, 115 P.3d 1191, 2005 Cal. LEXIS 8226.

In an appeal from a capital murder conviction under Pen C § 187, the reviewing court declined to address whether the evidence was insufficient to uphold the jury's first degree murder verdicts on a theory of premeditated and deliberated murder because adequate evidence existed for a rational jury to find the murders were committed during the commission of attempted rapes, so as to support felony-murder convictions under Pen C § 189. People

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v. Rundle (Cal. Apr. 3, 2008), 43 Cal. 4th 76, 74 Cal. Rptr. 3d 454, 180 P.3d 224, 2008 Cal. LEXIS 3795, modified, (Cal. May 14, 2008), 2008 Cal. LEXIS 5246, modified, (Cal. May 14, 2008), 2008 Cal. LEXIS 6844, cert. denied, (U.S. Nov. 10, 2008), 555 U.S. 1014, 129 S. Ct. 569, 172 L. Ed. 2d 433, 2008 U.S. LEXIS 8299, overruled in part, People v. Doolin (Cal. Jan. 5, 2009), 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11, 2009 Cal. LEXIS 2.

In a capital murder case in which defendant threw gasoline on the victim and lit her on fire, defendant's claim that the trial court erred in denying his request for a continuance to permit defense counsel additional time to prepare an accidental ignition defense lacked merit. Because defendant withdrew his Faretta motion and agreed that his attorney could present whatever defense he thought was appropriate, granting additional time to prepare the accidental ignition defense would have served no purpose. People v. D'Arcy (Cal. Mar. 11, 2010), 48 Cal. 4th 257, 106 Cal. Rptr. 3d 459, 226 P.3d 949, 2010 Cal. LEXIS 1808, cert. denied, (U.S. Oct. 4, 2010), 562 U.S. 850, 131 S. Ct. 104, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 6259.

Improper argument by the prosecutor was not prejudicial because the evidence of guilt was strong, showing that defendant, a street gang member, knew that a victim was a rival gang member, had said he was going to confront that victim, and fired a round through a restaurant window with sufficient accuracy that it penetrated the window, although it failed to wound the victims. People v. Jasso (Cal. App. 6th Dist. Dec. 13, 2012), 211 Cal. App. 4th 1354, 150 Cal. Rptr. 3d 464, 2012 Cal. App. LEXIS 1270.

Although defendant challenged the sufficiency of the evidence supporting his convictions for murder, sodomy, and forcible lewd act on a minor under 14, there was abundant evidence the victim was sexually assaulted and murdered. Although the physical evidence did not directly tie defendant to the murder, the jury could find the evidence supported defendant's guilt. People v. Brown (Cal. June 2, 2014), 59 Cal. 4th 86, 172 Cal. Rptr. 3d 576, 326 P.3d 188, 2014 Cal. LEXIS 3759, cert. denied, (U.S. Feb. 23, 2015), 135 S. Ct. 1402, 191 L. Ed. 2d 373, 2015 U.S. LEXIS 1452.

Defendant was legally insane when he killed the victims if, as a result of his delusion, the facts as he perceived them, even if erroneous, would entitle him to claim self-defense. The trial court erred when it instructed the jury that to claim self-defense, defendant's beliefs also had to be reasonable, but the error was harmless as to three of defendant's four victims because there was no evidence that defendant perceived he was in imminent danger from these victims and considerable evidence that he knew he was not. People v. Leeds (Cal. App. 2d Dist. Sept. 28, 2015), 240 Cal. App. 4th 822, 192 Cal. Rptr. 3d 906, 2015 Cal. App. LEXIS 836, modified, (Cal. App. 2d Dist. Oct. 27, 2015), 2015 Cal. App. LEXIS 954.

Defendant was legally insane when he killed the victims if, as a result of his delusion, the facts as he perceived them, even if erroneous, would entitle him to claim self-defense. The trial court erred when it instructed the jury that to claim self-defense, defendant's beliefs also had to be reasonable, and the error was not harmless as to defendant's father, who could have been perceived as an immediate threat. People v. Leeds (Cal. App. 2d Dist. Sept. 28, 2015), 240 Cal. App. 4th 822, 192 Cal. Rptr. 3d 906, 2015 Cal. App. LEXIS 836, modified, (Cal. App. 2d Dist. Oct. 27, 2015), 2015 Cal. App. LEXIS 954.

Failure to instruct on heat of passion due to provocation was harmless error, even if the jury theoretically could have found that provocation or heat of passion negated premeditation and deliberation, because a special circumstance finding that defendant lay in wait demonstrated that the jury did not rely solely on premeditation and deliberation to find first degree murder. People v. Wright (Cal. App. 1st Dist. Dec. 15, 2015), 242 Cal. App. 4th 1461, 196 Cal. Rptr. 3d 115, 2015 Cal. App. LEXIS 1118, modified, (Cal. App. 1st Dist. Jan. 6, 2016), 2016 Cal. App. LEXIS 5.

In a capital murder case, the trial court erroneously terminated defendant's right to self-representation. The trial court's rationale, that defendant had been dilatory and had been stalling, was not supported by the record. People v. Becerra (Cal. June 27, 2016), 63 Cal. 4th 511, 203 Cal. Rptr. 3d 400, 372 P.3d 805, 2016 Cal. LEXIS 4575.

Defendant's right to an impartial jury was violated when a prospective juror was excused for cause based on written questionnaire responses reflecting personal opposition to the death penalty because the juror's responses also

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suggested she could put aside her personal views in determining the penalty. People v. Zaragoza (Cal. July 11, 2016), 204 Cal. Rptr. 3d 131, 374 P.3d 344, 1 Cal. 5th 21, 2016 Cal. LEXIS 4743.

Defendant who was convicted in adult court for second degree murder with gang enhancements committed when he was 16 years old was not entitled to retroactive application of Proposition 57 (requiring transfer to adult court by juvenile court, rather than direct filing by prosecutor); although the judgment was not final when Proposition 57 was passed, retroactive application was not required by the text and history, or by equal protection and due process principles. People v. Mendoza (Cal. App. 6th Dist. Mar. 30, 2017), 216 Cal. Rptr. 3d 361, 10 Cal. App. 5th 327, 2017 Cal. App. LEXIS 287, modified, (Cal. App. 6th Dist. Apr. 20, 2017), 2017 Cal. App. LEXIS 369, cert. denied, (U.S. Jan. 8, 2018), 138 S. Ct. 693, 199 L. Ed. 2d 569, 2018 U.S. LEXIS 572, vacated, transferred, (Cal. Feb. 28, 2018), 229 Cal. Rptr. 3d 346, 411 P.3d 527, 2018 Cal. LEXIS 1116, overruled in part, People v. Superior Court (Lara) (Cal. Feb. 1, 2018), 228 Cal. Rptr. 3d 394, 410 P.3d 22, 4 Cal. 5th 299, 2018 Cal. LEXIS 726.

Defendant had not shown prejudice from his trial counsel's failure to object to certain testimony by the prosecution's gang expert where there was no reasonable probability that defendant would have achieved a more favorable result on the murder charge had counsel objected at trial, preventing the gang expert from testifying about defendant's prior crimes and contacts with law enforcement, because, in addition to the very strong evidence of planning, motive, and manner of killing, there was also evidence evincing defendant's consciousness of guilt, including his lies, concealment, and destruction of evidence; given the admissible evidence heard by the jury, the jury would have still found defendant guilty of first-degree murder. People v. Blessett (Cal. App. 3d Dist. Apr. 30, 2018), 232 Cal. Rptr. 3d 164, 22 Cal. App. 5th 903, 2018 Cal. App. LEXIS 385, modified, (Cal. App. 3d Dist. May 24, 2018), 2018 Cal. App. LEXIS 481.

41. Parole

Governor erred by reversing the decision of the Board of Prison Terms granting parole to an inmate convicted of second degree murder. There was no evidence to establish unsuitability for parole under Cal. Code Regs. tit. 15, § 2402(c); the inmate had no prior record for violence, he completed treatment programs in prison, and showed remorse. In re Smith (Cal. App. 2d Dist. June 5, 2003), 109 Cal. App. 4th 489, 134 Cal. Rptr. 2d 781, 2003 Cal. App. LEXIS 824.

Due process was violated by a 2005 denial of parole for an inmate who was convicted of three murders committed in 1977 because the parole board relied on a commitment offense that was no more callous than most murders. Although the murders were planned, first degree murders under Pen C § 189 involved premeditation and deliberation by definition. In re Barker (Cal. App. 1st Dist. May 24, 2007), 151 Cal. App. 4th 346, 59 Cal. Rptr. 3d 746, 2007 Cal. App. LEXIS 844.

California Governor's reversal of a decision of the California Board of Parole Hearings to grant an inmate parole was not supported by some evidence and violated due process, thus entitling the inmate to habeas relief, where, although there was some evidence that the inmate's commitment offense of the second-degree murder of his wife was especially heinous, no evidence in the record before the Board supported a conclusion under Cal. Code Regs. tit. 15, § 2402(a) that, due solely to the nature of his commitment offense, the inmate currently posed an unreasonable risk of danger to society if released, because it was not the mere passage of time that deprived the inmate's commitment offense of predictive value with respect to the risk he might pose to society. The quantity and quality of the inmate's consistent and spotless record of upstanding conduct for the last 20 years, coupled with the absence of any negative factors and the presence of every conceivable favorable factor, combined to eliminate any modicum of predictive value that his commitment offense once had. In re Dannenberg (Cal. App. 6th Dist. Nov. 16, 2007), 156 Cal. App. 4th 1387, 68 Cal. Rptr. 3d 188, 2007 Cal. App. LEXIS 1865, modified, (Cal. App. 6th Dist. Dec. 3, 2007), 2007 Cal. App. LEXIS 1985, review granted, unpublished, (Cal. Feb. 13, 2008), 72 Cal. Rptr. 3d 621, 177 P.3d 230, 2008 Cal. LEXIS 1423, transferred, (Cal. Oct. 28, 2008), 85 Cal. Rptr. 3d 691, 196 P.3d 218, 2008 Cal. LEXIS 12752, sub. op., (Cal. App. 6th Dist. Jan. 23, 2009), 173 Cal. App. 4th 237, 92 Cal. Rptr. 3d 647, 2009 Cal. App. LEXIS 614.

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Even under the deferential "some evidence" standard, the justification given by the Governor of California for denying parole to an inmate convicted of the 1983 second-degree murder of his wife after the California Board of Parole Hearings found him suitable for parole could not withstand scrutiny where the Governor cited no evidence to suggest that, in the face of overwhelming evidence of his suitability for parole, the inmate's release would pose an unreasonable risk of danger to society because the Governor's justification for finding that the murder was particularly egregious was based on the fact that the inmate decided at some point during an encounter in which he and his wife were discussing their marital problems to kill his wife and did so by deliberately shooting her multiple times at close range, but the fact that the inmate intentionally killed his wife was not a permissible factor, inasmuch as malice was one of the minimal elements of second-degree murder and malice involved either an intent to kill or an intent to commit an act, the natural consequences of which were dangerous to human life. The fact that the inmate entered a negotiated plea of guilty to second-degree murder did not preclude the Governor from considering particular aspects of the crime beyond its basic elements, and the fact that the inmate shot his wife multiple times at close range did not demonstrate that the crime was particularly egregious, atrocious, or heinous such that the inmate remained a danger to the public nearly a quarter of a century later because he did not attack, injure or kill multiple victims; did not carry out the offense in a dispassionate and calculated manner, such as an execution-style murder, or in a manner that demonstrated an exceptionally callous disregard for human suffering; and the motive for the crime was not inexplicable or very trivial. In re Burden (Cal. App. 3d Dist. Mar. 24, 2008), 161 Cal. App. 4th 14, 73 Cal. Rptr. 3d 581, 2008 Cal. App. LEXIS 385, review granted, depublished, (Cal. July 9, 2008), 80 Cal. Rptr. 3d 26, 187 P.3d 886, 2008 Cal. LEXIS 8245, transferred, (Cal. Oct. 28, 2008), 85 Cal. Rptr. 3d 689, 196 P.3d 217, 2008 Cal. LEXIS 12746, sub. op., (Cal. App. 3d Dist. Dec. 12, 2008), 169 Cal. App. 4th 18, 86 Cal. Rptr. 3d 549, 2008 Cal. App. LEXIS 2407.

In light of the definition of second-degree murder in Pen C § 187 and Pen C § 189, it can reasonably be said that all second-degree murders by definition involve some callousness such as lack of emotion or sympathy, emotional insensitivity, or indifference to the feelings and suffering of others; since parole is the general rule, the offense must be more than callous and instead must show an exceptionally callous disregard for human suffering. Wells v. Mendoza-Powers (E.D. Cal. Oct. 29, 2008), 2008 U.S. Dist. LEXIS 88224.

Where a prisoner, during an argument with his estranged wife at a time where he had been drinking alcohol, got a gun, shot his wife, and attempted to hide the body, the circumstances of the offense of second-degree murder did not demonstrate an exceptionally callous disregard for human suffering as required by Cal. Code Regs. tit. 15, § 2402(c)(1)(D) to establish unsuitability for parole; relative triviality of the motive alone did not justify a conclusion that the prisoner currently posed an unreasonable threat to society. Wells v. Mendoza-Powers (E.D. Cal. Oct. 29, 2008), 2008 U.S. Dist. LEXIS 88224.

Governor's reversal of a grant of parole was supported by the aggravated nature of the commitment offense. Although the jury found the inmate guilty of only second degree murder, there was evidence of a willful, premeditated, and deliberate first degree murder under Pen C § 189, with special circumstances that included murder by torture and racially motivated killing. In re Rozzo (Cal. App. 4th Dist. Mar. 16, 2009), 172 Cal. App. 4th 40, 91 Cal. Rptr. 3d 85, 2009 Cal. App. LEXIS 359.

Some evidence supported the California Governor's reversal of the California Board of Parole Hearings' grant of parole to an inmate who was serving an indeterminate sentence of 16 years to life for second-degree murder with a weapon use enhancement where the inmate's failure to accept the full extent of her responsibility for the murder rendered the circumstances of that offense relevant to her current level of dangerousness. Despite having entered a plea to second-degree murder, with the requisite element of an intentional killing, the inmate continued to deny she had any such intent, and her description of the circumstances leading to the murder also differed markedly from the facts of the offense as related by other witnesses. In re Taplett (Cal. App. 3d Dist. Aug. 17, 2010), 188 Cal. App. 4th 440, 115 Cal. Rptr. 3d 565, 2010 Cal. App. LEXIS 1591.

42. Disclosure

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In the penalty phase of a capital murder trial, the State failed to disclose material favorable evidence, as required by the Fourteenth Amendment, specifically, a letter detailing an admission by the State's star witness that the witness, rather than the accused, committed a prior murder. Because the prior murder was the only aggravating factor, the court reversed the death penalty imposed under Pen C §§ 187, 189, 190.2(a)(17), as well as the second degree murder conviction for the prior crime. In re Miranda (Cal. May 5, 2008), 43 Cal. 4th 541, 76 Cal. Rptr. 3d 172, 182 P.3d 513, 2008 Cal. LEXIS 4819.

43. Sentencing

In a first degree murder trial, the evidence was sufficient to find that defendant had the specific intent to promote, further, or assist in "any criminal conduct" by gang members, as required for gang enhancement under Pen C § 186.22(b)(1), because the term "any criminal conduct" was broad enough to encompass the charged murder itself, as well as other conduct. People v. Vazquez (Cal. App. 2d Dist. Oct. 13, 2009), 178 Cal. App. 4th 347, 100 Cal. Rptr. 3d 351, 2009 Cal. App. LEXIS 1663.

In a capital murder case, the trial court did not err during the penalty phase in redacting statements made by defendant to mental health experts that tended to incriminate his codefendants and in concluding that a joint penalty trial could still proceed. Given that the jury was instructed to, and obligated to, give individualized sentencing determinations to each defendant, any prejudice from the jury's being prevented from hearing statements that might have raised defendant's codefendants' culpability without significantly changing his own was minimal at most. People v. Gamache (Cal. Mar. 18, 2010), 48 Cal. 4th 347, 106 Cal. Rptr. 3d 771, 227 P.3d 342, 2010 Cal. LEXIS 1914, cert. denied, (U.S. Nov. 29, 2010), 562 U.S. 1083, 131 S. Ct. 591, 178 L. Ed. 2d 514, 2010 U.S. LEXIS 9043.

Defendant's sentence of death was not disproportionate to his personal culpability in light of the evidence that defendant intended to kill his child and that the torture inflicted by defendant on the child was a concurrent cause of the child's death. People v. Jennings (Cal. Aug. 12, 2010), 50 Cal. 4th 616, 114 Cal. Rptr. 3d 133, 237 P.3d 474, 2010 Cal. LEXIS 7728.

In a case in which defendant was convicted of assault on a child committed with force likely to cause great bodily injury resulting in death and of second-degree murder, the trial court did not err in finding that defendant was ineligible for conduct credit pursuant to Pen C, § 2933.2(c), after it stayed execution of sentence for the murder conviction pursuant to Pen C § 654 because the "notwithstanding" language found in § 2933.2(c), operated to prevent any reduction of his term of imprisonment, despite the general provisions of § 654. The circumstance that execution of sentence for defendant's murder conviction was stayed pursuant to § 654 did not alter the reality that he was a person who "[wa]s convicted" of the crime of murder within the meaning of § 2933.2(a), and that as a consequence he fell within § 2933.2(c)'s target population. People v. Duff (Cal. Aug. 19, 2010), 50 Cal. 4th 787, 114 Cal. Rptr. 3d 233, 237 P.3d 558, 2010 Cal. LEXIS 8099.

Sentence of 25 years to life for first degree felony murder was not cruel and unusual punishment under the Eighth Amendment or Cal. Const. Art I, §§ 6 & 17, in a case arising from a collision that occurred when defendant was fleeing the scene of the burglary. People v. Russell (Cal. App. 4th Dist. Aug. 23, 2010), 187 Cal. App. 4th 981, 114 Cal. Rptr. 3d 668, 2010 Cal. App. LEXIS 1465.

It was Sixth Amendment error to excuse for cause a prospective juror who did not have strong views on capital punishment but said she could vote for it; contrary to the trial court's impression, the juror made no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case. A person is not substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications. People v. Pearson (Cal. Jan. 9, 2012), 53 Cal. 4th 306, 135 Cal. Rptr. 3d 262, 266 P.3d 966, 2012 Cal. LEXIS 2.

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Where robbery and sexual assaults were pursued with different criminal objectives than murder, they could be punished separately from the murder. People v. Pearson (Cal. Jan. 9, 2012), 53 Cal. 4th 306, 135 Cal. Rptr. 3d 262, 266 P.3d 966, 2012 Cal. LEXIS 2.

Sentence of life without possibility of parole was not disproportionate for a defendant who, at 17 years of age, murdered his aunt by stabbing her 28 times during a sexual assault and expressed no remorse. People v. Gutierrez (Cal. App. 2d Dist. Sept. 24, 2012), 209 Cal. App. 4th 646, 147 Cal. Rptr. 3d 249, 2012 Cal. App. LEXIS 1000, review granted, depublished, (Cal. Jan. 3, 2013), 150 Cal. Rptr. 3d 567, 290 P.3d 1171, 2013 Cal. LEXIS 231, rev'd, (Cal. May 5, 2014), 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421, 324 P.3d 245, 2014 Cal. LEXIS 3135.

Sentence of 25 years to life was not disproportionate for first degree murder, even though defendant was not present when an accomplice was killed during a robbery, because defendant was the mastermind of the home-invasion robbery and knew his accomplices were going to use a gun to accomplish his goals. People v. Johnson (Cal. App. 2d Dist. Nov. 19, 2013), 221 Cal. App. 4th 623, 164 Cal. Rptr. 3d 505, 2013 Cal. App. LEXIS 931.

In a first murder case in which defendant stabbed a marijuana dealer to death in order to rob him of marijuana defendant could not afford to buy, defendant's sentence of life imprisonment without the possibility of parole did not constitute cruel and unusual punishment. The planning in which defendant engaged, as well as the unprovoked and vicious nature of the crime, led to the conclusion that defendant's sentence was not grossly disproportionate to the nature of the offense or to his culpability. People v. Abundio (Cal. App. 2d Dist. Dec. 4, 2013), 221 Cal. App. 4th 1211, 165 Cal. Rptr. 3d 183, 2013 Cal. App. LEXIS 971, modified, (Cal. App. 2d Dist. Jan. 3, 2014), 2014 Cal. App. LEXIS 2.

Court reversed and remanded sentences for felony murder, carjacking, robbery, and kidnapping for purposes of committing robbery because it was unclear what crime constituted the underlying felony for purposes of a multiple punishment analysis. Although the trial court stayed the robbery sentence, but it was unclear if that stay related to the felony murder or to the kidnapping for purposes of robbery. People v. Dubose (Cal. App. 4th Dist. Mar. 25, 2014), 224 Cal. App. 4th 1416, 169 Cal. Rptr. 3d 599, 2014 Cal. App. LEXIS 273, modified, (Cal. App. 4th Dist. Apr. 17, 2014), 2014 Cal. App. LEXIS 343, review denied, ordered not published, (Cal. July 9, 2014), 2014 Cal. LEXIS 4909.

Trial court has the authority to select the underlying felony for a felony murder when it relates to conducting a multiple punishment analysis. People v. Dubose (Cal. App. 4th Dist. Mar. 25, 2014), 224 Cal. App. 4th 1416, 169 Cal. Rptr. 3d 599, 2014 Cal. App. LEXIS 273, modified, (Cal. App. 4th Dist. Apr. 17, 2014), 2014 Cal. App. LEXIS 343, review denied, ordered not published, (Cal. July 9, 2014), 2014 Cal. LEXIS 4909.

Death penalty was not disproportionate because defendant alone committed three burglary and robbery murders, purely for financial gain. Although the three victims cooperated fully with defendant's demands and offered no resistance, he nevertheless shot and killed them one by one. People v. Cunningham (Cal. July 2, 2015), 61 Cal. 4th 609, 189 Cal. Rptr. 3d 737, 352 P.3d 318, 2015 Cal. LEXIS 4523, cert. denied, (U.S. Jan. 25, 2016), 136 S. Ct. 989, 194 L. Ed. 2d 11, 2016 U.S. LEXIS 899.

Prison terms of 25 years to life for robbery murder were not disproportionate, even though defendants did not directly participate in the killing and were juveniles at the time of the crime, because they willingly participated in armed robbery and events leading up to the murder, including driving a stolen getaway car. People v. Jordan (Cal. App. 4th Dist. Mar. 16, 2015), 235 Cal. App. 4th 198, 185 Cal. Rptr. 3d 174, 2015 Cal. App. LEXIS 240, review granted, depublished, (Cal. July 8, 2015), 189 Cal. Rptr. 3d 207, 351 P.3d 330, 2015 Cal. LEXIS 4875, vacated, transferred, (Cal. Aug. 17, 2016), 211 Cal. Rptr. 3d 654, 385 P.3d 840, 2016 Cal. LEXIS 6797.

It was not cruel and unusual punishment to impose the minimum sentence of 50 years to life for a robbery murder and related offenses committed when defendant was 17 years old. The trial court complied with constitutional requirements when it considered, among other things, that defendant was not particularly young, and he planned the sophisticated crimes, had a positive emotional reaction to intimidating and terrifying a victim, and felt no

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remorse. People v. Jordan (Cal. App. 4th Dist. Mar. 16, 2015), 235 Cal. App. 4th 198, 185 Cal. Rptr. 3d 174, 2015 Cal. App. LEXIS 240, review granted, depublished, (Cal. July 8, 2015), 189 Cal. Rptr. 3d 207, 351 P.3d 330, 2015 Cal. LEXIS 4875, vacated, transferred, (Cal. Aug. 17, 2016), 211 Cal. Rptr. 3d 654, 385 P.3d 840, 2016 Cal. LEXIS 6797.

Prison terms of 25 years to life for a robbery murder and related offenses committed when defendants were 17 years old were not de facto terms of life without parole because it was possible defendants would be paroled in their forties; therefore the Eighth Amendment did not require the trial court to consider factors relating to youth. People v. Jordan (Cal. App. 4th Dist. Mar. 16, 2015), 235 Cal. App. 4th 198, 185 Cal. Rptr. 3d 174, 2015 Cal. App. LEXIS 240, review granted, depublished, (Cal. July 8, 2015), 189 Cal. Rptr. 3d 207, 351 P.3d 330, 2015 Cal. LEXIS 4875, vacated, transferred, (Cal. Aug. 17, 2016), 211 Cal. Rptr. 3d 654, 385 P.3d 840, 2016 Cal. LEXIS 6797.

Given the lack of evidence that defendant planned anything more dangerous than a garden-variety armed robbery, reckless disregard to the risk to human life, for purposes of the felony murder special circumstance, was not established by defendant's actions after the murder, which included that he made no attempt to help the victim and that he made a callous comment about the victim when advising an accomplice not to tell anyone what happened. In re Taylor (Cal. App. 1st Dist. Apr. 19, 2019), 246 Cal. Rptr. 3d 342, 34 Cal. App. 5th 543, 2019 Cal. App. LEXIS 359.

Evidence of a defendant's actions after a murder betraying an indifference to the loss of life does not, standing alone, establish that the defendant knowingly created a grave risk of death for purposes of the felony murder special circumstance. In re Taylor (Cal. App. 1st Dist. Apr. 19, 2019), 246 Cal. Rptr. 3d 342, 34 Cal. App. 5th 543, 2019 Cal. App. LEXIS 359.

For purposes of a robbery-murder special circumstance, a finding that defendant was a major participant or demonstrated reckless indifference to human life was not supported by evidence that he supplied the guns that were used in the crime, knew the guns were loaded, and agreed with a suggestion that he and his friends "jack" someone. There was no evidence that the killing was planned or even contemplated; rather, it appeared the shooting occurred in response to the victim resisting and striking the shooter. In re Ramirez (Cal. App. 5th Dist. Feb. 20, 2019), 243 Cal. Rptr. 3d 753, 32 Cal. App. 5th 384, 2019 Cal. App. LEXIS 134.

44. Rights of Defendant

In a 1996 capital murder trial under Pen C §§ 187, 189, 190.2, there was no error in granting defendant's request to represent himself based on federal and state case law equating competence for self-representation with competence to stand trial. At the time of trial, California had not set a higher or different competence standard. People v. Taylor (Cal. Dec. 24, 2009), 47 Cal. 4th 850, 102 Cal. Rptr. 3d 852, 220 P.3d 872, 2009 Cal. LEXIS 13168, cert. denied, (U.S. Oct. 4, 2010), 562 U.S. 885, 131 S. Ct. 212, 178 L. Ed. 2d 128, 2010 U.S. LEXIS 7104.

Magistrate judge properly found that a California prisoner who was convicted of two counts of first degree murder under Pen C § 189 and of multiple-murder special circumstances under Pen C § 190.2(a)(3) was entitled to habeas relief under 28 U.S.C.S. § 2254 because the error of admitting his confession and testimony in contravention of clearly established law under the U.S. Supreme Court's decision in Harrison was not harmless error in relation to the elements of premeditation and deliberation; however, the error of admitting the prisoner's confession and testimony was harmless with respect to the lesser-included offense of second degree murder. Lujan v. Garcia (C.D. Cal. Mar. 30, 2010), 2010 U.S. Dist. LEXIS 31468, aff'd in part, vacated in part, (9th Cir. Cal. Oct. 29, 2013), 734 F.3d 917, 2013 U.S. App. LEXIS 22017.

In the penalty phase of a capital murder trial, the trial court properly advised defendant concerning the dangers of self-representation; it was not misleading for the trial court to observe that it did not make sense to dismiss counsel at that point of the trial, or that defense counsel knew all about the case and had done a great job. People v.

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Williams (Cal. May 6, 2013), 56 Cal. 4th 630, 156 Cal. Rptr. 3d 214, 299 P.3d 1185, 2013 Cal. LEXIS 4004, cert. denied, (U.S. Feb. 24, 2014), 571 U.S. 1197, 134 S. Ct. 1279, 188 L. Ed. 2d 298, 2014 U.S. LEXIS 1629.

Permitting the prosecutor to ask unlimited leading questions of a victim, who had identified defendant as the shooter from photographic lineup but refused to answer questions when he testified, deprived defendant of the right under the Confrontation Clause to cross-examine on what was tantamount to devastating adverse testimony. People v. Murillo (Cal. App. 2d Dist. Nov. 13, 2014), 231 Cal. App. 4th 448, 179 Cal. Rptr. 3d 891, 2014 Cal. App. LEXIS 1024, modified, (Cal. App. 2d Dist. Dec. 9, 2014), 2014 Cal. App. LEXIS 1120.

Defendant's stipulation to a bench trial for the guilt phase of a capital murder trial was not tantamount to a plea of guilty; defendant enjoyed a full court trial and counsel conceded neither guilt nor the necessary elements of the various offenses. People v. Cunningham (Cal. July 2, 2015), 61 Cal. 4th 609, 189 Cal. Rptr. 3d 737, 352 P.3d 318, 2015 Cal. LEXIS 4523, cert. denied, (U.S. Jan. 25, 2016), 136 S. Ct. 989, 194 L. Ed. 2d 11, 2016 U.S. LEXIS 899.

Self-representing defendant's express waiver of the right to jury trial was invalid as to the penalty phase of a capital murder trial but valid as to the guilt phase. People v. Daniels (Cal. Aug. 31, 2017), 221 Cal. Rptr. 3d 777, 400 P.3d 385, 3 Cal. 5th 961, 2017 Cal. LEXIS 6769.

In a trial for the attempted murder of a police officer, defendant's Sixth Amendment right to assert innocence was violated by counsel's decision, in pursuit of a lack-of-premeditation defense and over defendant's repeated objections, to admit that defendant was driving the car that seriously injured the officer. People v. Flores (Cal. App. 4th Dist. Apr. 12, 2019), 246 Cal. Rptr. 3d 77, 34 Cal. App. 5th 270, 2019 Cal. App. LEXIS 341.

Notes to Unpublished Decisions

1. Felony Murder Rule: Generally

2. Second Degree Murder: Malice

1. Felony Murder Rule: Generally

Unpublished decision: Habeas petitioner was not entitled to relief under 28 USCS § 2254 because the jury instructions at his trial properly instructed the jury regarding the relationship between the underlying felony and the homicide and also informed the jury of its responsibility to find all the elements of felony-murder in violation of Pen C § 189. Lopez v. Stainer (9th Cir. Cal. Oct. 9, 2012), 494 Fed. Appx. 778, 2012 U.S. App. LEXIS 20925, cert. denied, (U.S. Mar. 25, 2013), 568 U.S. 1253, 133 S. Ct. 1640, 185 L. Ed. 2d 624, 2013 U.S. LEXIS 2400.

2. Second Degree Murder: Malice

Unpublished decision: District court erred when it denied a state inmate's habeas corpus petition in full because the record showed that a state appeals court decision on the inmate's double jeopardy claim was contrary to the U.S. Supreme Court's decision in *Morris v. Mathews*: (1) the inmate contended that his retrial was tainted when a state prosecutor introduced his original information into the evidence, which information contained two charges, including an assault charge, of which he had previously been acquitted; (2) in order for the double jeopardy violation to constitute reversible error under *Morris*, the inmate had to demonstrate a reasonable probability that he would not have been convicted of a non-jeopardy-barred offense, absent the presence of the jeopardy-barred offenses at his retrial; (3) the record revealed that the jury at the retrial convicted the inmate of all of the charges in the original information, including the two double jeopardy-barred charges, and that the state prosecutor relied heavily upon the assault charge to establish malice, which was a required element of second degree murder in California; and (4) the inmate was entitled to federal habeas relief with regard to his second degree murder conviction because it was unlikely that he would have been convicted of that charge absent the introduction of the original information, which

opened the door to the jury's consideration of the assault charge during the retrial. *Damian v. Vaughn (9th Cir. Cal. June 21, 2006), 186 Fed. Appx. 775, 2006 U.S. App. LEXIS 15869.*

Research References & Practice Aids

Cross References:

"Willfully": Pen C § 7 subd 1.

"Knowingly": Pen C § 7 subd 5.

Evidence of voluntary intoxication with regard to specific intent: Pen C § 22.

Diminished capacity; insanity: Pen C § 25.

Persons capable of committing crimes: Pen C § 26.

Diminished capacity, diminished responsibility, and irresistible impulse: Pen C § 28.

Expert testimony as to requisite mental state: Pen C § 29.

"Murder": Pen C § 187.

"Malice": Pen C § 188.

Burden of proving justification or excuse in homicide cases: Pen C § 189.5.

Punishment for murder: Pen C §§ 190 et seq.

"Manslaughter": Pen C § 192.

Excusable homicide: Pen C § 195.

Justifiable homicide: *Pen C §§ 196, 197.*

Bare fear may not justify killing: Pen C § 198.

Presumption in favor of one who uses deadly force against intruder: Pen C § 198.5.

"Mayhem": Pen C § 203.

"Robbery": Pen C § 211.

"Rape": Pen C § 261.

Commission of lewd or lascivious act against child under 14 years of age: Pen C § 288.

Arson: Pen C §§ 450 et seq.

"Burglary": Pen C § 459.

Accusatory pleading," Pen C §§ 950 et seq.

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Insanity hearing: *Pen C § 1026*.

Jury to determine degree of crime: *Pen C § 1157*.

Court to determine degree of crime upon plea of guilty or where no jury: *Pen C § 1192*.

Possession of armor penetrating ammunition in commission of felony: *Pen C § 12022.2*.

Possession, transport or sale of armor penetrating ammunition: *Pen C §§ 12320 et seq.*

Jurisprudences

Cal Jur 3d (Rev) Criminal Law §§ 230 et seq.

Law Review Articles:

All conspirators as guilty of murder where one kills another during perpetration of robbery. 27 Cal. L. Rev. 612.

Partial insanity as affecting degree of crime. 34 Cal. L. Rev. 625.

Murder committed by lying in wait. 42 Cal. L. Rev. 337.

New limitations on second degree felony murder in California. 55 Cal. L. Rev. 329.

California death penalty trials and appeals: power to reduce the degree of the crime. 56 Cal. L. Rev. 1428.

Felony murder rule. 60 Cal. L. Rev. 856.

Criminal responsibility for death of co-felon. 7 Cal. W. L. Rev. 522.

People v Dillon: Felony murder in California. 21 Cal. W. L. Rev. 546.

California Supreme Court in 1968–1969: first degree murder. 58 CLR 238.

Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness. *43 Hastings Const. L.Q. 1*.

Clarification of homicide law from recent decisions. 1 Hastings L.J. 32.

Arson—strict application of felony—murder doctrine. 7 Hastings L.J. 314.

Murder by lying in wait in California. 8 Hastings L.J. 100.

Limitations on the applicability of the felony—murder rule in California. 22 Hastings L.J. 1327.

Application of concept of diminished capacity to murder. 4 Loy. L.A. L. Rev. 317.

People v Patterson: California's second degree felony—murder doctrine at "the brink of logical absurdity." 24 Loy. L.A. L. Rev. 195.

The case for a statutory second degree felony—murder rule in California. 16 Pac. L.J. 271.

Reviewed of selected 1990 California legislation—Proposition 115: The Crime Victims Justice Reform Act. 22 Pac. L.J. 1010.

Victims' rights symposium. 23 Pac. L.J. 815.

Proposition 115 preliminary hearings: Sacrificing reliability on the altar of expediency? 23 Pac. L.J. 1131.

Cal Pen Code § 189

Requirement of manslaughter instructions where evidence adduced showing defendant's diminished capacity and intoxication. 4 San Diego L. Rev. 173.

Taming the felony–murder rule. 14 Santa Clara Law. 97.

Elimination of element of “scrambling possession” for application of felony–murder rule to robbery. 14 Santa Clara Law. 188.

Constructive intent to commit murder. 4 S.C. L. Rev. 324.

Classification of murder of first or second degree. 9 S.C. L. Rev. 112, 19.

Proximate cause in the law of homicide. 12 S.C. L. Rev. 19.

Murder in second degree based on assault and battery without intent to kill. 15 S.C. L. Rev. 371.

Murder perpetrated by torture. 19 S.C. L. Rev. 417.

Propriety of conviction of manslaughter where evidence shows only murder of second degree or nothing. 23 S.C. L. Rev. 264.

Intent to kill as affecting degree of murder. 24 S.C. L. Rev. 288.

Felony murder doctrine. 30 S.C. L. Rev. 357.

Reflections on felony–murder. (1980–81) 12 Sw. U. L. Rev. 413.

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Old Wine in Old Bottles: California Mental Defenses at the Dawn of the 21st Century. 32 Sw. U. L. Rev. 75.

Lying in wait murder. 6 Stan. L. Rev. 345.

Mens rea and murder by torture. 10 Stan. L. Rev. 672.

California Supreme Court assaults felony–murder rule. 22 Stan. L. Rev. 1059.

Diminished capacity defense to felony–murder. 23 Stan. L. Rev. 799.

Merger and the California felony–murder rule. 20 UCLA L. Rev. 250.

Reversible error in first degree murder convictions: The Modesto Rule re–examined. 7 U.S.F. L. Rev. 1.

Lying in wait: a general circumstance. 30 U.S.F. L. Rev. 1249.

Premeditation and Deliberation in California: Returning to a Distinction Without a Difference. 36 U.S.F. L. Rev. 261.

Applying the felony murder rule to drug distributors: Speculations and implications. 11 Whittier L. Rev. 243.

Second degree felony–murder rule and child abuse in California: 13 J. Juv. L. 1.

A.B.A.J.

Application of felony–murder doctrine. 58 A.B.A.J. 204.

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Witkin & Epstein, Criminal Law (4th ed), Defenses §§ 229, 230.

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10 Witkin Summary (10th ed) Parent and Child § 200.

Jury Instructions

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 520, Murder With Malice Aforethought.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 521, Murder:Degrees.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 540B, Felony Murder: First Degree--Coparticipant Allegedly Committed Fatal Act.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 540A, Felony Murder: First Degree--Defendant Allegedly Committed Fatal Act.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 540C, Felony Murder: First Degree--Other Acts Allegedly Caused Death.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 541B, Felony Murder: Second Degree--Coparticipant Allegedly Committed Fatal Act.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 541A, Felony Murder: Second Degree--Defendant Allegedly Committed Fatal Act.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 541C, Felony Murder: Second Degree--Other Acts Allegedly Caused Death.

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Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 601, Attempted Murder: Deliberation and Premeditation.

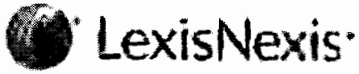
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Hierarchy Notes:

Cal Pen Code Pt. 1, Tit. 8, Ch. 1

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1. Cal Pen Code § 1170.95

Client/Matter: -None-

Cal. Penal Code § 1170.95(a):

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Document (1)

1. *Cal Pen Code § 1170.95*

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Cal Pen Code § 1170.95

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Deering's California Codes Annotated > PENAL CODE (§§ 1 — 34370) > Part 2 Of Criminal Procedure (§§ 681 — 1620) > Title 7 Of Proceedings After the Commencement of the Trial and Before Judgment (Chs. 1 — 7) > Chapter 4.5 Trial Court Sentencing (Art. 1) > Article 1 Initial Sentencing (§§ 1170 — 1170.95)

§ 1170.95. Felony murder; Petition for conviction vacated and resentencing; Requirements of petition; Hearing

(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b)

(1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response

Cal Pen Code § 1170.95

is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d)

(1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentedenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentedenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

History

Added Stats 2018 ch 1015 § 4 (SB 1437), effective January 1, 2019.

Annotations

Notes

Prior Law:

Note—

Prior Law:

Former Pen C § 1170.95, relating to subordinate terms for consecutive residential burglaries, was added Stats 1982 ch 1296 § 1, as *Pen C § 1170.8*, amended and renumbered by Stats 1983 ch 142 § 122, amended Stats 1987 ch 394 § 1, Stats 1988 ch 244 § 1, Stats 1988 ch 811 § 2, Stats 1993 ch 162 § 4 (AB 112), Stats 1997 ch 750 § 7 (SB 721), Stats 1998 ch 926 § 5 (SB 1900), and repealed Stats 2000 ch 689 § 2 (AB 1808).

Note—

Stats 2018 ch 1015 provides:

SECTION 1. The Legislature finds and declares all of the following:

- (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
- (b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
- (c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
- (d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
- (e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.
- (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

Notes to Decisions

1. Generally

2. Applicability

3. Particular Cases

1. Generally

Petitioning procedure specified in this statute is the avenue by which defendants with nonfinal sentences of the type specified in subdivision (a) of this statute must pursue relief; the statute does not distinguish between persons whose sentences are final and those whose sentences are not, and the legislature intended convicted persons to proceed via the statute's resentencing process rather than avail themselves of Cal. Sen. Bill No. 1437's ameliorative benefits on direct appeal. People v. Martinez (Cal. App. 2d Dist. Jan. 24, 2019), 242 Cal. Rptr. 3d 860, 31 Cal. App. 5th 719, 2019 Cal. App. LEXIS 68, modified, (Cal. App. 2d Dist. Feb. 13, 2019), 2019 Cal. App. LEXIS 119.

Where the juvenile court has sustained a murder allegation on a natural and probable consequences theory, a juvenile may, pursuant to the provisions of Pen C § 1170.95, petition the court to have that conviction vacated and the corresponding commitment (or other disposition) recalled. In re R.G. (Cal. App. 2d Dist. May 13, 2019), 247 Cal. Rptr. 3d 24, 35 Cal. App. 5th 141, 2019 Cal. App. LEXIS 429.

2. Applicability

Defendant, who was convicted of murder after instructions were given that allowed the jury to convict him of first-degree murder pursuant to either a felony-murder theory or the natural and probable consequences doctrine, as both were defined prior to the effective date of Cal. Sen. Bill No. 1437, could not, on direct appeal, avail himself of the ameliorative benefits of the senate bill, but instead, had to file a *Pen C § 1170.95*, petition in the trial court to seek retroactive relief under the senate bill. *People v. Martinez* (Cal. App. 2d Dist. Jan. 24, 2019), 242 Cal. Rptr. 3d 860, 31 Cal. App. 5th 719, 2019 Cal. App. LEXIS 68, modified, (Cal. App. 2d Dist. Feb. 13, 2019), 2019 Cal. App. LEXIS 119.

Defendant minor, who had been convicted of second degree murder based on the natural and probable consequence theory of murder, was ineligible for retroactive relief under Senate Bill No. 1437 (2017–2018 Reg. Sess.), because he did not file a petition to vacate the conviction under *Pen C § 1170.95*. *In re R.G.* (Cal. App. 2d Dist. May 13, 2019), 247 Cal. Rptr. 3d 24, 35 Cal. App. 5th 141, 2019 Cal. App. LEXIS 429.

In a case in which the appellate court requested supplemental briefing from the parties on the effect of Senate Bill No. 1437 on one of defendant's first degree murder convictions, the appellate court concluded that defendant was not entitled to relief under Senate Bill No. 1437. The statutory changes resulting from Senate Bill No. 1437 did not benefit defendant such that it would lessen his punishment and entitle him to relief under the amended law. *People v. Gutierrez-Salazar* (Cal. App. 5th Dist. Aug. 6, 2019), 38 Cal. App. 5th 411, 2019 Cal. App. LEXIS 718.

Whether defendants were actually entitled to the benefits of Senate Bill No. 1437 (2017-2018 Reg. Sess.) had to be considered in the first instance by the trial court, following remand, pursuant to the procedures created by *Pen C § 1170.95*, not on direct appeal. *People v. Lopez* (Cal. App. 2d Dist. Aug. 21, 2019), 2019 Cal. App. LEXIS 773.

3. Particular Cases

Appeals court declined to address the merits of a claim relating to changes in the application of the natural and probable consequences doctrine under Senate Bill 1437, which was enacted while appeal was pending, because defendants had not yet petitioned for relief in superior court under *Pen C § 1170.95*, which prescribes the specific avenue for convicted defendants to seek retroactive relief. *People v. Anthony* (Cal. App. 1st Dist. Mar. 8, 2019), 244 Cal. Rptr. 3d 499, 32 Cal. App. 5th 1102, 2019 Cal. App. LEXIS 199.

Research References & Practice Aids

Hierarchy Notes:

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SENATE COMMITTEE ON APPROPRIATIONS

Senator Ricardo Lara, Chair
2017 - 2018 Regular Session

SB 1437 (Skinner) - Accomplice liability for felony murder

Version: February 16, 2018

Policy Vote: PUB. S. 6 - 1

Urgency: No

Mandate: Yes

Hearing Date: May 14, 2018

Consultant: Shaun Naidu

This bill meets the criteria for referral to the Suspense File.

Bill Summary: SB 1437 would prohibit the application of the felony-murder rule to a participant to or conspirator of the underlying felony who did not commit the homicidal act personally.

Fiscal Impact:

- Court: Unknown, potentially-major costs in the millions of dollars to the courts to process and adjudicate resentencing petitions. Costs would be dependent on the number of individuals who would file a petition for resentencing pursuant to this bill. (General Fund*)
- Department of Corrections and Rehabilitation (CDCR): Unknown, potentially-major costs in the hundreds of thousands of dollars to the millions of dollars to the department to supervise and transport inmates from state facilities to the appropriate courthouses for resentencing hearings. Actual costs would be dependent on the number of individuals whom CDCR is required to transport and how many inmates the department could transport and supervise per excursion. (General Fund)

Additionally, CDCR anticipates administrative workload costs of about \$200,000 for case records audit and review of resentencing documents, data and document entry into the Strategic Offender Management System (SOMS), and release processing and data entry into the Electronic Records Management System. (General Fund)

Unknown, potentially-major out-year or current-year savings in reduced incarceration expenses for inmates resentenced to a shorter term of incarceration. The proposed 2018-19 per capita cost to house a person in a state prison is \$80,729 annually, with an annual marginal rate per inmate of between \$10,000 and \$12,000. The average contract-prison rate cost per inmate is over \$30,000 annually. The actual savings would be dependent on the number of individuals who successfully petition the court for resentencing and whose sentences to state prison are reduced to a shorter term than what was initially imposed. When these averted admissions are compounded, the savings could reach into the millions of dollars annually. (General Fund)

- Local costs: Unknown costs to county District Attorneys' Offices and Public Defenders' Offices to litigate petitions for resentencing. These costs likely would be reimbursable by the state, the extent to which would be determined by the Commission on State Mandates. (General Fund, local funds)

*Trial Court Trust Fund

Background: California law defines murder as “the unlawful killing of a human being or a fetus with malice aforethought.” (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter due to the additional element of malice, which may be expressed or implied. Murder is further delineated into first and second degrees. Depending on the associated circumstances of the offense, first-degree murder carries the possible punishments of death, life in prison without the possibility of parole, or a term in state prison of twenty-five years to life. First-degree murder, in part, is a murder that is committed in the perpetration of, or attempted perpetration of, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Any murder not enumerated as first-degree murder in statute is second-degree murder, which carries a punishment of a term in state prison of fifteen years to life.

California voters passed Proposition 8 (1982), which created a statutory definition of a “serious felony” and enacted what is commonly known as the Three Strikes Law. Both the serious felony list and the Three Strikes Law were later amended by the voters with Proposition 21 (2000) and Proposition 36 (2012), respectively. The Three Strikes Law requires increased penalties for certain recidivist persons in addition to any other enhancement or penalty provisions that may apply, including individuals with current and prior convictions of a serious felony, as specified.

The felony-murder rule (or doctrine) can result in a first-degree or a second-degree murder conviction. The rule creates culpability for murder for people who kill another person during the commission of a felony. The culpability extends to accomplices and co-conspirators. Moreover, the death does not need to be in furtherance of the felony offense and may be accidental.

First-degree felony murder takes place when a death occurs during the commission of one of the enumerated crimes associated with first-degree murder. Second-degree felony murder occurs when a death results from the commission of a felony that (1) has not been included in the first-degree murder category and (2) is, objectively, “inherently dangerous” to human life. The court has held that a felony is inherently dangerous when it cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal.3d 824, 833.)

Proposed Law: This bill would:

- Prohibit malice from being imputed to a person based solely on his or her participation in a crime.
- Prohibit a participant or conspirator in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.
- Prohibit a participant or conspirator in the perpetration or attempted perpetration of one of the specified first-degree murder felonies in which a death occurs from being liable for murder, unless the person:
 - Personally committed the homicidal act;
 - Acted with premeditated intent to aid and abet an act wherein a death would occur; or,
 - Was a major participant in the underlying felony and acted with reckless indifference to human life.
- Include in the list of serious felonies the commission of a felony inherently dangerous to human life wherein a person was killed.

- Provide a means of resentencing a person when all of the following apply:
 - A complaint, information, or indictment was filed against him or her that allowed the prosecution to proceed under a theory of first-degree felony murder, second-degree felony murder, or murder under the natural and probable consequences doctrine;
 - The person was sentenced for first-degree or second-degree murder or accepted a plea offer in lieu of a trial at which he or she could be convicted for first-degree or second-degree murder; and,
 - The person could not be charged with murder after the enactment of this bill.
- Provide that the court cannot, through this resentencing process, remove a strike from the petitioner's record.

Related Legislation: SCR 48 (Skinner, Ch. 175, Res. 2017) resolved that the Legislature recognizes a need for statutory changes to the felony-murder rule to more equitably sentence persons in accordance with their involvement in the crime.

AB 2195 (Bonilla, 2016) would have required the collection and reporting, as specified, of data on the number of persons, by race and gender, charged with and convicted of felony murder. AB 2195 was held on the Suspense File of the Assembly Committee on Appropriations.

SB 878 (Hayden, 1999) would have required the court, after a conviction of more than one defendant of first-degree felony murder, to determine, prior to imposing the sentence on the defendant who did not physically or directly commit the murder, whether the imposition of a sentence of first-degree murder is proportionate to the offense committed by the defendant and to the defendant's culpability of the offense, based on specified factors. SB 878 failed passage on the Senate floor.

Staff Comments: As the abstract of judgement reflects only the degree of a conviction for murder, it is difficult to determine the number of individuals incarcerated for murder whose basis of conviction is the felony-murder rule. The Department of Corrections and Rehabilitation similarly does not track this information. According to information from the author, as quoted by the analysis of this bill by the Senate Committee on Public Safety, 72 percent of women currently incarcerated in California with a life sentence did not personally commit the homicidal act.

With respect to the overall population in state prison for a murder conviction, CDCR reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals, would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in additional workload costs to the court of about \$7.6 million. While the court is not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources.

Similarly, SB 1437 would produce additional costs to CDCR to transport petitioners to and from court hearings. There are many factors that affect the costs of out-of-institution transportation, including each inmate's escape risk and in-custody behavior,

the distance from an inmate's housing facility to the courthouse, and the pace at which a court moves through its docket. Presuming that two correctional officers with regular hourly wages would transport one inmate with a total travel and court time of four hours, which is a conservative assumption, this bill would cost the department almost \$300 per hearing. If the court and travel time were extended, department costs would rise commensurately. If the department were able to transport multiple inmates to a courthouse at one time, the per-inmate costs would be lowered in turn.

-- END --

Cal Gov Code § 17500

Deering's California Codes are current through Chapters 1-6, 18, and 22 of the 2019 Regular Session, including all legislation effective June 26, 2019 or earlier.

Deering's California Codes Annotated > GOVERNMENT CODE (§§ 1 — 50000–500049) > Title 2 Government of the State of California (Divs. 1 — 5) > Division 4 Fiscal Affairs (Pts. 1 — 8) > Part 7 State-Mandated Local Costs (Chs. 1 — 6) > Chapter 1 Legislative Intent (§ 17500)

§ 17500. Legislative findings and declarations

The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.

It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution. Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner in accordance with the requirements of Section 6 of Article XIII B of the California Constitution.

History

Added Stats 1984 ch 1459 § 1. Amended Stats 2004 ch 890 § 2 (AB 2856).

Annotations

Notes

Amendments:

Note—

Amendments:

2004 Amendment:

Deleted "and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the constitution" at the end of the first sentence in the second paragraph.

Note—

Stats 2005 ch 72 provides:

SEC. 17. (a) Notwithstanding any other provision of law, the Commission on State Mandates, no later than June 30, 2006, shall reconsider its test claim statement of decision in CSM-4202 on the Mandate Reimbursement Program to determine whether Chapter 486 of the Statutes of 1975 and Chapter 1459 of the Statutes of 1984 constitute a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since these statutes were enacted. If a new test claim is filed on Chapter 890 of the Statutes of 2004, the commission shall, if practicable, hear and determine the new test claim at the same time as the reconsideration of CSM-4202. The commission, if necessary, shall revise its parameters and guidelines in CSM-4485 to be consistent with this reconsideration and, if practicable, shall include a reasonable reimbursement methodology as defined in Section 17518.5 of the Government Code. If the parameters and guidelines are revised, the Controller shall revise the appropriate claiming instructions to be consistent with the revised parameters and guidelines. Any changes by the commission to the original statement of decision in CSM-4202 shall be deemed effective on July 1, 2006.

(b) Notwithstanding any other provision of law, the Commission on State Mandates shall set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM-4257) and Brown Act Reform (CSM-4469) test claims. The operative date of these actions shall be the effective date of this act. In addition, the Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions, as necessary to be consistent with any other provisions of this act.

NOTES OF DECISIONS

1. Generally

1.5. Particular Determinations

2. Legislative Intent

2.5. Construction

3. Construction with Other Law

4. Jurisdiction

1. Generally

Gov C § 17500-17630 was enacted to implement Cal Const Art XIII B § 6. County of Fresno v. State (Cal. Apr. 22, 1991), 53 Cal. 3d 482, 280 Cal. Rptr. 92, 808 P.2d 235, 1991 Cal. LEXIS 1363.

Gov C § 17556(d) declares that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. County of Fresno v. State (Cal. Apr. 22, 1991), 53 Cal. 3d 482, 280 Cal. Rptr. 92, 808 P.2d 235, 1991 Cal. LEXIS 1363.

1.5. Particular Determinations

State's practice of paying only a nominal amount for mandated programs, while indefinitely deferring the remaining costs, did not comply with the mandate reimbursement requirements of Cal Const Art XIII B § 6, and the implementing statutes contained in Gov C §§ 17500 et seq., as clearly expressed in Gov C § 17561. Thus, school districts were entitled to declaratory relief under CCP § 1060. California School Bds. Assn. v. State of California (Cal. App. 4th Dist. Feb. 9, 2011), 192 Cal. App. 4th 770, 121 Cal. Rptr. 3d 696, 2011 Cal. App. LEXIS 164.

2. Legislative Intent

In enacting Gov C §§ 17500 et seq., the Legislature established the Commission on State Mandates as a quasi-judicial body to carry out a comprehensive administrative procedure for resolving claims for reimbursement of state-mandated local costs arising out of Cal Const Art XIII B § 6. The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of Cal Const Art XIII B § 6, lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establish procedures that exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce Cal Const Art XIII B § 6. Thus, the statutory scheme contemplates that the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Redevelopment Agency v. California Comm'n on State Mandates (Cal. App. 4th Dist. Mar. 7, 1996), 43 Cal. App. 4th 1188, 51 Cal. Rptr. 2d 100, 1996 Cal. App. LEXIS 267.

2.5. Construction

Although the State may require local entities to provide new programs or services, it may not require the local entities to use their own revenues to pay for the programs. Payment at some later, undefined time is impermissible. California School Bds. Assn. v. State of California (Cal. App. 4th Dist. Feb. 9, 2011), 192 Cal. App. 4th 770, 121 Cal. Rptr. 3d 696, 2011 Cal. App. LEXIS 164.

3. Construction with Other Law

The Legislature's initial appropriation to reimburse counties for the costs of Pen C § 987.9 (funding by court for preparation of defense for indigent defendants in capital cases), was not a final and unchallengeable determination that the statute constitutes a state mandate, nor did the Commission on State Mandates err in finding that the statute is not a state mandate, despite the Legislature's finding to the contrary in a later appropriations bill. The commission was not bound by the Legislature's determination, and it had discretion to determine whether a state mandate existed. The comprehensive administrative procedures for resolution of claims arising out of Cal Const Art XIII B § 6 (Gov C §§ 17500 et seq.), are the exclusive procedures by which to implement and enforce the constitutional provision. Thus, the commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Any legislative findings are irrelevant to the issue of whether a state mandate exists, and the commission properly determined that no such mandate existed. In any event, the Legislature itself ceased to regard the provisions of Pen C § 987.9, as a state mandate in 1983. County of Los Angeles v. Commission on State Mandates (Cal. App. 2d Dist. Feb. 24, 1995), 32 Cal. App. 4th 805, 38 Cal. Rptr. 2d 304, 1995 Cal. App. LEXIS 161.

While the legislative history of an amendment to Lab C § 4707 may have evinced the understanding or belief of the Legislature that the amendment created a state mandate, such understanding or belief was irrelevant to the issue of whether a state mandate existed. The Legislature has entrusted that determination to the Commission on State

Mandates, subject to judicial review (Gov C §§ [17500](#), [17559](#)), and has provided that the initial determination by Legislative Counsel is not binding on the Commission. (Gov C § [17575](#).) *City of Richmond v. Commission on State Mandates* (Cal. App. 3d Dist. May 28, 1998), 64 Cal. App. 4th 1190, 75 Cal. Rptr. 2d 754, 1998 Cal. App. LEXIS 546.

4. Jurisdiction

The superior court had jurisdiction to adjudicate a county's assertion that the Legislature's transfer to counties of the responsibility for providing health care services for medically indigent adults constituted a new program that required state funding under Cal Const Art XIII B § [6](#) (reimbursement to local government for costs of new state-mandated program). Although the administrative procedures for determining state-mandated local costs, set forth in Gov C §§ [17500](#) et seq., are the exclusive means by which the state's obligations under Cal Const Art XIII B § [6](#), are to be determined, in this case requiring the county to resort to the statutory procedures would have unduly restricted the county's constitutional right. Other counties' test claim to determine the state's obligations, which was supposed to create an administrative process capable of resolving all disputes, was settled and dismissed without resolving the pertinent issues. This undermined the adequacy of the statutory procedures. Moreover, the county had twice filed claims for reimbursement with the Commission on State Mandates, but the commission did not respond. Requiring the county to pursue further, futile administrative procedures would have resulted in irreparable harm in light of the county's expressed intent to terminate, for lack of funding, its program for the medically indigent. *County of San Diego v. State of California* (Cal. App. 4th Dist. Apr. 18, 1995), 33 Cal. App. 4th 1787, 40 Cal. Rptr. 2d 193, 1995 Cal. App. LEXIS 364, review granted, depublished, (Cal. July 13, 1995), 46 Cal. Rptr. 2d 586, 904 P.2d 1197, 1995 Cal. LEXIS 4446, reprinted, (Cal. App. 4th Dist. Apr. 18, 1995), 38 Cal. App. 4th 1151.

In a water quality regulation dispute, Gov C §§ [17500](#) et seq., deprived the trial court of jurisdiction to consider an issue regarding state-mandated costs. *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Bd.* (Cal. App. 3d Dist. Apr. 13, 2010), 183 Cal. App. 4th 1110, 108 Cal. Rptr. 3d 290, 2010 Cal. App. LEXIS 514, modified, (Cal. App. 3d Dist. May 5, 2010), 2010 Cal. App. LEXIS 610.

Research References & Practice Aids

Jurisprudences

Cal. Forms Pleading & Practice (Matthew Bender®) ch 324 "Jurisdiction: Subject Matter Jurisdiction".

Treatises:

Cal. Forms Pleading & Practice (Matthew Bender) ch 474 "Availability of Judicial Review of Agency Decisions".

Cal. Employment Law (Matthew Bender), § [21.02](#)

9 Witkin Summary (10th ed) Taxation § 122.

Hierarchy Notes:

Cal Gov Code Tit. 2, Div. 4

Cal Gov Code Tit. 2, Div. 4, Pt. 7



User Name: Hasmik Yaghobyan

Date and Time: Monday, December 30, 2019 12:21:00 PM EST

Job Number: 106234856

Document (1)

1. *People v. Cavitt, 33 Cal. 4th 187*

Client/Matter: -None-

Search Terms: People v. Cavitt, 33 Cal. 4th 187

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-



Caution

As of: December 30, 2019 5:21 PM Z

People v. Cavitt

Supreme Court of California

June 21, 2004, Filed

S105058

Reporter

33 Cal. 4th 187 *; 91 P.3d 222 **; 14 Cal. Rptr. 3d 281 ***; 2004 Cal. LEXIS 5523 ****; 2004 Daily Journal DAR 7393; 2004 Cal. Daily Op. Service 5417

THE PEOPLE, Plaintiff and Respondent, v. JAMES FREDDIE CAVITT, Defendant and Appellant. THE PEOPLE, Plaintiff and Respondent, v. ROBERT NATHANIEL WILLIAMS, Defendant and Appellant.

special circumstance, facilitated, causal relationship, time and place, unrelated, sheet

Subsequent History: Habeas corpus proceeding at, Motion granted by, Stay granted by Cavitt v. Woodford, 2007 U.S. Dist. LEXIS 27270 (N.D. Cal., Mar. 28, 2007)

Prior History: [****1] Superior Court of San Mateo County, Nos. SC038915B and SC038915C, Craig L. Parsons and Rosemary Pfeiffer, Judges. Court of Appeal, First District, Div. Three, Nos. A081492, and A088117.

People v. Cavitt, 2002 Cal. LEXIS 3265 (Cal., May 15, 2002)

Disposition: Judgments of the Court of Appeal affirmed.

Core Terms

felony, killing, felony-murder, perpetrators, murder, robbery, homicide, nonkiller, burglary-robbery, burglary, underlying felony, felony murder, logical nexus, continuous transaction, homicidal act, place of temporary safety, instructions, commit, temporal, coincidence, accidental, complicity, causal, killer,

Case Summary

Procedural Posture

Defendants one and two were convicted of first-degree murder with the special circumstances of robbery murder and burglary murder, as well as certain lesser offenses. Defendant one was also convicted of personally inflicting great bodily injury in the commission of the murder. The cases were consolidated, and the Court of Appeal of California, First Appellate District, Division Three, affirmed. The court granted review.

Overview

Defendants one and two were convicted of the felony murder of the stepmother of defendant one's girlfriend. The girlfriend plotted with defendants one and two to burglarize the stepmother's house. Both defendants argued that the evidence supported the defense theory that the girlfriend killed the stepmother after both defendants fled the scene. The court granted review to clarify a nonkiller's liability for a killing "committed in the perpetration" of an inherently dangerous felony under *Cal. Penal Code § 189's* felony-murder rule. The court held that, in such circumstances, the felony-murder rule required both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death. The causal relationship was established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or

attempted to commit. The temporal relationship was established by proof the felony and the homicidal act were part of one continuous transaction. The court affirmed the judgment. There was substantial evidence of a logical nexus between the burglary/robbery and the murder.

Outcome

The court affirmed.

where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, there must be a logical nexus--that is, more than mere coincidence of time and place--between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller. Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential. The court also holds that the requisite temporal relationship between the felony and the homicidal act exists even if the nonkiller is not physically present at the time of the homicide, as long as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of one continuous transaction.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN1 [↓] **Felony Murder, Elements**

Regarding a nonkiller's liability for a killing committed in the perpetration of an inherently dangerous felony under *Cal. Penal Code § 189's* felony-murder rule, in such circumstances, the felony-murder rule requires both a causal relationship and a temporal relationship between the underlying felony and the act resulting in death. The 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 nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN2 [↓] **Murder, Felony Murder**

The felony-murder rule does not apply to nonkillers HN4 [↓] **Sentencing, Fines**

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

HN3 [↓] **First-Degree Murder, Elements**

All murder which is committed in the perpetration of, or attempt to perpetrate certain enumerated felonies including robbery and burglary, is murder of the first degree. *Cal. Penal Code § 189*. The mental state required is simply the specific intent to commit the underlying felony, since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning--if a death results from his commission of that felony it will be first-degree murder, regardless of the circumstances.

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

33 Cal. 4th 187, *187; 91 P.3d 222, **222; 14 Cal. Rptr. 3d 281, ***281; 2004 Cal. LEXIS 5523, ****1

The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. The legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating the court's treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first-degree murder for any homicide committed in the course thereof.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > Defenses > General Overview

HN5 [↓] Felony Murder, Elements

It is no defense to felony murder that the nonkiller did not intend to kill, forbade his associates to kill, or was himself unarmed.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN6 [↓] Felony Murder, Elements

A fundamental purpose of the felony murder rule, which is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. It is difficult to imagine how homicidal acts that are unintentional, negligent, or accidental could be said to have advanced or facilitated the underlying felony when those acts are, by their nature, unintended. The court has never construed case law to require a killing to

advance or facilitate the felony, so long as some logical nexus existed between the two. Although evidence that the fatal act facilitated or promoted the felony is unquestionably relevant to establishing that nexus, California case law has not yet required that such evidence be presented in every case. Such a requirement finds no support in the statutory text, either.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN7 [↓] Murder, Felony Murder

See *Cal. Penal Code § 189*.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN8 [↓] Murder, Felony Murder

Cal. Penal Code § 189 is construed to require only a logical nexus between the felony and the homicide.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN9 [↓] Felony Murder, Elements

The California Supreme Court has often required more than mere coincidence in time and place between a felony and an act resulting in death to establish a nonkiller's liability for felony murder. *Cal. Penal Code § 189* requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony. *Section 189* does not apply even where a co-felon commits the killing during a robbery, if the nonkiller does not join the felony until after the killing occurs.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

33 Cal. 4th 187, *187; 91 P.3d 222, **222; 14 Cal. Rptr. 3d 281, ***281; 2004 Cal. LEXIS 5523, ****1

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

HN10 [↓] **Attempt, Elements**

The California Supreme Court has approved instructions imposing felony-murder liability on a nonkiller if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional, or unintentional, or accidental. But this well-settled formulation does not suggest that no causal connection need exist between the felony and the act resulting in death. By its terms, the formulation requires the parties to have been jointly engaged in the perpetration or the attempt to perpetrate the felony at the time of the act resulting in death. A confederate who performs a homicidal act that is completely unrelated to the felony for which the parties have combined cannot be said to have been jointly engaged in the perpetration or attempt to perpetrate the felony at the time of the killing. Otherwise, if one of two burglars ransacking a home glances out of a window, sees his enemy for whom he has long been searching and shoots him, the unarmed accomplice, party only to the burglary, will be guilty of murder in the first degree.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN11 [↓] **Murder, Felony Murder**

California law has long required some logical connection between a felony and an act resulting in death, and rightly so. Yet the requisite connection has not depended on proof that the homicidal act furthered or facilitated the underlying felony. Instead, for a nonkiller to be responsible for a homicide committed by a co-felon under the felony-murder rule, there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death. The assumption that the "in furtherance" and "jointly engaged" formulations articulate opposing standards of felony-murder liability is rejected. The latter does not mean that mere coincidence of time and place between the felony and the homicide is sufficient. And the former does not require that the killer intended the homicidal act to aid or promote the felony. Rather, cases have

merely used different words to convey the same concept: to exclude homicidal acts that are completely unrelated to the felony for which the parties have combined, and to require instead a logical nexus between the felony and the homicide beyond a mere coincidence of time or place.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN12 [↓] **Jury Trials, Jury Instructions**

The felony-murder rule does not require proof that the homicidal act furthered or facilitated the felony, only that a logical nexus exist between the two.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > Criminal Offenses > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > Objections

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

HN13 [↓] **Murder, Felony Murder**

The existence of a logical nexus between a felony and a murder in the felony-murder context, like the relationship between a robbery and a murder in the context of the felony-murder special circumstance, is not a separate element of the charged crime but, rather, a clarification of the scope of an element. The mere act of clarifying the scope of an element of a crime or a special

circumstance does not create a new and separate element of that crime or special circumstance. Hence, if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, it is the defendant's obligation to request any clarifying or amplifying instructions on the subject. Sua sponte instructions are required only on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. In sum, 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.

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Penalties

HN14 [↓] **Sentencing, Fines**

Liability for felony murder does not depend on an examination of the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the legislature, he is no longer entitled to such fine judicial calibration. The felony-murder rule generally acts as a substitute for the mental state ordinarily required for the offense of murder. Accordingly, a nonkiller's liability for felony murder does not depend on the killer's subjective motivation but on the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to commit.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN15 [↓] **Murder, Felony Murder**

The felony-murder rule renders it unnecessary to examine the individual state of mind of each person causing an unlawful killing--which is precisely what the "fresh and independent product" limitation would require courts to do.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

HN16 [↓] **Felony Murder, Elements**

California case law has consistently rejected a strict construction of the temporal relationship between felony and killing as to both first-degree murder and the felony-murder special circumstance. Instead, the court has said that a killing is committed in the perpetration of an enumerated felony if the killing and the felony are parts of one continuous transaction. Indeed, the court has invoked the continuous-transaction doctrine not only to aggravate a killer's culpability, but also to make complicit a nonkiller, where the felony and the homicide are parts of one continuous transaction.

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN17 [↓] **Murder, Felony Murder**

The court's reliance on the continuous-transaction doctrine is consistent with the purpose of the felony-murder statute, which was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the felony before the homicide was completed. In particular, the rule was not intended to relieve the wrongdoer from any probable consequence of his act by placing a limitation upon the *res gestae* which is unreasonable or unnatural. The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction, with the proviso that felony-murder liability attaches only to those engaged in the

felonious scheme before or during the killing.

Criminal Law & Procedure > ... > Murder > Felony
Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

HN18 **Felony Murder, Elements**

The escape rule defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony by deeming the felony to continue until the felon has reached a place of temporary safety. The continuous-transaction doctrine, on the other hand, defines the duration of felony-murder liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction.

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

Criminal Law & Procedure > ... > Acts & Mental
States > Mens Rea > Specific Intent

HN19 **Murder, Felony Murder**

Concurrent intent to kill and to commit the target felonies does not undermine the basis for a felony-murder conviction.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Defendants were convicted in separate trials of the felony murder of the stepmother of the girlfriend of one of the defendants. Defendants admitted to plotting with the stepdaughter to enter the victim's home, to tie her up, and to steal her property. The plan went forward with defendants entering the home, throwing a sheet over the victim's head and binding it and her with rope and duct tape, beating her and leaving her facedown on

the bed, and escaping with guns, jewelry and other valuables. Before leaving, defendants tied up the stepdaughter to make it appear she was a victim as well. The victim died of asphyxiation. There was ample evidence that defendants were the direct perpetrators of the murder, but there was also evidence that the stepdaughter may have suffocated her stepmother, for reasons independent of the burglary-robbery, after defendants had escaped. (Superior Court of San Mateo County, Nos. SC038915B and SC038915C, Craig L. Parsons and Rosemary Pfeiffer, Judges.) The Court of Appeal, First District, Div. Three, Nos. A081492 and A088117, ordered the cases consolidated for purposes of oral argument and decision, and affirmed the convictions in an unpublished decision.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held even if the stepdaughter had killed her stepmother out of a private animus after the defendants escaped, there was sufficient evidence of a logical nexus between the burglary-robbery and the murder to hold the two non-killing defendants liable for felony murder. The victim was covered in a sheet, beaten, hog-tied with rope and tape, and left facedown on a bed. Her breathing was labored at the time defendants departed. These acts either asphyxiated the victim in themselves or left her unable to resist the murderous impulses of her stepdaughter. The logical nexus standard of felony-murder liability does not require that the killer intend the homicidal act to aid or promote the felony. Although the record supported a finding that [*188] defendants and/or the stepdaughter intended to eliminate the sole witness to the burglary-robbery, evidence that she died accidentally as a result of being bound and gagged during the burglary-robbery was sufficient logical nexus to support the judgment as well. The theory that the stepdaughter decided to kill her stepmother for reasons unrelated to the burglary robbery, if credited, would not have absolved the defendants of responsibility for the death. Their liability for felony murder depended on the objective facts that connected the victim's death to the burglary-robbery and not on the subjective intent of the killer. The logical nexus standard of felony-murder liability also requires more than mere coincidence of time and place between the felony and the homicide. The continuous-transaction doctrine defines the temporal relationship required to find felony-murder liability. Felony-murder liability attached to defendants even though they were not present at the time of the victim's death, because the burglary-robbery and the homicidal act were part of one continuous transaction. Additional instructions that implied at the trial of one defendant that the burglary-

robbery continued until all three perpetrators had relinquished control over the victim, though they misstated California law, were harmless beyond a reasonable doubt, because the only control which the stepdaughter had over the victim was attributable to the fact that defendants had bound and gagged the victim during the burglary-robbery. Any finding that the victim remained under the control of her stepdaughter at the time of the homicide was thus equivalent to a finding that the homicide was part of a continuous transaction with the burglary-robbery. Finally, the court held that any error in excluding the testimony of the stepdaughter's classmates that she hated her stepmother and wanted to kill her was not prejudicial as it would not have affected the logical nexus between the burglary-robbery and the homicide. (Opinion by Baxter, J., with George, C. J., Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Werdegard, J., with Kennard, J., concurring (see p. 210). Concurring opinion by Chin, J. (see p. 213).)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

[*191] CA(1) (1)

Homicide § 16—Murder—Felony Murder—Nonkiller—Nexus Between Felony and Homicidal Act.

The felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. There must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in [*189] death before the felony-murder rule may be applied to a nonkiller. Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential.

CA(2) (2)

Homicide § 16—Murder—Felony Murder—Nonkiller—Temporal Relationship Between Felony and Homicidal Act—Continuous Transaction.

The requisite temporal relationship between the felony and the homicidal act, necessary to application of the felony-murder rule, exists even if the nonkiller is not physically present at the time of the homicide, as long

as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of one continuous transaction.

CA(3) (3)

Homicide § 16—Murder—Felony Murder—Specific Intent to Commit Underlying Felony.

All murder which is committed in the perpetration of, or attempt to perpetrate certain enumerated felonies including robbery and burglary is murder of the first degree. (*Pen. Code*, § 189.) The mental state required is simply the specific intent to commit the underlying felony, since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute.

CA(4) (4)

Homicide § 16—Murder—Felony-murder Rule—Purpose.

The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.

CA(5) (5)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Evidence that the Homicidal Act Facilitated or Promoted the Underlying Felony.

An instruction on a nonkiller's liability for the felony murder committed by a cofelon must require a logical nexus between the homicidal act and the underlying felony. Although evidence that the fatal act facilitated or promoted the felony is unquestionably relevant to establishing that nexus, it is not required that such evidence be presented in every case.

[*190] CA(6) (6)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Intent of Killer to Further Felony Not Required.

In the context of felony murder, the Legislature has not imposed a requirement that the killer intend the act causing death to further the felony.

CA(7)[↓] (7)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Statutory Requirement.

Pen. Code, § 189, requires only a logical nexus between the felony and the homicide.

CA(8)[↓] (8)

Homicide § 16—Murder—Felony Murder—More Than Mere Coincidence in Time and Place.

More than mere coincidence in time and place between the felony and the act resulting in death is required to establish a nonkiller's liability for felony murder.

CA(9)[↓] (9)

Homicide § 16—Murder—Felony Murder—Nonkiller—Logical Nexus Between Felony and Homicidal Act.

For a nonkiller to be responsible for a homicide committed by a cofelon under the felony-murder rule, there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death.

CA(10)[↓] (10)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Jury Instructions—"In Furtherance" Phrasing.

The felony-murder rule does not require proof that the homicidal act furthered or facilitated the felony, only that a logical nexus exist between the two. Therefore, jury instructions were not deficient merely because "in furtherance" phrasing—that a homicidal act be "in furtherance of" the burglary-robbery—was omitted.

CA(11)[↓] (11)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Not Element of Charged Crime—Jury Instructions—No Sua Sponte Duty to Clarify.

A trial court has no sua sponte duty to clarify the logical-nexus requirement in a felony-murder prosecution. The existence of a logical nexus between the felony and the murder in the felony-murder context, like the relationship between the robbery and the murder in the context of the felony-murder special circumstance, is not a separate element of the charged crime but, rather, a clarification of the scope of an element.

[*191] CA(12)[↓] (12)

Homicide § 16—Murder—Felony Murder—Logical Nexus Between Felony and Homicidal Act—Victim Left Hooded, Bound, and Beaten in the Presence of a Cofelon—Possibility of Deliberate Homicidal Act by Cofelon.

It could not be said in a felony-murder prosecution that the death of the victim who was the intended target of the burglary-robbery was completely unrelated to the felonies where the victim died of asphyxiation after the defendants left the premises, having left the victim in the company of her stepdaughter, who had planned the burglary-robbery with defendants. As part of those felonies, the victim was covered in a sheet, beaten, hog-tied with rope and tape, and left facedown on the bed. Her breathing was labored at the time defendants left. These acts either asphyxiated the victim in themselves or left her unable to resist the murderous impulses of her stepdaughter. Thus, on this record, one could not say that the homicide was completely unrelated, other than the mere coincidence of time and place, to the burglary-robbery, even if the stepdaughter had deliberately suffocated the victim.

[1 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Crimes Against the Person, § 139.]

CA(13)[↓] (13)

Homicide § 16—Murder—Felony Murder—Nonkiller—Liability Not Dependant on Subjective Acts.

A nonkiller's liability for felony murder does not depend on the killer's subjective motivation but on the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to

commit.

CA(14)[↓] (14)

Homicide § 16—Murder—Felony Murder—Duration of Underlying Felony—Escape Rule.

The “escape rule” defines the duration of an underlying felony, in the context of certain ancillary consequences of the felony, by deeming the felony to continue until the felon has reached a place of temporary safety.

CA(15)[↓] (15)

Homicide § 16—Murder—Felony Murder—Duration of the Underlying Felony—Continuous Transaction Doctrine.

The “continuous-transaction” doctrine defines the duration of felony-murder liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction.

CA(16)[↓] (16)

Homicide § 16—Murder—Felony Murder—Escape Rule—Instruction Concurrent with Instruction on Continuous Transaction Doctrine Not Prejudicial.

Inasmuch as concurrent intent to kill and to commit the target felonies does not undermine the basis for a felony-murder conviction, a finding that a victim remained under the control of [*192] one of three cofelons at the time of a homicide—the one cofelon with concurrent personal reasons to kill the victim—was equivalent to a finding that the homicide was part of a continuous transaction with the burglary-robbery. Thus, under the facts of the case, additional instructions which deemed the felony to continue until all three felons had relinquished control over the victim did not supply an impermissible route to conviction of a cofelon who had departed before the death occurred.

CA(17)[↓] (17)

Homicide § 16—Murder—Felony Murder—Duration of the Underlying Felony—Continuous Transaction Doctrine—Private Intent of Cofelon—Exclusion of Evidence.

Evidence that the stepdaughter of a homicide victim wanted to kill her stepmother, even if credited, would not have affected the undisputed logical nexus between the burglary-robbery committed by the stepdaughter and cofelons and the homicide, where the requisite connection was based on the fact that the crimes—burglary-robbery and homicide—involved the same victim, occurred at the same time and place, and were each facilitated by binding and gagging the victim. Evidence that the bound and gagged stepmother was intentionally murdered by the stepdaughter because of a private grudge after the departure of her cofelons, instead of killed accidentally or killed intentionally to facilitate the burglary-robbery, would not have undermined that connection. Hence, the exclusion from the jury's consideration of testimony by the stepdaughter's schoolmates that she hated her stepmother and said that she wanted to kill her, even if error, could not have been prejudicial as to a cofelon who had relinquished control of the victim before her death.

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Judges: Baxter, J., with George, C. J., Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Werdegar, J., with Kennard, J., concurring. Concurring opinion by Chin, J.

Opinion by: BAXTER

Opinion

[*193] [**225] [***284] **BAXTER, J.**—Defendants James Freddie Cavitt and Robert Nathaniel Williams were convicted in separate trials of the felony murder of 58-year-old Betty McKnight, the stepmother of Cavitt's girlfriend, Mianta McKnight. Defendants admitted [***285] plotting with Mianta to enter the McKnight home, to catch Betty unawares and tie her up, and to steal Betty's jewelry and other property. On the evening of December 1, 1995, with [****2] Mianta's assistance, the plan went forward. Defendants entered the house, threw a sheet over Betty's head, bound this hooded sheet to her wrists and ankles with rope and duct tape, and escaped with guns, jewelry, and other valuables from the bedroom. Betty was beaten and left hog-tied, facedown on the bed. Her breathing was labored. Before leaving, defendants made it appear that Mianta was a victim by pretending to tie her up as well. By the time Mianta untied herself and called her father to report the burglary-robbery, Betty had died from asphyxiation.

The evidence at trial amply supported a finding that defendants were the direct perpetrators of the murder. However, there was also evidence that tended to support the defense theory—namely, that Mianta deliberately suffocated Betty, for reasons independent of the burglary-robbery, after defendants had escaped and reached a place of temporary safety. Defendants assert that the felony-murder rule would not apply to this scenario and that the trial court's instructions erroneously denied the jury the opportunity to consider their theory.

Because the jury could have convicted defendants without finding they were the direct perpetrators [****3] of the murder, *HN1* [↑] we granted review to clarify a nonkiller's liability for a killing “committed in the perpetration” of an inherently dangerous felony under *Penal Code section 189's* felony-murder rule.¹ (See *People v. Pulido* (1997) 15 Cal.4th 713, 720–723 [63 Cal. Rptr. 2d 625, 936 P.2d 1235] (*Pulido*)). We hold

¹ The jury also found true the burglary-murder and robbery-murder special circumstances. Defendants have not independently challenged the special circumstance findings in this proceeding, and we express no views here as to the scope of a nonkiller's liability under the felony-murder special-circumstance provisions.

that, in such circumstances, the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying [**226] felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction. Applying these rules to the facts here, we affirm the judgment of the Court of Appeal.

[****4]

[*194] Background

Defendant James Cavitt started dating Mianta McKnight in January 1995. Mianta's father, Philip, and her stepmother, Betty, disapproved of the relationship. Concerned about Mianta's late-night dating and her high school truancy, Philip insisted that Mianta move from Oakland, where she had been living with Philip's niece, back to Brisbane to live with him and Betty. He hoped this would keep her away from Cavitt.

After moving back to Brisbane in November 1995, Mianta became upset that Philip and Betty did not allow her to go on dates with Cavitt. Her relationship with Betty in particular had been rocky for some time, and she often told her schoolmates that she hated Betty.

Around the end of November 1995, 17-year-old Mianta, 17-year-old Cavitt, and Cavitt's friend, 16-year-old defendant Robert Williams, developed a plan to burglarize the McKnight house, where Mianta was then living. The plan was to enter the [***286] house with Mianta's assistance, tie up Betty, and steal what they could find. The three scheduled the burglary-robbery for December 1. On that afternoon, Mianta purchased rope and packing tape on the way home from school. Later on, she placed a bed sheet [****5] outside the house and left the side door unlocked.

Around 6:30 p.m., Williams and Cavitt drove together to the McKnight house. They were wearing black clothes, gloves, and hockey masks and were carrying duct tape. Between 7:00 and 7:15 p.m., Mianta met them at the side door, gave them the rope she had just bought, and told them Betty was upstairs in bed. All three went upstairs. Cavitt and Williams threw the sheet over Betty's head. While Cavitt secured the sheet around Betty's head with duct tape, Williams fastened Betty's

wrists together with plastic flex cuffs. Then they used the rope to bind her ankles and wrists together with the sheet, creating a kind of hood for Betty's head. During the process, Cavitt and Williams also punched Betty in the back with their fists to get her to be quiet. Betty sustained extensive bruising to her face, shoulders, arms, legs, ankles and wrists, consistent with blunt force trauma.

After Betty was immobilized, Cavitt, Williams, and Mianta ransacked the bedroom, removing cash, cameras, Rolex watches, jewelry, and two handguns. Before leaving, Cavitt and Williams pretended to bind Mianta and placed her on the bed next to Betty. Cavitt and Williams [****6] each claimed that Betty was still breathing, although with difficulty, when they left her, facedown on the bed.

After Mianta freed herself, she turned Betty over onto her back. Mianta claimed she removed duct tape from Betty's mouth. Betty did not move and [*195] did not appear to be breathing. Mianta called her father to tell him they had been robbed. She also told him Betty was unconscious. Philip immediately reported the incident to the Brisbane Police Department at 7:44 p.m. When the dispatcher called the McKnight house at 7:45 p.m., Mianta claimed that robbers had entered the house while she was downstairs watching television, had put a sheet over her head, and had knocked her unconscious; that she was eventually able to free herself; that she had called her father to report the crime; and that her stepmother was unconscious.

Brisbane police arrived at 7:52 p.m. Betty was on her back on the bed. She was not breathing and had no pulse. Her hands were bound behind her, and her wrists and ankles were tied together with a rope. Officers attempted cardiopulmonary resuscitation. Paramedics obtained a heartbeat at 8:11 p.m., but Betty had already suffered severe and irreversible brain [****7] injury. She was pronounced dead the next morning. The cause of death was insufficient oxygen, or anoxia, caused by asphyxiation. The injuries she sustained were a contributing cause.

During conversations with police and a neighbor, Mianta reiterated her claim that unidentified robbers had somehow entered [**227] the house, that they had wrapped her in a sheet and knocked her unconscious, and that she had been unable to untie herself until after the robbers left, at which point she discovered that her stepmother was unconscious. When police secured Philip's consent to conduct a polygraph of his daughter,

however, Mianta eventually confessed to her involvement in the burglary-robbery. Cavitt and Williams were arrested on December 2 and also confessed. While being transported to juvenile hall, Cavitt said to Williams, "Man, we fucked up. We should have just shot her."

[***287] Police found the stolen jewelry, cameras, and handguns at Cavitt's home, as well as black clothing, gloves, and hockey masks.

Cavitt and Williams, who were tried separately, contended that Mianta must have killed Betty after they had left and for reasons unrelated to the burglary-robbery. To that end, they offered evidence [****8] tending to show that Mianta hated her stepmother, that Mianta had expressed to her schoolmates a desire to kill her stepmother, and that Betty could have been suffocated after Cavitt and Williams had returned to Cavitt's home with the loot.

Cavitt and Williams were convicted of first degree murder with the special circumstances of robbery murder and burglary murder, as well as certain lesser offenses. Cavitt was also convicted of personally inflicting great bodily [*196] injury in the commission of the murder. Each was sentenced to an unstayed term of 25 years to life. (See *Pen. Code*, § 190.5, *subd. (b)*.) The Court of Appeal, having ordered the cases consolidated for purposes of oral argument and decision, affirmed in an unpublished decision.

Discussion

This case involves the " 'complicity aspect' " of the felony-murder rule. (*Pulido, supra*, 15 Cal.4th at p. 720.) As in *Pulido*, we are not concerned with that part of the felony-murder rule making a *killer* liable for first degree murder if the homicide is committed in the perpetration of a robbery or burglary. Rather, the question here involves "a *nonkiller's* liability for the felony [****9] murder committed by another." (*Id. at p. 720*.)

Defendants contend that a nonkiller can be liable for the felony murder committed by another only if the act resulting in death facilitated the commission of the underlying felony. Since (in their view) the evidence here would have supported the inference that Mianta killed her stepmother out of a private animus, and not to advance the burglary-robbery, they claim that the trial court's failure to instruct the jury on the requirement that the killing facilitate the burglary-robbery mandates reversal of their felony-murder convictions. The Attorney General, on the other hand, asserts that no causal

relationship need exist between the underlying felony and the killing. In his view, it is enough that the act resulting in death occurred at the same time as the burglary and robbery.

CA(1) (1) After reviewing our case law, we find that neither formulation satisfactorily describes the complicity aspect of California's felony-murder rule. We hold instead that **HN2** the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and **[****10]** place. Under California law, there must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller. Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential.

CA(2) (2) We also hold that the requisite temporal relationship between the felony and the homicidal act exists even if the nonkiller is not physically present at the time of the homicide, as long as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of one continuous transaction.

[*197] A

HN3 **CA(3)** (3) "All murder ... which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including **[**228]** robbery and burglary] ... is murder **[***288]** of the first degree." (*Pen. Code*, § 189.) The mental state required is simply the specific intent to commit the underlying felony (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal. Rptr. 2d 373, 52 P.3d 572]), since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. (*People v. Roberts* (1992) 2 Cal.4th 271, 316 [6 Cal. Rptr. 2d 276, 826 P.2d 274] **[****11]** ["the consequences of the evil act are so natural or probable that liability is established as a matter of policy"]; *People v. Washington* (1965) 62 Cal.2d 777, 780 [44 Cal. Rptr. 442, 402 P.2d 130]; 2 La Fave, *Substantive Criminal Law* (2d ed. 2003) § 14.5(b), p. 449.) "Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances." (*People v. Burton* (1971) 6 Cal.3d 375, 387–388 [99 Cal. Rptr. 1, 491 P.2d 793] (*Burton*).

HN4 **CA(4)** (4) The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. (*Burton, supra*, 6 Cal.3d at p. 388.) "The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing **[****12]** was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof." (*Ibid.*)

1

Defendants contend that a nonkiller's liability for the felony murder committed by a cofelon depends on proof of a very specific causal relationship between the homicidal act and the underlying felony—namely, that the killer intended thereby to advance or facilitate the felony. Yet, defendants cite no case in which we have relieved a nonkiller of felony-murder liability because of insufficient proof that the killer actually intended to advance or facilitate the underlying felony. Indeed, the felony-murder rule is intended to eliminate the need to plumb the parties' peculiar intent with respect to a **[*198]** killing committed during the perpetration of the felony. (*Burton, supra*, 6 Cal.3d at p. 388.)² Defendants' formulation, which finds no support in the statutory text, **[****13]** would thwart that goal.

Moreover, defendants' formulation is at odds with **HN6** a fundamental purpose of the felony-murder rule, which is " 'to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.' " (*People v. Billa* (2003) 31 Cal.4th 1064, 1069 [6 Cal. Rptr. 3d 425, 79 P.3d 542].) It is difficult to imagine how homicidal acts that are

² As we have previously explained, **HN5** it is no defense to felony murder that the nonkiller did not intend to kill, forbade his associates to kill, or was himself unarmed. (*People v. Boss* (1930) 210 Cal. 245, 249 [290 P. 881]; *People v. Floyd* (1970) 1 Cal.3d 694, 707 [83 Cal. Rptr. 608, 464 P.2d 64], disapproved on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36 [148 Cal. Rptr. 890, 583 P.2d 748].)

unintentional, negligent, or accidental could be [***289] said to have advanced or facilitated the underlying felony when those acts are, by their nature, unintended.

Defendants make little effort to grapple with the policies [****14] underlying the felony-murder rule and rely instead almost entirely on our oft-repeated observation in *People v. Vasquez (1875)* 49 Cal. 560 (*Vasquez*) that “[i]f the homicide in question was committed by one of [the nonkiller’s] associates engaged in the robbery, *in furtherance of their common purpose to rob*, he is as accountable as though his own hand had intentionally given the fatal blow, and is guilty of murder in the first degree.” (*Id. at p. 563*, italics [**229] added.) Relying on *Vasquez*, defendants claim the felony-murder rule requires proof that the homicidal act have advanced or facilitated the underlying felony. Defendants misread *Vasquez*.

CA(5)[↑] (5) In the century and a quarter since *Vasquez* was decided, we have never construed it to require a killing to advance or facilitate the felony, so long as some logical nexus existed between the two. To the contrary, in *People v. Olsen (1889)* 80 Cal. 122, 125 [22 P. 125] (*Olsen*), overruled on other grounds in *People v. Green (1956)* 47 Cal.2d 209, 227, 232 [302 P.2d 307], we upheld an instruction that based a nonkiller’s complicity on a killing that was committed merely “*in [****15] the prosecution of the common design*”—and, in *Pulido*, we observed that this instruction was “similar” to the *Vasquez* formulation. (*Pulido, supra*, 15 Cal.4th at p. 720.) The similarity, of course, is that both require a logical nexus between the homicidal act and the underlying felony. Although evidence that the fatal act facilitated or promoted the felony is unquestionably relevant to establishing that nexus, California case law has not yet required that such evidence be presented in every case.

CA(6)[↑] (6) Such a requirement finds no support in the statutory text, either. *Penal Code section 189* states only that **HN7[↑]** “[a]ll murder ... which is committed in the [**199] perpetration of, or attempt to perpetrate” the enumerated felonies “is murder of the first degree.” (*Pen. Code*, § 189.) Nowhere has the Legislature imposed a requirement that the killer intend the act causing death to further the felony. We are therefore reluctant to derive such a requirement from the “in furtherance” discussion in our case law, which is itself only a court-created gloss on *section 189*.

CA(7)[↑] (7) Indeed, even jurisdictions whose felony-murder statutes require [****16] the homicidal act to be

“in furtherance” of an enumerated felony do not require proof that the act furthered or aided the felony. *People v. Lewis (1981)* 111 Misc.2d 682, 686 [444 N.Y.S.2d 1003, 1006], which construed a New York felony-murder statute that included this language, is instructive: “This equation of ‘in furtherance’ with ‘in aid of’ or ‘in advancement of’ has the virtue of linguistic accuracy, but is at odds with both the history and purpose of the ‘in furtherance’ requirement. The phrase can best be understood as the third logical link in the triad which must be present to connect a felony with a consequent homicide. Just as ‘in the course of’ imposes a duration requirement, [and] ‘causes the death’ a causation requirement, ‘in furtherance’ places a relation requirement between the felony and the homicide. More than the mere coincidence to time and place [citation], the nexus must be one of logic or plan. Excluded are those deaths which are so far outside the ambit of the plan of the felony and its execution as to be unrelated to them.” In sum, it is “a misinterpretation of the phrase to require that the murder bring success to the felonious [****17] purpose.” (*Id. at p. 687*; see also *State v. Young [***290] (1983)* 191 Conn. 636 [469 A.2d 1189, 1193] [“New York courts have construed the phrase to impose the requirement of a logical nexus between the felony and the homicide”]; see also *State v. Montgomery (2000)* 254 Conn. 694 [759 A.2d 995, 1020] [“ ‘The phrase ‘in furtherance of’ was intended to impose the requirement of a relationship between the underlying felony and the homicide beyond that of mere causation in fact” ’ ”].) We likewise construe **HN8[↑]** *Penal Code section 189* to require only a logical nexus between the felony and the homicide.

Defendants’ proffered interpretation would also lead to absurd results. Consider the situation in which a fire is set and the defendant departs by the time a firefighter arrives and dies in the course of combating the fire. A Washington appellate court, embracing defendants’ approach, interpreted the “in furtherance” requirement in its felony-murder statute to relieve a defendant-arsonist from liability in those circumstances: “Here, there is no evidence from which any reasonable juror could [****18] conclude that in acting to advance or promote the arson, [defendant] caused [the victim’s] death.” (*State v. Leech (1989)* 54 Wn. App. 597 [775 P.2d 463, 466].) The Washington Supreme Court rejected this approach and upheld the felony-murder [**200] conviction, finding it sufficient that there was a temporal and causal connection between the arson and the death. (*State v. Leech (1990)* [**230] 114 Wn.2d 700 [790 P.2d 160, 163–165 & fn. 21], revg. *State v. Leech, supra*, 775 P.2d 463; accord, *Morris, The Felon’s*

Responsibility for the Lethal Acts of Others (1956) 105 U.Pa.L.Rev. 50, 79–80 (Morris.)

CA(8) (8) The Attorney General, on the other hand, contends that the requisite intent, combined with a killing by a cofelon that occurs while the felony is ongoing, is sufficient to establish the nonkiller's liability for felony murder. His formulation, in other words, would require only a temporal connection between the homicidal act and the underlying felony. This description of the relationship between the killing and the felony is incomplete. **HN9** We have often required more than mere coincidence in time and place between the ******19** felony and the act resulting in death to establish a nonkiller's liability for felony murder. In *People v. Washington*, *supra*, 62 Cal.2d 777, for example, we reversed a conviction of felony murder where the accomplice was killed during the robbery by the victim. We held that *Penal Code section 189* requires "that the felon or his accomplice commit the killing, for if he does not, the killing is not committed ******21** to perpetrate the felony." (*Washington*, *supra*, at p. 781.) In *Pulido*, *supra*, 15 Cal.4th 713, we held that *section 189* does not apply even where a cofelon committed the killing during a robbery, if the nonkiller did not join the felony until after the killing occurred. (*Pulido*, *supra*, at p. 716.)

The Attorney General correctly points out that **HN10** we have approved instructions imposing felony-murder liability on a nonkiller "if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the crime of robbery, whether such killing is intentional, or unintentional, or accidental." (*People v. Perry* (1925) 195 Cal. 623, 637 [234 P. 890]; ******20** *People v. Martin* (1938) 12 Cal.2d 466, 472 [85 P.2d 880].) But this "well-settled" formulation (*Martin*, *supra*, at p. 472) does not suggest that *no* causal connection need exist between the felony and the act resulting in death. By its terms, the *Martin-Perry* formulation requires the parties to have been jointly engaged in the perpetration or the attempt to perpetrate the felony at the time of the act resulting in death. A confederate who performs a homicidal act that is completely unrelated to the felony for which the parties have combined cannot be said to have been "jointly engaged" in the perpetration or attempt to perpetrate the felony at the time of the killing. Otherwise, "if one of two burglars ransacking a home glances out of a window, sees his enemy for whom he has long been searching and shoots him, the unarmed accomplice, party only to the burglary, will be guilty of murder in the first degree."

(Morris, *supra*, 105 U.Pa. L.Rev. at p. 73.)

[*201] CA(9) (9) **HN11** California law thus has long required some logical connection between the felony and the act resulting in death, and rightly so. Yet the requisite connection has not depended on proof that the homicidal ******21** act furthered or facilitated the underlying felony. Instead, for a nonkiller to be responsible for a homicide committed by a cofelon under the felony-murder rule, there must be a logical nexus, beyond mere coincidence of time and place, between the felony the parties were committing or attempting to commit and the act resulting in death.

We therefore reject the assumption—shared by both parties—that the " 'in furtherance' " (e.g., *Vasquez*, *supra*, 49 Cal. at p. 563) and "jointly engaged" (e.g., *People v. Martin*, *supra*, 12 Cal.2d at p. 472) formulations articulate opposing standards of felony-murder liability. The latter does *not* mean—as the Attorney General suggests—that mere coincidence of time and place between the felony and the homicide is sufficient. And the former does *not* require—as defendants suggest—that the killer intend the homicidal act to aid or promote the felony. Rather, *Vasquez* and *Martin* have merely used different words to convey the same concept: to exclude homicidal acts that are completely unrelated to the felony for which the parties have combined, and to require instead a logical nexus between the felony and ******22** the homicide beyond a mere coincidence of time or place.

[231] 2**

One of the most discussed cases in this area—*People v. Cabaltero* (1939) 31 Cal. App. 2d 52 [87 P.2d 364] (*Cabaltero*)³—merits additional analysis.

In *Cabaltero*, six defendants were convicted of felony murder, based on the killing of an accomplice (Ancheta) during the perpetration of the robbery of a rural landowner (Nishida). The conspirators plotted to rob Nishida on payday by creating an altercation that would divert attention from the robbery. One of the conspirators was to create the distraction; two others were to rob Nishida; two more were to stand guard outside the building where the robbery was to take place; and Cabaltero was to drive the getaway car.

³ See, e.g., *Pulido*, *supra*, 15 Cal.4th at page 722 and footnote 2, and citations therein.

(*Cabaltero*, *supra*, 31 Cal. App. 2d at pp. 55–56.) The robbery proceeded as planned, and the loot was obtained at gunpoint without anyone firing a shot. Meanwhile, Ancheta, who was standing [****23] guard outside, fired shots at two people who had just driven up. Immediately after the shots were fired, one of the robbers emerged from the building, exclaimed, “Damn you, what did you shoot for,” and shot Ancheta fatally. (*Id.* at p. 56.)

[*202] Some courts and commentators have criticized *Cabaltero*, charging that it sustained felony-murder liability for nonkillers based merely on “the deliberate acts [****292] of one accomplice, outside the conspiracy, ‘outside the risk’ of the conspiracy, and serving only his personal animus.” (Morris, *supra*, 105 U.Pa. L.Rev. at p. 73.) As we have explained above, we agree that a nonkiller cannot be liable under the felony-murder rule where the killing has no relation to the felony other than mere coincidence of time and place. *Cabaltero* does not appear to be such a case, however. Viewing the situation objectively, it seems plain that Ancheta was shot as punishment for the greatly increased risk of detection caused by his decision to fire at two people who were approaching the building. To the extent the Ancheta shooting was intended to aid in the escape from the robbery [****24] (*Cabaltero*, *supra*, 31 Cal. App. 2d at pp. 61–62), the homicide would satisfy even the strict causal connection demanded by defendants. Accordingly, a logical nexus between the homicide and the felony existed in that case.

3

Substantial evidence of a logical nexus between the burglary-robbery and the murder exists in this case as well. The record supports a finding that defendants and/or Mianta killed Betty to eliminate the sole witness to the burglary-robbery or that Betty died accidentally as a result of being bound and gagged during the burglary-robbery. Either theory is sufficient to support the judgment. (E.g., *People v. Kimble* (1988) 44 Cal.3d 480, 502 [244 Cal. Rptr. 148, 749 P.2d 803] (*Kimble*).) Even if the jury believed that defendants did not want to kill Betty or that they conditioned their participation in the burglary-robbery on the understanding that Betty not get hurt, it would not be a defense to felony murder. (*People v. Boss*, *supra*, 210 Cal. at p. 249; *Vasquez*, *supra*, 49 Cal. at pp. 562–563.)

As defendants point out, however, the record might also have supported a finding that Mianta killed Betty out of a private animus and not to aid or promote the burglary-

robbery. [****25] Defendants contend that the jury instructions, by omitting any requirement that the homicidal act be “in furtherance of” the burglary-robbery, failed to apprise the jury of this latter possibility and therefore mandate reversal of their convictions.

CA(10)[↑] (10) We disagree. Although we have used the “in furtherance” phrase with some frequency in our opinions, we also recognize that this wording has the potential to sow confusion if used in the instructions to the jury. (See *Francis v. City & County of San Francisco* (1955) 44 Cal.2d 335, 341 [282 P.2d 496] [“The admonition has been frequently stated that it is dangerous to frame an instruction upon isolated extracts from the opinions of the court”]; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal. App. 3d 858, 876, fn. 5 [*203] [110 Cal. Rptr. 511].) [**232] Indeed, as we have explained above, HN12[↑] the felony-murder rule does not require proof that the homicidal act furthered or facilitated the felony, only that a logical nexus exist between the two. We therefore do not find the jury instructions deficient merely because the “in furtherance” phrasing was omitted. We must instead measure the instructions against the applicable law as set forth in part [****26] A.1, *ante*.

The instructions in Cavitt's case tracked CALJIC No. 8.27 and provided in relevant part: “If a human being is killed by one of several persons engaged in the commission of the crimes of robbery or burglary, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the offense, aid, promote, [****293] encourage or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental.” Williams's jury received a substantively similar instruction. ⁴

[****27] The instructions adequately apprised the jury

⁴ “If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime[s] of burglary or robbery, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental.”

of the need for a logical nexus between the felonies and the homicide in this case. To convict, the jury necessarily found that "the killing occurred *during* the commission or attempted commission of robbery or burglary" by "one of several persons *engaged in the commission*" of those crimes. The first of these described a temporal connection between the crimes; the second described the logical nexus. A burglar who happens to spy a lifelong enemy through the window of the house and fires a fatal shot, as in Professor Morris's example (Morris, *supra*, 105 U.Pa. L.Rev. at p. 73), may have committed a killing while the robbery and burglary were taking place but cannot be said to have been "engaged in the commission" of those crimes at the time the shot was fired.

CA(11)[↑] (11) We further find that the trial court had no sua sponte duty to clarify the logical-nexus requirement. **HN13[↑]** The existence of a logical nexus between the felony and the murder in the felony-murder context, like the relationship between the robbery and the murder in the context of the felony-murder special circumstance (*People v. Green* (1980) 27 Cal.3d 1, 59–62 [164 Cal. Rptr. 1, 609 P.2d 468]), **[****28]** is not a separate element of the charged crime but, rather, a clarification of the scope of an element. (*Kimble, supra*, 44 Cal.3d at p. 501.) "[T]he mere act of 'clarifying' the scope of an element of a **[*204]** crime or a special circumstance does not create a new and separate element of that crime or special circumstance." (*Ibid.*)

Hence, if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, "it is the defendant's obligation to request any clarifying or amplifying instructions on the subject." (*People v. Garrison* (1989) 47 Cal.3d 746, 791 [254 Cal. Rptr. 257, 765 P.2d 419].) "Sua sponte instructions are required only ' "on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' " " (*Kimble, supra*, 44 Cal.3d at p. 503; **[****29]** see also *People v. Guzman* (1988) 45 Cal.3d 915, 952 [248 Cal. Rptr. 467, 755 P.2d 917] [no sua sponte duty to define the meaning of the phrase " 'while [defendant] was engaged in ... the commission of rape'", overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [108 Cal. Rptr. 2d 409, 25 **[**233]** P.3d 618].) In

sum, 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. (*Garrison, supra*, 47 Cal.3d at p. 791.)

[*294] CA(12)[↑] (12)** Because the evidence here did not raise an issue as to the existence of a logical nexus between the burglary-robbery and the homicide, the trial court had no sua sponte duty to clarify this requirement. This is not a situation in which Mianta just happened to have shot and killed her lifelong enemy, whom she coincidentally spied through the window of the house during the burglary-robbery. (Cf. Morris, *supra*, 105 U.Pa. L.Rev. at p. 73.) Betty, the murder victim, was the intended target of the burglary-robbery. As part of those felonies, Betty was covered in a sheet, beaten, hog-tied with rope and tape, and left **[****30]** facedown on the bed. Her breathing was labored at the time defendants left. These acts either asphyxiated Betty in themselves or left her unable to resist Mianta's murderous impulses. Thus, on this record, one could not say that the homicide was completely unrelated, other than the mere coincidence of time and place, to the burglary-robbery.⁵

[*205] CA(13)[↑] (13) Defendants apparently assume that Mianta's personal animus towards the victim of the felony, **[****31]** if credited, should somehow absolve the other participants of their responsibility for the victim's death. They are mistaken. **HN14[↑]** Liability for felony murder does not depend on an examination of "the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration" (*Burton, supra*, 6 Cal.3d at p. 388.) "The felony-murder rule generally acts as a substitute for the *mental state* ordinarily required for the offense of murder." (*People v. Patterson* (1989) 49 Cal.3d 615,

⁵ As Cavitt concedes, cases that raise a genuine issue as to the existence of a logical nexus between the felony and the homicide "are few indeed." It is difficult to imagine how such an issue could ever arise when the target of the felony was intentionally murdered by one of the perpetrators of the felony. Nor, other than in circumstances akin to Professor Morris's hypothetical, does it seem likely that a genuine dispute could arise when the victim was killed during the escape from the felony or was killed negligently or accidentally during the perpetration of the felony.

626 [262 Cal. Rptr. 195, 778 P.2d 549].) Accordingly, a nonkiller's liability for felony murder does not depend on the killer's subjective motivation but on the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to commit. Otherwise, defendants' responsibility would vary based merely on whether the trier of fact believed that Mianta killed Betty by accident, because [****32] of a personal grudge, to eliminate a witness, or simply to find out what killing was like.⁶

[****33] One would hardly be surprised to discover that targets of inherently dangerous [***295] felonies are selected precisely *because* one or more of the participants in the felony harbors a personal animus towards the victim. But it would be novel indeed if that commonplace fact could be used to exculpate the parties to a felonious enterprise of a murder committed in the perpetration of that felony, where a logical nexus between the felony and the murder exists. (Cf. *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1141 ["concurrent intent to kill [**234] and to commit the target felony or felonies does not undermine the basis for a felony-murder conviction"].) Defendants' focus on the killer's subjective motivation thus is not merely contrary to the felony-murder rule but would in practice swallow it up. Under the circumstances here, we reject the defense contention that the trial court erred in failing to give, *sua sponte*, a clarifying instruction to explain more fully the requisite connection between [*206] the felonies and the homicide. (*People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal. Rptr. 2d 385, 926 P.2d 365]; *Kimble*, *supra*, 44 Cal.3d at p. 503.)

⁶ We also reject Cavitt's summary assertion that *Olsen*, *supra*, 80 Cal. 122, excluded killings that are a " 'fresh and independent product' of the killer's mind" from the ambit of the felony-murder rule. Cavitt misreads *Olsen*, which explicitly did not address "the supposed case of counsel where the greater crime was, or might have been, 'a fresh and independent product of the mind of one of the conspirators'" (*Olsen*, *supra* 80 Cal. at p. 125.)

Moreover, as stated above, **HN15** [†] the felony-murder rule renders it unnecessary to examine the individual state of mind of each person causing an unlawful killing—which is precisely what the "fresh and independent product" limitation would require courts to do. Here, for example, the defense theory was that Mianta decided to kill Betty for reasons independent of the felony. As we explain in the text, however, this theory even if credited would not relieve defendants of liability for felony murder in this case.

B

Defendants challenge next [****34] the instructions concerning the temporal relationship between the homicide and the felonies. The defense theory was that Mianta killed Betty in the five or 10 minutes after defendants had left the house and, along with the stolen property, had reached a place of temporary safety but before Mianta reported the crime. Thus, in their view, the burglary and robbery had ended before Betty was killed, relieving them of liability for felony murder.

The People contended that Betty was killed—or the acts resulting in her death were performed—while defendants were present or, at the least, before defendants reached a place of temporary safety. They also argued that defendants were guilty of felony murder, even if the homicide occurred after they had reached a place of temporary safety, as long as the felonies and the homicide constituted part of one continuous transaction. The trial court in both cases agreed, and instructed each jury that a killing "is committed in the commission of a felony if the killing and the felony are parts of one continuous transaction. There is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of [****35] the felony, so long as the two acts are part of one continuous transaction."⁷

⁷ Cavitt's jury was further instructed as follows: "When a killing occurs after the elements of the felony have been committed, the felony-murder rule applies if the killing and the felony were part of 'one continuous transaction.' Some factors that you may consider in determining whether the killing and the felony were part of, 'one continuous transaction' might include, but are not limited to, the following considerations:

"(1) whether or not any aider and abettor exercised continuous control over the victim. [¶] (2) whether or not the killing occurs in pursuance of a felony. [¶] (3) the distance between the location of the perpetration of the felony and the location of the killing. [¶] (4) the time lapse between the perpetration of the felony and the killing. [¶] (5) whether the killing is a direct causal result of the felony. [¶] (6) whether the killing occurs while the perpetrators are attempting to protect themselves against discovery of the felony or reporting of the crime. [¶] (7) whether the killing is a natural and probable consequence of the felony.

"No one of these factors, or any combination of factors is to be considered by you to be determinative of the phrase 'one continuous transaction.' There is no requirement that the defendant be present at the scene of the killing so long as the defendant's participation in the felony sets in motion a chain of

[**36] [*207] [***296]** We find no error. **HN16** [↑] Our case law has consistently rejected a “ ‘strict construction of the temporal relationship’ between felony **[**235]** and killing as to both first degree murder and [the] felony-murder special circumstance.” (*People v. Sakarias* (2000) 22 Cal.4th 596, 624 [94 Cal. Rptr. 2d 17, 995 P.2d 152].) Instead, we have said that “a killing is committed in the perpetration of an enumerated felony if the killing and the felony ‘are parts of one continuous transaction.’ ” (*People v. Hayes* (1990) 52 Cal.3d 577, 631 [276 Cal. Rptr. 874, 802 P.2d 376].) Indeed, we have invoked the continuous-transaction doctrine not only to aggravate a killer’s culpability, but also to make complicit a nonkiller, where the felony and the homicide are parts of one continuous transaction. (E.g., *People v. Whitehorn* (1963) 60 Cal.2d 256, 260, 264 [32 Cal. Rptr. 199, 383 P.2d 783] [defendant, who had raped the victim, was guilty of felony murder when accomplice strangled the victim after the rape]; see also *People v. Ross* (1979) 92 Cal. App. 3d 391, 402 [154 Cal. Rptr. 783]; *People v. Manson* (1976) 61 Cal. App. 3d 102, 208–209 [132 Cal. Rptr. 265]; *People v. Medina* (1974) 41 Cal. App. 3d 438, 452 [116 Cal. Rptr. 133]; **[****37]** see generally 1 Witkin & Epstein, Cal.

events which resulted in the killing.”

In addition to the instruction quoted in the text, Williams’s jury was instructed in accordance with *CALJIC Nos. 8.21.1* and *8.21.2*, which define, respectively, the duration of a robbery and a burglary. The burglary instruction closely tracked, with appropriate modifications, the robbery instruction, which provided: “For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time. [¶] A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrators are in possession of the stolen property and fleeing in an attempt to escape. Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrators or to regain the stolen property. [¶] A robbery is complete when the perpetrators have eluded any pursuers, have reached a place of temporary safety, and are in unchallenged possession of stolen property after having effected an escape with such property.” The trial court then modified each instruction by adding a concluding paragraph: “The perpetrators have not reached a place of temporary safety if, having committed the robbery [or burglary] with other perpetrators, any one of the perpetrators continues to exercise control over the victim. Only when all perpetrators have relinquished control over the victim[,] are in unchallenged possession of the stolen property[,] and have effected an escape can it be said that any one of them has reached a place of temporary safety.”

Criminal Law (3d ed. 2000) § 139, p. 754.)

HN17 [↑] Our reliance on the continuous-transaction doctrine is consistent with the purpose of the felony-murder statute, which “was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the [felony] before the homicide was completed.” (*People v. Chavez* (1951) 37 Cal.2d 656, 669–670 [234 P.2d 632].) In particular, the rule “ ‘was not intended to relieve the wrongdoer from any probable consequence of his act by placing a limitation upon the *res gestae* which is unreasonable or unnatural.’ The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction” (*id.* at p. 670), with the proviso “that felony-murder liability attaches only to those engaged in the felonious scheme before or during the killing.” (*Pulido, supra*, 15 Cal.4th at p. 729.)

[*297] [*208]** This is not to say that Mianta, by remaining in the **[****38]** house with Betty, could have prolonged defendants’ liability indefinitely. For example, if Mianta had untied Betty, revived her, and two weeks later poisoned her in retaliation for some perceived slight, the burglary-robbery and the murder would not be part of “one continuous transaction.” Cavitt’s fear that, because Mianta lived with the victim, the felonies “could be deemed to continue indefinitely” is therefore unfounded. Hence, no error appears in the Cavitt instructions.

The jury in Williams’s trial, however, received not only the instruction concerning the continuous-transaction rule, but also *CALJIC Nos. 8.21.1* and *8.21.2*. (See fn. 7, *ante.*) Those instructions provided that the burglary and robbery continued while the “perpetrators” were in flight and that those crimes were “complete” when the “perpetrators” had reached a place of temporary safety. The court then added the following paragraph: “The perpetrators have not reached a place of temporary safety if, having committed the robbery [or burglary] with other perpetrators, any one of the perpetrators continues to exercise control over the victim. Only when all perpetrators have relinquished control over the victim[,] **[****39]** are in unchallenged possession of the stolen property[,] and have effected an escape can it be said that any one of them has reached a place of temporary safety.” In Williams’s view, the requirement that *all* perpetrators must reach a place of temporary safety before any of them can be said to have done

so—and thus, before the underlying felony can be said to be completed—is a misstatement of law.

CA(14) (14) To resolve this claim, we first recognize that we are presented with two related, but distinct, doctrines: the continuous-transaction doctrine and the escape rule. **HN18** The “escape rule” defines the duration of the underlying felony, in the context of certain ancillary consequences of the felony (*People v. Cooper* (1991) 53 Cal.3d 1158, 1167 [282 Cal. Rptr. 450, 811 P.2d 742]), by deeming the felony to continue until the felon has reached a place of temporary safety. (E.g., *People v. Bodely* (1995) 32 Cal.App.4th 311, 313 [38 Cal. Rptr. 2d 72].) **CA(15)** (15) The continuous-transaction doctrine, on the other hand, defines the duration of felony-murder liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one continuous transaction. (*ibid.* [“the duration of felony-murder liability is not determined by considering whether the felony itself has been completed”]; *People v. Castro* (1994) 27 Cal.App.4th 578, 585 [32 Cal. Rptr. 2d 529] [“it is settled that a murder is deemed to occur in the commission of rape even after the rape is completed so long as the rape and murder are part of a continuous transaction”]; *People v. Taylor* (1980) 112 Cal. App. 3d 348, 358 [169 Cal. Rptr. 290].) It thus would have been sufficient to have instructed the Williams jury on the continuous-transaction doctrine alone, as the Cavitt jury was instructed. (See generally *People v. Montoya* (1994) 7 Cal.4th 1027, 1045, fn. 9 [31 Cal. Rptr. 2d 128, 874 P.2d 903] [“the duration of the offense of burglary, as defined for the purpose of assigning aider and abettor liability, need not and should not be identical to the definition pertinent to felony-murder liability”].) Williams, however, asked for and received *CALJIC Nos. 8.21.1* and *8.21.2*.

CA(16) (16) There is case support for the proposition that, under the escape rule, a felony continues as long as any one of the perpetrators retains control over the victim or is in flight from the crime scene. (E.g., *People v. Auman* (Colo.Ct.App. 2002) 67 P.3d 741, 751–752, cert. granted (Colo. 2003) 2003 Colo. LEXIS 262; *White v. State* (2001) [***298] 140 Md. App. 520 [781 A.2d 902, 911]; see *Morris*, *supra*, 105 U.Pa. L.Rev. at pp. 75–77.) We need not decide whether this instruction accurately states the law in California, however, because we find that any error could not have prejudiced Williams. As stated, his jury was correctly instructed on the continuous-transaction doctrine. Moreover, the only “control” Mianta had over Betty was attributable to the

fact that defendants had bound and gagged Betty during the burglary-robbery. Even if Mianta had decided to kill Betty for personal reasons, there was no evidence that she formed this private intent *after* defendants had left and reached a place of temporary safety. Inasmuch as **HN19** concurrent intent to kill and to commit the target felonies “does not undermine the basis for a felony-murder conviction” (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1141), a finding that Betty remained under Mianta’s control at the time of the homicide was, in this particular situation, equivalent to a finding that the homicide was part of a continuous transaction with the burglary-robbery. (*People v. Castro*, *supra*, 27 Cal.App.4th at p. 585; see *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal. Rptr. 2d 753, 18 P.3d 674]; *People v. Portillo* (2003) 107 Cal.App.4th 834, 846 [132 Cal. Rptr. 2d 435].) Thus, under the facts of this case, the additional paragraph did not supply an impermissible route to conviction. We therefore find that even if the additional paragraph misstated California law, it was harmless beyond a reasonable doubt. (*People v. Sakarias*, *supra*, 22 Cal.4th at pp. 625–626.)

C

At both trials, Mianta’s schoolmates testified that Mianta hated her stepmother and had said she wanted to kill her. In Cavitt’s trial, however, the court informed the jury that this testimony could not be used in evaluating the charge of felony murder but could be used only for the robbery-murder and burglary-murder special circumstances. Cavitt argues that the limiting instruction was error and requires reversal of his felony-murder conviction. We find that any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) [***43]

CA(17) (17) Evidence that Mianta wanted to kill Betty, even if credited, would not have affected the undisputed logical nexus between the burglary-robbery and the homicide. That connection was based on the fact that the crimes involved the same victim, occurred at the same time and place, and were each facilitated by binding and gagging Betty. Evidence that Betty was intentionally murdered by Mianta because of a private grudge, instead of killed accidentally or killed intentionally to facilitate the burglary-robbery, would not have undermined that connection. Hence, the exclusion of this evidence from the jury’s consideration, even if error, could not have been prejudicial.

On the other hand, evidence that Mianta had a private

motive was relevant to the jury's determination that the homicide and the burglary-robbery were part of a single continuous transaction. Nonetheless, it is not reasonably probable that the result would have been different had the testimony of Mianta's schoolmates been admitted without the limiting instruction. As stated, the jury was permitted to use this testimony in considering the robbery-murder and burglary-murder special circumstances. In order to find the [****44] special circumstances true, the jury necessarily found that the murder was committed "during the commission of or in order to carry out or advance the commission of the crimes of robbery or burglary or to facilitate [***299] the escape therefrom or to avoid detection." Accordingly, the jury, despite this testimony, found either that the homicide was committed "during the commission" of the burglary-robbery or that it was designed to facilitate those crimes or the escape therefrom. Either finding demonstrates that the homicide was part of a continuous transaction with the burglary-robbery. Moreover, despite the admission of this same testimony for all purposes, Williams's jury convicted him of felony murder.

The likelihood of prejudice was further diminished by the fact the jury did hear from other witnesses that Mianta's relationship with Betty was poor, that she was angry with Betty, and (from Cavitt himself) that Mianta wanted to kill Betty. None of this testimony was subject to the limiting instruction concerning the testimony of Mianta's schoolmates. In sum, Cavitt cannot show prejudice.

Disposition

The judgment of the Court of Appeal is affirmed.

George, C. J., Chin, J., [****45] Brown, J., and Moreno, J., concurred.

Concur by: WERDEGAR; CHIN

Concur

WERDEGAR, J.—I concur in the majority's result and in most of its reasoning, but I cannot agree that CALJIC No. 8.27, the standard instruction outlining complicity in felony murder, "adequately apprised the jury of the need for a logical nexus between the felonies and the homicide." (Maj. opn., [***211] *ante*, at p. 203.) That

instruction tells the jury that when a killing is perpetrated by "one of several persons *engaged in the commission*" of the predicate felony (CALJIC No. 8.27, italics added), all those complicit in the felony are also complicit in murder. In my view, the italicized language is calculated only to inform the jury of the necessary temporal connection between the predicate felony and the murder, not of the necessary causal or logical connection. Like the so-called *Martin-Perry* formulation¹ from which the standard instruction apparently derives, CALJIC No. 8.27 appear[s] to state a broader rule of felony-murder complicity, under which the killing need have no particular causal or logical relationship to the common [felonious] scheme." (*People v. Pulido* (1997) 15 Cal.4th 713, 722 [63 Cal. Rptr. 2d 625, 936 P.2d 1235].) [****46]

The majority (*ante*, at p. 203) suggests that a felon who kills during the commission of the felony but for reasons or in a manner logically and causally unrelated to the felony is not "engaged in the commission of" the felony when he or she kills; the killing, therefore, would not create cofelon liability under CALJIC No. 8.27. (See also maj. opn., *ante*, at p. 200 [same argument as to *Martin-Perry* formulation].) This reading of the instruction, I fear, is too subtle to be apprehended by the ordinary juror, especially when CALJIC No. 8.27 is coupled with standard instructions designed to be given in felony-murder cases on duration of the predicate felony. (See, e.g., CALJIC Nos. 8.21.1 (7th ed. 2004) [robbery still in progress while perpetrator [****47] is fleeing with the loot, until perpetrator reaches place of [***300] temporary safety], 8.21.2 (7th ed. 2004) [***238] [burglary still in progress while perpetrator is fleeing in an attempt to escape, until perpetrator reaches place of temporary safety].) Without further instruction, a reasonable layperson would assume that the law considers a burglar, for example, to be engaged in the commission of the crime from the moment of entering the building at least until leaving it, despite any momentary diversion from the felonious enterprise the burglar may experience during that period.

As the majority explains, an accomplice in the predicate felony is liable for a killing committed by another of the felons only if the killing is logically or causally related to

¹ See *People v. Perry* (1925) 195 Cal. 623, 637 [234 P. 890] (all those are complicit in murder who were, with the killer, "jointly engaged at the time of such killing" in the underlying felony); *People v. Martin* (1938) 12 Cal.2d 466, 472 [85 P.2d 880] (same).

the contemplated felony; complicity depends on “the existence of objective facts that connect the act resulting in death to the felony the nonkiller committed or attempted to commit.” (Maj. opn., *ante*, at p. 204.) The rule is similar, though not identical, to that governing complicity in crimes committed by a fellow conspirator or accomplice generally. When two or more persons set out to commit a robbery, for example, and one of them not [****48] only robs but tries to kill a victim, the other robbers are held [*212] complicit in attempted murder if and only if that attempt was a natural and probable outgrowth of the target robbery. (*People v. Prettyman* (1996) 14 Cal.4th 248, 261–263 [58 Cal. Rptr. 2d 827, 926 P.2d 1013]; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5 [221 Cal. Rptr. 592, 710 P.2d 392].) Analogously, a robber is liable for a murder committed by his or her confederate if and only if the murder, objectively viewed, proceeded logically or causally from the commission of the target crime, the robbery.²

² Commentators have observed that the two complicity rules (that governing felony murder and that governing aiding and abetting generally) involve similar imputations of conduct and culpability (Robinson, *Imputed Criminal Liability* (1984) 93 *Yale L.J.* 609, 617–618) and may be seen as general and specific aspects of the same problem—“the problem of the responsibility of one criminal ... for the conduct of a fellow-criminal ... who, in the process of committing or attempting the agreed-upon crime, commits another crime” (2 La Fave, *Substantive Criminal Law* (2d ed. 2003) § 14.5(c), p. 450). The language used to define the scope of the two rules also is linked historically in California law. (See *People v. Olsen* (1889) 80 Cal. 122, 124–125 [22 P. 125] [instruction that nonkiller was complicit in felony murder committed “in the prosecution of the common design” necessarily excluded killings that were “outside of and foreign to the common design” and hence not the “ ‘ordinary and probable effect’ ” of the agreed-upon felony], overruled on other grounds in *People v. Green* (1956) 47 Cal.2d 209, 227 [302 P.2d 307]; *People v. Kauffman* (1907) 152 Cal. 331, 334 [92 P. 861] [seminal decision on natural and probable consequences rule: conspirator not liable for crimes committed by another conspirator unless they were done “in execution” or “in furtherance” of the common design]; *People v. Terry* (1970) 2 Cal.3d 362, 401–402 & fn. 18 [85 Cal. Rptr. 409, 466 P.2d 961] [approving, in felony-murder case, instruction that nonkiller was not responsible for murder if it was neither “in furtherance of” nor a “natural and probable consequence of” the planned robbery], disapproved on another point in *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [63 Cal. Rptr. 2d 1, 935 P.2d 708].) Nevertheless, complicity appears broader under the felony-murder rule than under the natural and probable consequences doctrine, which we have described as

[****49] *CALJIC No. 8.27* simply fails to inform a jury of this principle. Any error in failing to give a clearer instruction on the point was, as the majority explains, harmless here, for there was no substantial evidence to support the theory that Mrs. McKnight’s killing was logically or causally [***301] unrelated to the conspirators’ commission of burglary and robbery, in which defendants Cavitt and Williams were full participants. (Maj. opn., *ante*, at pp. 204–205.) In future cases, nevertheless, it would be appropriate for trial courts to clearly explain that murder complicity under the felony-murder rule requires not only a temporal relationship between commission of the felony and the killer’s fatal act, but also a logical or causal one. I suggest this principle, however phrased, be included in standard instructions on felony-murder complicity.

Kennard, J., concurred. [*213] CHIN, J.—[**239] I agree fully with the majority opinion, which I have signed. I write separately only to comment on the standard jury instructions, and in particular on *CALJIC No. 8.27*. I agree with the majority that instruction is generally adequate. But it can be improved.

As the majority holds, [****50] a nonkiller is not liable for *all* killings during the course of a felony the nonkiller is perpetrating. There must be a causal relationship between the felony and the death, i.e., there must be some logical nexus, beyond mere coincidence of time and place, between the killing and the underlying felony. (Maj. opn., *ante*, at p. 193.) This requirement will rarely be significantly at issue in a felony-murder case. Rarely will a killing during a felony have no connection to that felony, but merely be coincidental. Indeed, it may be only in law-school-type hypotheticals such as the one suggested in the article the majority cites (maj. opn., *ante*, at p. 200)—hypothesizing one of two burglars who, while committing the burglary, just happens to spot a long-sought enemy and shoots him for reasons completely unrelated to the burglary—that the required causal relationship might be missing. Such scenarios are exceedingly unlikely in real life. And certainly if, as is usually the case (and was here), the felony’s target was killed, it is hard even to hypothesize a factual scenario in which there would be no connection between the felony

resting on foreseeability (*People v. Croy, supra*, 41 Cal.3d at p. 12, fn. 5), in that a felon may be held responsible for a killing by his or her cofelon, under the felony-murder rule, even if the killing was not foreseeable to the nonkiller because “the plan as conceived did not contemplate the use or even the carrying of a weapon or other dangerous instrument.” (2 La Fave, *Substantive Criminal Law, supra*, § 14.5(c), p. 452.)

and the killing.

But the fact that the causal relationship [****51] requirement will rarely be truly at issue does not mean the instructions should not be the best and clearest possible. Accordingly, I suggest that in the future, courts might more clearly inform the jury that the felony-murder rule requires both a causal and a temporal relationship between the underlying felony and the act resulting in death. The causal relationship requires some logical connection between the killing and the underlying felony beyond mere coincidence of time and place. The temporal relationship requires that the felony and the killing be part of one continuous transaction.

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Document (1)

1. *People v. Dillon, 34 Cal. 3d 441*

Client/Matter: -None-

Search Terms: 34 Cal. 3d 441

Search Type: Natural Language

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Cases

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People v. Dillon

Supreme Court of California

September 1, 1983

Crim. No. 21964

Reporter

34 Cal. 3d 441 *; 668 P.2d 697 **; 194 Cal. Rptr. 390 ***; 1983 Cal. LEXIS 226 ****

THE PEOPLE, Plaintiff and Respondent, v. NORMAN
JAY DILLON, Defendant and Appellant

attempted robbery, second degree, manslaughter,
marijuana, severance, Italics

Subsequent History: [****1] Respondent's Petition for a Rehearing was Denied October 6, 1983. Richardson, J., was of the Opinion that the Petition should be Granted.

Prior History: Superior Court of Santa Cruz County, No. 68320, Christopher C. Cottle, Judge.

Disposition: The judgment is affirmed as to the conviction of attempted robbery. As to the conviction of murder, the judgment is modified by reducing the degree of the crime to murder in the second degree and, as so modified, is affirmed. The cause is remanded to the trial court with directions to arraign and pronounce judgment on defendant accordingly, and to determine whether to recommit him to the Youth Authority.

Core Terms

murder, felony-murder, killing, malice, robbery, felony, first degree murder, first degree, cases, sentence, culpability, deliberate, larceny, perpetration, common law, circumstances, courts, cruel, homicide, felony murder, disproportionate, offender, shotgun, arson,

Case Summary

Procedural Posture

Defendant appealed a judgment of the Superior Court of Santa Cruz County (California) that convicted him of attempted robbery and first-degree felony murder, arguing that a standing crop, as realty, could not be the subject of a robbery and that application of felony-murder rule constituted a deprivation of due process of law.

Overview

While attempting to steal marijuana growing on another's land, defendant was discovered by the landowner, who carried a shotgun. Fearing that he would be shot, defendant shot first, killing the landowner. He appealed his conviction of attempted robbery and first-degree felony murder, arguing that a standing crop of marijuana could not be the subject of a robbery because it was realty, not personalty, and that the felony-murder rule violated due process requirements. In affirming the attempted robbery conviction, the appellate court concluded that a robbery within the meaning of *Cal. Penal Code § 211* was committed when property affixed to realty was severed and removed. Thus, defendant was properly convicted of attempting to commit such a robbery. In modifying the judgment by reducing the crime to second-degree murder, however, the appellate court concluded that, where defendant was unusually immature and his act

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was in response to a perceived threat, the life sentence constituted cruel and unusual punishment. Nevertheless, because defendant intentionally killed the victim without legally adequate provocation, he could be and ought to be punished for second-degree murder.

Outcome

The judgment convicting defendant of attempted robbery was affirmed. A standing crop, once severed from realty, was property that could be the subject of a robbery or an attempted robbery. The judgment convicting defendant of first-degree felony murder was modified to reflect a conviction of murder in the second degree where the mandatory punishment imposed under the former conviction constituted cruel and unusual punishment.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > General Overview

HN1 [↓] **Criminal Law & Procedure, Criminal Offenses**

One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime. Accordingly, the requisite overt act need not be the last proximate or ultimate step towards commission of the substantive crime.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony

Murder > General Overview

HN2 [↓] **Felony Murder, Elements**

Felony murder involves an attempt to commit a felony that, by settled judicial definition, is inherently dangerous to human life.

Criminal Law & Procedure > Defenses > Abandonment & Withdrawal

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN3 [↓] **Defenses, Abandonment & Withdrawal**

Subsequent events tending to show a voluntary abandonment are irrelevant once the requisite intent and act to commit a crime are proved.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN4 [↓] **Inchoate Crimes, Attempt**

Preparation alone is not enough to show an attempt; there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Verdicts

HN5 [↓] **Inchoate Crimes, Attempt**

When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine

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whether it contains substantial evidence--i.e., evidence that is credible and of solid value--from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. In the case of a prosecution for attempt, an additional rule is applicable. Acts that could conceivably be consistent with innocent behavior may, in the eyes of those with knowledge of the actor's criminal design, be unequivocally and proximately connected to the commission of the crime; it follows that the plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement.

Civil
Procedure > ... > Justiciability > Standing > General Overview

Criminal Law & Procedure > Criminal Offenses > Theft & Related Offenses > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Robbery > General Overview

Criminal Law & Procedure > ... > Robbery > Unarmed Robbery > Penalties

HN6 [↓] Justiciability, Standing

Robbery of a standing crop is punishable in California.

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

Real Property Law > Fixtures & Improvements > Fixture Characteristics

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Real Property Law > Fixtures & Improvements > General Overview

HN7 [↓] Larceny & Theft, Elements

He who by his wrongful acts converts a fixture into personal property and then with larcenous intent forthwith carries it away without the consent of the owner may be rightfully convicted of larceny.

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

Real Property Law > Fixtures & Improvements > General Overview

HN8 [↓] Theft & Related Offenses, Larceny & Theft

Under *Cal. Penal Code § 495*, the provisions of chapter 5, which relate to theft, apply where the thing taken is any fixture or part of the realty .

Criminal Law & Procedure > Criminal Offenses > General Overview

HN9 [↓] Criminal Law & Procedure, Criminal Offenses

In the absence of legislative proscription of conduct, there is no crime.

Criminal Law & Procedure > ... > Crimes Against Persons > Robbery > General Overview

Real Property Law > Fixtures & Improvements > General Overview

HN10 [↓] Crimes Against Persons, Robbery

A robbery within the meaning of *Cal. Penal Code § 211* is committed when property affixed to realty is severed and taken therefrom in circumstances that would have subjected the perpetrator to liability for robbery if the property had been severed by another person at some previous time.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN11 [↓] Murder, First-Degree Murder

In California, the first-degree felony-murder rule is a creature of statute.

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Constitutional Law > Separation of Powers

HN12 [↓] **Constitutional Law, Separation of Powers**

The courts do not sit as a super-legislature with the power to judicially abrogate a statute merely because it is unwise or outdated.

Criminal Law & Procedure > ... > Murder > Felony
Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-
Degree Murder > General Overview

HN13 [↓] **Felony Murder, Elements**

With respect to any homicide resulting from the commission of or attempt to commit one of the felonies listed in the statute, California decisions generally hold *Cal. Penal Code § 189* to be not only a degree-fixing device but also a codification of the felony-murder rule. No independent proof of malice is required in such cases, and by operation of the statute, the killing is deemed to be first-degree murder as a matter of law.

Governments > Legislation > Effect &
Operation > Amendments

HN14 [↓] **Effect & Operation, Amendments**

It is ordinarily to be presumed that the legislature, by deleting an express provision of a statute, intended a substantial change in the law.

Governments > Legislation > Interpretation

HN15 [↓] **Legislation, Interpretation**

When a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. It is presumed the word was used in the sense specified by the legislature, and the statute will be construed accordingly.

Governments > Legislation > Interpretation

HN16 [↓] **Legislation, Interpretation**

It is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute.

Governments > Legislation > Interpretation

HN17 [↓] **Legislation, Interpretation**

When a statute proposed by the California Code Commission for inclusion in a code has been enacted by the legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the legislature.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > General
Overview

HN18 [↓] **Procedural Due Process, Scope of Protection**

The *due process clause of U.S. Const. amend XIV* protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

HN19 [↓] **Procedural Due Process, Scope of Protection**

Due process requires proof beyond a reasonable doubt of each element of the crime charged.

Criminal Law & Procedure > ... > Murder > Felony
Murder > Elements

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Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

HN20 **Felony Murder, Elements**

Malice is presumed by operation of the felony-murder rule.

Criminal Law & Procedure > Trials > Burdens of
Proof > General Overview

Evidence > Inferences &
Presumptions > Presumptions > Rebuttal of
Presumptions

Evidence > Inferences &
Presumptions > Presumptions

HN21 **Trials, Burdens of Proof**

In strictness there cannot be such a thing as a conclusive presumption. Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.

Evidence > Inferences &
Presumptions > Presumptions > Rebuttal of
Presumptions

Evidence > Inferences &
Presumptions > Presumptions

HN22 **Presumptions, Rebuttal of Presumptions**

A conclusive presumption is in actuality a substantive rule of law. The so-called conclusive presumption is really not a presumption but rather a rule of substantive law.

Criminal Law & Procedure > ... > Murder > Felony
Murder > Elements

Evidence > Inferences &
Presumptions > Presumptions > Rebuttal of
Presumptions

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

Criminal Law & Procedure > Trials > Burdens of
Proof > General Overview

Criminal Law & Procedure > Trials > Burdens of
Proof > Prosecution

Evidence > Inferences &
Presumptions > Presumptions

HN23 **Felony Murder, Elements**

In every case of murder other than felony murder, the prosecution undoubtedly has the burden of proving malice as an element of the crime. Yet to say that (1) the prosecution must also prove malice in felony-murder cases but that (2) the existence of such malice is "conclusively presumed" upon proof of the defendant's intent to commit the underlying felony, is merely a circuitous way of saying that in such cases the prosecution need prove only the latter intent. The issue of malice is therefore wholly immaterial for the purpose of the proponent's case when the charge is felony murder. In that event the conclusive presumption is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is not an element of felony murder.

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

HN24 **Murder, Felony Murder**

Killings by the means or on the occasions enumerated in *Cal. Penal Code*, §189 are murders of the first degree because of the substantive statutory definition of the crime.

Criminal Law & Procedure > ... > Murder > Felony
Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony
Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

[HN25](#) **Felony Murder, Elements**

The substantive statutory definition of the crime of first-degree felony murder in California does not include either malice or premeditation. These elements are eliminated by the felony-murder doctrine, and the only criminal intent required is the specific intent to commit the particular felony. This is a rule of substantive law in California and not merely an evidentiary shortcut to finding malice, as it withdraws from the jury the requirement that they find either express malice or implied malice. In short, malice aforethought is not an element of murder under the felony-murder doctrine.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Evidence > Inferences & Presumptions > Presumptions

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

[HN26](#) **Felony Murder, Elements**

Because the felony-murder doctrine actually raises no presumption of malice at all, there is no occasion to judge it by the standard that governs the validity of true presumptions.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

[HN27](#) **Felony Murder, Elements**

The two kinds of first-degree murder in California differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first-degree felony murder, it is entirely irrelevant and need not be proved at all. From this profound legal difference flows an equally significant factual distinction, to wit, that first-degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter but also a variety of unintended homicides resulting from reckless behavior, ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

Criminal Law & Procedure > ... > Murder > Felony Murder > Penalties

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Penalties

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN28](#) **Fundamental Rights, Cruel & Unusual Punishment**

34 Cal. 3d 441, *441; 668 P.2d 697, **697; 194 Cal. Rptr. 390, ***390; 1983 Cal. LEXIS 226, ****1

The California legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an offense listed in *Cal. Penal Code § 189*: regardless of the defendant's individual culpability with respect to that homicide, he must be adjudged a first degree murderer and sentenced to death or life imprisonment with or without possibility of parole--the identical punishment inflicted for deliberate and premeditated murder with malice aforethought.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Constitutional Law > Separation of Powers

HN29 **Fundamental Rights, Cruel & Unusual Punishment**

In the tripartite system of government, it is the function of the legislative branch to define crimes and prescribe punishments, and such questions are in the first instance for the judgment of the legislature alone. Yet legislative authority remains ultimately circumscribed by the constitutional provision forbidding the infliction of cruel or unusual punishment, adopted by the people of California as an integral part of the Declaration of Rights. It is the difficult but imperative task of the judicial branch, as coequal guardian of the California Constitution, to condemn any violation of that prohibition. The legislature is thus accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, but the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function.

Constitutional Law > Separation of Powers

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

HN30 **Constitutional Law, Separation of Powers**

A statutory punishment may violate the constitutional prohibition not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed. Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalties is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty out of all proportion to the offense, i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

HN31 **Fundamental Rights, Cruel & Unusual Punishment**

The state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings. Punishment that is so excessive as to transgress those limits and deny that worth cannot be tolerated. A punishment may violate the California constitutional prohibition if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN32 **Fundamental Rights, Cruel & Unusual Punishment**

In determining whether a penalty constitutes cruel and

34 Cal. 3d 441, *441; 668 P.2d 697, **697; 194 Cal. Rptr. 390, ***390; 1983 Cal. LEXIS 226, ****1

unusual punishment, a court must examination of the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN33 **Fundamental Rights, Cruel & Unusual Punishment**

In conducting an inquiry into whether a penalty constitutes cruel and unusual punishment, the courts are to consider not only the offense in the abstract--i.e., as defined by the legislature--but also the facts of the crime in question--i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN34 **Fundamental Rights, Cruel & Unusual Punishment**

In determining whether a penalty constitutes cruel and unusual punishment, the courts must view the nature of the offender in the concrete rather than the abstract: although the legislature can define the offense in general terms, each offender is necessarily an individual. This branch of the inquiry therefore focuses on the particular person before the court and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law &
Procedure > Sentencing > Proportionality

HN35 **Fundamental Rights, Cruel & Unusual Punishment**

A punishment that is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is

disproportionate to the defendant's individual culpability.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law &
Procedure > Sentencing > Proportionality

HN36 **Fundamental Rights, Cruel & Unusual Punishment**

Even though a statutory maximum penalty may not be facially excessive, the constitutional prohibition against cruel or unusual punishment requires that in every case the defendant be given a specific term that is not disproportionate to the culpability of the individual offender and reflects the circumstances existing at the time of the offense.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN37 **Fundamental Rights, Cruel & Unusual Punishment**

The United States Supreme Court insists on individualized consideration as a constitutional requirement in imposing the death sentence, which means that courts must focus on relevant facets of the character and record of the individual offender.

Headnotes/Summary

Summary **CALIFORNIA OFFICIAL REPORTS SUMMARY**

Defendant, a 17-year-old high school student, was

charged with first degree felony murder and attempted robbery. The prosecution arose when defendant and several youthful companions attempted to take marijuana from a marijuana farm and defendant fatally shot a man who was guarding the farm. The jury found defendant guilty as charged, although it expressed a reluctance to apply the felony-murder rule to the facts. The trial court, which also stated its belief that the evidence did not support a first degree murder conviction under any theory other than felony murder, initially committed defendant to the Youth Authority. However, subsequent mandate proceedings resulted in a finding that defendant was ineligible for commitment to the Youth Authority as a matter of law, and the trial court was directed to vacate the order of commitment. Defendant was thereafter sentenced to life imprisonment in state prison. (Superior Court of Santa Cruz County, No. 68320, Christopher C. Cottle, Judge.)

The Supreme Court affirmed the judgment as to the attempted robbery conviction, modified the judgment as to the murder conviction by reducing the degree of the crime to second degree murder, and, as so modified, affirmed, and remanded the cause to the trial court with directions to determine whether to recommit defendant to the Youth Authority. The court first held that a standing crop can be the subject of a robbery and that substantial evidence supported the attempted robbery at issue. As to the felony-murder rule, the court held that it is a creature of statute and hence could not be judicially abrogated. The court also held that the rule does not deny defendants due process of law by relieving the prosecution of the burden of proving malice, since malice is not an element of the crime of felony murder. The court further held, however, that the penalty for first degree felony murder, like all statutory penalties, is subject to the constitutional prohibition against cruel and unusual punishment and to the rule that a punishment is impermissible if it is grossly disproportionate to the offense as defined or as committed, and/or to the individual culpability of the offender. Applying this rule to the attenuated showing of individual culpability in the instant case and to the massive loss of liberty entailed in a life sentence, which was the same punishment that would have been inflicted had defendant committed premeditated first degree murder, the court held that the penalty constituted cruel and unusual punishment. (Opinion by Mosk, J., with Bird, C. J., and Kingsley, J., * concurring. Separate concurring opinion by Reynoso, J. Separate concurring opinion by Kaus, J. Separate

concurring opinion by Kingsley, J. * Separate concurring opinion by Bird, C. J. Separate concurring and dissenting opinion by Richardson, J. Separate concurring and dissenting opinion by Broussard, J.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

[CA\(1a\)](#) [↓] (1a) [CA\(1b\)](#) [↓] (1b) [CA\(1c\)](#) [↓] (1c)
[CA\(1d\)](#) [↓] (1d) [CA\(1e\)](#) [↓] (1e) [CA\(1f\)](#) [↓] (1f)

Criminal Law § 14—Attempt—When Attempt Supports Felony-murder Charge.

--In a prosecution for attempted robbery, the trial court properly instructed the jury in terms of a standard instruction on attempts that correctly required proof of intent and a direct act beyond mere preparation (*Pen. Code, § 664*). The fact that the attempted robbery was also used to support a charge of homicide on a felony-murder theory did not require proof of the commission of an element of the underlying crime other than the formation of the requisite intent. As long as the trier of fact is convinced beyond a reasonable doubt that the defendant intended to commit a crime and was in the process of attempting to carry out that intent, no public purpose is served by distinguishing between those who have managed to satisfy some element of the offense and those who have not. Society is entitled to no lesser degree of protection from attempted crimes when the charge is felony murder, involving as it does an attempt to commit a felony that by definition must be inherently dangerous to human life.

[CA\(2a\)](#) [↓] (2a) [CA\(2b\)](#) [↓] (2b) [CA\(2c\)](#) [↓] (2c)
[CA\(2d\)](#) [↓] (2d) [CA\(2e\)](#) [↓] (2e) [CA\(2f\)](#) [↓] (2f)

Criminal Law § 15—Attempt—Abandonment—When Attempt Supports Felony-murder Charge.

--In a prosecution for attempted robbery, the trial court properly instructed the jury in terms of a standard instruction on attempts which accurately standard that subsequent events tending to show a voluntary abandonment of the criminal effort are irrelevant once the requisite intent and act beyond mere preparation are proved (*Pen. Code, § 664*). The fact that the attempted robbery was also used to support a charge of homicide on a felony-murder theory did not render it appropriate

* Assigned by the Chairperson of the Judicial Council.

to carve out a voluntary abandonment defense. If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude the a crime will be committed; but when the acts are such that any rational person would believe that a crime is about to be consummated absent an intervening force, the attempt is underway, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him. Public safety would be needlessly jeopardized if the police were required to refrain from interceding until absolutely certain in each case that the criminal will go through with his plan. The law of attempts eliminates this burden once the subject has plainly demonstrated, by his actions, his intent presently to commit the crime. (Disapproving, to the extent they are inconsistent, *People v. Von Hecht* (1955) 133 Cal.App.2d 25 [133 Cal.Rptr. 25, 283 P.2d 764], *People v. Montgomery* (1941) 47 Cal.App.2d 1, 13 [111 P.2d 437], and *People v. Corkery* (1933) 134 Cal.App. 294, 297 [25 P.2d 257].)

CA(3a) (3a) CA(3b) (3b) CA(3c) (3c)
CA(3d) (3d) CA(3e) (3e)

Criminal Law § 14—Attempt—Requisite Overt Act.

--One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime. Accordingly, the requisite overt act need not be the last proximate or ultimate step towards commission of the substantive crime.

CA(4a) (4a) CA(4b) (4b) CA(4c) (4c)
CA(4d) (4d) CA(4e) (4e)

Criminal Law § 14—Attempt—Purpose of Imposing Criminal Culpability.

--Applying criminal culpability to acts directly moving toward the commission of a crime is an obvious safeguard to society, since it makes it unnecessary for police to wait before intervening until the actor has done the substantive evil sought to be prevented. It allows such criminal conduct to be stopped or intercepted when it becomes clear what the actor's intention is and when the acts done show that the perpetrator is actually putting his plan into action.

CA(5a) (5a) CA(5b) (5b) CA(5c) (5c)
CA(5d) (5d) CA(5e) (5e) CA(5f) (5f)

Robbery § 17—Attempt to Commit Robbery— Sufficiency of Evidence.

--A conviction for attempting to take marijuana from a marijuana farm was supported by substantial evidence where a rational trier of fact could have found that the evidence clearly demonstrated defendant's intent to rob, and where there was also substantial evidence from which a reasonable jury could have found that defendant accomplished direct but ineffectual acts toward commission of the intended robbery. Since defendant and his companions had learned from their prior forays to the farm that it was guarded by armed men, they must have known they would probably be required to use force to reach their goal. This inference was supported by the undisputed facts that they arranged for reinforcements and equipped themselves with ample means to overpower and restrain the guards. The fact that defendant and his companions would have preferred not to have any such confrontation did not negate the intent to rob. In addition, the conduct of defendant and his companions went beyond mere preparation. The fact that defendant did not actually encroach on the field before he fled did not immunize him from criminal liability. In light of the evidence of intent, the jury could have rationally found that the acts of defendant and his companions were sufficient to establish beyond a reasonable doubt that they were engaged in an attempt to commit robbery.

CA(6a) (6a) CA(6b) (6b) CA(6c) (6c)
CA(6d) (6d) CA(6e) (6e)

Criminal Law § 622—Appellate Review—Scope— Sufficiency of Evidence—Substantial Evidence Rule.

--When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains evidence that is credible and of solid value from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

CA(7a) (7a) CA(7b) (7b) CA(7c) (7c)
CA(7d) (7d) CA(7e) (7e)

Criminal Law § 14—Attempt—Requisite Over Act.

--In a prosecution for an attempt, acts that could conceivably be consistent with innocent behavior may, in the eyes of those with knowledge of the actor's criminal design, be unequivocally and proximately connected to the commission of the crime. Thus, the plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement.

CA(8a) (8a) CA(8b) (8b) CA(8c) (8c)
CA(8d) (8d) CA(8e) (8e)

Robbery § 3—Elements of Offense—Taking of Property—Contraband.

--By prohibiting possession of an item, the government does not license criminals to take it by force or stealth from other criminals. Thus, robbery of contraband is subject to penal sanction.

CA(9a) (9a) CA(9b) (9b) CA(9c) (9c)
CA(9d) (9d) CA(9e) (9e) CA(9f) (9f) CA(9g)
(9g)

Robbery § 3—Elements of Offense—Taking of Property—Standing Crops.

--A robbery within the meaning of *Pen. Code, § 211*, is committed when property affixed to realty, such as standing crops, is severed and taken therefrom in circumstances that would have subjected the perpetrator to liability for robbery had the property been severed by another person at some previous time. The Legislature has said as much with regard to the lesser included offense of larceny (*Pen. Code, §§ 487b, 487c, 495*), and the common law rule to the contrary is a hypertechnical remnant of an archaic formalism that can no longer be seriously defended.

CA(10a) (10a) CA(10b) (10b) CA(10c) (10c)
CA(10d) (10d) CA(10e) (10e)

Theft § 7—Larceny—Elements of Offense—Taking and Asportation—Taking of Personalty—Common Law Rule.

--The common law rule limiting larceny to the unlawful taking of personalty derived from the fact that realty, in the sense of land subject to description by metes and bounds, cannot be carried away. Being incapable of larcenous asportation, it was not regarded as requiring

at the hands of the criminal law the same protection as personalty.

CA(11a) (11a) CA(11b) (11b) CA(11c) (11c)
CA(11d) (11d) CA(11e) (11e)

Criminal Law § 5—Prohibition by Law—Necessity of Enactment.

--In the absence of legislative proscription of conduct, there is no crime (*Pen. Code, § 6*).

CA(12a) (12a) CA(12b) (12b)

Courts § 5—Powers and Organization—Inherent and Statutory Powers—Conformance of Common Law to Contemporary Conditions.

--The courts are empowered to conform the common law of the state to contemporary conditions and enlightened notions of justice.

CA(13a) (13a) CA(13b) (13b)

Homicide § 16—Felony Murder.

--Felony murder is a highly artificial concept which deserves no extension beyond its required application.

CA(14a) (14a) CA(14b) (14b) CA(14c) (14c)
CA(14d) (14d) CA(14e) (14e) CA(14f) (14f)
CA(14g) (14g)

Homicide § 16—Felony Murder—Codification of Common Law Rule.

--The first degree felony-murder rule is a creature of statute (*Pen. Code, § 189*), and is not an uncodified common law rule subject to judicial abrogation. Although a closely balanced question, the evidence of present legislative intent was sufficient to outweigh the contrary implications of the language of § 189 and its predecessors. The California Code Commission, acting in 1872, apparently believed that its version of § 189 codified the felony-murder rule as to the listed felonies, even though it may have misread the relevant law, and the Legislature adopted § 189 in the form proposed by the commission. Pursuant to rules of statutory construction, the Legislature thus acted with the same intent as the commission when it adopted § 189.

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Nothing in the ensuing history of the statute suggested that the Legislature acted with any different intent when it subsequently amended the statute in various respects. Accordingly, it was inferred that the Legislature still believed that § 189 codified the first degree felony-murder rule. This belief was controlling.

CA(15a) (15a) CA(15b) (15b)

Homicide § 11—First Degree Murder—Fixing of Degree.

--With respect to a homicide that is committed by one of the means listed in *Pen. Code*, § 189 (murder), such statute is merely a degree-fixing measure. There must first be independent proof beyond a reasonable doubt that a crime was murder, i.e., an unlawful killing with malice aforethought (*Pen. Code*, §§ 187, 188), before § 189 can operate to fix the degree thereof at murder in the first degree. Thus, if a killing is murder within the meaning of §§ 187 and 188, and is by one of the means enumerated in § 189, the use of such means makes the killing first degree murder as a matter of law. However, a killing by one of the means enumerated in the statute is not first degree murder unless it is first established that it is murder. If the killing was not murder, it cannot be first degree murder, and a killing cannot become murder in the absence of malice aforethought. Without a showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in the statute.

CA(16a) (16a) CA(16b) (16b)

Homicide § 16—Felony Murder—Codification of Common Law Rule.

--With respect to a homicide resulting from the commission of or attempt to commit one of the felonies listed in *Pen. Code*, § 189 (murder), such statute has been generally treated as not only a degree-fixing device, but also as a codification of the felony-murder rule. No independent proof of malice is required in such cases; by operation of the statute the killing is deemed to be first degree murder as a matter of law.

CA(17a) (17a) CA(17b) (17b)

Statutes § 45—Construction—Presumptions—When Legislature Deletes Express Statutory Provision.

--It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

CA(18a) (18a) CA(18b) (18b)

Statutes § 31—Construction—Language—Words and Phrases—Statutory Definitions.

--When a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. It is presumed that the word was used in the sense specified by the Legislature, and the statute will be construed accordingly.

CA(19a) (19a) CA(19b) (19b)

Statutes § 31—Construction—Language—Words and Phrases—Giving Same Meaning to Word Used in Different Parts of Statute.

--It is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute.

CA(20a) (20a) CA(20b) (20b)

Statutes § 50—Construction—Codes—Penal Code—Code Commission Reports.

--When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 is enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature.

CA(21a) (21a) CA(21b) (21b) CA(21c) (21c)
CA(21d) (21d) CA(21e) (21e)

Homicide § 16—Felony Murder—Conclusive Presumption of Malice—Due Process.

--In felony-murder cases the prosecution need only prove defendant's intent to commit the underlying felony. The "conclusive presumption" of malice is no more than a procedural fiction that masks the substantive reality that, as a matter of law, malice is not an element of felony murder. Since the felony-murder

rule does not in fact raise a presumption of the existence of an element of the crime, it does not violate the due process requirement for proof beyond a reasonable doubt of each element of the crime charged. Similarly, the felony-murder doctrine does not violate the rule that a statutory presumption affecting the People's burden of proof in criminal cases is invalid unless there is a rational connection between the fact proved and the fact presumed.

[CA\(22a\)](#) (22a) [CA\(22b\)](#) (22b) [CA\(22c\)](#) (22c)

Criminal Law § 283—Evidence—Burden of Proof—Degree of Proof—Beyond Reasonable Doubt—Due Process.

--Due process requires proof beyond a reasonable doubt of each element of the crime charged (*Pen. Code, § 1096*).

[CA\(23a\)](#) (23a) [CA\(23b\)](#) (23b) [CA\(23c\)](#) (23c)

Homicide § 104—Appeal—Constitutionality of Felony-murder Rule—Precedential Value of Prior Case Law.

--On appeal from a felony-murder conviction in which defendant challenged the constitutionality of the felony-murder rule on due process grounds, prior judicial opinions reciting that malice is "presumed" by operation of the felony-murder rule were not controlling, since they did not address such constitutional issue.

[CA\(24a\)](#) (24a) [CA\(24b\)](#) (24b) [CA\(24c\)](#) (24c)

Evidence § 14—Conclusive Presumptions.

--In strictness there can be no such thing as a conclusive presumption. Whenever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that when the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case. Thus, a conclusive presumption is in actuality a substantive rule of law.

[CA\(25a\)](#) (25a) [CA\(25b\)](#) (25b) [CA\(25c\)](#) (25c)

Homicide § 16—Felony Murder—Conclusive

Presumption of Malice—Equal Protection.

--The "conclusive presumption" of malice in felony-murder cases does not violate equal protection, even though defendants charged with murder other than felony murder are allowed to reduce their degree of guilt by evidence negating the element of malice, since the two kinds of murder are not the same crime, and since malice is not an element of felony murder.

[CA\(26a\)](#) (26a) [CA\(26b\)](#) (26b)

Homicide § 10—Murder—Malice—Distinction Between First Degree Murder and Felony Murder.

--In the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt. In the case of felony murder, which is automatically fixed at first degree by operation of *Pen. Code, § 189*, defendant's state of mind is entirely irrelevant and need not be proved at all, since malice is not an element of felony murder. Thus, first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder.

[CA\(27a\)](#) (27a) [CA\(27b\)](#) (27b) [CA\(27c\)](#) (27c) [CA\(27d\)](#) (27d)

Criminal Law § 518—Punishment—Cruel and Unusual—Disproportionality—Felony Murder.

--In a successful felony-murder prosecution against a 17-year-old high school student which arose out of an attempted robbery of a marijuana farm by defendant and several youthful companions and defendant's fatal shooting of a man who was guarding the farm, imposition of the statutorily prescribed penalty of life imprisonment as a first degree murderer (*Pen. Code, § 190 et seq.*) violated the prohibition against cruel and unusual punishment (*Cal. Const., art. I, § 17*) under the circumstances presented. The record indicated that defendant was unusually immature for his age, that he had had no prior trouble with the law, and that he was not the prototype of a hardened criminal who posed a grave threat to society. In addition, the shooting at issue was a response to a suddenly developing situation that defendant perceived as putting his life in danger. Against this showing of attenuated individual culpability was the massive loss of liberty entailed in a life

sentence and the fact that, due to his minority, no greater punishment could have been inflicted on defendant had he committed premeditated first degree murder. Moreover, both the judge and jury indicated their belief that the prescribed penalty was excessive. The excessiveness of the punishment was also underscored by the petty chastisements imposed on the six other youths who participated with defendant in the same offenses. Nevertheless, since defendant intentionally killed the victim without legally adequate provocation, he was subject to punishment as a second degree murderer.

CA(28a) [↕] (28a) CA(28b) [↕] (28b)

Criminal Law § 518—Punishment—Cruel and Unusual.

--The legislative authority to define crimes and prescribe penalties, while in the first instance for the judgment of the Legislature alone, remains ultimately circumscribed by the constitutional provision forbidding the infliction of cruel and unusual punishment (Cal. Const., art. I, § 17). Thus, while the Legislature is accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function.

CA(29a) [↕] (29a) CA(29b) [↕] (29b)

Criminal Law § 518—Punishment—Cruel and Unusual—Disproportionality.

--A statutory punishment may violate the prohibition against cruel and unusual punishment (Cal. Const., art. I, § 17) not only if it is inflicted by a cruel or unusual method, but also if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. Accordingly, the judiciary should not interfere in this process unless a statute prescribes a penalty out of all proportion to the offense.

CA(30a) [↕] (30a) CA(30b) [↕] (30b)

Criminal Law § 518—Punishment—Cruel and Unusual—Disproportionality.

--In determining whether a statutory punishment is so disproportionate to the crime for which it is inflicted that it violates the prohibition against cruel and unusual punishment (Cal. Const., art. I, § 17), a court must examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society. In conducting such inquiry, however, the court is to consider not only the offense as defined by the Legislature, but also the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts. The court must also view the offender in the concrete rather than the abstract. This branch of the inquiry focuses on the particular person before the court and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind. Thus, a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability.

CA(31a) [↕] (31a) CA(31b) [↕] (31b)

Appellate Review § 64—Powers of Trial Court Pending Appeal—Jurisdiction to Set Aside Void Order.

--A trial court has jurisdiction to set aside a void order even while an appeal in the case is pending.

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Judges: Opinion by Mosk, J., with Bird, C. J., and Kingsley, J., [****2] * concurring. Separate concurring opinion by Reynoso, J. Separate concurring opinion by Kaus, J. Separate concurring opinion by Kingsley, J. * Separate concurring opinion by Bird, C. J. Separate concurring and dissenting opinion by Richardson, J. Separate concurring and dissenting opinion by Broussard, J.

Opinion by: MOSK

Opinion

[*450] [**700] [***393] Defendant appeals from a judgment convicting him of first degree felony murder and attempted robbery. The case presents two principal issues. First, we inquire whether a standing crop can be the subject of robbery; declining to perpetuate an archaic distinction between that crime and larceny, we conclude that it can. We next address a multiple attack on the first degree felony-murder rule. After reviewing its legislative history we find that in California the rule is a creature of statute, and hence cannot be judicially abrogated. We also reject various constitutional challenges to the rule; we hold primarily that the rule does not deny due process of law by relieving the prosecution of the burden of proving malice, because malice is not an element of the crime [****3] of felony murder.

We further hold, however, that the penalty for first degree felony murder, like all statutory penalties, is subject to the constitutional prohibition against cruel or unusual punishments (*Cal. Const., art. I, § 17*), and in particular to the rule that a punishment is impermissible if it is grossly disproportionate to the offense as defined or as committed, and/or to the individual culpability of the offender. (*In re Lynch (1972) 8 Cal.3d 410 [105*

Cal.Rptr. 217, 503 P.2d 921.) Because such disproportion is manifest on the record before us -- as it was to the triers of fact -- we modify the judgment to punish this defendant as a second degree murderer. As modified, the judgment will be affirmed.

[*451] At the time of these events defendant was a 17-year-old high school student living in the Santa Cruz Mountains not far from a small, secluded farm on which Dennis Johnson and his brother illegally grew marijuana. Told by a friend about the farm, defendant set out with two schoolmates to investigate it and to take some of the marijuana if possible. After crossing posted barricades and evading a primitive tin-can alarm system, the three boys reached the [****4] farm, a quarter-acre plot enclosed by a six-foot wire fence. In an effort to avoid being seen by Johnson, who was guarding the property, the boys tried several different approaches, then hid in a hollow tree stump. Johnson appeared with a shotgun, cocked the weapon, and ordered them out; defendant remained in hiding, but his companions complied. Johnson demanded to know what they were doing there; disbelieving their story that they were hunting rabbits, he told them to get off the property. He warned them that his brother would have shot them if he had met them, adding that the next time the youths came on his property he might shoot them himself. Defendant overheard these threats.

The two boys departed promptly, but defendant stayed inside the tree trunk until it grew dark. Finally emerging, he went to take another look at the plantation. Again Johnson confronted him with a shotgun, pointed the weapon at him, and ordered him to go. He left without further ado.

Some weeks later defendant returned to the farm to show it to his brother. As the latter was looking over the scene, however, a shotgun blast was heard and once more the boys beat a hasty retreat.

[***394] After [****5] the school term began, defendant and a friend discussed the matter further [**701] and decided to attempt a "rip-off" of the marijuana with the aid of reinforcements. Various plans were considered for dealing with Johnson; defendant assertedly suggested that they "just hold him up. Hit him over the head or something. Tie him to a tree." They recruited six other classmates, and on the morning of October 17, 1978, the boys all gathered for the venture. Defendant had prepared a rough map of the farm and the surrounding area. Several of the boys brought shotguns, and defendant carried a .22 caliber semi-

* Assigned by the Chairperson of the Judicial Council.

automatic rifle. They also equipped themselves with a baseball bat, sticks, a knife, wirecutters, tools for harvesting the marijuana, paper bags to be used as masks or for carrying plants, and rope for bundling plants or for restraining the guards if necessary. Along the way, they found some old sheets and tore them into strips to use as additional masks or bindings to tie up the guards. Two or three of the boys thereafter fashioned masks and put them on.

The boys climbed a hill towards the farm, crossed the barricades, split into four pairs, and spread out around the field. [****6] There they saw one of the [*452] Johnson brothers tending the plants; discretion became much the better part of valor, and they made little or no progress for almost two hours. Although the testimony of the various participants was not wholly consistent, it appears that two of the boys abandoned the effort altogether, two others were chased away by dogs but began climbing the hill by another route, and defendant and his companion, with the remaining pair, watched cautiously just outside the field of marijuana.

One of the boys returning to the farm then accidentally discharged his shotgun, and the two ran back down the hill. While the boys near the field reconnoitered and discussed their next move, their hapless friend once more fired his weapon by mistake. In the meantime Dennis Johnson had circled behind defendant and the others, and was approaching up the trail. They first heard him coming through the bushes, then saw that he was carrying a shotgun. When Johnson drew near, defendant began rapidly firing his rifle at him. After Johnson fell, defendant fled with his companions without taking any marijuana. Johnson suffered nine bullet wounds and died a few days later.

[****7] |

Defendant first contends the court erred in phrasing the attempted robbery charge in terms of CALJIC instructions Nos. 6.00 and 6.01. *CALJIC No. 6.00* provides, inter alia, that an attempt to commit a crime requires proof of a specific intent to commit the crime and of "a direct but ineffectual act done toward its commission"; and that in determining whether such an act took place "it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt," but the acts will be sufficient when they

"clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design . . ." *CALJIC No. 6.01* states, "If a person has once committed acts which constitute an attempt to commit crime, he cannot avoid responsibility by not proceeding further with his intent to commit the crime, either by reason of voluntarily abandoning his purpose or because [****8] he was prevented or interfered with in completing the crime."

CA(1a)[↑] (1a) CA(2a)[↑] (2a) Defendant in effect maintains that in cases in which an attempted felony is also used to support a charge of homicide on a felony-murder theory, these instructions are too broad because they could result in liability up to and including the death penalty despite the absence of any conduct that would amount to an actual element of the underlying crime, [*453] and despite the fact that the perpetrator might voluntarily abandon his criminal plan. In felony-murder cases, therefore, defendant would apparently require [***395] proof not only of intent and a direct act beyond mere preparation, but of the [**702] commission of an element of the underlying crime other than the formation of such intent, and would allow as a defense the voluntary abandonment of the criminal effort, regardless of how close to consummation it had progressed.

We are not persuaded to so limit the law of attempts. The instructions given here accurately state that law (*Pen. Code. § 664*; see *People v. Gallardo (1953) 41 Cal.2d 57, 66 [257 P.2d 29]*; *People v. Miller (1935) 2 Cal.2d 527, 530 [42 P.2d 308]*; *People v. [****9] Murray (1859) 14 Cal. 159*), while defendant's proposal would frustrate its aim. *CA(3a)[↑] (3a) HN1[↑]* "One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime." (*People v. Camodeca (1959) 52 Cal.2d 142, 147 [338 P.2d 903]*.) Accordingly, the requisite overt act "need not be the last proximate or ultimate step towards commission of the substantive crime . . . [para.] *CA(4a)[↑] (4a)* Applying criminal culpability to acts directly moving toward commission of crime . . . is an obvious safeguard to society because it makes it unnecessary for police to wait before intervening until the actor has done the substantive evil sought to be prevented. It allows such criminal conduct to be stopped or intercepted when it becomes clear what the actor's intention is and when

34 Cal. 3d 441, *453; 668 P.2d 697, **702; 194 Cal. Rptr. 390, ***395; 1983 Cal. LEXIS 226, ****9

the acts done show that the perpetrator is actually putting his plan into action." (*People v. Staples* (1970) 6 Cal.App.3d [****10] 61, 67 [85 Cal.Rptr. 589]; see also *United States v. Stallworth* (2d Cir. 1976) 543 F.2d 1038 [37 A.L.R.Fed 248]; *United States v. Coplton* (2d Cir. 1950) 185 F.2d 629, 633 [28 A.L.R.2d 1041].)

CA(1b)[↑] (1b) CA(2b)[↑] (2b) We are satisfied that society is entitled to no lesser degree of protection when the charge is **HN2[↑]** felony murder, involving as it does an attempt to commit a felony that by settled judicial definition must be "inherently dangerous to human life." (See, e.g., *People v. Williams* (1965) 63 Cal.2d 452, 457 [47 Cal.Rptr. 7, 406 P.2d 647].) As long as the trier of fact is convinced beyond a reasonable doubt that the defendant intended to commit a crime and was in the process of attempting to carry out that intent, no public purpose is served by drawing fine distinctions between those who have managed to satisfy some element of the offense and those who have not.¹

[****11] [*454] Nor is it appropriate to carve out a defense of voluntary abandonment in this context. As the jury was properly instructed, **HN3[↑]** subsequent events tending to show such an abandonment are irrelevant once the requisite intent and act are proved. (*People v. Staples*, *supra*, 6 Cal.App.3d at p. 69; *People v. Claborn* (1964) 224 Cal.App.2d 38, 41 [36 Cal.Rptr. 132]; *People v. Robinson* (1960) 180 Cal.App.2d 745, 750-751 [4 Cal.Rptr. 679]; *People v. Carter* (1925) 73 Cal.App. 495, 500 [238 P. 1059], and cases cited; Perkins, *Criminal Attempt and Related Problems* (1954-1955) 2 UCLA L.Rev. 319, 354.)² The armed robber

¹Indeed, the draftsmen of the Model Penal Code would require even less, making punishable as an attempt any act or omission that constitutes "a substantial step in a course of conduct planned to culminate in . . . commission of the crime," so long as that step is "strongly corroborative of the actor's criminal purpose." (Model Pen. Code (Proposed Official Draft 1962) §§ 5.01(1)(c), 5.01(2).) Under this standard, acts normally considered only preparatory could be sufficient to establish liability. (See Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (1961) 61 Colum.L.Rev. 571, 592-607.)

²Limited and equivocal authority to the contrary can be found in *People v. Von Hecht* (1955) 133 Cal.App.2d 25, 36 [283 P.2d 764], *People v. Montgomery* (1941) 47 Cal.App.2d 1, 13 [111 P.2d 437], disapproved on another ground in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44], and *People v. Corkery* (1933) 134

who feels a pang of conscience or chill of fear and bolts from the bank moments before the teller can hand over the loot has nevertheless [***396] endangered the lives of innocent people. Unlike the repentant conspirator (cf. *People v. [**703] Crosby* (1962) 58 Cal.2d 713, 730-731 [25 Cal.Rptr. 847, 375 P.2d 839]; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1003 [95 Cal.Rptr. 360]), he has taken direct steps towards committing the prohibited act. Public safety would be needlessly jeopardized if [****12] the police were required to refrain from interceding until absolutely certain in each case that the criminal would go through with his plan. The law of attempts eliminates precisely that burden once the subject has plainly demonstrated, by his actions, his intent presently to commit the crime.

Defendant submits that his proposed test is supported by the following language from *People v. Buffum* (1953) 40 Cal.2d 709, 718 [256 P.2d 317]: **HN4[↑]** "Preparation alone is not enough, there must be some appreciable [****13] fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter" (See also *People v. Miller* (1935) *supra*, 2 Cal.2d 527, 530, quoting from 1 Wharton's Criminal Law (12th ed. 1957) p. 280.) We did not mean by this language, however, to depart from the generally accepted definition of attempt. Our reference to an "appreciable fragment of the crime" is simply a restatement of the requirement of an overt act directed towards immediate consummation; it does not establish the novel requirement that an actual element of the offense be proved in every case. [*455] Furthermore, properly understood, our reference to interruption by independent circumstances rather than the will of the offender merely clarifies the requirement that the act be unequivocal. It is obviously impossible to be certain that a person will not lose his resolve to commit the crime until he completes the last act necessary for its accomplishment. But the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized. [****14] If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him.

Cal.App. 294, 297 [25 P.2d 257]. To the extent these cases are inconsistent with this decision, they are disapproved.

CA(5a) (5a) Defendant further contends that the evidence in this case was insufficient as a matter of law to support the jury's verdict that he was guilty of an attempt to commit robbery. **CA(6a)** (6a) The general rule, of course, is that **HN5** "When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55 [164 Cal.Rptr. 1, 609 P.2d 468].) **CA(7a)** (7a) And in the case of a prosecution for attempt, an additional rule is applicable. Acts that could conceivably be consistent with innocent behavior may, in the eyes of those with knowledge of the actor's criminal design, be unequivocally and proximately connected to the commission of the crime; it follows that the plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement. (*People v. Anderson* (1934) 1 Cal.2d 687, 690 [37 P.2d 67]; *People v. Berger* (1955) 131 Cal.App.2d 127, 130 [280 P.2d 136]; *People v. Fiegelman* (1939) 33 Cal.App.2d 100, 105 [91 P.2d 156].)

CA(5b) (5b) Here a rational trier of fact could have found that the evidence clearly demonstrated defendant's intent to rob. From their prior forays to the marijuana farm, defendant and his companions had learned that it was guarded by armed men who were able and willing to defend it by the use of deadly weapons if necessary. Accordingly, the youths could not have entertained a reasonable expectation that they would be able simply to walk onto the property in broad daylight and take its valuable crop without vigorous resistance by the owners. Rather, they must have known they would probably be required to use force to reach their goal. The inference is fully supported by the undisputed facts that, in response to what they had learned, the boys arranged for reinforcements, repeatedly discussed how they would overpower and restrain the guards, then equipped themselves with ample means to accomplish those ends -- i.e., guns, knives, clubs, masks, rope, and strips of sheeting. Doubtless they would have preferred to harvest the marijuana without any such confrontation, but this remote possibility did not negate their evident intent to rob.³

³As the Attorney General aptly puts it, "A person planning to

******17** There was also substantial evidence from which a reasonable jury could have found that defendant accomplished direct but ineffectual acts towards the commission of the intended robbery. It appears that defendant did not actually encroach on the marijuana field before he fled, but this circumstance does not immunize him from criminal liability; to hold otherwise would be to import the technical rules of trespass into the common sense appraisal of facts required of juries in attempt cases, a step that no other California court has taken.⁴ Here the conduct of defendant and his companions went beyond mere preparation. Having armed and disguised themselves, they set off for the farm, made their way past barricades posted with "no trespassing" signs, arrived on the scene carrying the means of forcibly subduing any opposition, divided themselves into small groups, encircled the field and watched for their opportunity. Even when they saw that the farm was not unattended and that armed guards were present, they persisted in their enterprise rather than avoid a confrontation by discreetly withdrawing. From prior experience, moreover, they knew that the guards would not hesitate to leave the field in order to drive away any interlopers. The situation they had created was thus fraught with risk of harm, as events would unfortunately soon prove. In light of the above-discussed clear evidence of their intent, the jury could rationally find that the acts of defendant and his companions to that point were sufficient to establish beyond a reasonable doubt that they were engaged in an attempt to commit robbery. The conviction of attempt is thus supported both by the instructions and by the proof.

steal the contents of a cash register in a liquor store which is open for business may have a generalized hope that the clerk will be away from his post when he arrives and that he will be able to snatch the money without opposition. But when, preparing for a violent confrontation, the person arms himself, dons a mask and obtains rope with which to bind the clerk, it is unreasonable to say that he has not entertained the specific intent to commit robbery."

⁴In a variety of contexts convictions of attempt have been upheld even though the defendant did not actually go onto the premises where the crime was to be committed. (See, e.g., *United States v. Stallworth* (2d Cir. 1976) *supra*, 543 F.2d 1038 [attempted robbery]; *People v. Vizcarra* (1980) 110 Cal.App.3d 858 [168 Cal.Rptr. 257] [same]; *People v. Gibson* (1949) 94 Cal.App.2d 468 [210 P.2d 747] [attempted burglary]; *People v. Parrish* (1948) 87 Cal.App.2d 853 [197 P. 804] [attempted murder]; *People v. Stites* (1888) 75 Cal. 570 [17 P. 693] [attempt to obstruct railroad tracks].)

[****19] II

CA(8a)[↑] (8a) (See fn. 5.) CA(9a)[↑] (9a) Defendant next contends that a standing crop of marijuana cannot in any event be the subject of robbery or attempted robbery [*457] because it is realty, not personalty.⁵ Although defendant's argument finds apparent support in the common law definition of property subject to larceny, we hold that HN6[↑] robbery of a standing crop is punishable in California. We reach this conclusion both because the Legislature has [***398] said as much with regard to the lesser included offense of larceny, and because the [**705] common law rule to the contrary is a hypertechnical remnant of an archaic formalism that can no longer be seriously defended.

[****20] CA(10a)[↑] (10a) The common law rule limiting larceny to the unlawful taking of personalty derived from the undeniable fact that realty, in the sense of land subject to description by metes and bounds, cannot be "carried away." (See Perkins, Criminal Law (2d ed. 1969) p. 234.) "Real property under the English law was never the subject of [larceny]. Being incapable of larcenous *asportation*, it was not regarded as requiring at the hands of the criminal law the same protection as personalty." (Italics added.) (*People v. Cummings* (1896) 114 Cal. 437, 440 [46 P. 284].) When restricted to land, the logic of the rule was unassailable. But for various reasons unrelated to the criminal law, "realty" was defined in due course to include many items that can be more or less readily detached and removed from the land. Unfortunately, the legal fiction that these objects are "immovable" has never hindered would-be thieves from moving most of them. Nevertheless, probably because larceny was a felony at common law and therefore a capital offense, judges resisted its application to those who had merely pilfered growing food or wood.⁶ Courts therefore clung to the

⁵ Defendant apparently concedes that robbery of contraband is subject to penal sanction. California was for some time the only jurisdiction to adhere to a contrary rule (*People v. Spencer* (1921) 54 Cal.App. 54 [201 P. 130]), but our court has long since agreed to the overruling of this aberrant precedent. (*People v. Odenwald* (1930) 104 Cal.App. 203, 211-212 [285 P. 406] [opn. on den. of hg.].) Today the rule is universal that by prohibiting possession of an item, the government does not license criminals to take it by force or stealth from other criminals.

⁶"The horribly severe punishment (death) meted out for this offense in earlier times has also been influential in inducing courts to refine and limit the crime. This process frequently

artificial distinction between [****21] personal property and things that "savour of the realty" (4 Stephen, *New Commentaries on the Laws of England* (1st Am. ed. 1846) p. 155), and held that if the thief maintained possession continuously during severance and asportation, the property never became personalty in the possession of its owner and hence no larceny could occur. Put conversely, "if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel." (1 Hale, [*458] *Pleas of the Crown* (1st Am. ed. 1847) p. 510.) Thus, in a perverse and unintended application of the work ethic, thieves industrious enough to harvest what they stole and to carry it away without pause were guilty at most of trespass, while those who tarried along the way, or enjoyed fruits gathered by the labor of others, faced the hangman's noose.

[****22] The rule has long been the subject of ridicule and limitation. Our court first criticized it over a century ago: "This rule involved many technical niceties, which have resulted in what appear to us to be pure absurdities. For example, if the article stolen was severed from the soil by the thief himself and immediately carried away, so that the whole constituted but one transaction, it was held to be only a trespass; but if, after the severance, he left the article for a time and afterward returned for it and took it away on another occasion, then it became a larceny [para.] We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas, if he had taken them from the ground, after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich gold-bearing rock with felonious intent should only be a trespass, if the rock be immediately carried off; but if left on the ground, and taken off by the thief a few hours later, it becomes larceny. The more [****23] sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and if he then

enabled them, in cases which they deemed to be meritorious, to avoid the necessity of pronouncing the death penalty. The subject of larceny therefore is the best illustration of the old saying that hard cases make bad law." (*State v. Day* (Me. 1972) 293 A.2d 331, 333, quoting from 2 Bishop, *Criminal Law* (9th ed.) § 760, p. 584.)

removed it, with a felonious intent, he would be guilty of a larceny, whatever dispatch may have been employed [***399] in the removal." (*People v. Williams (1868)* 35 Cal. 671, 676.) But while the rule could [**706] no longer command the respect of reason, it was nevertheless honored by time, and on that basis alone the court felt compelled to follow it. Reluctantly putting aside common sense in favor of common law, the court confessed that it "adverted to the question mainly for the purpose of directing the attention of the Legislature to a subject which appears to demand a remedial statute." (*Id. at p. 677.*)

The Legislature was quick to respond. In 1872 it adopted a statute redefining detachable fixtures and crops as personalty subject to larceny, "in the same manner as if the thing had been severed by another person at some previous time." (*Pen. Code, § 495.*) Contemporaneously, it enacted a statute dividing the crime of larcenous severance of realty into grand larceny, if the object of the theft is worth \$ 50 or [****24] more, and petty larceny otherwise. (Stats. 1871-1872, ch. 218, p. 282; now see *Pen. Code, §§ 487b, 487c.*) **CA(9b)** [↑] (9b) Defendant argues that because those statutes are explicitly directed at larceny only, they reveal a legislative intent to leave intact the common law rule as it applies to robbery.

[*459] To so argue is to presume the Legislature concluded that although the old rule was absurd as applied to thieves, it should nevertheless be maintained to exonerate robbers. We are given no reason to believe the Legislature intended to be more solicitous of the more violent criminal, nor can we conceive of any rational motivation it could have had for doing so. A more plausible interpretation is that the Legislature foresaw as likely only theft, and not robbery, of things attached to the land: it had little reason to expect that robbers would eschew bank vaults in favor of barnyards, or that farmers would patrol their fields so assiduously that covetous criminals would need to resort to robbery to achieve their ends. Had the Legislature anticipated in 1872 that the meteoric rise in popularity and hence in value of an illicit plant would lead to violent confrontations between black market [****25] cultivators and armed bandits, we have no doubt it would have explicitly applied the rule to robbery as well.

We recognize that it did not do so. But this circumstance does not compel us to conclude that the old rule as to larceny applies today to robbery. In fact, defendant offers no evidence that there ever existed at common law an explicit doctrine regarding robbery of

crops, and we have been unable to find a single case in any jurisdiction raising that precise issue. Ordinarily, of course, we are under no obligation to apply even an exemplary common law rule to an area of law not traditionally associated with it.

Defendant points out that despite the lack of any express rule regarding robbery of crops or fixtures, it has always been understood that the law of robbery borrows its definition of subject property from the law of larceny, because the former crime is distinguished from the latter only by the less circuitous means of its accomplishment. (*People v. Butler (1967)* 65 Cal.2d 569, 572-573 [55 Cal.Rptr. 511, 421 P.2d 703]; *People v. Leyvas (1946)* 73 Cal.App.2d 863, 866 [167 P.2d 770]; 2 Burdick, *The Law of Crime* (1946) § 595, pp. 408-409; 4 Blackstone, [****26] Commentaries 242.)⁷ Defendant's observation is correct but not dispositive.

First, the rule requiring an interruption between severance and asportation has suffered such erosion and criticism during the past century that we no longer feel compelled to preserve it, as this court did in *Williams*, particularly in an area of law not previously [****27] marred by its application. Many [***400] courts [*460] have found the doctrine at odds with reason and have therefore abolished it rather [**707] than await legislative intervention. For instance, the Supreme Court of Nebraska observed in 1905: "These fine technical distinctions and absurd sophistries are repugnant to our conceptions of justice, and the courts of most states have discarded them; while those which in a measure retain them have confined the rule within the most narrow limits. Undoubtedly the modern and true rule is that **HNT** [↑] he who by his wrongful acts converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny." (*Junod v. State (1905)* 73 Neb. 208, 211 [102 N.W. 462].) In our

⁷The relationship was acknowledged in the explanatory note of the California Code Commission accompanying the enactment of the robbery statute in 1872. The note stated in part, "Three elements are necessary to constitute the offense of robbery, as it is generally understood: 1. A taking of property from the person or presence of its possessor; 2. A wrongful intent to appropriate it; 3. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simply larceny; . . ." (Italics in original.) (Cal. Code Com. note to Ann. *Pen. Code, § 211* (1st ed. 1872) p. 99 [hereinafter 1872 Code Com. note].)

sister state of Oregon the doctrine, the application of which "at times is so subtle as to require much mental gymnastics," was overthrown in 1914 in favor of "the simpler, more modern, and better" rule adverted to above. (*State v. Donahue* (1914) 75 Ore. 409 [144 P. 755, 758, 5 A.L.R. 1121]; see also *State v. Day* (Me. 1972) *supra*, 293 A.2d 331. [****28] 333; *Stephens v. Commonwealth* (1947) 304 Ky. 38 [199 S.W.2d 719, 721]; *State v. Wolf* (1907) 22 Del. 323 [66 A. 739, 741]; *Ex parte Willike* (1870) 34 Tex. 155, 159.) Of the courts that have hesitated to overrule the doctrine outright, many have found ways of limiting it; some redefine "fixtures" for this purpose to exclude items that the civil law includes in the term (*Garrett v. State* (1952) 213 Miss. 328 [56 So.2d 809, 810-811] [gas heaters]; *Eaton v. Commonwealth* (1930) 235 Ky. 466 [31 S.W.2d 718], [copper wire attached to posts]; *State v. Berryman* (1873) 8 Nev. 262, 269-271 [mineral ore]; *Jackson v. State* (1860) 11 Ohio St. 104, 112 [leather belt affixed to machinery]; *Hoskins v. Tarrance* (Ind. 1840) 5 Blackf. 417, 418-419 [key in the lock of a door]), while others effectively eliminate the requirement of a separation between severance and asportation by creative reconstruction of the facts to establish a sufficient temporal gap (*Fuller v. State* (1948) 34 Ala.App. 211 [39 So.2d 24, 26]; *Stansbury v. Luttrell* (1927) 152 Md. 553 [137 A. 339, 342]; *Commonwealth v. Steimling* (1893) [****29] 156 Pa. 400 [27 A. 297, 299]).

Moreover, in England the rule has been continuously eroded by statute since 1601 (4 Blackstone, Commentaries 233-234), and in those few American jurisdictions in which courts have refrained from adopting the modern rule, lawmakers have often done so. (*Commonwealth v. Meinhardt* (1953) 173 Pa.Super. 495 [98 A.2d 392, 393]; *Garrett v. State* (Miss. 1952) *supra*, 56 So.2d 809, 810; *Williams v. State* (1948) 186 Tenn. 252 [209 S.W.2d 29, 31]; *State v. Jackson* (1940) 218 N.C. 373 [11 S.E.2d 149, 151, 131 A.L.R. 143]; *Beall v. State* (1882) 68 Ga. 820.) Hence despite the common law, "it is the generally accepted modern rule that he who by his wrongful act converts a fixture into personal property, and then with larcenous intent forthwith carries it away without the consent of the owner, may be rightfully convicted of larceny." (50 Am.Jur.2d, Larceny, § 73, p. 245.)

[*461] Today, the old rule is less justifiable and more mischievous than ever. As the Maine court observed, "In a modern mobile society in which the attachment of all manner of valuable appliances and gadgets to the realty is commonplace, we [****30] see no occasion to attribute to the Legislature any intention to so narrowly

circumscribe the meaning of the words 'goods or chattels' in our larceny statute as to make the stealing of chattels severed from realty an attractive and lucrative occupation." (*State v. Day* (Me. 1972) *supra*, 293 A.2d 331, 333.) We perceive no reason to reach a different conclusion regarding the words "goods" and "chattels" as they apply to robbery in our statute. (See *Pen. Code, § 7, subd. (12)*.) We believe it would come as a great surprise to the potential victim of crime to learn that the more precautions he takes to guard his valuables, and the more violence that must be done to take them from him, the less severe the penalty the law will impose. Because we find no reasoned support for the continued application of the common law rule, even in the narrow context in which it was traditionally invoked, we refrain from extending it to the crime of robbery.

Lastly, defendant argues that in 1872 the Legislature expressly restricted the scope of its new rule to larceny by the introductory [***401] clause of *HN8* [↑] *Penal Code section 495*, which states, "The provisions of this Chapter [i.e., [**708] [****31] chapter 5, relating to theft] apply where the thing taken is any fixture or part of the realty" But the quoted language does not preclude application of the section to other chapters of the Penal Code; it merely specifies that when its conditions are satisfied, the theft provisions may be applied. Admittedly, it does not authorize its own application to robbery, but it need not do so; that authority exists by virtue of the close relationship between robbery and larceny. (See fn. 7, *ante*.) Moreover, even if we refrain from employing *section 495* for the present purpose, *sections 487b* and *487c* contain no similar language, and are therefore eligible to clarify the law of robbery as it was understood when the Legislature acted, and as it is understood today.

CA(11a) [↑] (11a) We recognize that *HN9* [↑] in the absence of legislative proscription of conduct, there is no crime. (*Pen. Code, § 6; Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631-632 [87 Cal.Rptr. 481, 470 P.2d 617, 40 A.L.R.3d 420].) *CA(9c)* [↑] (9c) But we do not hereby expand the definition of robbery; we merely give full effect to a clear legislative intent to eliminate an almost universally disfavored rule from our law. We are confident [****32] that in enacting *sections 487b, 487c, and 495*, the Legislature meant to express its unqualified disapproval of the rule that our predecessors stoically accepted in *Williams*. To infer therefrom a legislative desire to *extend* the rule to a new context would be to pervert the historical record and defeat this legislative intent. In the words of Oliver Wendell Holmes, "We agree to all the generalities about not

supplying criminal laws with what they omit, but there [**462] is no canon against using common sense in construing laws as saying what they obviously mean." (*Roschen v. Ward* (1929) 279 U.S. 337, 339 [73 L.Ed. 722, 728, 49 S.Ct. 336].)

For the reasons stated, we hold that **HN10** a robbery within the meaning of *section 211* is committed when property affixed to realty is severed and taken therefrom in circumstances that would have subjected the perpetrator to liability for robbery if the property had been severed by another person at some previous time. Defendant was properly convicted of attempting to commit such a robbery.

III

On the murder charge the court gave the jury the standard CALJIC instructions defining murder, malice aforethought, wilful, deliberate [***33] and premeditated first degree murder, first degree felony murder, second degree murder, manslaughter, and self-defense. The felony-murder instruction (CALJIC No. 8.21) informed the jury that an unlawful killing, whether intentional, negligent, or accidental, is murder in the first degree if it occurs during an attempt to commit robbery. Defendant mounts a two-fold attack on the first degree felony-murder rule in this state: he contends (1) it is an uncodified common law rule that this court should abolish, and (2) if on the contrary it is embodied in a statute, the statute is unconstitutional.⁸

[***34] **CA(12a)** (12a) Defendant first asks us in effect to adopt the position taken by the Michigan Supreme Court in *People v. Aaron* (1980) 409 Mich. 672 [299 N.W.2d 304, 13 A.L.R.4th 1180] and to abolish the felony-murder rule in a further exercise of the power we invoke in part II of this opinion, i.e., our power to conform the common law of this state to contemporary conditions and enlightened notions of justice. (See,

⁸On factual grounds we declined to reach these issues in *People v. Ramos* (1982) 30 Cal.3d 553, 589-590 [180 Cal. Rptr. 266, 639 P.2d 908], and *People v. Haskett* (1982) 30 Cal.3d 841, 851, footnote 2 [180 Cal. Rptr. 640, 640 P.2d 776]. As will appear, however, in the case at bar there is no doubt that the jury based its first degree murder verdict on the felony-murder rule. The jurors made this fact plain in their communications to the court both before and after rendering their verdict; and following that verdict, the court stated on the record that the evidence did not support a first degree murder conviction under any theory other than felony murder. The issues are therefore properly before us.

e.g., *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 393-398 [115 Cal. Rptr. 765, 525 P.2d 669], and cases cited.) Defendant emphasizes the dubious origins [***402] of the felony-murder doctrine, the many [**709] strictures levelled against it over the years by courts and scholars, and the legislative and judicial limitations that have increasingly circumscribed its operation. We do not disagree with these criticisms; indeed, our opinions make it clear we hold no brief for the felony-murder rule. **CA(13a)** (13a) We have repeatedly stated that felony murder [**463] is a "highly artificial concept" which "deserves no extension beyond its required application." (*People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582; accord, *People v. Henderson* [***35] (1977) 19 Cal.3d 86, 92-93 [137 Cal. Rptr. 1, 560 P.2d 1180]; *People v. Poddar* (1974) 10 Cal.3d 750, 756 [111 Cal. Rptr. 910, 518 P.2d 342]; *People v. Satchell* (1971) 6 Cal.3d 28, 33-34 [98 Cal. Rptr. 33, 489 P.2d 1361, 50 A.L.R.3d 383]; *People v. Sears* (1970) 2 Cal.3d 180, 186-187 [84 Cal. Rptr. 711, 465 P.2d 847]; *People v. Wilson* (1969) 1 Cal.3d 431, 440 [82 Cal. Rptr. 494, 462 P.2d 22]; *People v. Ireland* (1969) 70 Cal.2d 522, 539 [75 Cal. Rptr. 188, 450 P.2d 580, 40 A.L.R.3d 1323].) And we have recognized that the rule is much censured "because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin" (*Phillips, supra*, at p. 583, fn. 6, of 64 Cal.2d) and because "in almost all cases in which it is applied it is unnecessary" and "it erodes the relation between criminal liability and moral culpability" (*People v. Washington* (1965) 62 Cal.2d 777, 783 [44 Cal. Rptr. 442, 402 P.2d 130]).

CA(14a) (14a) Nevertheless, a thorough review of legislative history convinces us that **HN11** in California -- in distinction to Michigan -- the first degree felony-murder rule is a creature of statute. [***36] However much we may agree with the reasoning of *Aaron*, therefore, we cannot duplicate its solution to the problem: **HN12** this court does not sit as a super-legislature with the power to judicially abrogate a statute merely because it is unwise or outdated. (See *Griswold v. Connecticut* (1965) 381 U.S. 479, 482 [14 L.Ed.2d 510, 513, 85 S.Ct. 1678]; *Estate of Horman* (1971) 5 Cal.3d 62, 77 [95 Cal. Rptr. 433, 485 P.2d 785]; *People v. Russell* (1971) 22 Cal.App.3d 330, 335 [99 Cal. Rptr. 277].)

We begin with *Aaron*. After a detailed survey of the history of the felony-murder doctrine in England and the United States (299 N.W.2d at pp. 307-316), the opinion observes that in Michigan the Legislature has not seen

fit to codify either murder, malice, or felony murder, but instead has left each to be governed by the common law (*id. at pp. 319-323*). The court then explains, however, that in order to mitigate the harshness of the common law rule that all murders were of one kind and were punishable alike by death (see 2 Pollock & Maitland, *History of English Law* (2d ed. 1909) p. 485; 4 Blackstone, *Commentaries* 194-202), the Michigan Legislature adopted in 1837 [****37] a statute dividing murder into two degrees with different punishments for each. The statute provides that "murder" committed either (1) by certain listed means (poison, lying in wait, or other wilful, deliberate, and premeditated killing) or (2) during the commission or attempted commission of certain listed felonies (e.g., arson, rape, robbery, or burglary), is murder in the first degree, and all other kinds of murder are murder in the second degree. The opinion points out (299 N.W.2d at pp. 321-323) that [*464] the statute is a copy of the first legislation in the nation on this topic, enacted in Pennsylvania in 1794, and that it has long been construed by Michigan courts to be no more than a degree-fixing device, i.e., that when a "murder" is otherwise proved -- to wit, an unlawful killing with malice aforethought -- the statute simply fixes the degree thereof at first degree if it was committed by one of the listed means or during one of the listed felonies; it does not automatically transform all killings so committed into first degree murder.⁹

[****38] [*710] [***403] Concluding that Michigan has no statutory felony-murder rule, the *Aaron* court stresses that it has already severely restricted the common law felony-murder rule in its prior decisions, e.g., by barring its application when the felony is not "inherently dangerous to human life" or when the homicide is not directly attributable to the defendant because it is committed by the intended felony victim acting in self-defense. (*Id. at pp. 324-325*.) As a "logical extension" of those decisions, the court holds it no longer permissible in any prosecution in Michigan to automatically equate a mere intent to commit the

underlying felony with the malice aforethought required for murder. (*Id. at p. 326*.) The court concludes by abolishing the common law felony-murder rule in its jurisdiction, reasoning that the rule is either unnecessary -- when malice can be proved by other evidence, including when relevant the nature and circumstances of the underlying felony -- or unjust -- when such malice cannot be proved, because in those cases the rule violates the criminal law's basic premise of individual moral culpability. (*Id. at pp. 327-329*.)

From the reported [****39] history of the 1794 Pennsylvania statute it clearly appears the *Aaron* court was correct in characterizing it as a degree-fixing measure rather than a codification of the common law felony-murder rule. (See Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder* (1949) 97 U.Pa.L.Rev. 759, 764-773.) CA(15a)[*] (15a) California has a very similar statute, *Penal Code section 189*,¹⁰ [****40] and we need not speculate on its provenance; its draftsmen acknowledged that it was taken directly from the [*465] 1794 Pennsylvania statute. (1872 Code Com. note, p. 82.) It is equally clear that with respect to any homicide committed by one of the *means* listed in *section 189* -- i.e., by bomb, poison, lying in wait, torture, or any other kind of wilful, deliberate and premeditated killing -- the California statute, like its Pennsylvania antecedent, is merely a degree-fixing measure: in such cases there must first be independent proof beyond a reasonable doubt that the crime was murder, i.e., an unlawful killing with malice aforethought (*Pen. Code, §§ 187, 188*), before *section 189* can operate to fix the degree thereof at murder in the first degree.¹¹

¹⁰ *Section 189* provides in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under *Section 288*, is murder of the first degree; and all other kinds of murders are of the second degree."

⁹The opinion notes that the 1794 Pennsylvania statute is so construed by the Pennsylvania courts (e.g., *Commonwealth ex rel. Smith v. Myers* (1970) 438 Pa. 218 [261 A.2d 550, 553, 56 A.L.R.3d 217]; *Commonwealth v. Redline* (1958) 391 Pa. 486 [137 A.2d 472, 476]) and that similar statutes in other jurisdictions are likewise viewed only as degree-fixing measures. (E.g., *State v. Galloway* (Iowa 1979) 275 N.W.2d 736, 738; *Warren v. State* (1976) 29 Md.App. 560 [350 A.2d 173, 177-178]; *State v. Millette* (1972) 112 N.H. 458 [299 A.2d 150, 153].)

¹¹"Thus if a killing is murder within the meaning of *sections 187* and *188*, and is by one of the means enumerated in *section 189*, the use of such means makes the killing first degree murder as a matter of law. It must be emphasized, however, that a *killing* by one of the means enumerated in the statute is not murder of the first degree unless it is first established that it is *murder*. If the killing was not murder, it cannot be first degree murder, and a killing cannot become murder in the absence of malice aforethought. Without a

an unlawful act which *did* amount to felony was deemed murder by operation of another statute. The inference is not unreasonable, but the question remains: which other statute was believed by the commission to codify the felony-murder rule?

[****53] For the answer, the Attorney General turns to his third and last piece of evidence, to wit, the legislative history not of homicide but of the crime of arson. The arson statute in force before adoption of the Penal Code contained a specialized felony-murder rule applicable to that felony alone.¹⁸ In 1872 the commission rewrote the prior law of arson into sections 447 to 455 of the Penal Code, but omitted the specialized felony-murder rule from the new statutory scheme. Its official comment to section 455 read in its entirety: "This chapter is founded upon Secs. 4, 5, and 6, of Act concerning crimes and punishments of 1856. -- Stats. 1856, p. 132. The text omits the clause in Sec. 4 [*sic*] which provides that 'should the lives of any persons be lost in consequence of such burning the offender shall be deemed guilty of murder, and shall be indicted and punished accordingly.' *This provision is surplusage, for the killing in that case is in the perpetration of arson, [*471] and falls within the definition of murder in the first degree. -- See Sec. 189, ante.*" (Italics added.) (1872 Code Com. note, p. 176.)

[****54] From the emphasized language the Attorney General asks us to infer that the commission intended its proposed version of *section 189* to incorporate a statutory first degree felony-murder rule, i.e., that as to any killing occurring during the commission of one of the listed felonies (including therefore arson) the section served both (1) the felony-murder function of making such killing the crime of murder and (2) the degree-fixing function of making that crime murder in the first

¹⁸After prescribing a term of imprisonment for arson, the statute declared in section 5: "and should the life or lives of any person or persons be lost in consequence of such burning as aforesaid, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly." (Stats. 1856, ch. 110, § 5, p. 132.)

By another quirk of draftsmanship (cf. fn. 12, *ante*) the statute purported to apply this proviso to second degree arson (§ 5) but not to first degree arson (§ 4), and again a literal reading of the statute would have been absurd. The proviso had been taken verbatim from our first arson statute, which recognized only one degree of that crime. (Stats. 1850, ch. 99, § 56, at p. 235.) The discrepancy arose in 1856 when the Legislature divided arson into two degrees but did not make the proviso plainly applicable to both.

degree. Again the inference is not unreasonable, although it may be doubted that the commission thought the matter through as carefully as the Attorney General would have us conclude. Rather, it appears the commission [****408] simply assumed it was making no change in the law: its heavy reliance on the 1864 *Sanchez* opinion in its note to *section 189* [**715] suggests the commission read that opinion to mean that the predecessor to *section 189* -- i.e., amended section 21 of the 1850 act -- had itself codified the felony-murder rule. For the reasons explained above, that reading of either *Sanchez* or section 21 would have been mistaken.

Nevertheless, for present purposes any such error by the [****55] commission is immaterial. It no longer matters that the commission may have misread pre-1872 law on this point; what matters is (1) the commission apparently *believed* that its version of *section 189* codified the felony-murder rule as to the listed felonies, and (2) the Legislature adopted *section 189* in the form proposed by the commission. CA(20a)[(20a) HN17["When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." (*People v. Wiley* (1976) 18 Cal.3d 162, 171 [133 Cal.Rptr. 135, 554 P.2d 881]; accord, *Keeler v. Superior Court* (1970) *supra*, 2 Cal.3d 619, 630, and cases cited in fn. 15.) CA(14f)[(14f) If we assume the 1872 Legislature drew the inferences that the Attorney General now asks us to draw regarding the intent of the commission, the quoted rule compels us to conclude that the Legislature acted with the same intent when it adopted *section 189*.

Nothing in the ensuing history of *section 189* (see fn. 14, *ante*) suggests that the Legislature acted [****56] with any different intent when it subsequently amended the statute in various respects, most recently in 1981. We infer that the Legislature still believes, as the code commission apparently did in 1872, that *section 189* codifies the first degree felony-murder rule. That belief is controlling, regardless of how shaky its historical foundation may be.

[*472] Accordingly, although the balance remains close, we hold that the evidence of present legislative intent thus identified by the Attorney General is sufficient to outweigh the contrary implications of the language of *section 189* and its predecessors. We are therefore required to construe *section 189* as a statutory

At this point, however, our law appears to diverge sharply from that of Pennsylvania and Michigan. CA(16a)^(F) (16a) HN13^(F) With respect to any homicide resulting from the commission of or attempt to commit one of the *felonies* listed in the statute, our decisions generally hold *section 189* to be not only a degree-fixing device but also a codification **[****41]** of the felony-murder rule: no independent proof of malice is required in such cases, and by operation of the statute the killing is deemed to be first degree murder as a matter of law. The difference, as we will show, lies in our history.

CA(14b)^(F) (14b) In its initial session, on April 16, 1850, the California Legislature adopted "An Act concerning Crimes and Punishments," the first statute regulating the criminal law of this state. (Stats. 1850, ch. 99, p. 229.) Several sections of that act are relevant to our **[***404]** inquiry. As at common law, murder was defined as the unlawful killing of a human being with malice aforethought (§ 19), **[**711]** there was only one degree, and it was punishable by death (§ 21). Manslaughter, an unlawful killing without malice, was divided into its voluntary and involuntary forms. (§ 22.) The latter was defined, *inter alia*, as a killing in the commission of an unlawful act, with one significant qualification: "Provided, that where such involuntary killing shall happen in the commission of an unlawful act, which . . . is committed in the prosecution of a felonious intent, the offence shall be deemed and adjudged to be murder." (§ 25.) The quoted **[****42]** proviso of section 25 in effect codified the common law felony-murder rule in this state.¹²

[*466] The next significant event occurred in 1856, when the Legislature amended section 21 of the Act of 1850 to divide the crime of murder into two degrees: first degree murder was defined as that committed by certain listed means or in the perpetration of certain listed felonies, while all other murders were of the second degree.¹³

showing of malice, it is immaterial that the killing was perpetrated by one of the means enumerated in the statute." (Italics in original.) (*People v. Mattison* (1971) 4 Cal.3d 177, 182 [93 Cal.Rptr. 185, 481 P.2d 193].)

¹² By a quirk of draftsmanship the proviso purported to apply only to "involuntary" killings committed during a felony. It would have been absurd, of course, to punish as murder those killings but not "voluntary" killings during a felony, and the clause was therefore construed to apply to all such homicides without regard to intent to kill. (See *People v. Doyell* (1874) 48 Cal. 85, 94.)

[**43]** Except for the addition of the category of murder by means of torture, the quoted language of amended section 21 was identical to the 1794 Pennsylvania statute. (Compare Keedy, *op. cit. supra*, 97 U.Pa.L.Rev. at p. 773.) It was therefore construed in the same way by this court, i.e., as a degree-fixing measure designed to mitigate the harshness of the common law of murder. (See, e.g., *People v. Moore* (1857) 8 Cal. 90, 93; *People v. Bealoba* (1861) 17 Cal. 389, 393-399.) The court explained that by adopting the amendment the Legislature did not "attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment." (*People v. Haun* (1872) 44 Cal. 96, 98; accord, *People v. Keefer* (1884) 65 Cal. 232, 235 [3 P. 818].)

Thus on the eve of the enactment of the Penal Code of 1872, two relevant statutes were in force in California: (1) section 25 of the 1850 act, which codified the felony-murder rule; and (2) amended section **[****44]** 21 of the same act, which divided the crime of murder into degrees and tailored the punishment accordingly. The two statutes were not only consistent but complimentary. When a killing occurred in the commission of a felony, section 25 declared it to be murder; thereupon section 21 prescribed the degree of that murder according to the particular felony involved -- first degree if the felony was arson, rape, robbery, or burglary, second degree if it was any other felony. This court recognized the relationship between the statutes in a decision reviewing a conviction of murder committed shortly before the Penal Code of 1872 took effect. (*People v. Doyell* (1874) *supra*, 48 Cal. 85.) The court first observed (at p. 94) that "Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is

¹³ Amended section 21 provided in pertinent part: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; . . ." (Stats. 1856, ch. 139, § 2, p. 219.)

The amendment also made corresponding changes in punishment, prescribing the death penalty for first degree murder and a term of imprisonment of 10 years to life for second degree murder.

murder. (Acts of 1850, p. 220, Sec. 25; . . .)" The court then reasoned [*467] that the 1856 amendment of section 21 "did not change the law of murder, done in the attempt to commit a felony. It only prescribes a severer punishment where the murder [***405] is committed in the attempt to perpetrate arson, rape, robbery [****45] or burglary (on account of the enormity of these offenses), [**712] than where it is committed in carrying out any other felonious design." (*Id.* at pp. 94-95.)

What was plainly evident before 1872, however, was much less so after the adoption of the Penal Code. The enactment of that code operated to repeal the Act of 1850, including therefore sections 21 and 25. (*Pen. Code*, § 6.) But of those two provisions *only section 21 reappeared in the Penal Code*, as section 189 thereof; ¹⁴ by contrast, the felony-murder provision of section 25 was *not* reenacted in the new code, and hence "ceased to be the law." (*People v. Logan* (1917) 175 Cal. 45, 48 [164 P. 1121].) From the drawing of such a deliberate distinction between the two provisions, and from the wording of section 189 itself, certain inferences arise which point to a conclusion that the Legislature meant the section to operate, like its predecessor, solely as a degree-fixing measure.

[****46] CA(17a)[↑] (17a) First, HN14[↑] "It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*People v. Valentine* (1946) 28 Cal.2d 121, 142 [169 P.2d 1]; accord, *People v. Schmel* (1975) 54 Cal.App.3d 46, 51 [126 Cal.Rptr. 317].) CA(14c)[↑] (14c) Under this principle, the Legislature's decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850.

¹⁴As adopted in 1872, **section 189** provided: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all other kinds of murder are of the second degree."

Over the ensuing years the Legislature added one further "means" of committing first degree murder (by "destructive device or explosive") and two further listed felonies (mayhem and a violation of § 288 [child molesting]), but the essential structure of the statute remains the same today. (Compare fn. 10, *ante*.)

Second, aside from a few grammatical changes the wording of section 189 was identical to that of section 21. (Compare fns. 13 & 14.) Indeed, its draftsmen acknowledged this obvious fact: "This section is founded upon Sec. 21 of the Crimes and Punishment Act, as amended by the Act of 1856. -- Stats. 1856, p. 219. The Commission made no material change in the language." (1872 Code Com. note, p. 82.) In these circumstances, the code itself decreed the proper construction of section 189: "The provisions of this Code, so far as they are substantially the same as existing statutes, [*468] must be construed as continuations thereof, and not as new [****47] enactments." (*Pen. Code*, § 5.)

CA(18a)[↑] (18a) Third, HN15[↑] when a statute defines the meaning to be given to one of its terms, that meaning is ordinarily binding on the courts. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 156 [137 Cal.Rptr. 154, 561 P.2d 244]; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 638 [268 P.2d 723].) It is presumed the word was used in the sense specified by the Legislature, and the statute will be construed accordingly. (*Application of Monrovia Evening Post* (1926) 199 Cal. 263, 270 [248 P. 1017].) CA(14d)[↑] (14d) In the 1872 Penal Code the Legislature simultaneously enacted section 187, defining the crime of "murder" as "the unlawful killing of a human being, with malice aforethought," and section 189, providing that "murder" committed in certain ways constituted murder in the first degree. Under this principle, the word "murder" in section 189 would have had the meaning prescribed for it in section 187, i.e., an unlawful killing "with malice aforethought."

CA(19a)[↑] (19a) Fourth, HN16[↑] it is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in [****48] another part of the same statute. (*Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123 [173 P.2d 313]; accord, *Santa Clara County Dist. Attorney Investigators Assn. v. County of Santa Clara* (1975) 51 Cal.App.3d 255, 263, fn. 4 [124 Cal.Rptr. 115]; see also *People v. Hernandez* (1981) 30 Cal.3d 462, 468 [179 [**713] Cal.Rptr. 239, 637 P.2d 706], and cases cited.) CA(14e)[↑] (14e) This rule would seem to apply a fortiori to section 189, where in a single compound sentence the Legislature used the word "murder" only once but with two referents (fn. 14, *ante*): the section defined first degree murder as all "murder" (1) which is committed by certain listed methods or (2) which is committed during certain listed felonies. As noted above (fn. 11, *ante*), in the first half of this sentence the word "murder" means an unlawful

killing committed *with malice aforethought*; under the foregoing rule, the same word would have had the same meaning in the second half of the same sentence (i.e., murder during the listed felonies).

Seeking to overcome these inferences, the Attorney General contends that three items of statutory history are proof of a contrary [****49] legislative intent. He first relies on the California Code Commission's note to *section 189*, but in point of fact that commentary sheds little or no light on the issue before us. The commission began with a correct historical justification for the continued role of *section 189* as a *degree-fixing* measure.¹⁵ Nowhere in the remainder [****469] of the note, however, did the commission assert that the statute was also intended to serve the purpose of former *section 25* by codifying the felony-murder rule. Instead, the note merely quoted with approval a long passage from an 1864 opinion of this court (*People v. Sanchez*, 24 Cal. 17, 29-30) which discussed how to distinguish between the two degrees of murder -- i.e., how to administer the *degree-fixing* function of former *section 21*. It is true the discussion included a statement to the effect that "where the *killing* is done in the perpetration or attempt to perpetrate some one of the felonies enumerated in [section 21] . . . the jury have no option but to find the prisoner guilty [of murder] in the first degree." (Italics added; *id.* at p. 29.) But the *Sanchez* court obviously did not mean thereby to transform [****50] *section 21* into a statutory felony-murder rule, as the Legislature had already codified that rule 14 years earlier in *section 25*. When carefully read in context, rather, both the quoted statement and the entire passage of *Sanchez* in which it appeared amounted to no more than an explanatory review of the then-prevailing, pre-1872, statutory law.¹⁶

¹⁵"At common law every unlawful killing of a human being, with malice aforethought, was punishable by death, but as such killings differed greatly from each other in the degree of atrociousness, the manifest injustice of involving them all in the same punishment led to the enactment of statutes dividing murder into two degrees, and affixing to murders of the second degree milder punishments than to those of the first. Among the first enactments to this end was the Pennsylvania statute of April 22d, 1794, of which ours is a copy." (1872 Code Com. note, p. 82.)

¹⁶In any event, most of the language of *Sanchez* relied on by the commission was later held by this court to constitute "erroneous statements of law." (*People v. Valentine* (1946) *supra*, 28 Cal.2d 121, 135 [169 P.2d 1] [disapproving instructions copied from *Sanchez*]; see also *People v. Bender*

[****51] Lacking direct evidence in the history of the murder statute, the Attorney General next refers us to the evolution of the manslaughter statute during the same period. The 1850 act (Stats. 1850, ch. 99, p. 229) provided a rather diffuse definition of manslaughter, covering four sections. (§§ 22-25.) Involuntary manslaughter was defined as an unintentional killing occurring in the commission of either (1) a lawful act likely to produce death, in an unlawful manner or without due caution, or (2) "an unlawful act." (§§ 22, 25.) In 1872 the manslaughter definitions of 1850 were reenacted in simplified form as *section 192 of the Penal Code*. No change in meaning was intended, and the commission reported that *section 192* "embodies the material portions" of sections 22 through 25 of the 1850 law. (1872 Code Com. note, p. 85.)

One change in wording, however, is now stressed by the Attorney General. As we have seen, in drafting *section 192* the commission deleted the proviso of former *section [***407] 25* which affirmatively declared that when the "unlawful act" is a felony the killing will be deemed murder; but at the [**714] same time the commission added to the definition of manslaughter [****52] during [****470] an "unlawful act" the qualifying phrase, "not amounting to felony."¹⁷ In the Penal Code of 1872 (§ 16) any unlawful act "not amounting to felony" was a misdemeanor, and the primary purpose of the latter phrase was therefore to codify the *misdemeanor-manslaughter* rule that had been implied in the 1850 legislation. The Attorney General apparently contends the quoted phrase should also be read as a negative pregnant implying that the commission had elsewhere affirmatively provided for a corresponding *felony-murder* rule: i.e., by specifying that a killing during an unlawful act "not amounting to felony" was deemed manslaughter by operation of *section 192*, the commission assertedly implied that a killing during

(1945) 27 Cal. 2d 164, 182-183 [163 P.2d 8] [same.]

¹⁷*Section 192* thus read in its entirety:

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

"1. Voluntary -- upon a sudden quarrel or heat of passion.

"2. Involuntary -- in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Italics added.)

Except for a 1945 amendment adding the offense of vehicular manslaughter, the 1872 wording of the section is still in effect.

enactment of the first degree felony-murder rule in California.¹⁹

[****57] IV

CA(21a) (21a) Defendant contends in the alternative that if section 189 codifies the first degree felony-murder rule, the statute is unconstitutional. He principally urges that the rule violates due process of law in two respects.

First, he invokes the principle that **HN18** "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Italics added.) (*In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375, 90 S.Ct. 1068].) He then reasons as [****409] follows: because malice aforethought is an element of the crime of murder as defined in California (*Pen. Code, § 187*), the quoted [**716] language of *Winship* requires the People to prove malice beyond a reasonable doubt in every murder prosecution. When such a prosecution is conducted on a theory of felony murder, however, the felony-murder rule relieves the People of this burden of proof because it raises a "presumption" of malice from the defendant's intent to commit the underlying felony. The rule, defendant concludes, thus violates the due

¹⁹This is also the view expressed in opinions of this court too numerous to list, from as early as 1884 (*People v. Keefer*, *supra*, 65 Cal. 232, 233 [mistakenly citing the statute as "section 198"]) to as late as 1978 (*Pizano v. Superior Court*, 21 Cal.3d 128, 142, fn. 3 [145 Cal.Rptr. 524, 577 P.2d 659] [dis. opn. by Bird, C. J.]). On close inspection, however, much of this jurisprudence appears unsatisfactory, often consisting of opinions that are reasoned either erroneously (cf. fn. 16, *ante*) or not at all (see, e.g., *People v. Bostic* (1914) 167 Cal. 754, 761 [141 P. 380]). Rather than attempt to harmonize or explain these precedents, and because of the importance of the issue, we have undertaken to analyze the full legislative history of section 189.

We recognize that from the standpoint of consistency the outcome of this analysis leaves much to be desired. Although the misdemeanor-manslaughter rule is plainly a creature of statute (*Pen. Code, § 192*, par. 2), we reach the same conclusion as to the first degree felony-murder rule only by piling inference on inference; and the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code (see *People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582, and cases cited). A thorough legislative reconsideration of the whole subject would seem to be in order.

process clause.

For specific authority defendant relies on [****58] *Mullaney v. Wilbur* (1975) 421 U.S. 684 [44 L.Ed.2d 508, 95 S.Ct. 1881], and *Sandstrom v. Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450]. In *Mullaney* the [**473] defendant was convicted of murder under a Maine statutory scheme which defined murder as an unlawful killing with malice aforethought, yet required the prosecution to prove beyond a reasonable doubt only that the homicide was unlawful (i.e., neither justifiable nor excusable) and intentional; when the prosecution established those two elements, malice would be presumed unless the defendant could prove by a preponderance of the evidence that he had acted in the heat of passion on sudden provocation (i.e., without malice). The United States Supreme Court held it a denial of due process to thus shift to the defendant the burden of disproving an ingredient of the offense charged against him, even though it affected only the degree of his guilt.

In *Sandstrom* the defendant was convicted of "deliberate homicide," defined by Montana law as a killing which is "purposely or knowingly" committed. The United States Supreme Court held it a denial of due process in that context to instruct the [****59] jury that the law presumes a person intends the ordinary consequences of his voluntary acts. (See *Evid. Code, § 665*.) The court stressed that the question whether the homicide was committed "purposely or knowingly" -- i.e., the defendant's state of mind with respect to the killing -- was an essential element of the crime under the Montana statutory scheme. (442 U.S. at pp. 520-521 [61 L.Ed.2d at p. 49].) The court then reasoned (at pp. 521-523 [61 L.Ed.2d at pp. 49-51]) that if the jury understood the challenged instruction to state a conclusive presumption, it would have wholly denied the defendant the benefit of the presumption of innocence on the mental element of the crime, a procedure unconstitutional under *Morissette v. United States* (1952) 342 U.S. 246, 274-275 [96 L.Ed. 288, 306, 72 S.Ct. 240]. If on the other hand the jury took the instruction to raise a rebuttable presumption, it would have shifted to the defendant the burden of disproving the same element, a procedure unconstitutional under *Mullaney*. (442 U.S. at p. 524 [61 L.Ed.2d at p. 51].)

CA(22a) (22a) We do not question defendant's major premise, i.e., that **HN19** due process requires proof beyond a reasonable [****60] doubt of each element of the crime charged. (See *Pen. Code, § 1096; People v. Vann* (1974) 12 Cal.3d 220, 225-228 [115

34 Cal. 3d 441, *473; 668 P.2d 697, **716; 194 Cal. Rptr. 390, ***409; 1983 Cal. LEXIS 226, ****60

Cal.Rptr. 352, 524 P.2d 824.) Defendant's minor premise, however, is flawed by an incorrect view of the substantive law of felony murder in California. **CA(23a)** (23a) To be sure, numerous opinions of this court recite that **HN20** malice is "presumed" (or a cognate phrase) by operation of the felony-murder rule.²⁰ But none of those opinions speaks to the constitutional [*474] issue now raised, and their language is therefore not controlling. (*In re Tartar (1959) 52 Cal.2d 250, 258 [339 P.2d 553]*, and cases cited.)

[****61] [***410] **CA(21b)** (21b) Addressing the issue for the first time, we start with the indisputable fact that if the effect of the felony-murder rule on malice is indeed a "presumption," it is a [*717] "conclusive" one. It does not simply shift to the defendant the burden of proving that he acted without malice, as in *Mullaney*; rather, in a felony-murder prosecution the defendant is not permitted to offer any such proof at all. Yet it does not necessarily follow that he is denied the presumption of innocence with regard to an element of the crime, as in *Sandstrom*. We are led astray if we treat the "conclusive presumption of malice" as a true presumption; to do so begs the question whether malice is an element of felony murder. And to answer that question, we must look beyond labels to the underlying reality of this so-called "presumption."

CA(24a) (24a) Although the drafters of the Evidence Code chose to perpetuate the traditional distinction between rebuttable and "conclusive" presumptions (*id.*, §§ 601, 620), they apparently did so in order to emphasize that the code provisions on the topic were largely continuations of prior law. But they were not misled by their own terminology: in their [****62] accompanying note the drafters frankly acknowledged that "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law." (Cal. Law Revision Com. com. to *Evid. Code*, § 620, 29B West's Ann. Evid. Code (1966 ed.) p. 573.) Why this is so is explained by Wigmore with

characteristic clarity: **HN21** "In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." (Fn. omitted.) (9 Wigmore on Evidence (Chadbourn rev. 1981) § 2492, pp. 307-308.)

This court has adopted the foregoing view. For example, in upholding the "conclusive presumption" of legitimacy now declared by *Evidence Code section 621, subdivision (a)*, we [****63] stated that **HN22** "A conclusive presumption is in actuality a substantive rule of law" (*Kusior v. Silver (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]*). Again, in *Jackson v. Jackson (1967) 67 Cal.2d 245, 247 [60 Cal.Rptr. 649, 430 P.2d 289]*, we observed that "the so-called conclusive presumption is really not a presumption but rather a rule of substantive law." (Accord, *Vincent B. v. Joan R. (1981) [*475] 126 Cal.App.3d 619, 623 [126 Cal.Rptr. 619, 179 Cal.Rptr. 9]; People v. Russell (1971) 22 Cal.App.3d 330, 335 [99 Cal.Rptr. 277]* [incest].)

CA(21c) (21c) We take the same view of the "conclusive presumption of malice" in felony-murder cases. **HN23** In every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. (*Pen. Code*, §§ 187, 188; *People v. Bender (1945) 27 Cal.2d 164, 180 [163 P.2d 8]*.) Yet to say that (1) the prosecution must also prove malice in felony-murder cases, but that (2) the existence of such malice is "conclusively presumed" upon proof of the defendant's intent to commit the underlying felony, is merely a circuitous way of saying that in such cases [****64] the prosecution need prove only the latter intent. (See Note, *Irrebuttable Presumptions: An Illusory Analysis (1975) 27 Stan.L.Rev. 449, 462-463*.) In Wigmore's words, the issue of malice is therefore "wholly immaterial for the purpose of the proponent's case" when the charge is felony murder. In that event the "conclusive presumption" is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is not an element of felony murder.

Our decisions have recognized this reality. **HN24**

²⁰In various contexts this court has said, for example, that the felony-murder rule "presumes" malice (*People v. Ketchel (1969) 71 Cal.2d 635, 642 [79 Cal.Rptr. 92, 456 P.2d 660]*), "ascribes" malice (*People v. Washington (1965) supra, 62 Cal.2d 777, 780*), "[posits]" malice (*People v. Ireland (1969) supra, 70 Cal.2d 522, 538*), "imposes" malice (*People v. Phillips (1966) supra, 64 Cal.2d 574, 583, fn. 6*), or that it results in an "imputation" of malice (*People v. Burton (1971) 6 Cal.3d 375, 385 [99 Cal.Rptr. 1, 491 P.2d 793]*) or an "implication" of malice (*People v. Poddar (1974) supra, 10 Cal.3d 750, 755*).

"Killings by the means or on the occasions under discussion [i.e., enumerated in *Pen. Code*, § 189] are murders of the first degree because of the substantive statutory definition of the crime. Attempts to explain the [***411] statute to the jury in terms of nonexistent 'conclusive presumptions' tend more to confuse than to enlighten a jury unfamiliar with the inaccurate practice of stating rules of substantive law in terms of rules of [**718] evidence." (Italics added.) (*People v. Valentine* (1946) *supra*, 28 Cal.2d 121, 136; accord, *People v. Bernard* (1946) 28 Cal.2d 207, 211-212 [169 P.2d 636].) **HN25** [↑] The "substantive statutory [****65] definition" of the crime of first degree felony murder in this state does not include either malice or premeditation: "These elements are eliminated by the felony-murder doctrine, and the only criminal intent required is the specific intent to commit the particular felony." (*People v. Cantrell* (1973) 8 Cal.3d 672, 688 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1], and *People v. Wetmore* (1978) 22 Cal.3d 318, 324, fn. 5, 326 [149 Cal.Rptr. 265, 583 P.2d 1308].) This is "a rule of substantive law in California and not merely an evidentiary shortcut to finding malice as it withdraws from the jury the requirement that they find either express malice or . . . implied malice" (*People v. Stamp* (1969) 2 Cal.App.3d 203, 210 [82 Cal.Rptr. 598]). In short, "malice aforethought is not an element of murder under the felony-murder doctrine." (*People v. Avalos* (1979) 98 Cal.App.3d 701, 718 [159 Cal.Rptr. 736].) ²¹

[****66] [*476] Because the felony-murder rule thus does not in fact raise a "presumption" of the existence of an element of the crime, it does not violate the due process clause as construed in *Mullaney* or *Sandstrom*. This is also the holding of each of our sister jurisdictions that has addressed the issue. ²²

²¹ In *People v. Aaron* (1980) *supra*, 299 N.W.2d 304, the Michigan Supreme Court was divided over the question whether malice is an element of felony murder. The majority insisted that it is (*id.*, at p. 321 fn. 104), while a concurring and dissenting justice argued that it is not (*id.*, at pp. 332-333 fn. 15). We agree with the latter, for all the reasons he sets forth.

²² Federal: *Westberry v. Murphy* (1st Cir. 1976) 535 F.2d 1333, 1334.

Iowa: *State v. Nowlin* (1976) 244 N.W.2d 596, 604-605.

Kansas: *State v. Goodseal* (1976) 220 Kan. 487 [553 P.2d 279, 286], overruled on another ground in *State v. Underwood*

[****67] For the same reason we need not be detained by defendant's second due process claim, i.e., that the felony-murder doctrine violates the rule that a statutory presumption affecting the People's burden of proof in criminal cases is invalid unless there is a "rational connection" between the fact proved (here, felonious intent) and the fact presumed (malice). (See *Ulster County Court v. Allen* (1979) 442 U.S. 140, 165 [60 L.Ed.2d 777, 797, 99 S.Ct. 2213]; *Leary v. United States* (1969) 395 U.S. 6, 36 [23 L.Ed.2d 57, 81, 89 S.Ct. 1532]; *Tot v. United States* (1943) 319 U.S. 463, 467-468 [87 L.Ed. 1519, 1524, 63 S.Ct. 1241].) **HN26** [↑] If, as we here conclude, the felony-murder doctrine actually raises no "presumption" of malice at all, there is no occasion to judge it by the standard that governs the validity of true presumptions. The point is therefore without substance, as the Court of Appeal has already held. **CA(25a)** [↑] (25a) (See fn. 23.) (*People v. Johnson* (1974) 38 Cal.App.3d 1, 7-8 [112 Cal.Rptr. 834]; see also *People of Territory of Guam v. Root* (9th Cir. 1975) 524 F.2d 195, 197-198.) ²³

(1980) 228 Kan. 294 [615 P.2d 153, 163].

Maryland: *Evans v. State* (1975) 28 Md.App. 640 [349 A.2d 300, 329-330, 336-337], *affd.* *State v. Evans* (1976) 278 Md. 197 [362 A.2d 629]; accord, *Warren v. State* (1976) *supra*, 350 A.2d 173, 177-179.

Massachusetts: *Com. v. Watkins* (1978) 375 Mass. 472 [379 N.E.2d 1040, 1049].

Nebraska: *State v. Bradley* (1982) 210 Neb. 882 [317 N.W.2d 99, 101-102].

North Carolina: *State v. Swift* (1976) 290 N.C. 383 [226 S.E.2d 652, 668-669]; accord, *State v. Womble* (1977) 292 N.C. 455 [233 S.E.2d 534, 536-537]; *State v. Wall* (1982) 304 N.C. 609 [286 S.E.2d 68, 71-72].

Oklahoma: *James v. State* (1981) 637 P.2d 862, 865.

South Carolina: *Gore v. Leeke* (1973) 261 S.C. 308 [199 S.E.2d 755, 757-758].

Washington: *State v. Wanrow* (1978) 91 Wn.2d 301 [588 P.2d 1320, 1325].

West Virginia: *State ex rel. Peacher v. Sencindiver* (1977) 233 S.E.2d 425, 426-427.

²³ There is likewise no merit in a narrow equal protection argument made by defendant. He reasons that the "presumption" of malice discriminates against him because persons charged with "the same crime," i.e., murder other than felony murder, are allowed to reduce their degree of guilt by

[****68] [***412] V

[**719] CA(26a) (26a) It follows from the foregoing analysis that HN27 the two kinds of first degree murder in this state differ in a fundamental respect: in the case of [*477] deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. ²⁴ From this profound legal difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

[****69] A

CA(27a) (27a) Despite this broad factual spectrum, HN28 the Legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an offense listed in *section 189*: regardless of the defendant's individual culpability with respect to that homicide, he must be adjudged a first degree murderer and sentenced to death or life imprisonment with or without possibility of parole -- the identical punishment inflicted for deliberate and premeditated murder with malice aforethought. (*Pen. Code, § 190 et seq.*) As the record before us illustrates, however, in some first degree felony-murder cases this Procrustean penalty may violate the prohibition of the California Constitution against cruel or unusual punishments. (*Cal. Const., art. I, § 17.*)

CA(28a) (28a) The matter is governed by *In re Lynch* (1972) 8 Cal.3d 410 [105 Cal.Rptr. 217, 503 P.2d 921], and its progeny. As in *Lynch* (at p. 414), "We approach this issue with full awareness of and respect

evidence negating the element of malice. As shown above, in this state the two kinds of murder are not the "same" crimes and malice is not an element of felony murder.

²⁴ As shown in parts III and IV, *ante*, malice is not an element of felony murder and such murder is automatically fixed at first degree by operation of *section 189*.

for the distinct roles of the Legislature and the courts in such an undertaking. We recognize that HN29 in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe [****70] punishments, and that such questions are in the first instance for the judgment of the Legislature alone. [Citations.] [para.] Yet legislative authority remains ultimately circumscribed by the constitutional provision forbidding the infliction of cruel or unusual punishment, [*478] adopted by the people of this state as an integral part of our Declaration of Rights. It is the difficult but imperative task of the judicial branch, as coequal guardian of the Constitution, to condemn any violation of that prohibition. As we concluded in *People v. Anderson* (1972) 6 Cal.3d 628, 640 [100 Cal.Rptr. 152, 493 P.2d 880], 'The Legislature is thus accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime, but the final judgment as to whether the punishment it decrees exceeds constitutional limits is a judicial function.'

CA(29a) (29a) In the exercise of that function we adopted in *Lynch* the rule that HN30 a statutory punishment may violate the constitutional prohibition not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed. ²⁵ We recognized that [**720] [****71] [***413] "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*Id., at pp. 423-424.*) Undertaking to define

²⁵ The United States Supreme Court has recently reaffirmed a similar rule applicable to the corresponding provision of the federal Constitution: "The Cruel and Unusual Punishment Clause of the Eighth Amendment is directed, in part, 'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.' [Citations.]" (*Enmund v. Florida* (1982) 458 U.S. 782, 788 [73 L.Ed.2d 1140, 1146, 102 S.Ct. 3368, 3372]; accord, *Solem v. Helm* (1983) U.S. , [77 L.Ed.2d 637, 645-647, 103 S.Ct. 3001].)

that limit for future cases, we explained that **HN31** the state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings: "Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." (*Id.*, at p. 424.) We concluded (*ibid.*) that a punishment may violate the California ******72** constitutional prohibition "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."

Under this standard we held in *Lynch* that an indeterminate life-maximum sentence for second-offense indecent exposure was unconstitutionally excessive. In succeeding years we have invoked the proportionality rule to strike ******73** down legislation barring recidivist narcotic offenders from being considered for parole for 10 years (*In re Foss* (1974) 10 Cal.3d 910, 917-929 [112 ***479** Cal.Rptr. 649, 519 P.2d 1073]; *In re Grant* (1976) 18 Cal.3d 1, 5-18 [132 Cal.Rptr. 430, 553 P.2d 590]), to order the release of a defendant who served 22 years for a nonviolent act of child molestation (*In re Rodriguez* (1975) 14 Cal.3d 639, 653-656 [122 Cal.Rptr. 552, 537 P.2d 384]), and to invalidate the statutory requirement that persons convicted of misdemeanor public lewdness must register with the police as sex offenders (*In re Reed* (1983) 33 Cal.3d 914 [191 Cal.Rptr. 658, 663 P.2d 216]). The Courts of Appeal have likewise nullified a number of statutory penalties under compulsion of the rule.²⁶

******74** **CA(30a)** (30a) In each such decision the court used certain "techniques" identified in *Lynch* (8 Cal.3d at pp. 425-429) to aid in determining proportionality. Especially relevant here is the first of these techniques, i.e., **HN32** an examination of "the

²⁶ In three cases the courts have invalidated excessively high minimum parole provisions for narcotics violations. (*People v. Vargas* (1975) 53 Cal.App.3d 516, 533-538 [126 Cal.Rptr. 88]; *People v. Ruiz* (1975) 49 Cal.App.3d 739, 745-748 [122 Cal.Rptr. 841]; *People v. Malloy* (1974) 41 Cal.App.3d 944, 954-956 [116 Cal.Rptr. 592].) In two cases the courts struck down indeterminate life-maximum sentences as grossly disproportionate to the crimes. (*People v. Keogh* (1975) 46 Cal.App.3d 919, 928-933 [120 Cal.Rptr. 817] [four counts of forged checks totalling less than \$ 500]; *In re Wells* (1975) 46 Cal.App.3d 592, 596-604 [121 Cal.Rptr. 23] [second-offense nonviolent child molesting].)

nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id.* at p. 425.)

With respect to "the nature of the offense," we recognize that when it is viewed in the abstract robbery-murder presents a very high level of such danger, second only to deliberate and premeditated murder with malice aforethought. **HN33** In conducting this inquiry, however, the courts are to consider not only the offense in the abstract -- i.e., as defined by the Legislature -- but also "the facts of the crime in question" (*In re Foss* (1974) *supra*, 10 Cal.3d 910, 919) -- i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the ******414** defendant's involvement, and the consequences of his acts.

Secondly, it is obvious that **HN34** the courts must also view "the nature of the offender" in the ******75** concrete rather than the abstract: ******721** although the Legislature can define the offense in general terms, each offender is necessarily an individual. Our opinion in *Lynch*, for example, concludes by observing that the punishment in question not only fails to fit the crime, "it does not fit the criminal." (8 Cal.3d at p. 437.) This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.

[*480] The decided cases illustrate both these concerns. Thus we observed in *Lynch* (*ibid.*) that at the conclusion of the trial the judge remarked in open court that the defendant was "a man of great potential," having the capacity to get along well with people and a superior intellect. We then emphasized that the "circumstances of the offense" did not undermine that appraisal (*id.*, at pp. 437-438): contrasting the *Lynch* case with that of a deliberately offensive public exhibitionist, we explained that the defendant's sole act was to carelessly ******76** allow a lone waitress in a drive-in restaurant to see him masturbate in the relative privacy of his car in the middle of the night.²⁷

²⁷ Similarly, in *Reed* we underscored the facts that the petitioner masturbated briefly in a men's restroom and the sole witness was an undercover vice officer. We further emphasized that the petitioner had served for 21 years in the

The cases since *Lynch* demonstrate that **HN35** a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability. Thus in *Foss* we had "no doubt that heroin abuse presents a serious problem to our society or that harsh penalties may be necessary to restrict the supply, sale and distribution of this substance." (Fn. omitted; 10 Cal.3d at p. 921.) ******77** Yet we stressed that the defendant had agreed to assist an acquaintance to obtain heroin only because the latter was an addict and was going through withdrawal; that the defendant was himself an addict and was suffering from withdrawal at the time of the events; and that the sole payment he took was enough of the narcotic for a dose of his own. (Id., at p. 918.) We concluded that in such circumstances it shocked the conscience to automatically bar the defendant from parole for 10 years "without consideration for either the offender or his offense" (id., at p. 923.).

In *Rodriguez* the defendant was convicted of child molesting (Pen. Code, § 288) and given the indeterminate life-maximum sentence then prescribed by the statute for that crime. The Adult Authority did not fix his term at less than maximum, and after serving 22 years he sought release on habeas corpus. He first claimed the statute was unconstitutional on its face, contending that the life-maximum sentence it prescribed was grossly disproportionate to the offense of child molesting; we held to the contrary, stressing the crime's potential for grave injury and even death (14 Cal.3d at pp. 647-648). In the alternative ******78** the defendant attacked the statute as applied to him, urging that the 22 years he had served were disproportionate to his actual culpability in the circumstances of the case. We held this claim meritorious and ordered him discharged from custody. We reasoned that **HN36** even though a statutory maximum penalty may not be facially excessive, the constitutional prohibition against cruel or unusual punishment requires that ***481** in every case the defendant be given a specific term that is ******415** "not disproportionate to the culpability of the individual offender" and reflects "the circumstances existing at the time of the offense." (Id., at p. 652.) After reviewing prior decisions we concluded, "Thus the rule that the ****722** measure of the constitutionality of punishment for crime is individual culpability is well established in

United States Air Force, was steadily employed, and had no prior arrest record, and we concluded that he "is not the prototype of one who poses a grave threat to society" (33 Cal.3d at p. 924).

the law of this state." (Id., at p. 653.)

Applying this rule to the record in *Rodriguez*, we stressed the manner in which the defendant committed the offense and his past history and personal traits: "Nor do the particular characteristics of this offender at the time of the offense justify 22 years' imprisonment. He was only 26 years old ******79** at the time of the offense. His conduct was explained in part by his limited intelligence, his frustrations brought on by intellectual and sexual inadequacy, and his inability to cope with these problems. He has no history of criminal activity apart from problems associated with his sexual maladjustment. Thus, it appears that neither the circumstances of his offense nor his personal characteristics establish a danger to society sufficient to justify such a prolonged period of imprisonment." (Id., at p. 655.)

Finally, we take note of the recent United States Supreme Court case of *Enmund v. Florida* (1982) *supra*, 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368]; although it deals with the federal constitutional prohibition against cruel and unusual punishment, the reasoning of the opinion is instructive. In *Enmund* two persons robbed and fatally shot an elderly couple at their farmhouse; defendant Enmund's sole involvement was that at the time of the crimes he was sitting in a car parked some 200 yards away, waiting to help the robbers escape. Enmund was convicted of being a constructive aider and abettor and hence a principal in the commission of a first degree ******80** felony murder, and was sentenced to death. The United States Supreme Court reversed, holding that such punishment is unconstitutionally disproportionate in the circumstances. The court explained that "The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for **HN37** we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' [citation] which means that we must focus on 'relevant facets of the character and record of the individual offender.'" (Italics in original; id., at p. 798 [73 L.Ed.2d at p. 1152, 102 S.Ct. at p. 3377].)

Turning to those facts, the court reasoned that "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed [the victims]. This was

impermissible [*482] under the Eighth Amendment." (*Id.*, at p. 798 [73 L.Ed.2d at p. 1152, 102 S.Ct. [****81] at p. 3377].) Again, in rejecting retribution as a justification for the penalty, the court explained: "we think this very much depends on the degree of Enmund's culpability -- what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to 'the degree of [his] criminal culpability,' [citation], and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." (*Id.*, at p. 800 [73 L.Ed.2d at p. 1153, 102 S.Ct. at p. 3378].) The court concluded (458 U.S. 782 at p. 801 [73 L.Ed.2d at p. 1154, 102 S.Ct. at p. 3378]) that for penalty purposes "Enmund's criminal culpability must be limited to his participation in the robbery, and *his punishment must be tailored to his personal responsibility and moral guilt.*" (Italics added.)

B

CA(27b)[↑] (27b) We proceed to a similar analysis of the record in the case at bar. As noted at the outset, when he committed the offenses herein defendant was a 17-year-old high [****416] school student.²⁸ At trial he took the stand in his own behalf and told the jury his side of the story. [****82] From that testimony a plausible picture emerged of the evolution of [**723] defendant's state of mind during these events -- from youthful bravado, to uneasiness, to fear for his life, to panic. Although such an explanation is often discounted as self-serving, in this case the record repeatedly demonstrates that the judge and jury in fact gave defendant's testimony large credence and substantial weight.

Thus defendant stated that when he heard the first shotgun blast accidentally set off by his hapless colleague, he became concerned that one of his friends might have been shot. Next he watched as a man guarding the marijuana plantation walked towards the sound while carrying a shotgun, and five or ten minutes later he heard a second shotgun blast from the same direction. At that point anxiety turned to alarm, and he testified that "we just wanted [****83] to get the hell out of there, because there were shotgun blasts going off and we thought our friends were being blown away."

²⁸In the rural setting in which he lived, it was apparently common for youths of his age to have .22 caliber rifles. Defendant also held a hunting license.

One of defendant's companions then told him he had overheard a guard say, "These kids mean business." Shortly afterwards the boys heard a man stealthily coming up the trail behind them; they believed at first it was one of their friends, but soon saw it was Dennis Johnson, carrying a shotgun at port arms. The boys could neither retreat nor hide, and defendant was sure that Johnson had seen them. According to defendant, as Johnson drew near [*483] he shifted the position of his shotgun and "he was pointing it outwards and I thought he was getting ready to shoot me I just didn't know what to do I just saw him swing the gun behind the trees, and that's when I started firing." Defendant raised his rifle to his waist and "pointed it somewhere in his direction." He testified that "I just pressed the trigger, I was so scared I just kept squeezing it, and shots just went off. I don't know how many" He denied having any ill-will towards Johnson, whom he did not personally know, and reiterated that he began shooting only because [****84] "I was afraid he was going to shoot me He knew where I was at. I couldn't do anything. I just shot him. I didn't even think about it. I never thought of shooting anybody." Defendant stopped firing when Johnson fell.

On cross-examination defendant testified that when Johnson pointed the shotgun in his direction, "Nobody told me what to do and I had no support, and I just pulled the trigger so many times because I was so scared" When asked why he had fired nine times, defendant replied, "I never thought between pulling the trigger the first time or the ninth time. I just kept pulling because he was going to shoot me and I had to do something. I didn't have it aimed at him. I didn't know whether it would hit him or not. I just had it pointed. I just pulled the trigger so many times because I was so frightened."

Called as an expert witness, a clinical psychologist testified that after conducting a series of tests and examinations he concluded that defendant was immature in a number of ways: intellectually, he showed poor judgment and planning; socially, he functioned "like a much younger child"; emotionally, he reacted "again, much like a younger child" by denying [****85] the reality of stressful events and living rather in a world of make-believe. In particular, the psychologist gave as his opinion that when confronted by the figure of Dennis Johnson armed with a shotgun in the circumstances of this case, defendant probably "blocked out" the reality of the situation and reacted reflexively, without thinking at all. There was no expert testimony to the contrary.

At the close of the evidence the jury sent the judge a note asking, in view of the fact that defendant was being tried as an adult, what was the purpose of the psychologist's testimony. The note explained that "From his testimony, it appears that Norman's [i.e., defendant's] mentality and emotional [***417] maturity is that of a minor." The judge directed the jury not to speculate why defendant was being tried as an adult, and to give the expert's testimony whatever effect the instructions permitted.

Among those instructions, as noted at the outset, was the standard first degree felony-murder instruction which informed the [**724] jury that an unlawful [*484] killing, whether intentional, negligent, or accidental, is murder in the first degree if it occurs during an attempt [****86] to commit robbery.²⁹ Despite the plain language of this instruction, the jury sent the judge a second note in the course of its deliberations, this time asking whether it could bring in a verdict of second degree murder or manslaughter even if it found the killing occurred during an attempted robbery.³⁰ The judge replied by rereading the felony-murder instruction, and reiterated that "If the jury concluded here that there was an attempted robbery and the jury concluded that . . . this killing occurred during the attempted robbery, then it would be murder of the first degree." Thus instructed, the jury soon returned verdicts convicting defendant of attempted robbery and first degree murder.

[****87] In his final remarks before discharging the jurors, however, the judge expressed sympathy with their evident reluctance to apply the felony-murder rule to these facts: "I don't want to say a lot about the verdict at this point, but I can tell you that, based upon the

²⁹ Indeed, the judge made the standard instruction fit the facts even more closely by modifying it to require a verdict of first degree felony murder not only when the killing during the felony is intentional, negligent, or accidental, but also when it is committed "in self defense." The latter was the heart of the defense in this case.

³⁰ The note read as follows:

"We need a clarification[.] If defendant is guilty of attempted robbery, can we consider

2nd degree murder

manslaughter etc.

or

if some one is killed during the commission of an attempted robbery, even accidental, are we to bring in a verdict of guilty to 1st degree murder[?]"

evidence, your decision is certainly supported by the evidence. *This felony murder rule is a very harsh rule and it operated very harshly in this case.* I felt that the evidence did not support a first degree murder conviction under any theory other than felony first degree murder, and the law is the law." (Italics added.) The judge then told the jurors that defendant could either be sent to state prison to serve a life sentence or be committed to the Youth Authority, and the prosecutor advised them that any observations they may have about the disposition of the case would be welcomed.

In response to that invitation, the foreman of the jury wrote to the judge two days later, confirming the jury's unwillingness to return the verdict compelled by the felony-murder rule. The letter stated in relevant part: "It was extremely difficult for most of the members, including myself, not to allow compassion and sympathy [****88] to influence our verdict as Norman Dillon by moral standards is a minor

". . . .

[*485] The felony-murder law is *extremely* harsh but with the evidence and keeping 'the law, the law,' we the jury had little choice but to bring in a verdict of guilty of 1st degree murder.

"We covered every aspect, including the possibility of abandonment of the attempted robbery, but as [the prosecutor] so aptly put it, 'The ship had left the dock and had set sail'; the action had gone beyond the stage of preparation.

"We, the jury, would have considered a lesser verdict, but it seemed our hands were tied when all 8 of the elements of 'attempted robbery' had been met. The only other two elements to make it felony-murder were homicide and a causal connection. It is obvious from the evidence that this was so." (Italics in original.)

Expressing "the general consensus of opinion of most or all the jurors," the foreman then implored the judge to give defendant "his best opportunity in life" by committing him to the Youth Authority [***418] rather than sentencing him to state prison. Emphasizing that defendant was even more immature than a normal minor of his age, the foreman [****89] explained that "Mere confinement would not be the answer for him"; rather, there was a need for psychological counseling and training in a skill or trade "to assist this young person in trying to cope with his fellow man in an already [**725] tough world to live in, even under

normal circumstances." ³¹

At the sentencing hearing the intake supervisor of the Youth Authority testified by stipulation that he had reviewed the probation report, interviewed defendant, and found that defendant meets the discretionary eligibility standards of the Youth Authority. ³² The court then ruled defendant statutorily eligible for the Youth Authority, and committed [****90] him to that institution. The judge stressed that he had the opportunity to carefully evaluate not only the evidence but also defendant personally, and that he agreed with the jury's view of the proper disposition of the case. ³³

[*486] The judge then explained to defendant the several reasons why he had decided not to sentence him [****91] to state prison. First, "I know, on the basis of my observations and very strong supporting evidence, that you are immature; that at the time you committed this offense, you were less than 17 in many respects, emotionally, intellectually, and in a lot of other ways." Even at the time of sentencing, "you are much less mature than most of the people your age" Second, "I don't consider you a dangerous person" from the standpoint of future risk of harm. Indeed, the judge emphasized that "I don't consider you as dangerous as many of the people -- most of the people, all of the people that I have ever come across who have been found guilty of first degree murder." ³⁴ [****92] Third, "most importantly here, you have no record. You can't find very many first degree murderers who have no

³¹ This letter was lodged with the superior court, and a copy thereof was appended as an exhibit to defendant's opening brief on appeal. Defendant requests that the record on appeal be augmented to include the letter, and the Attorney General has not opposed the request. Pursuant to *California Rules of Court, rule 12(a)*, we order the record to be so augmented.

³² The record of the sentencing hearing was filed in this court in the related case of *People v. Superior Court (Dillon)*, S.F. 24163, discussed below.

³³ "I think the attitude of the jury is a very practical attitude. This is a jury that was unbiased; a jury that obviously did what they had to do, in view of the evidence, and what was totally justified and, at the same time, they could also express these other feelings. That demonstrates to me their objectivity. They were not advocates. They were judges, as I am. So I accept and give a great deal of weight to the jury's recommendation here, not because I have to, but because it makes some sense to me."

³⁴ Prior to his appointment to the bench the judge had been district attorney of the county for a number of years.

record." The point, said the judge, "is that you have not, in the past, demonstrated conduct that is the kind of conduct that was involved here. And I think that's important. I think that this offense, despite its seriousness, is, to some degree, out of context with your past." ³⁵

Adverting to the fact that the gun was fired nine times, the judge acknowledged that prior to this trial "I could not imagine how somebody could kill another person, shoot them nine times, without deliberation, premeditation, and . . . a total absence of any concern for another human being at all." After hearing the testimony, however, "I am satisfied, on the basis of the evidence here, that the shooting of Dennis Johnson was not planned by you. I accept that. I am not only indicating that I have a reasonable doubt as to whether that happened, but I accept, on the basis of the evidence, that that was not a planned, deliberate killing." Rather, although it was "an intentional killing," it was "a killing that, spontaneously, you decided to engage [***419] in. I think, whether your story is completely true or [****93] not, it is basically true. You were trapped. You were trapped in a situation of your own making."

Against this showing of defendant's attenuated individual culpability we weigh the punishment actually inflicted on him. That punishment, we first observe, turned out to be far more severe than all [**726] parties expected. After the trial court committed defendant to the Youth Authority and he took this appeal, the People collaterally attacked the commitment order on the ground of excess of jurisdiction. The Court of Appeal held that at the time of the offense herein a minor convicted of first degree murder was ineligible as a matter of law for commitment to the Youth Authority. (*People v. Superior [**487] Court (Dillon) (1981) 115 Cal.App.3d 687 [185 Cal.Rptr. 290].*) **CA(31a)**[↑] **(31a)** (See fn. 36.) It therefore issued a writ of mandate directing the trial court to vacate the order of commitment, ³⁶ and that court was left with no

³⁵ The probation officer's report, included in the record on appeal, recites that defendant has no prior convictions, whether of felony, misdemeanor, infraction, or juvenile offenses, and that "The defendant has never before been involved with the authorities for a criminal offense."

³⁶ A trial court has jurisdiction to set aside a void order even while an appeal in the case is pending. (*People v. West Coast Shows, Inc. (1970) 10 Cal.App.3d 462 467 [89 Cal.Rptr. 290].*)

alternative but to sentence defendant to life imprisonment in state prison. (Former *Pen. Code*, § 190.) CA(27c)(7) (27c) Defendant's punishment is thus the massive loss of liberty entailed in such a sentence, coupled with the disgrace of being stigmatized [****94] as a first degree murderer. (See *In re Winship* (1970) *supra*, 397 U.S. 358, 363 [25 L.Ed.2d 368, 375].)³⁷

Because of his minority no greater punishment could have been inflicted on defendant if he had committed the most aggravated form of homicide known to our law -- a carefully planned murder executed in cold blood after a calm and mature deliberation.³⁸ [****96] Yet despite the prosecutor's earnest endeavor throughout [****95] the trial to prove a case of premeditated first degree murder, the triers of fact squarely rejected that view of the evidence: as the jurors' communications to the judge made plain, if it had not been for the felony-murder rule they would have returned a verdict of a lesser degree of homicide than first degree murder. Moreover, after hearing all the testimony and diligently evaluating defendant's history and character, both the judge and the jury manifestly believed that a sentence of life imprisonment as a first degree murderer was excessive in relation to

³⁷We are aware that defendant will eventually be eligible for release on parole. Because of the circumstances of the killing, however, his potential parole date lies many years in the future: under Board of Prison Terms regulations, defendant faces a base term of 14, 16, or 18 years (Cal. Admin. Code, tit. 15, § 2282(b)), plus 2 additional years for use of a firearm (*id.*, § 2285).

³⁸This contrast implicates the second technique noted in *Lynch* for determining proportionality, i.e., a comparison of the challenged penalty with those prescribed in the same jurisdiction for more serious crimes. (8 Cal.3d at pp. 426-427.) While such a comparison is particularly striking when a more serious crime is punished *less* severely than the offense in question, it remains instructive when the latter is punished as severely as a more serious crime. (See, e.g., *In re Foss* (1974) *supra*, 10 Cal.3d 910, 925-926.) That is the case here.

We need not invoke the third *Lynch* technique -- a comparison of the challenged penalty with those prescribed for the same offense in other jurisdictions -- in order to complete our analysis. We discussed these techniques in *Lynch* only as examples of the ways in which courts approach the proportionality problem; we neither held nor implied that a punishment cannot be ruled constitutionally excessive unless it is disproportionate in all three respects. (See, e.g., *In re Rodriguez* (1975) *supra*, 14 Cal.3d 639, 656 ["Petitioner has already served a term which by any of the *Lynch* criteria is

defendant's true culpability: as we have seen, they made strenuous but vain efforts to avoid imposing that punishment.³⁹

[*488] [***420] The record fully supports the triers' conclusion. It shows that at the time of the events herein defendant was an unusually [**727] immature youth. He had had no prior trouble with the law, and, as in *Lynch* and *Reed*, was not the prototype of a hardened criminal who poses a grave threat to society. The shooting in this case was a response to a suddenly developing situation that defendant perceived as putting his life in immediate [****97] danger. To be sure, he largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking when that risk seemed to eventuate.

Finally, the excessiveness of defendant's punishment is underscored by the petty chastisements handed out to the six other youths who participated with him in the same offenses.⁴⁰ It is true that it was only defendant who actually pulled the trigger of his gun; but several of his companions armed themselves with shotguns, and the remainder carried such weapons as a knife and a baseball bat. Because their raid on the marijuana plantation was an elaborately prepared and concerted attempt evidenced by numerous overt acts, it appears they were all coconspirators in the venture. At the very least they were aiders and abettors and hence principals in the commission of both the attempted robbery and the killing of Johnson. (*Pen. Code*, § 31.) Yet none was convicted of any degree of homicide

disproportionate to his offense" (italics added).) The sole test remains, as quoted above, whether the punishment "shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, 8 Cal.3d at p. 424.)

³⁹The separate opinion of Justice Kaus offers an additional reason for the result reached in this opinion. But his route -- whether described as nullification or civil disobedience -- impliedly reopens the classic debate as to whether society has created courts of law or courts of justice. Whatever the result of that exercise, it cannot seriously be urged that, when asked by the jurors, a trial judge must advise them: "I have instructed you on the law applicable to this case. Follow it or ignore it, as you choose." Such advice may achieve pragmatic justice in isolated instances, but we suggest the more likely result is anarchy.

⁴⁰The remaining member of the group was granted immunity for giving evidence against all the others.

whatever, and none was sentenced to state prison for any crime. Instead, the one member [****98] of the group who was an adult was allowed to plead no contest to charges of conspiracy to commit robbery and being an accessory (i.e., after the fact) to a felony, and was put on three years' probation with one year in county jail. Five of defendant's fellow minors were simply made wards of the court; of these, only one was detained -- in a juvenile education and training project -- while the other four were put on probation and sent home. In short, defendant received the heaviest penalty provided by law while those jointly responsible with him received the lightest -- the proverbial slap on the wrist.

In his thoughtful analysis of the subject, Professor Fletcher finds it surprising -- and unjustifiable -- that heretofore "neither state legislatures nor the courts have sought to bring the felony-murder rule into line with well-accepted criteria of individual accountability and proportionate punishment." [*489] [****99] (Fletcher, *Reflections on Felony-Murder* (1981) 12 Sw.U.L.Rev. 413, 418.) Under compulsion of the Constitution, we take that step today.

For the reasons stated we hold that in the circumstances of this case the punishment of this defendant by a sentence of life imprisonment as a first degree murderer violates article I, section 17, of the Constitution. Nevertheless, because he intentionally killed the victim without legally adequate provocation, defendant may and ought to be punished as a second degree murderer.

The judgment is affirmed as to the conviction of attempted robbery. As to the conviction of murder, the judgment is modified by reducing the degree of the crime to murder in the second degree and, as so modified, is affirmed. The cause is remanded to the trial court with directions to arraign and pronounce judgment on defendant accordingly, and to determine whether to recommit him to the Youth Authority.

Concur by: REYNOSO; KAUS; KINGSLEY; BIRD; RICHARDSON (In Part); BROUSSARD (In Part)

Concur

REYNOSO, J. I concur in the result.

Generally, the role of a high court is to settle the law.

That is, we are a court [***421] which sets decisional policy, not a court which [****100] corrects error. Accordingly, we have an institutional duty to speak with a voice which can be followed by the courts of this state. Too many separate opinions, more often than not, confuse decisional law. The case at bench, unlike most decisions demands [**728] separate opinions so that the bench and bar may know which of the distinct sections commands a majority.

I write separately only to indicate the sections in which I concur, and those sections in which I concur only in the result.

CA(1c) [↑] (1c) CA(2c) [↑] (2c) CA(3b) [↑] (3b) CA(4b) [↑] (4b) CA(5c) [↑] (5c) CA(6b) [↑] (6b) CA(7b) [↑] (7b) CA(8b) [↑] (8b) CA(9d) [↑] (9d) CA(10b) [↑] (10b) CA(11b) [↑] (11b) CA(26b) [↑] (26b) CA(27d) [↑] (27d) CA(28b) [↑] (28b) CA(29b) [↑] (29b) CA(30b) [↑] (30b) CA(31b) [↑] (31b) I concur with sections I, II and V. The conduct indeed went beyond preparation -- it was an attempt, as section I correctly concludes. And section II realistically reasons that a crop can be the object of a robbery. Finally, section V correctly applies *In re Lynch* (1972) 8 Cal.3d 410 [105 Cal.Rptr. 217, 503 P.2d 921]. The remaining sections (III and IV) include discussion regarding the felony-murder rule which causes me grave concern; while I agree with the result, I am not in entire agreement with the reasoning. Accordingly, I concur only in the result.

[*490] KAUS, J. CA(1d) [↑] (1d) CA(2d) [↑] (2d) CA(3c) [↑] (3c) CA(4c) [↑] (4c) CA(5d) [↑] (5d) CA(6c) [↑] (6c) CA(7c) [↑] (7c) CA(8c) [↑] (8c) CA(9e) [↑] (9e) CA(10c) [↑] (10c) CA(11c) [↑] (11c) CA(12b) [↑] (12b) CA(13b) [↑] (13b) CA(14g) [↑] (14g) CA(15b) [↑] (15b) CA(16b) [↑] (16b) CA(17b) [↑] (17b) CA(18b) [↑] (18b) CA(19b) [↑] (19b) CA(20b) [↑] (20b) CA(21d) [↑] (21d) CA(22b) [↑] (22b) CA(23b) [↑] (23b) CA(24b) [↑] (24b) CA(25b) [↑] (25b) I fully concur in parts I, II and IV of the lead opinion. Further -- although I would rely more heavily [****101] on a century of precedent in addition to the rather slender legislative history as a basis for the existence of a statutory first degree felony-murder rule -- I concur in the conclusions reached in part III.

With respect to part V, although my views concerning the seriousness of defendant's conduct parallel those of Justices Richardson and Broussard, it is evident that they were not shared by the jury. The facts recited in part V, B of Justice Mosk's opinion leave no doubt that the trial court's instructions -- both before and during

deliberations -- caused an unwilling jury to return a verdict of first degree murder. In fact, the record compels the conclusion that if the trial court had fully answered the jury's question posed in its second note -- whether it "had to" bring in a verdict of first degree murder if it found that the victim was killed during an attempted robbery -- at worst, defendant would have been found guilty of second degree murder.

When the jury asked whether it was compelled to find defendant guilty of first degree murder if it found certain facts to be true, it was obviously looking for a way to avoid the harsh consequences of the felony-murder rule. The [****102] court reiterated its earlier instruction on the law, concluding that if "this killing occurred during the attempted robbery, then it would be murder of the first degree." When this instruction is coupled with the court's earlier standard admonition that it is the jury's duty "to apply the rules of law that I state to you to the facts as you determine them . . ." (*CALJIC No. 1.00*) this left the jury no choice. As far as the average lay juror is concerned, failure to follow the court's instructions invites legal sanctions of some kind and unless the juror is willing to risk a fine, jail or heaven knows what, he or she feels bound to follow the instructions. Yet the essence of the jury's power to "nullify" a rule or result which it considers unjust is precisely that the law cannot touch a juror who joins in a legally unjustified acquittal or guilty verdict on a lesser charge than the one which the proof calls for. ¹ [****103] It seems to me that when the jury practically begged the court to show it a way by which to avoid a first degree verdict, [*491] its immunity from legal harm if it followed its conscience was a fact of legal life on which the court was bound to instruct. ²

[**422] The power of a jury to nullify what it considers an unjust law has been part of our common law heritage since *Bushell's Case* (1670) 6 Howell's State Trials 999.

¹ For diverse views on the subject of jury nullification, see, e.g., Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy* (1980) 43 Law & Contemp. Probs. No. 4, p. 51; Schefflin, *Jury Nullification: The Right To Say No* (1972) 45 So. Cal. L. Rev. 168; Christie, *Lawful Departures From Legal Rules: "Jury Nullification" and Legitimated Disobedience* (Book Review 1974) 62 Cal. L. Rev. 1289 (hereafter *Christie*); Kadish & Kadish, *Discretion to Disobey* (Stan. U. Press 1973); Kalven & Zeisel, *The American Jury* (Little, Brown 1966) pp. 286-312.)

² Minimally such an instruction should have informed the jury of (1) its power to render a verdict more lenient than the facts justify, and (2) its immunity from punishment if it chooses to exercise that power.

[**729] Bushell had been the foreman of a jury which -- against all the evidence and in defiance of the direction of the court -- acquitted William Penn and William Mead for preaching to an unlawful assembly. Imprisoned for their disobedience, the jurors were eventually freed on a writ of habeas corpus. The case established for all practical purposes, that thenceforth a jury was immune from legal sanctions for rendering a perverse acquittal.

Judicial attitudes toward jury nullification run the gamut from grudging acceptance to enthusiastic endorsement. For example, in *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, the defense claimed that it was entitled to an instruction that the jury [****104] could disregard the law as stated by the court. The majority disagreed. After recalling some of the shining moments of jury nullification in American history -- the acquittal of Peter Zenger and the many refusals to convict in prosecutions under the fugitive slave law -- the court stated: "What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a 'necessary counter to case-hardened judges and arbitrary prosecutors,' does not establish as an imperative that the jury must be informed by the judge of that power." (473 F.2d at p. 1136.) The dissent failed to understand why a doctrine that "permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice" (*id.*, at p. 1142 (dis. opn. of Bazelon, J.)) should not be brought to the attention of the jury which may be bursting with a desire to be fair and render particularized justice, but does not know how. ³

[****105] One does not have to be as starry-eyed about jury nullification as the *Dougherty* dissent to appreciate that the issue here is different than the one presented in *Dougherty*. To instruct on nullification at the outset of deliberations affirmatively invites the jury to consider disregarding the law. I understand the arguments against such a course and do not advocate it. What happened here, however, is that the court was faced with a jury which, after [*492] some deliberation and of its own accord, in effect asked: "May we nullify?" The answer it was given was obviously incorrect.

³ *Dougherty* has been followed in several cases. They are listed in *United States v. Wiley* (8th Cir. 1974) 503 F.2d 106, 107, footnote 4. Since then *United States v. Grismore* (10th Cir. 1976) 546 F.2d 844, 849 and *United States v. Buttorff* (8th Cir. 1978) 572 F.2d 619, 627, have followed suit.

I know of no case which has turned on the question whether such an answer is error which may affect the eventual jury verdict. Perhaps *Sparf and Hansen v. United States (1895) 156 U.S. 51 [39 L.Ed. 343, 15 S.Ct. 273]* comes closest. There the defendants were charged with capital murder. During deliberations several jurors returned to ask whether they could return a verdict of manslaughter. The court, in effect, said that they could not. On appeal the issue was formulated as being whether questions of law, as well as of fact, should be left to the jury. The answer was, predictably, [****106] in the negative.⁴ The United States Supreme Court did, however, note that the trial court had, after stating the applicable legal rules, instructed as follows: "In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so; but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court." (Italics added and deleted.) (*156 U.S. at p. 62, fn. 1 [39 L.Ed. at p. 348]*.) While nothing in the court's analysis suggests that it was the recognition of the jury's power that saved [**730] the day, it is significant that the trial court [***423] had obviously thought it proper to mention it.

[****107] Actually, *Dougherty* itself suggests that if the jury spontaneously feels the urge to nullify, a different situation is presented. The "occasional medicine . . . daily diet . . ." passage quoted above, continues in this fashion: "On the contrary, it is pragmatically useful to structure instructions in such wise that the jury must feel strongly about the values involved in the case, so strongly that it *must itself identify* the case as establishing a call of high conscience, and *must independently initiate and undertake* an act in contravention of the established instructions." (*473 F.2d at pp. 1136-1137.*) (Italics added.) While this language does not visualize that a spontaneous "call of high conscience" will result in a note to the trial court asking "what do we do now?" it is clear that even in the opinion of the *Dougherty* majority it creates a situation quite different from the one it had previously discussed -- the jury which, absent judicial nudging, may be perfectly

⁴ Some authorities have defended jury nullification on the basis of the now generally discarded notion that the jury has the ultimate responsibility for determining the law as well as the facts. Modern enthusiasm for jury nullification is more commonly based on the jury's right or power to reject the law as applied to the facts if its conscience will not permit it to follow the court's instruction. (*Christie, op. cit. supra*, fn. 1, at pp. 1298-1299.)

content to apply the strict letter of the law.

That shoving the jury in the direction of nullification is something the trial court need not do does not mean that it is permitted to pressure the jury [****108] [**493] into stifling a spontaneous urge to nullify. In *United States v. Spock (1st Cir. 1969) 416 F.2d 165*, the convictions were reversed because the trial court had asked the jury to answer several "special questions" concerning the various elements of the crimes charged. The court felt that this procedure amounted to undue judicial pressure because it infringed on its power to arrive at a general verdict without having to support it by reasons. "There is no easier way to reach, and perhaps to force, a verdict of guilty, than to approach it step by step. A juror, wishing to acquit, may be formally catechized. By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions." (*Id. at p. 182.*)

The point of *Spock* is that it considers jury nullification not as a sick doctrine that has occasional good days, but as a positive value which must not be smothered by procedural [****109] gimmicks.

As I have said, I do not share the lead opinion's relatively benign view of defendant's crime. The jury, however, did. It asked whether it could put its assessment of defendant's culpability into effect. The court said "no" when the correct answer was plainly "yes." Under the circumstances the error clearly calls for a reversal.

If three of my colleagues agreed with me, we would face a knotty problem of disposition: Reversal? Modification to second degree murder? Modification to manslaughter? I am not sure what the proper answer would be. Under the circumstances, however, I am convinced that the only practical solution for me is to concur in the reduction of degree. I so concur.

KINGSLEY, J. I concur in Justice Mosk's opinion.

I have read with interest the scholarly opinion by Justice Kaus on the subject of "jury nullification," but do not agree that that doctrine has anything to do with the case at bench. The concept of "jury nullification" is one that permits a jury to ignore the plain letter of the law and administer what those 12 persons, as a body, regard the

socially more appropriate verdict in a particular case. The doctrine represents what [****110] Dean Pound called a "soft spot" in the law, which permitted the law to yield in a special case rather than cast doubt on the justice of the applicable law in general.

[*494] Here, however, the majority of the court is not ignoring the law. The constitutional provision against cruel and unusual punishment is, itself, a vital part of the law which we apply in the case of young Mr. Dillon.

[**731] It is now settled that that provision in both the federal and California Constitutions prohibits the application of an otherwise [***424] valid sanction to a particular person under particular circumstances. We are not *ignoring* the law of California; we are *applying* the *whole* law.

BIRD, C. J., Concurring. I join in Justice Mosk's opinion for the court. However, I write separately to emphasize that today's decision still leaves unresolved some important challenges to the felony-murder rule.

Although the first degree felony-murder rule in this state appears to be a "creature of statute" (*ante*, at p. 463), this cannot be said for second degree felony murder. As Justice Mosk's opinion observes, "the second degree felony-murder rule remains, as it has been [****111] since 1872, a judge-made doctrine without any express basis in the Penal Code" (*Ante*, at p. 472, fn. 19.)

This court has repeatedly criticized the felony-murder rule as a "highly artificial" and "barbaric" concept which "not only 'erodes the relation between criminal liability and moral culpability' but also is usually unnecessary for conviction" (See *People v. Phillips* (1966) 64 Cal.2d 574, 582, 583, fn. 6 [51 Cal.Rptr. 225, 414 P.2d 353]; *People v. Satchell* (1971) 6 Cal.3d 28, 33 [98 Cal.Rptr. 33, 489 P.2d 1361, 50 A.L.R.3d 383].) This court is precluded by statute from abrogating the "unwise" and "outdated" first degree felony-murder rule (*ante*, at p. 463), but there is nothing which prevents this court from reassessing the second degree felony-murder doctrine. In view of the criticisms that this court and others have leveled against the rule over the past decade, the time seems to be at hand for doing away with that portion of the "barbaric" anachronism which we are responsible for creating.

Moreover, as to the first degree felony-murder rule, there are still a number of open questions that have not been decided by this court. As [****112] the majority opinion notes, the rule encompasses a wide range of individual culpability. (*Ante*, at p. 477.) With regard to those felons who come within its ambit -- i.e., those who

kill deliberately and with premeditation and malice in the course of the enumerated felonies -- the first degree felony-murder rule is superfluous. These individuals would be convicted of first degree murder by the traditional malice-plus-premeditation route, regardless of the existence or nonexistence of the felony-murder rule.

The elimination of the element of malice for felony murder is also unnecessary to obtain the conviction of those felons who, in the course of the [*495] enumerated felonies, (1) kill intentionally but without premeditation or (2) cause a death through "an intentional act involving a high degree of probability that it will result in death, which act is done for a base, anti-social purpose and with a wanton disregard for human life." Such persons act with malice. (*Pen. Code, § 188; CALJIC No. 8.11* (1982 rev.).)

Thus, the only *actual* consequence of this first degree felony-murder rule is to mete out to certain persons who cause a death unintentionally or accidentally [****113] the punishment which society prescribes for premeditated murder. Serious questions remain as to whether the state and federal Constitutions permit the government to exact such extreme punishment in the absence of proof that an accused deliberated or harbored malice.

The Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375, 90 S.Ct. 1068].) Today's majority opinion correctly holds that the "substantive statutory definition" of the crime of first degree felony murder in this state does not include malice as an element. (*Ante*, at p. 475.) However, this conclusion does not necessarily mean that the *Constitution* permits a first degree murder conviction to be based on a [**732] killing where an accused harbored no malice.

Winship requires proof beyond a reasonable doubt of every *element* of murder, but the language of the *Winship* decision has broader implications. According to *Winship*, [***425] due process requires proof beyond a reasonable doubt of "every fact necessary [****114] to constitute the crime." (397 U.S. at p. 364 [25 L.Ed.2d at p. 375], italics added.) The United States Supreme Court did not tell us in *Winship* how to determine which "facts" are so "necessary" that the prosecution must prove them beyond a reasonable doubt. However, the high court has recognized that

state legislatures will not be permitted to evade *Winship* by merely eliminating a "fact necessary to constitute the crime" from their statutory definition of the offense. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [44 L.Ed.2d 508, 519, 95 S.Ct. 1881]; see also *Patterson v. New York* (1977) 432 U.S. 197, 211, fn. 12 [53 L.Ed.2d 281, 292, 97 S.Ct. 2319].) As that court has taken pains to point out, "there are obviously constitutional limits beyond which the States may not go in this regard." (*Patterson*, supra, 432 U.S. at p. 210 [53 L.Ed.2d at p. 292].) The exact location of these "limits," however, has remained largely undefined in subsequent cases. (But see *post*, fn. 3.)

While the Supreme Court has managed to avoid this issue thus far, commentators have found it a fertile ground for theoretical discussion. Some have argued merely that [****115] those facts specified by the Legislature as necessary [*496] to justify a particular criminal sanction must be proved beyond a reasonable doubt. (See, e.g., Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases* (1977) 86 Yale L.J. 1299.) Others have criticized this approach as overly formalistic¹ and have suggested that *Winship's* reasonable doubt standard must be tied to a recognition of certain constitutional limitations on the Legislature's power to define substantive crimes. (See, e.g., Jeffries & Stephan, *op. cit. supra*, 88 Yale L.J. at pp. 1365-1366; Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*

¹ As Jeffries and Stephan observe, "[the] trouble lies in trying to define justice in exclusively procedural terms. *Winship's* insistence on the reasonable-doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof. Guilt and innocence are substantive concepts. Their content depends on the choice of facts determinative of liability. If this choice is remitted to unconstrained legislative discretion, no rule of constitutional procedure can restrain the potential for injustice. A normative principle for protecting the 'innocent' must take into account not only the certainty with which facts are established but also the selection of facts to be proved. A constitutional policy to minimize the risk of convicting the 'innocent' must be grounded in a constitutional conception of what may constitute 'guilt.' Otherwise 'guilt' would have to be proved with certainty, but the legislature could define 'guilt' as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise." (Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law* (1979) 88 Yale L.J. 1325, 1347 [hereafter, Jeffries & Stephan].)

(1980) 94 Harv.L.Rev. 321, 342-343 (hereafter, Allen.) These authors contend that the state should be required to prove beyond a reasonable doubt every fact which is constitutionally necessary to establish the guilt of the accused. In conjunction with this argument, there is an asserted need for a constitutional doctrine applicable to the substantive criminal law which defines minimum requirements for the imposition of the criminal sanction. It is suggested [****116] that the constitutional basis for such a doctrine may be found within notions of substantive due process, equal protection, cruel and/or unusual punishment, or some combination of all three. (See Note, *The Constitutionality of Affirmative Defenses After Patterson v. New York* (1978) 78 Colum.L.Rev. 655, 669-672; Allen, *op. cit. supra*, 94 Harv.L.Rev. at p. 343.)

[****117] What the exact contours of this doctrine are is another matter. The two most frequently mentioned constitutional limitations on substantive criminal law are a constitutional doctrine of mens rea (see Jeffries & [**733] Stephan, *op. cit. supra*, 88 Yale L.J. at pp. 1371-1376; Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 148-149; Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea* (1973) 10 Houston L.Rev. 1039) and the Eighth Amendment's requirement [****426] of proportionality in criminal punishment.² [*497] (See Jeffries & Stephan, *op. cit. supra*, 88 Yale L.J. at pp. 1376-1379; see generally Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment* (1972) 24 Stan. L.Rev. 838; Note, *Disproportionality in Sentences of Imprisonment* (1979) 79 Colum. L.Rev. 1119; see also *Solem v. Helm* (1983) U.S. [77 L.Ed.2d 637, 103 S.Ct. 3001]; *United States v. Weems* (1910) 217 U.S. 349 [54 L.Ed. 793, 30 S.Ct. 544]; *In re Lynch* (1972) 8 Cal.3d 410 [105 Cal.Rptr. 217, 503 P.2d 921]; but see *Rummel v. Estelle* [****118] (1980) 445 U.S. 263 [63 L.Ed.2d 382, 100 S.Ct. 1133].)

If either source for such a theory is adopted,³ [****119]

² Jeffries and Stephan also suggest a constitutional requirement of an actus reus. (88 Yale L.J. at pp. 1370-1371.) As Professor Allen notes, however, the actus reus requirement may be viewed in large part as an aid in establishing a culpable mental state to a sufficient degree of certainty. (See 94 Harv.L.Rev. at pp. 343-344, fn. 83.)

³ The Supreme Court's recent decision in *Sandstrom v. Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450] suggests that the court may well be moving in that direction.

the doctrine of felony murder as a rule of substantive criminal law is highly vulnerable. (See Jeffries & Stephan, *op. cit. supra*, 88 Yale L.J. at pp. 1383-1387; Comment, *Constitutional Limits Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule* (1975) 46 Miss.L.J. 1021, 1037-1040.) Since the rule punishes as murder any killing in the course of a felony without a showing of a culpable mental state with respect to that result, its continued application would impermissibly conflict with a constitutional requirement of mens rea.⁴

[****120] [*498] [***427] Moreover, [**734] proportionality may be violated when one considers that, at least in the absence of a showing of mens rea, defendants are in reality punished for the commission of the underlying felony. Two similarly situated felons may receive grossly disproportionate punishments based on the fortuity that a totally unintended and nonnegligent death occurred in one case but not the other.⁵ (See

prosecution." (*Id.*, at pp. 250-251 [96 L.Ed. at pp. 293-294].)

In *United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 436 [57 L.Ed.2d 854, 868, 98 S.Ct. 2864], the court again relied on *Morissette* in holding that a showing of intent was required to sustain criminal liability under the antitrust laws. Although the court purported to interpret the statute so as to require a mens rea element, despite a substantial body of contrary precedent, it referred to and clearly relied on the constitutionally disfavored status of strict liability crimes. (*Id.*, at pp. 437-438 [57 L.Ed.2d at pp. 869-870].)

⁴It is true that in order for a defendant to be convicted of felony murder, the state must first establish his mental culpability with respect to the underlying felony. He is not morally blameless. However, as the United States Supreme Court noted in *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324 [61 L.Ed.2d 560, 576-577, 99 S.Ct. 2781], "[the] constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E.g., *Mullaney v. Wilbur*, 421 U.S. at 697-698 (requirement of proof beyond a reasonable doubt is not '[limited] to those facts which, if not proved, would wholly exonerate' the accused). Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar."

Once the prosecution proves defendant's culpable mental state with respect to the underlying felony, that culpability level is punishable by the sanction attached to the felony itself. The felony-murder rule, which mandates the imposition of severe additional punishment without any showing of additional mental culpability, is properly characterized as a strict liability criminal law concept. It is a concept which is blatantly unconstitutional if the Constitution prohibits the imposition of criminal punishment without a showing of a culpable mental state with respect to the result achieved. As Justice Mosk noted in dissent in *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 593 [91 Cal.Rptr. 275, 477 P.2d 131]: "Fundamental principles of criminal responsibility dictate that the defendant be subject to a greater penalty only when he has demonstrated a greater degree of culpability. To ignore that rule is at best to frustrate the deterrent purpose of punishment, and at worst to risk constitutional invalidation on the ground of invidious discrimination."

Sandstrom applied strict due process limits to the state's power to invoke *conclusive* presumptions, which were long thought to constitute rules of substantive criminal law. (See 9 Wigmore, Evidence (Chadbourne rev. ed. 1981) § 2492, p. 308.) The *Sandstrom* court relied heavily on *Morissette v. United States* (1952) 342 U.S. 246 [96 L.Ed. 288, 72 S.Ct. 240], which many commentators see as a foundation for a constitutional mens rea requirement:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public

⁵This raises the spectre of the multitude of equal protection challenges which could be leveled against applications of the felony-murder rule. (See Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder* (1978) 15 Houston L.Rev. 356, 382.) A prime example appears by way of a recent Court of Appeal case. In *People v. Fuller* (1978) 86 Cal.App.3d 618 [150 Cal.Rptr. 515], defendants were charged with first degree felony murder after they were involved in a fatal traffic accident during an escape from the burglary of an unoccupied vehicle on an auto dealer's lot. The

also Lockett v. Ohio (1978) 438 U.S. 586, 620 [57 L.Ed.2d 973, 999, 98 S.Ct. 2954] (conc. opn. of Marshall, J.).)

[****121] [*499] It is certainly possible that the cruel or unusual punishment analysis of today's majority opinion will develop along the lines suggested by these authorities. Time will tell. I write separately merely to point out that there are unresolved constitutional issues which this court may have to pass upon sooner or later.

Dissent by: RICHARDSON (In Part); BROUSSARD (In Part)

court grudgingly reversed a trial court order dismissing the murder count. Relying on our holding in People v. Salas (1972) 7 Cal.3d 812, 822 [103 Cal.Rptr. 431, 500 P.2d 7, 58 A.L.R.3d 832], the Court of Appeal reasoned that since the burglars had not reached a "place of temporary safety," the burglary was ongoing when the fatality occurred, thus allowing application of the felony-murder rule. (86 Cal.App.3d at p. 623.)

The problem with such an application is that the escape, during which the death occurred, had no logical connection to the nature of the underlying felony. The felons could have been escaping from the scene of any crime with identical results. Although the Court of Appeal felt compelled by past cases to hold otherwise, it suggested that application of the doctrine should be limited to inherently dangerous burglaries. While this represents a more enlightened view, it misconceives the crucial point. The nature of the underlying crime is totally irrelevant. It is the felon's dangerous conduct during the escape which must be deterred. In Fuller, that conduct (reckless driving) already subjected the defendants to charges of vehicular manslaughter and possibly second degree murder on a reckless murder theory. (86 Cal.App.3d at p. 629.)

It is utterly irrational to subject some defendants to a first degree murder charge and a possible death sentence while others are charged only with vehicular manslaughter (or indeed no crime at all if their conduct was not grossly negligent) based solely on the nature of the crime from which they are escaping. Moreover, in People v. Olivas (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55, 551 P.2d 375], we recognized that distinctions in criminal punishments affect the citizen's fundamental interest in personal liberty and are thus subject to strict judicial scrutiny. The state can surely claim no compelling interest in imposing grossly disproportionate punishment on escaping burglars as opposed to escaping kidnapers or escaping thieves for unintended deaths which occur during such escapes.

Dissent

RICHARDSON, J., Concurring and Dissenting. CA(1e)[↑] (1e) CA(2e)[↑] (2e) CA(3d)[↑] (3d) CA(4d)[↑] (4d) CA(5e)[↑] (5e) CA(6d)[↑] (6d) CA(7d)[↑] (7d) CA(8d)[↑] (8d) CA(9f)[↑] (9f) CA(10d)[↑] (10d) CA(11d)[↑] (11d) CA(21e)[↑] (21e) CA(22c)[↑] (22c) CA(23c)[↑] (23c) CA(24c)[↑] (24c) CA(25c)[↑] (25c) I fully concur with the majority insofar as it (1) affirms defendant's conviction of attempted robbery, and (2) sustains the constitutionality of the first degree felony-murder rule. (*Pen. Code*, § 189.)

I respectfully dissent, however, from the majority's conclusions that, as applied to defendant, the penalty of life imprisonment with possibility of parole constitutes cruel or unusual punishment under the *California Constitution* (art. I, § 17), and that accordingly the judgment must be modified to reduce the offense to second degree murder. In my view, modification of the judgment in reliance on the cruel or unusual punishment clause constitutes an unwarranted invasion both of the powers of the Legislature to define crimes and prescribe punishments, [****122] [**735] and of the Governor to exercise clemency and commute sentences.

We have long insisted that "appellate courts do not have the power to modify a sentence or reduce the punishment therein imposed absent error in the proceedings. [Citation.]" (People v. Giminez (1975) 14 Cal.3d 68, 72 [120 Cal.Rptr. 577, 534 P.2d 65]; see People v. Odle (1951) 37 Cal.2d 52, 57 [230 P.2d 345].) Use of such a power by the appellate courts would constitute an exercise of "clemency powers similar to those vested in the governor . . . and raise serious constitutional questions relating to the separation of powers." (Odle, at p. 58.) [****428] And although a truly disproportionate sentence may constitute "error" which would invoke our limited power to vacate or reduce a sentence (see People v. Frierson (1979) 25 Cal.3d 142, 182-183 [158 Cal.Rptr. 281, 599 P.2d 587]), nevertheless, as I will explain, this defendant's sentence of life with possibility of parole cannot reasonably be deemed disproportionate to his offense of first degree murder.

We have defined "cruel or unusual punishment" under the state Constitution as one which is "so disproportionate to the [****123] crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (In re Lynch (1972) 8 Cal.3d 410, 424 [105 Cal.Rptr. 217, 503 P.2d

921, fn. omitted.) The punishment here, as the majority itself acknowledges, is an enhanced base term of only 20 years in prison for the murder which he committed. (*Ante*, p. 487, fn. 37.) Moreover, he may well be released on parole at a much earlier date if the Board of Prison Terms [**500**] finds sufficient circumstances in mitigation (Cal. Admin. Code, tit. 15, § 2284), or if defendant earns available postconviction credits (*id.*, § 2290). It is conceivable that defendant could be paroled after serving only seven years in prison. (*Pen. Code*, § 3046.) Can it reasonably be said that a term probably ranging from 7 to 20 years in prison is "cruel or unusual punishment" for the first degree murder of which he was convicted? Emphatically not.

The sovereign people of this state have provided in their Constitution that "*The death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments . . .*" (*Cal. Const.*, art. I, § 27, italics [**124**] added.) But for his age (17) at the time of his offenses, defendant herein could have been charged with the death penalty or with life imprisonment *without parole*. (See *Pen. Code*, § 190.5; *People v. Davis* (1981) 29 Cal.3d 814 [176 Cal.Rptr. 521, 633 P.2d 186].) If the infliction of the death penalty cannot be deemed cruel or unusual punishment under the state Constitution, how can a substantially *lesser* penalty be so characterized?

The majority stresses defendant's youth, his immaturity, his lack of a prior criminal record, and the asserted fact that "The shooting in this case was a response to a suddenly developing situation . . ." (*Ante*, p. 488.) Each of these factors properly may be considered by the Board of Prison Terms in determining defendant's parole date. (Cal. Admin. Code, tit. 15, §§ 2281, 2284.) They do not, however, assist us one whit in measuring the constitutional propriety of a "life" sentence for first degree murder.

The majority's mild characterization of the killing as a mere benign "response to a suddenly developing situation" finds little support in the record. This is the way I read this record: Defendant had previously attempted [**125**] to invade the marijuana plantation for the purpose of seizing some of the contraband. He met armed resistance by the owners and was forced to retreat. He thereupon carefully planned his second foray. He was going to "get even." He and a friend each planned to recruit three other friends. They chose the month of October because the marijuana would be ready for harvesting. Defendant told the gang to arm themselves, saying that he would bring his .410 and .22

rifles but that he needed ammunition. He rejected one proposal to start a diversionary fire, telling one companion that they should "just go up there. If the guy came out, we would just hold [**736**] him up, hit him over the head or something. Tie him to a tree."

The time of the departure and place and time of assembly of the crew were agreed upon. Defendant prepared a map. Six of the persons, one of them armed with a shotgun, rendezvoused and obtained shotgun shells, paper [**501**] bags to be used as masks or containers, and diagonal pliers for nipping the marijuana buds. Then, by prearrangement, they met defendant and still another person, making a party of eight. Defendant had a .22 rifle and was handed some [**126**] ammunition. Two of the others carried shotguns, another grabbed a baseball bat, still another had brought wire cutters and a pocket knife. Defendant also carried some [**429**] rope to be used either in tying up the marijuana or one of their intended victims. The young men tore up some old sheets and fashioned them into masks, obtained sticks to fight off the dogs, and then, with the use of the map, reviewed final plans for the raid. At this point defendant loaded his rifle. He was not hunting rabbits!

The men split into either three or four separate groups for their final approach to the marijuana field from different directions. Defendant and three other companions heard someone coming up a trail. Two of the party hid. Defendant either remained standing or, having crouched, then stood, and as the victim emerged from the bushes, defendant fired at him point blank at a distance of 10 to 30 feet. The victim did not point his gun at defendant and no words were exchanged. Defendant's rifle required that its trigger be pressed separately each time a bullet was fired. A subsequent autopsy of the victim's body revealed that *nine* bullets had found their mark. Defendant [**127**] knew exactly what he was doing. He had carefully prepared for this ultimate culmination of his lethal plans.

There was nothing unplanned about this killing; indeed, under the circumstances recited above, an armed confrontation with tragic consequences appeared almost *inevitable*. The felony-murder rule, specifying that any homicide occurring during the perpetration or attempted perpetration of a robbery is first degree murder, clearly was designed to foreclose any argument regarding the actor's lack of premeditation or planning. Yet it is precisely such an argument that the majority accepts when it agrees to reduce defendant's sentence to second degree murder.

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NND 943008

34 Cal. 3d 441, *501; 668 P.2d 697, **736; 194 Cal. Rptr. 390, ***429; 1983 Cal. LEXIS 226, ****127

None of the disproportionality cases cited and relied on by the majority is apposite here. *In re Lynch*, supra, 8 Cal.3d 410, held excessive an indeterminate life-maximum sentence for a second offense of indecent exposure. *In re Foss* (1974) 10 Cal.3d 910, 917-929 [112 Cal.Rptr. 649, 519 P.2d 1073], and *In re Grant* (1976) 18 Cal.3d 1, 5-18 [132 Cal.Rptr. 430, 553 P.2d 590], struck down legislation barring recidivist drug offenders from parole consideration for 10 years. *In re Rodriguez* (1975) 14 Cal.3d [****128] 639, 653-656 [122 Cal.Rptr. 552, 537 P.2d 384], mandated the release of a nonviolent child molester who had been imprisoned for 22 years. None of these cases, which involved relatively minor offenses, supports a challenge to a probable 7- to 20-year "life" sentence for a first degree murder.

[*502] In *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368], the high court held that the death penalty was a disproportionate punishment as applied to an accomplice to a robbery and murder who had neither killed nor intended to kill the victim. As the high court stated, "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike This was impermissible under the Eighth Amendment." (P. 798 [73 L.Ed.2d at p. 1152, 102 S.Ct. at p. 3377].) In the present case, of course, the record discloses that defendant both personally and intentionally shot and killed his victim. No accomplice was involved. Thus, *Enmund* certainly is no authority for the majority's holding that defendant cannot be subjected to a "life" sentence for first degree murder.

[****129] As *Enmund* explains, a defendant's punishment should be "tailored to his personal responsibility and moral guilt." (458 U.S. at p. 801 [73 L.Ed.2d [**737] at p. 1154, 102 S.Ct. at p. 3378].) Defendant was personally responsible for, and morally guilty of, a homicide committed in the attempted perpetration of a robbery. Although defendant, had he been a year older, could have been sentenced to death or life imprisonment without parole, by reason of his youth he received a far less severe sentence. A probable 7- to 20-year "life" sentence is very modest penal treatment for a deliberate killing. Any further clemency should rest with the Governor.

I would affirm the judgment in its entirety.

BROUSSARD, J., Concurring and Dissenting. CA(1f)[(1f) CA(2f)[(2f) CA(3e)[(3e) CA(4e)[(4e) CA(5f)[(5f) CA(6e)[(6e) CA(7e)[(7e) CA(8e)[

(8e) CA(9g)[(9g) CA(10e)[(10e) CA(11e)[(11e) I concur in part I of the majority opinion, which holds that the trial court properly [***430] instructed the jury on the crime of attempted robbery. I join also in part II, which overturns the common law doctrine that a standing crop cannot be the subject of larceny or robbery. Finally, I agree in principle with part IV of the majority opinion; a statute codifying the common law felony-murder rule would not violate the state [****130] or federal Constitutions by conclusively presuming malice.

In part III of their opinion, however, the majority pile "inference on inference" (*ante*, p. 472, fn. 19) to reach the conclusion that *Penal Code section 189* codifies the common law rule that a killing during the commission of a felony is considered to be murder without requiring proof of malice. The majority's account of the history of *section 189*, however, persuades me to a contrary conclusion.

As the majority explain, as of 1872 California had two felony-murder statutes: former section 25, which codified the common law felony-murder rule; and former section 21, which fixed the degree of the murder. The [*503] 1872 Penal Code reenacted section 21 (now renumbered as § 189) but omitted section 25.

We do not know why the Legislature failed to reenact section 25. (It seems fanciful to attempt to trace that failure to a mistaken comment by the Code Commissioners in their discussion of an arson statute.) It is possible that the Legislature intended to reenact the common law felony-murder rule and failed through inadvertence or oversight. But the fact remains that the Legislature did not reenact that rule, but retained [****131] only the statute which fixed the degree of the murder.

I do not believe the language of *section 189*, the degree-fixing statute, can reasonably be construed to encompass the common law felony-murder rule. As the majority carefully explain, the language of *section 189* derives from former section 21 and similar enactments in other states -- enactments clearly intended to serve solely the function of distinguishing between first and second degree murder. The current wording of *section 189* reflects this limited purpose. ¹ It does not refer to a

¹ *Section 189* reads as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other

killing to perpetrate a felony -- the subject of the common law rule -- but to a "murder" to perpetrate six specific felonies.² In fixing the degree of the murder, moreover, *section 189* includes not only murders in perpetration of the listed felonies, but also those committed by **[**738]** explosive, poison, lying in wait, or torture. A killing committed by such means, however, is not murder without proof of malice. (*People v. Mattison* (1971) 4 Cal.3d 177, 182-184 [93 Cal.Rptr. 185, 481 P.2d 193].) There is no reasonable way to read the language of *section 189* to make killings in perpetration of the six listed felonies murder without **[****132]** proof of malice, but to require malice for all other killings described in that section.

[**133]** I conclude that the felony-murder rule remains judge-created and judge-preserved common law. It is therefore within the power of this court to overturn that rule. (See *People v. Drew* (1978) 22 Cal.3d 333, 347 [149 Cal.Rptr. 275, 583 P.2d 1318].) If we were to consider that matter, we **[*504]** would have to recognize that numerous decisions **[****431]** of this court have upheld and applied that rule. (See, e.g., *People v. Cantrell* (1973) 8 Cal.3d 672, 688 [105 Cal.Rptr. 792, 504 P.2d 1256]; *People v. Burton* (1971) 6 Cal.3d 375, 387-388 [99 Cal.Rptr. 1, 491 P.2d 793].) (Some, written without the guidance of the majority's historical analysis, have mistakenly assumed the rule was statutory.) The Legislature has undoubtedly relied on those decisions in considering and enacting other penal legislation. This long-continued pattern of judicial precedent and legislative reliance would weigh heavily against repudiation of the felony-murder rule, serving to offset the logical weakness of that rule and the occasional inequities it brings about. But the majority's conclusion that the felony-murder rule is statutory moots that issue.

kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under *Section 288*, is murder of the first degree; and all other kinds of murders are of the second degree"

² Under the majority's construction of *section 189*, "the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code" (*Ante*, p. 472, fn. 19.) Both the common law felony-murder rule and former *section 25*, however, provided that all killings to perpetrate a felony were murder, without distinguishing the degree of the murder. If the second degree felony-murder rule has been a judge-made rule since 1872, it follows that the 1872 Legislature did not fully codify the common law rule.

I dissent also to part **[****134]** V of the majority opinion. The statutory punishment of life imprisonment with possibility of parole is not constitutionally disproportionate to the crime of first degree murder. Neither is it excessive under the circumstances of this particular murder.

The defendant before us planned the robbery and recruited other youths to help him. The would-be robbers expected to meet armed resistance, planned to overcome that resistance, and armed themselves accordingly. When defendant, as he must have anticipated, met the armed guard he had encountered on two previous forays, defendant shot the guard nine times. Although defendant claims he shot impulsively and from panic, the same may well be true of many adult murderers. On this record, defendant is equally culpable as the typical adult felony-murder defendant -- perhaps more so, since defendant was the instigator of the robbery and knew he would probably have to use his weapon to consummate the robbery.

The state, of course, does not have to punish every defendant to the maximum extent permitted by the Constitution. It may decide that certain defendants are good prospects for rehabilitation, and that severe punishment would interfere **[****135]** with that goal. The defendant before us may be one who would benefit from a rehabilitative commitment. But the decision whether to create rehabilitative programs, and who should be eligible for commitment under those programs, is essentially a legislative decision. So long as the Legislature does not punish disproportionately to the gravity of the crime and the culpability of the offender, its refusal to extend lenient treatment or to offer rehabilitative programs to those convicted of first degree murder does not constitute cruel or unusual punishment. I would therefore affirm the judgment against defendant.

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1. *County of San Diego v. State of California, 15 Cal. 4th 68*

Client/Matter: -None-

Search Terms: County of San Diego v. State of California, 15 Cal. 4th 68

Search Type: Natural Language

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Cases

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County of San Diego v. State of California

Supreme Court of California

March 3, 1997, Decided

No. S046843.

Reporter

15 Cal. 4th 68 *; 931 P.2d 312 **; 61 Cal. Rptr. 2d 134 ***; 1997 Cal. LEXIS 630 ****; 97 Daily Journal DAR 2296; 97 Cal. Daily Op. Service 1555

COUNTY OF SAN DIEGO, Cross-complainant and Respondent, v. THE STATE OF CALIFORNIA et al., Cross-defendants and Appellants.

Prior History: [****1] Superior Court of San Diego County, Super. Ct. No. 634931. Michael I. Greer, * Harrison R. Hollywood and Judith McConnell, Judges.

Disposition: The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least \$ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c); Welf. & Inst. Code, § 10000, 17000) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

Core Terms

reimbursement, funds, medical care, adult, eligible,

* Retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

costs, indigent, fiscal year, subdivision, superior court, medically indigent, court of appeals, programs, mandates, new program, provide medical care, indigent person, financial responsibility, healthcare, higher level of service, trial court, mandamus, state mandate, spending, board of supervisors, local government, medical services, asserts, proceedings, linked

Case Summary

Procedural Posture

Appellant state sought review of the judgment from the Court of Appeal (California), which affirmed the trial court that reversed a decision of the state mandates commission. The state mandates commission had held that respondent county was not entitled to reimbursement under Cal. Const. art. XIII B, § 6, for its treatment of medically indigent adults after the legislature excluded such persons from the California Medical Assistance Program.

Overview

The legislature excluded medically indigent adults from receiving medical care pursuant to the California Medical Assistance Program (Medi-Cal). Subsequently, respondent county provided medical care to these persons and sought reimbursement from appellant state pursuant to Cal. Const. art. XIII B, § 6. The state mandates commission held for appellant, but the trial court reversed the commission's decision, and the court of appeals affirmed the trial court. The court affirmed the

court of appeal's decision in part and reversed in part. The court found that the legislature's exclusion of medically indigent adults from Medi-Cal mandated a new program within the meaning of *art. XIII B, § 6*. Former statutes, however, did not establish a \$ 41 million spending floor for respondent's county medical services program. The court remanded the action to the state mandates commission to determine whether, and by what amount, respondent was forced to incur costs in excess of state-provided funds to comply with the standards of care provided by the former *Cal. Health & Safety Code § 1442.5(c)* and *Cal. Welf. & Inst. Code §§ 10000, 17000*.

Outcome

The court affirmed the court of appeal's judgment that respondent county could recover costs incurred to treat medically indigent adults because the legislature mandated a new program by excluding medically indigent adults from the California Medical Assistance Program. The court reversed the court of appeal's judgment that respondent was entitled to at least \$ 41 million and remanded to the state mandates commission for a cost determination.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > General Overview

Public Health & Welfare
Law > ... > Medicaid > Coverage > General
Overview

Public Health & Welfare
Law > Healthcare > General Overview

Public Health & Welfare Law > Social
Security > Medicaid > General Overview

HN1  **Governments, State & Territorial
Governments**

The California Medical Assistance Program, *Cal. Welf. & Inst. Code § 14063*, which began operating March 1, 1966, establishes a program of basic and extended health care services for recipients of public assistance and for medically indigent persons. It represents California's implementation of the federal medicaid program, *42 U.S.C.S. §§ 1396-1396v*, through which the federal government provides financial assistance to states so that they may furnish medical care to qualified indigent persons.

Governments > Local Governments > Finance

Healthcare Law > ... > Health
Insurance > Reimbursement > General Overview

Public Health & Welfare
Law > ... > Providers > Payments &
Reimbursements > Hospitals

Public Health & Welfare
Law > Healthcare > General Overview

Public Health & Welfare Law > Social
Security > Medicaid > General Overview

HN2  **Local Governments, Finance**

Former *Cal. Welf. & Inst. Code § 14150.1* provides in part that a county may elect to pay as its share of costs under the California Medical Assistance Program, *Cal. Welf. & Inst. Code § 14063*, 100 percent of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increases for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county. If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increases for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county.

Governments > Local Governments > Finance

Healthcare Law > ... > Health

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Insurance > Reimbursement > General Overview

Public Health & Welfare Law > Social Security > Medicaid > General Overview

Public Health & Welfare Law > Healthcare > General Overview

HN3 Local Governments, Finance

Former *Cal. Welf. & Inst. Code § 14150* provides the standard method for determining the counties' share of costs under the California Medical Assistance Program, *Cal. Welf. & Inst. Code § 14063*. Under it, a county is required to pay the state a specific sum, in return for which the state will pay for the medical care of all categorically linked individuals. Financial responsibility for nonlinked individuals remains with the counties.

Governments > Local Governments > Finance

Governments > State & Territorial Governments > Finance

HN4 Local Governments, Finance

Cal. Const. art. XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. *Cal. Const. art. XIII B* imposes a complementary limit on the rate of growth in governmental spending. These two constitutional articles work in tandem, together restricting California governments' power both to levy and to spend for public purposes.

Governments > Local Governments > Finance

Governments > State & Territorial Governments > Finance

HN5 Local Governments, Finance

Cal. Const. art. XIII B, § 6, provides in part that whenever the legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the legislature may, but need not, provide such subvention of funds for legislative mandates that are enacted prior to January 1, 1975, or executive orders or

regulations initially implementing legislation enacted prior to January 1, 1975.

Governments > State & Territorial Governments > Finance

HN6 State & Territorial Governments, Finance

Cal. Const. art. XIII B § 6, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

Governments > State & Territorial Governments > Finance

HN7 State & Territorial Governments, Finance

To determine whether a statute imposes state-mandated costs on a local agency within the meaning of *Cal. Const. art. XIII B, § 6*, the local agency must file a test claim with the Commission on State Mandates, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. *Cal. Gov't Code §§ 17521, 17551, 17555*. If the commission finds a claim to be reimbursable, it determines the amount of reimbursement. *Cal. Gov't Code § 17557*. The local agency then follows certain statutory procedures to obtain reimbursement. *Cal. Gov't Code § 17558 et seq.*

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Governments > State & Territorial Governments > Finance

HN8 Declaratory Judgments, State Declaratory Judgments

If the legislature refuses to appropriate money for a reimbursable mandate, the local agency may file an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement. *Cal. Gov't Code § 17612(c)*. If the Commission on State Mandates finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under *Cal. Civ. Proc. Code § 1094.5*. *Cal.*

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Gov't Code § 17559. Cal. Gov't Code § 17552 declares that these provisions provide the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state as required by Cal. Const. art. XIII B, § 6.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN9 **Case or Controversy, Standing**

Individual taxpayers and recipients of government benefits lack standing to enforce Cal. Const. art. XIII B, § 6, because the applicable administrative procedures, which are the exclusive means for determining and enforcing the state's § 6 obligations, are available only to local agencies and school districts directly affected by a state mandate.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN10 **Remedies, Mandamus**

The power of superior courts to perform mandamus review of administrative decisions derives in part from Cal. Const. art. VI, § 10. Section 10 gives the Supreme Court, courts of appeal, and superior courts original jurisdiction in proceedings for extraordinary relief in the nature of mandamus. Cal. Const. art. VI, § 10. The jurisdiction may not lightly be deemed to be destroyed.

While the courts are subject to reasonable statutory regulation of procedure and other matters, they maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction is not supplied by implication.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN11 **Reviewability, Jurisdiction & Venue**

Under Cal. Gov't Code § 17500 et seq., the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN12 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

A court that refuses to defer to another court's primary jurisdiction is not without jurisdiction.

Administrative Law > Judicial Review > Administrative Record > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN13 **Judicial Review, Administrative Record**

The threshold determination of whether a statute imposes a state mandate is an issue of law.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

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Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Exceptions

HN14 **Reviewability, Exhaustion of Remedies**

Counties seeking to pursue an unfunded mandate claim under Cal. Const. art. XIII B, § 6, must exhaust their administrative remedies. However, counties may pursue § 6 claims in superior court without first resorting to administrative remedies if they can establish an exception to the exhaustion requirement. The futility exception to the exhaustion requirement applies if a county can state with assurance that the Commission on State Mandates will rule adversely in its own particular case.

Public Health & Welfare
Law > Healthcare > General Overview

HN15 **Public Health & Welfare Law, Healthcare**

Cal. Welf. & Inst. Code § 17000 creates the residual fund to sustain indigents who cannot qualify under any specialized aid programs. By its express terms, § 17000 requires a county to relieve and support indigent persons only when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions. Cal. Welf. & Inst. Code § 17000.

Governments > State & Territorial
Governments > Legislatures

Public Health & Welfare
Law > Healthcare > General Overview

HN16 **State & Territorial Governments, Legislatures**

In adopting the California Medical Assistance Program (Medi-Cal), Cal. Welf. & Inst. Code § 14063, the state legislature, for the most part, shifted indigent medical care from being a county responsibility to a state responsibility under the Medi-Cal program.

Governments > Legislation > Effect & Operation > General Overview

HN17 **Legislation, Effect & Operation**

Cal. Const. art. XIII B, § 6, prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of § 6.

Governments > Local Governments > Finance

Public Health & Welfare
Law > Healthcare > General Overview

HN18 **Local Governments, Finance**

As amended in 1982, Cal. Welf. & Inst. Code § 16704(c)(1), provides in part that the county board of supervisors shall assure that it will expend Medically Indigent Services Account funds only for the health services specified in Cal. Welf. & Inst. Code §§ 14132 and 14021 provided to persons certified as eligible for such services pursuant to Cal. Welf. & Inst. Code § 17000 and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount that is required to obtain the maximum allocation under Cal. Welf. & Inst. Code § 16702.

Governments > Local Governments > Finance

Labor & Employment Law > ... > Disability
Benefits > Scope & Definitions > General Overview

Public Health & Welfare
Law > Healthcare > Services for Disabled & Elderly
Persons > General Overview

Public Health & Welfare
Law > Healthcare > General Overview

HN19 **Local Governments, Finance**

Cal. Welf. & Inst. Code § 16704(c)(3) provides in part that any person whose income and resources meet the income and resource criteria for certification for services pursuant to Cal. Welf. & Inst. Code § 14005.7 other than

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for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which will deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service.

Public Health & Welfare
Law > Healthcare > General Overview

HN20 **Public Health & Welfare Law, Healthcare**

The provisions of *Cal. Welf. & Inst. Code § 16704(c)(3)* shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandate that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date.

Governments > Local Governments > Charters

Public Health & Welfare
Law > Healthcare > General Overview

HN21 **Local Governments, Charters**

See *Cal. Welf. & Inst. Code § 17000*.

Governments > Local Governments > Duties & Powers

HN22 **Local Governments, Duties & Powers**

Cal. Welf. & Inst. Code § 17001 confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents.

Administrative Law > Agency Rulemaking > General Overview

Governments > Local Governments > Duties & Powers

HN23 **Administrative Law, Agency Rulemaking**

When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose. Cal. Gov't Code § 11374.

Administrative Law > Judicial Review > Reviewability > Questions of Law

HN24 **Reviewability, Questions of Law**

Courts have the final responsibility for the interpretation of the law.

Governments > Local Governments > Duties & Powers

Public Health & Welfare
Law > Healthcare > General Overview

HN25 **Local Governments, Duties & Powers**

Cal. Welf. & Inst. Code § 17000 requires counties to relieve and support all indigent persons lawfully resident therein, when such persons are not supported and relieved by their relatives or by some other means.

Governments > Local Governments > Duties & Powers

Public Health & Welfare
Law > Healthcare > General Overview

HN26 **Local Governments, Duties & Powers**

Counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of *Cal. Welf. & Inst. Code § 17000* who do not receive it from other sources.

Public Health & Welfare
Law > Healthcare > General Overview

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HN27 **Public Health & Welfare Law, Healthcare**

Adult medically indigent persons are "indigent persons" within the meaning of *Cal. Welf. & Inst. Code § 17000* for medical care purposes. *Section 17000* requires counties to relieve and support all indigent persons.

Evidence > Inferences & Presumptions > General Overview

Pensions & Benefits Law > Governmental Employees > County Pensions

Public Health & Welfare Law > ... > Medicaid > Coverage > General Overview

HN28 **Evidence, Inferences & Presumptions**

An attorney general's opinion, although not binding, is entitled to considerable weight. Absent controlling authority, it is persuasive because the court presumes that the legislature is cognizant of the attorney general's construction of *Cal. Welf. & Inst. Code § 17000* and would have taken corrective action if it disagreed with that construction.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

HN29 **Local Governments, Duties & Powers**

Cal. Welf. & Inst. Code § 17000 mandates that medical care is provided to indigents and *Cal. Welf. & Inst. Code § 10000* requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

HN30 **Local Governments, Duties & Powers**

Cal. Welf. & Inst. Code § 17000 imposes a mandatory duty upon all counties to provide medically necessary care, not just emergency care. It further imposes a minimum standard of care below which the provision of medical services may not fall.

Governments > Local Governments > Duties & Powers

Healthcare Law > ... > Health Insurance > Reimbursement > General Overview

Public Health & Welfare Law > Healthcare > General Overview

HN31 **Local Governments, Duties & Powers**

The former *Cal. Health & Safety Code § 1442.5(c)* provides that, whether a county's duty to provide care to all indigent people is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment that is received by people who cannot afford to pay for their health care, shall be the same as that available to nonindigent people receiving health care services in private facilities in that county.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

HN32 **Local Governments, Duties & Powers**

The Supreme Court of California disapproves *Cooke v. Superior Court*, 261 Cal. Rptr. 706, 213 Cal. App. 3d 401 (1989), to the extent it held that the former *Cal. Health & Safety Code § 1442.5(c)* was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that any services in the county were reduced.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

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Governments > Local Governments > Finance

HN33 **Local Governments, Duties & Powers**

Former *Cal. Welf. & Inst. Code § 16990(a)* requires counties receiving California Healthcare for the Indigent Program funds, at a minimum, to maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year, adjusted annually as provided.

Public Health & Welfare
Law > Healthcare > General Overview

HN34 **Public Health & Welfare Law, Healthcare**

See former *Cal. Welf. & Inst. Code § 16991(a)(5)*.

Administrative Law > Judicial
Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General
Overview

HN35 **Remedies, Mandamus**

Mandamus pursuant to *Cal. Civ. Proc. Code § 1094.5*, commonly denominated "administrative" mandamus, is mandamus still. It is not possessed of a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations. The full panoply of rules applicable to "ordinary" mandamus applies to "administrative" mandamus proceedings, except where modified by statute. Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under *Cal. Civ. Proc. Code § 1085* as one brought under *Cal. Civ. Proc. Code § 1094.5* and deny a demurrer asserting that the wrong mandamus statute is invoked.

Civil Procedure > Appeals > Standards of Review

HN36 **Appeals, Standards of Review**

The determination whether statutes establish a mandate under *Cal. Const. art. XIII B, § 6*, is a question of law.

Where a purely legal question is at issue, the courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Civil Procedure > Remedies > Writs > General
Overview

HN37 **Common Law Writs, Mandamus**

The denial of a peremptory disqualification motion pursuant to *Cal. Civ. Proc. Code § 170.6* is reviewable only by writ of mandate under *Cal. Civ. Proc. Code § 170.3(d)*.

Civil Procedure > Appeals > Reviewability of Lower
Court Decisions > General Overview

Civil
Procedure > Remedies > Injunctions > Preliminary
& Temporary Injunctions

HN38 **Appeals, Reviewability of Lower Court Decisions**

A preliminary injunction is immediately and separately appealable under *Cal. Civ. Proc. Code § 904.1(a)(6)*.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

After a county's unsuccessful administrative attempts to obtain reimbursement from the state for expenses incurred through its County Medical Services (CMS) program, and after a class action was filed on behalf of CMS program beneficiaries seeking to enjoin termination of the program, the county filed a cross-complaint and petition for a writ of mandate (*Code Civ. Proc., § 1085*) against the state, the Commission on State Mandates, and various state officers, to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated

new program or higher level of service). The county alleged that the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The trial court found that the state had an obligation to fund the county's CMS program. (Superior Court of San Diego County, No. 634931, Michael I. Greer, * Harrison R. Hollywood, and Judith McConnell, Judges.) The Court of Appeal, Fourth Dist., Div. One, No. D018634, affirmed the judgment of the trial court insofar as it provided that Cal. Const., art. XIII B, § 6, required the state to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required the county to spend at least \$ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. The Court of Appeal remanded to the commission to determine the reimbursement amount and appropriate statutory remedies.

The Supreme Court affirmed the judgment of the Court of Appeal insofar as it held that the exclusion of medically indigent adults from Medi-Cal imposed a mandate on the county within the meaning of Cal. Const., art. XIII B, § 6. The Supreme Court reversed the judgment insofar as it held that the state required the county to spend at least \$ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991, and remanded the matter to the commission to determine whether, and by what amount, the statutory standards of care (e.g., Health & Saf. Code, § 1442.5, former subd. (c), Welf. & Inst. Code, §§ 10000, 17000) forced the county to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which the county was entitled. The court held that the trial court had jurisdiction to adjudicate the county's mandate claim, notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The court also held that the Legislature's 1982 transfer to counties of responsibility

for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was Welf. & Inst. Code, § 17000, enacted in 1965, rather than the 1982 legislation, and since Cal. Const., art. XIII B, § 6, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, Welf. & Inst. Code, § 17000, requires a county to support indigent persons only in the event they are not assisted by other sources. The court further held that there was a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide the medical care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000, or be struck down as void by the courts. The court also held that the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the commission to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its CMS program. (Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., ** and Aldrich, J., + concurring. Dissenting opinion by Kennard, J.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

CA(1)[] (1)

State of California § 12—Fiscal Matters— Appropriations—Reimbursement to Local Government for State-mandated Program.

--Cal. Const., art. XIII A, and art. XIII B, work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Their goals are to protect residents from excessive taxation and government spending. The purpose of Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), is to

** Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

+ Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ill equipped to assume increased financial responsibilities because of the taxing and spending limitations that *Cal. Const., arts. XIII A* and *XIII B*, impose. With certain exceptions, *Cal. Const., art. XIII B, § 6*, essentially requires the state to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.

CA(2a)[↓] (2a) CA(2b)[↓] (2b)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—
Jurisdiction—With Pending Test Claim.**

--The trial court had jurisdiction to adjudicate a county's mandate claim asserting the Legislature's transfer to counties of the responsibility for providing health care for medically indigent adults constituted a new program or higher level of service that required state funding under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for costs of new state-mandated program), notwithstanding that a test claim was pending in an action by a different county. The trial court should not have proceeded while the other action was pending, since one purpose of the test claim procedure is to avoid multiple proceedings addressing the same claim. However, the error was not jurisdictional; the governing statutes simply vest primary jurisdiction in the court hearing the test claim. The trial court's failure to defer to the primary jurisdiction of the other court did not prejudice the state. The trial court did not usurp the Commission on State Mandates' authority, since the commission had exercised its authority in the pending action. Since the pending action was settled, no multiple decisions resulted. Nor did lack of an administrative record prejudice the state, since determining whether a statute imposes a state mandate is an issue of law. Also, attempts to seek relief from the commission would have been futile, thus triggering the futility exception to the exhaustion requirement, given that the commission rejected the other county's claim.

CA(3)[↓] (3)

**Administrative Law § 99—Judicial Review and Relief—
Administrative Mandamus—Jurisdiction—As Derived**

From Constitution.

--The power of superior courts to perform mandamus review of administrative decisions derives in part from *Cal. Const., art. VI, § 10*. That section gives the Supreme Court, Courts of Appeal, and superior courts "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus." The jurisdiction thus vested may not lightly be deemed to have been destroyed. While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication.

CA(4)[↓] (4)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—Existence of
Mandate.**

--In a county's action against the state to determine the county's rights under *Cal. Const., art. XIII B, § 6* (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program. The state asserted the source of the county's obligation to provide such care was *Welf. & Inst. Code, § 17000*, enacted in 1965, rather than the 1982 legislation, and since *Cal. Const., art. XIII B, § 6*, did not apply to "mandates enacted prior to January 1, 1975," there was no reimbursable mandate. However, *Welf. & Inst. Code, § 17000*, requires a county to support indigent persons only in the event they are not assisted by other sources. To the extent care was provided prior to the 1982 legislation, the county's obligation had been reduced. Also, the state's assumption of full funding responsibility prior to the 1982 legislation was not intended to be temporary. The 1978 legislation that assumed funding responsibility was limited to one year, but similar legislation in 1979 contained no such limiting language. Although the state asserted the health care program was never operated by the state, the Legislature, in adopting Medi-Cal, shifted responsibility for indigent medical care from counties to the state. Medi-Cal permitted county boards of supervisors to prescribe

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rules (Welf. & Inst. Code, § 14000.2), and Medi-Cal was administered by state departments and agencies. Cal.)

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 123.]

CA(5a)[↓] (5a) CA(5b)[↓] (5b)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—Existence of
Mandate—Discretion to Set Standards—Eligibility.**

--In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care. While Welf. & Inst. Code, § 17001, confers discretion on counties to provide general assistance, there are limits to this discretion. The standards must meet the objectives of Welf. & Inst. Code, § 17000 (counties shall relieve and support "indigent persons"), or be struck down as void by the courts. As to eligibility standards, counties must provide care to all adult medically indigent persons (MIP's). Although Welf. & Inst. Code, § 17000, does not define "indigent persons," the 1982 legislation made clear that adult MIP's were within this category. The coverage history of Medi-Cal demonstrates the Legislature has always viewed all adult MIP's as "indigent persons" under Welf. & Inst. Code, § 17000. The Attorney General also opined that the 1971 inclusion of MIP's in Medi-Cal did not alter the duty of counties to provide care to indigents not eligible for Medi-Cal, and this opinion was entitled to considerable weight. Absent controlling authority, the opinion was persuasive since it was presumed the Legislature was cognizant of the Attorney General's construction and would have taken corrective action if it disagreed. (Disapproving Bay General Community Hospital v. County of San Diego (1984) 156 Cal.App.3d 944 [203 Cal.Rptr. 184] insofar as it holds that a county's responsibility under Welf. & Inst. Code, § 17000, extends only to indigents as defined by the county's board of supervisors, and suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of Welf. & Inst. Code, § 17000, but do not qualify for Medi-

CA(6)[↓] (6)

**Public Aid and Welfare § 4—County Assistance—
Counties' Discretion.**

--Counties may exercise their discretion under Welf. & Inst. Code, § 17001 (county board of supervisors or authorized agency shall adopt standards of aid and care for indigent and dependent poor), only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose (Gov. Code, § 11374). Despite the counties' statutory discretion, courts have consistently invalidated county welfare regulations that fail to meet statutory requirements.

CA(7)[↓] (7)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—Existence of
Mandate—Discretion to Set Standards—Service.**

--In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), the Legislature's 1982 transfer to counties of responsibility for providing health care for medically indigent adults mandated a reimbursable new program, despite the state's assertion that the county had discretion to refuse to provide such care by setting its own service standards. Welf. & Inst. Code, § 17000, mandates that medical care be provided to indigents, and Welf. & Inst. Code, § 10000, requires that such care be provided promptly and humanely. There is no discretion concerning whether to provide such care. Courts construing Welf. & Inst. Code, § 17000, have held it imposes a mandatory duty upon counties to provide medically necessary care, not just emergency care, and it has been interpreted to impose a minimum standard of care. Until its repeal in 1992, Health & Saf. Code, § 1442.5, former subd. (c), also spoke to the level of

services that counties had to provide under Welf. & Inst. Code, § 17000, requiring that the availability and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county. (Disapproving Cooke v. Superior Court (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706] to the extent it held that Health & Saf. Code, § 1442.5, former subd. (c), was merely a limitation on a county's ability to close facilities or reduce services provided in those facilities, and was irrelevant absent a claim that a county facility was closed or that services in the county were reduced.)

CA(8)[↓] (8)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—Minimum
Required Expenditure.**

--In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), in which the trial court found that the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults mandated a reimbursable new program entitling the county to reimbursement, the Court of Appeal, in reversing the damages portion of the trial court's judgment and remanding to the Commission on State Mandates to determine the amount of any reimbursement due, erred in finding the county had a minimum required expenditure on its County Medical Services (CMS) program. The Court of Appeal relied on Welf. & Inst. Code, former § 16990, subd. (a), which set forth the financial maintenance-of-effort requirement for counties that received California Healthcare for the Indigent Program (CHIP) funding. However, counties that chose to seek CHIP funds did so voluntarily. Thus, Welf. & Inst. Code, former § 16990, subd. (a), did not mandate a minimum funding requirement. Nor did Welf. & Inst. Code, former § 16991, subd. (a)(5), establish a minimum financial obligation. That statute required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its allocation from various sources was less than the funding it received under Welf. & Inst. Code, § 16703, for 1988-1989. Nothing about this requirement imposed on the county a minimum funding requirement.

CA(9)[↓] (9)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local Government
for State-mandated Program—County's Reimbursement
for Cost of Health Care to Indigent Adults—Proper
Mandamus Proceeding: Mandamus and Prohibition §
23—Claim Against Commission on State Mandates.**

--In a county's action against the state to determine the county's rights under Cal. Const., art. XIII B, § 6 (reimbursement to local government for state-mandated new program or higher level of service), after the Commission on State Mandates indicated the Legislature's 1982 transfer to counties of the responsibility for providing health care for medically indigent adults did not mandate a reimbursable new program, a mandamus proceeding under Code Civ. Proc., § 1085, was not an improper vehicle for challenging the commission's position. Mandamus under Code Civ. Proc., § 1094.5, commonly denominated "administrative" mandamus, is mandamus still. The full panoply of rules applicable to ordinary mandamus applies to administrative mandamus proceedings, except where they are modified by statute. Where entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding under Code Civ. Proc., § 1085, as one brought under Code Civ. Proc., § 1094.5, and should overrule a demurrer asserting that the wrong mandamus statute has been invoked. In any event, the determination whether the statutes at issue established a mandate under Cal. Const., art. XIII B, § 6, was a question of law. Where a purely legal question is at issue, courts exercise independent judgment, no matter whether the issue arises by traditional or administrative mandate.

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[**2]** Lloyd M. Harmon, Jr., County Counsel, John J. Sansone, Acting County Counsel, Diane Bardsley, Chief Deputy County Counsel, Valerie Tehan and Ian Fan, Deputy County Counsel, for Cross-complainant and Respondent.

Judges: Opinion by Chin, J., with George, C. J., Mosk, and Baxter, JJ., Anderson, J., * and Aldrich, J., ** concurring. Dissenting opinion by Kennard, J.

Opinion by: CHIN

Opinion

[*75] [*314] [***136] CHIN, J.

Section 6 of article XIII B of the California Constitution (section 6) requires the State of California (state), subject to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henver the Legislature or any state agency mandates a new program or higher level of service" In this action, the County of San Diego (San Diego or the County) [****3] seeks reimbursement under section 6 from the state for the costs of providing health care services to certain adults who formerly received medical care under the California Medical Assistance Program (Medi-Cal) (see Welf. & Inst. Code, [*315] [***137] § 14063)¹ because they were medically indigent, i.e., they had insufficient financial resources to pay for their own medical care. In 1979, when the electorate adopted section 6, the state provided Medi-Cal coverage to these medically indigent adults without requiring financial contributions from counties. Effective January 1, 1983, the Legislature excluded this population from Medi-Cal. (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357.) Since that date, San Diego has provided medical care to these individuals with varying levels of state financial assistance.

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

¹ Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

To resolve San Diego's claim, [****4] we must determine whether the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" on San Diego within the meaning of section 6. The Commission on State Mandates (Commission), which the Legislature created to determine claims under section 6, has ruled that section 6 does not apply to the Legislature's action and has rejected reimbursement claims like San Diego's. (See Kinlaw v. State of California (1991) 54 Cal. 3d 326, 330, fn. 2 [285 Cal. Rptr. 66, 814 P.2d 1308] (Kinlaw).) The trial court and Court of Appeal in this case disagreed with the Commission, finding that San Diego was entitled to reimbursement. The state seeks [*76] reversal of this finding. It also argues that San Diego's failure to follow statutory procedures deprived the courts of jurisdiction to hear its claim. We reject the state's jurisdictional argument and affirm the finding that the Legislature's exclusion of medically indigent adults from Medi-Cal "mandate[d] a new program or higher level of service" within the meaning of section 6. Accordingly, we remand the matter to the Commission to determine the amount of reimbursement, [****5] if any, due San Diego under the governing statutes.

I. FUNDING OF INDIGENT MEDICAL CARE

Before the start of Medi-Cal, "the indigent in California were provided health care services through a variety of different programs and institutions." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3 (Preliminary Report).) County hospitals "provided a wide range of inpatient and outpatient hospital services to all persons who met county indigency requirements whether or not they were public assistance recipients. The major responsibility for supporting county hospitals rested upon the counties, financed primarily through property taxes, with minor contributions from" other sources. (*Id.* at p. 4.)

HN1 [↑] Medi-Cal, which began operating March 1, 1966, established "a program of basic and extended health care services for recipients of public assistance and for medically indigent persons." (Morris v. Williams (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697] (Morris); *id.* at p. 740; see also Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 103.) It "represent[ed] California's implementation of the federal Medicaid program (42 U.S.C. § [****6] 1396-1396v), through which the federal government provide[d] financial assistance to states so that they [might] furnish medical care to qualified indigent persons. [Citation.]" (Robert F. Kennedy Medical Center v. Belsh (1996) 13

Cal. 4th 748, 751 [55 Cal. Rptr. 2d 107, 919 P.2d 721] (Belsh.) "[B]y meeting the requirements of federal law," Medi-Cal "qualif[ied] California for the receipt of federal funds made available under title XIX of the Social Security Act." (Morris, supra, 67 Cal. 2d at p. 738.) "Title [XIX] permitted the combination of the major governmental health care systems which provided care for the indigent into a single system financed by the state and federal governments. By 1975, this system, at least as originally proposed, would provide a wide range of health care services for all those who [were] indigent regardless of whether they [were] public assistance recipients" (Preliminary Rep., *supra*, at p. 4; see also Act of July 30, 1965, Pub.L. No. 89-97, § 121(a), 79 Stat. 286, reprinted in 1965 U.S. Code [*77] Cong. & Admin. News, p. 378 [states must make effort to [*316] [*138] liberalize eligibility [****7] requirements "with a view toward furnishing by July 1, 1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources"].)²

However, eligibility for Medi-Cal was initially limited only to persons linked to a federal categorical aid program by age (at least 65), blindness, disability, or membership in a family with dependent children within the meaning of the Aid to Families with Dependent Children program (AFDC). (See Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.) pp. 548, 550 (1971 Legislative Analyst's Report).) Individuals possessing one of these characteristics (categorically linked persons) received full benefits if [****8] they actually received public assistance payments. (*Id.* at p. 550.) Lesser benefits were available to categorically linked persons who were only medically indigent, i.e., their income and resources, although rendering them ineligible for cash aid, were "not sufficient to meet the cost of health care." (Morris, supra, 67 Cal. 2d at p. 750; see also 1971 Legis. Analyst's Rep., *supra*, at pp. 548, 550; Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, pp. 105-106.)

Individuals not linked to a federal categorical aid program (non-categorically linked persons) were ineligible for Medi-Cal, regardless of their means. Thus, "a group of citizens, not covered by Medi-Cal and yet unable to afford medical care, remained the

responsibility of" the counties. (County of Santa Clara v. Hall (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629] (Hall).) In establishing Medi-Cal, the Legislature expressly recognized this fact by enacting former section 14108.5, which provided: "The Legislature hereby declares its concern with the problems which will be facing the counties with respect to the medical care of indigent persons who are not covered [by Medi-Cal] . . . and . . . [****9] . . . whose medical care must be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116.) The Legislature directed the Health Review and Program Council "to study this problem and report its findings to the Legislature no later than March 1, 1967." (*Ibid.*)

Moreover, although it required counties to contribute to the costs of Medi-Cal, the Legislature established a method for determining the amount of their contributions that would "leave them with [sufficient funds to provide hospital care for those persons not eligible for Medi-Cal." (Hall, supra, 23 Cal. App. 3d at p. 1061, fn. omitted.) Former section 14150.1, [*78] which was known as the "county option" or the "option plan," required a county "to pay the state a sum equal to 100 percent of the county's health care costs (which included both linked and nonlinked individuals) provided in the 1964-1965 fiscal year, with an adjustment for population increase; in return the state would pay the county's entire cost of medical care."³ [****11] (County of Sacramento v. Lackner (1979) 97 Cal. App. 3d 576, 581 [159 Cal. Rptr. 1] (Lackner [****10]).) Under the county option, "the state agreed to assume all county health care costs . . . in excess of" the county's payment. (*Id.* at p. 586.) It "made no distinction between 'linked' and 'nonlinked' persons," and "simply

³ **HN2** [↑] Former section 14150.1 provided in relevant part: "[A] county may elect to pay as its share [of Medi-Cal costs] one hundred percent . . . of the county cost of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county If the county so elects, the county costs of health care in any fiscal year shall not exceed the total county costs of health care uncompensated from any source in 1964-65 for all categorical aid recipients, and all other persons in the county hospital or in a contract hospital, increased for such county for each fiscal year subsequent to 1964-65 by an amount proportionate to the increase in population for such county" (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 121.)

² Congress later repealed the requirement that states work towards expanding eligibility. (See Cal. Health and Welfare Agency, The Medi-Cal Program: A Brief Summary of Major Events (Mar. 1990) p. 1 (Summary of Major Events).)

guaranteed a medical cost ceiling to counties electing to come within the option plan." (*Ibid.*) "Any difference [**317] [***139] in actual operating costs and the limit set by the option provision [was] assumed entirely by the state." (Preliminary Rep., *supra*, at p. 10, fn. 2.) Thus, the county option "guarantee[d] state participation in the cost of care for medically indigent persons who [were] not otherwise covered by the basic Medi-Cal program or other repayment programs." ⁴ (1971 Legis. Analyst's Rep., *supra*, at p. 549.)

Primarily through the county option, Medi-Cal caused a "significant shift in financing of health care from the counties to the state and federal government. . . . During the first 28 months of the program the state . . . paid approximately \$ 76 million for care of non-Medi-Cal indigents in county hospitals." (Preliminary Rep., *supra*, at p. 31.) These state funds paid "costs that would otherwise have been borne by counties through increases in property taxes." (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1974-1975 Budget Bill, Sen. Bill No. 1525 (1973-1974 Reg. Sess.) p. 626 (1974 Legislative Analyst's Report).) "[F]aced with escalating Medi-Cal costs, [****12] the Legislature in 1967 imposed strict guidelines on reimbursing counties electing to come under the 'option' plan. ([Former] § 14150.2.) Pursuant to subdivision (c) of [former] section 14150.2, the state imposed a limit on its obligation to pay for medical services to nonlinked persons [*79] served by a county within the 'option' plan." (*Lackner, supra*, 97 Cal. App. 3d at p. 589; see also Stats. 1967, ch. 104, § 3, p. 1019; Stats. 1969, ch. 21, § 57, pp. 106-107; 1974 Legis. Analyst's Rep., *supra*, at p. 626.)

In 1971, the Legislature substantially revised Medi-Cal. It extended coverage to certain noncategorically linked minors and adults "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83; see Stats. 1971, ch. 577, § 12, 23, pp. 1110-1111, 1115.) These medically indigent individuals met "the income and resource requirements for aid under [AFDC] but [did] not otherwise qualify[] as a public

assistance recipient." (*56 Ops. Cal. Atty. Gen. 568, 569 (1973).*) The Legislature anticipated that this eligibility expansion would bring "approximately 800,000 [****13] additional medically needy Californians" into Medi-Cal. (Stats. 1971, ch. 577, § 56, p. 1136.) The 1971 legislation referred to these individuals as "[n]oncategorically related needy person[s]." (Stats. 1971, ch. 577, § 23, p. 1115.) Subsequent legislation designated them as "medically indigent person[s]" (MIP's) and provided them coverage under former section 14005.4. (Stats. 1976, ch. 126, § 7, p. 200; *id.* at § 20, p. 204.)

The 1971 legislation also established a new method for determining each county's financial contribution to Medi-Cal. The Legislature eliminated the county option by repealing former section 14150.1 and enacting former *section 14150*. That section specified (by amount) each county's share of Medi-Cal costs for the 1972-1973 fiscal year and set forth a formula for increasing the share in subsequent years based on the taxable assessed value of certain property. (Stats. 1971, ch. 577, § 41, 42, pp. 1131-1133.)

For the 1978-1979 fiscal year, the state assumed each county's share of Medi-Cal costs under former *section 14150*. (Stats. 1978, ch. 292, § 33, p. 610.) In July 1979, the Legislature repealed former *section 14150* altogether, thereby eliminating [****14] the counties' responsibility to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 74, p. 1043.) Thus, in November 1979, when the electorate adopted section 6, "the state was funding Medi-Cal coverage for [MIP's] without requiring any county financial contribution." (*Kinlaw, supra*, 54 Cal. 3d at p. 329.) The state continued to provide full funding for MIP medical care through 1982.

In 1982, the Legislature passed two Medi-Cal reform bills that, as of January 1, 1983, excluded from Medi-Cal most adults who had been eligible [*80] under the MIP category [***140] (adult [**318] MIP's or Medically Indigent Adults). ⁵ (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357; *Cooke v. Superior Court (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706] (Cooke).*) As part of excluding this population from Medi-Cal, the Legislature created the Medically Indigent Services Account (MISA) as a mechanism for "transfer[ing] [state]

⁴ **HN3** [↑] Former *section 14150* provided the standard method for determining the counties' share of Medi-Cal costs. Under it, "a county was required to pay the state a specific sum, in return for which the state would pay for the medical care of all [categorically linked] individuals Financial responsibility for nonlinked individuals . . . remained with the counties." (*Lackner, supra*, 97 Cal. App. 3d at p. 581.)

⁵ In this opinion, the terms "adult MIP's" and "Medically Indigent Adults" refer only to those persons who were excluded from the Medi-Cal program by the 1982 legislation.

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funds to the counties for the provision of health care services." (Stats. 1982, ch. 1594, § 86, p. 6357.) Through MISA, the state annually allocated funds to counties based on "the [****15] average amount expended" during the previous three fiscal years on Medi-Cal services for county residents who had been eligible as MIP's. (Stats. 1982, ch. 1594, § 69, p. 6345.) The Legislature directed that MISA funds "be consolidated with existing county health services funds in order to provide health services to low-income persons and other persons not eligible for the Medi-Cal program." (Stats. 1982, ch. 1594, § 86, p. 6357.) It further provided: "Any person whose income and resources meet the income and resource criteria for certification for [Medi-Cal] services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.)

After passage of the 1982 legislation, San Diego established [****16] a county medical services (CMS) program to provide medical care to adult MIP's. According to San Diego, between 1983 and June 1989, the state fully funded San Diego's CMS program through MISA. However, for fiscal years 1989-1990 and 1990-1991, the state only partially funded San Diego's CMS program. For example, San Diego asserts that, in fiscal year 1990-1991, it exhausted state-provided MISA funds by December 24, 1990. Faced with this shortfall, San Diego's board of supervisors voted in February 1991 to terminate the CMS program unless the state agreed by March 8 to provide full funding for the 1990-1991 fiscal year. After the state refused to provide additional funding, San Diego notified affected individuals and medical service providers that it would terminate the CMS program at midnight on March 19, 1991. The response to the County's notification ultimately resulted in the unfunded mandate claim now before us.

II. UNFUNDED MANDATES

Through adoption of Proposition 13 in 1978, the voters HN4 added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (County of Fresno v. State [****17] of California (1991) 53 Cal. 3d 482, 486 [280 Cal. Rptr. 92, [*81] 808 P.2d 235] (County of Fresno).) The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." (San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.

4th 571, 574 [7 Cal. Rptr. 2d 245, 828 P.2d 147].) CA(1) (1) These two constitutional articles "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (City of Sacramento v. State of California (1990) 50 Cal. 3d 51, 59, fn. 1 [266 Cal. Rptr. 139, 785 P.2d 522].) Their goals are "to protect residents from excessive taxation and government spending. [Citation.]" (County of Los Angeles v. State of California (1987) 43 Cal. 3d 46, 61 [233 Cal. Rptr. 38, 729 P.2d 202] (County of Los Angeles).)

HN5 Article XIII B of the California Constitution includes section 6, which is the constitutional provision at issue here. It provides in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide [****18] a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] . . . [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." Section 6 [**319] [****141] recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. (County of Fresno, supra, 53 Cal. 3d at p. 487.) Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose. (County of Fresno, supra, 53 Cal. 3d at p. 487; County of Los Angeles, supra, 43 Cal. 3d at p. 61.) With certain exceptions, HN6 section 6 "[e]ssentially" requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that [****19] it imposes upon local governmental agencies. [Citation.]" (Hayes v. Commission on State Mandates (1992) 11 Cal. App. 4th 1564, 1577 [15 Cal. Rptr. 2d 547].)

In 1984, the Legislature created a statutory procedure for HN7 determining whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. (Gov. Code, § 17500 et seq.). The local agency must file a test claim with the Commission, which, after a public hearing, decides whether the statute mandates a new program or increased level of service. (Gov. Code, § 17521, 17551, 17555.) If the Commission finds a claim to be

reimbursable, it must determine the amount of reimbursement. (Gov. Code, § 17557.) The local agency must then follow certain statutory procedures to [*82] obtain reimbursement. (Gov. Code, § 17558 et seq.) **HN8** If the Legislature refuses to appropriate money for a reimbursable mandate, the local agency may file "an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c).) If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under [****20] section 1094.5 of the Code of Civil Procedure. (Gov. Code, § 17559.) Government Code section 17552 declares that these provisions "provide the sole and exclusive procedure by which a local agency . . . may claim reimbursement for costs mandated by the state as required by Section 6"

III. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

A. The Los Angeles Action

On November 23, 1987, the County of Los Angeles (Los Angeles) filed a claim (the Los Angeles action) with the Commission asserting that the exclusion of adult MIP's from Medi-Cal constituted a reimbursable mandate under section 6. (*Kinlaw, supra*, 54 Cal. 3d at p. 330, fn. 2.) Alameda County subsequently filed a claim on November 30, 1987, but the Commission rejected it because of the pending Los Angeles claim. (*Id. at p. 331, fn. 4.*) Los Angeles refused to permit Alameda County to join as a claimant, but permitted San Bernardino County to join. (*Ibid.*)

In April 1989, the Commission rejected the Los Angeles claim, finding no reimbursable mandate. ⁶ (*Kinlaw, supra*, 54 Cal. 3d at p. 330, fn. 2.) It found that the 1982 legislation did not impose on counties a new program or a higher level of [****21] service for an existing program because counties had a "pre-existing duty" to provide medical care to the medically indigent under section 17000. That section provides in relevant part: "Every county . . . shall relieve and support all incompetent, poor, indigent persons . . . lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 did not impose a reimbursable mandate under section 6, the Commission further reasoned, because it "was enacted prior to January 1, 1975" Finally, the

Commission found no mandate because the 1982 legislation "neither establish[ed] the level of care to be provided nor . . . define[d] the class of persons determined to be eligible for medical care since these criteria were established by boards of supervisors" pursuant to section 17001.

[****22] [**320] [***142] On March 20, 1990, the Los Angeles Superior Court filed a judgment reversing the Commission's decision and directing issuance of a peremptory [*83] writ of mandate. On April 16, 1990, the Commission and the state filed an appeal in the Second District Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.) ⁷ In early 1992, the parties to the Los Angeles action agreed to settle their dispute and to seek dismissal. In April 1992, after learning of this agreement, San Diego sought to intervene. Explaining that it had been waiting for resolution of the action, San Diego requested that the Court of Appeal deny the dismissal request and add (or substitute in) the County as a party. The Court of Appeal did not respond. On December 15, 1992, the parties to the Los Angeles action entered into a settlement agreement that provided for vacation of the superior court judgment and dismissal of the appeal and superior court action. Consistent with the settlement agreement, on December 29, 1992, the Court of Appeal filed an order vacating the superior court judgment, dismissing the appeal, and instructing the superior court to dismiss the action [****23] without prejudice on remand. ⁸

⁷ In setting forth the facts relating to the Los Angeles action, we rely in part on the appellate record from that action, of which we take judicial notice. (Evid. Code, § 452, subd. (d), 459.)

⁸ The settlement resulted from 1991 legislation that changed the system of health care funding as of June 30, 1991. (See § 17600 et seq.; Stats. 1991, chs. 87, 89, pp. 231-235, 243-341.) That legislation provided counties with new revenue sources, including a portion of state vehicle license fees, to fund health care programs. However, the legislation declared that the statutes providing counties with vehicle license fees would "cease to be operative on the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal" that "[t]he state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (Rev. & Tax. Code, § 10753.8, subd. (b)(2), 11001.5, subd. (d)(2); see also Stats. 1991, ch. 89, § 210, p. 340.) Los Angeles and San Bernardino Counties

⁶ San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.

[****24] B. *The San Diego Action*1. *Administrative Attempts to Obtain Reimbursement*

On March 13, 1991, San Diego submitted an invoice to the State Controller seeking reimbursement of its uncompensated expenditures on the CMS program for fiscal year 1989-1990. The Controller is a member of the Commission. (Gov. Code, § 17525.) On April 12, the Controller returned the invoice "without action," stating that "[n]o appropriation has been given to this office to allow for reimbursement" of medical costs for adult MIP's, and noting that litigation was pending regarding the state's reimbursement obligation. On December 18, 1991, San Diego submitted a similar invoice for the 1990-1991 fiscal year. The state has not acted regarding this second invoice.

[*84] 2. *Court Proceedings*

Responding to San Diego's notice of intent to terminate the CMS program, on March 11, 1991, the Legal Aid Society of San Diego filed a class action on behalf of CMS program beneficiaries seeking to enjoin termination of the program. The trial court later issued a preliminary injunction prohibiting San Diego "from taking any action to reduce or terminate" the CMS program.

On March 15, 1991, San Diego [****25] filed a cross-complaint and petition for writ of mandate under *Code of Civil Procedure section 1085* against the state, the Commission, and various state officers.⁹ The cross-complaint alleged that, by excluding adult MIP's from Medi-Cal and transferring responsibility for [**321] [***143] their medical care to counties, the state had mandated a new program and higher level of service within the meaning of section 6. The cross-complaint further alleged that the state therefore had a duty under section 6 to reimburse San Diego for the entire cost of

settled their action to avoid triggering these provisions. Unlike the dissent, we do not believe that consideration of these recently enacted provisions is appropriate in analyzing the 1982 legislation. Nor do we assume, as the dissent does, that our decision necessarily triggers these provisions. That issue is not before us.

⁹The cross-complaint named the following state officers: (1) Kenneth W. Kizer, Director of the Department of Health Services; (2) Kim Belsh, Acting Secretary of the Health and Welfare Agency; (3) Gray Davis, the State Controller; (4) Kathleen Brown, the State Treasurer; and (5) Thomas Hayes, the Director of the Department of Finance. Where the context suggests, subsequent references in this opinion to "the state" include these officers.

its CMS program, and that the state had failed to perform its duty.

[****26] Proceeding from these initial allegations, the cross-complaint alleged causes of action for indemnification, declaratory and injunctive relief, reimbursement and damages, and writ of mandate. In its first declaratory relief claim, San Diego alleged (on information and belief) that the state contended the CMS program was a nonreimbursable, county obligation. In its claim for reimbursement, San Diego alleged (again on information and belief) that the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement from the State for the costs of such programs." "Under these circumstances," San Diego asserted, "denial of the County's claim by the Commission . . . is virtually certain and further administrative pursuit of this claim would be a futile act."

For relief, San Diego requested a judgment declaring the following: (1) that the state must fully reimburse San Diego if it "is compelled to provide any CMS Program services to plaintiffs . . . after March 19, 1991"; (2) that section 6 requires the state "to fully fund the CMS Program" (or, [****27] alternatively, that the CMS program is discretionary); (3) that the state must pay San Diego for all of its unreimbursed costs for the CMS program during [*85] the 1989-1990 and 1990-1991 fiscal years; and (4) that the state shall assume responsibility for operating any court-ordered continuation of the CMS program. San Diego also requested that the court issue a writ of mandamus requiring the state to fulfill its reimbursement obligation. Finally, San Diego requested issuance of preliminary and permanent injunctions to ensure that the state fulfilled its obligations to the County.

In April 1991, San Diego determined that it could continue operating the CMS program using previously unavailable general fund revenues. Accordingly, San Diego and plaintiffs settled their dispute, and plaintiffs dismissed their complaint.

The matter proceeded solely on San Diego's cross-complaint. The court issued a preliminary injunction and alternative writ in May 1991. At a hearing on June 25, 1991, the court found that the state had an obligation to fund San Diego's CMS program, granted San Diego's request for a writ of mandate, and scheduled an evidentiary hearing to determine damages and [****28]

remedies. On July 1, 1991, it issued an order reflecting this ruling and granting a peremptory writ of mandate. The writ did not issue, however, because of the pending hearing to determine damages. In December 1992, after an extensive evidentiary hearing and posthearing proceedings on the claim for a peremptory writ of mandate, the court issued a judgment confirming its jurisdiction to determine San Diego's claim, finding that section 6 required the state to fund the entire cost of San Diego's CMS program, determining the amount that the state owed San Diego for fiscal years 1989-1990 and 1990-1991, identifying funds available to the state to satisfy the judgment, and ordering issuance of a peremptory writ of mandate.¹⁰ The court also issued a peremptory writ of mandate directing the state and various state officers to comply with the judgment.

The Court of Appeal affirmed the judgment insofar as it provided that section 6 requires the state [****29] to fund the CMS program. The Court of Appeal also affirmed the trial court's finding that the state had required San Diego to spend at least \$ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. However, the Court of Appeal reversed those portions of the judgment determining the final reimbursement amount and specifying the state funds from which the state was to satisfy the judgment. It remanded the matter to the Commission to determine the reimbursement amount and appropriate statutory remedies. We then granted the state's petition for review.

[**322] [***144] IV. SUPERIOR COURT JURISDICTION

CA(2a)[¶] (2a) Before reaching the merits of the appeal, we must address the state's assertion that the superior court lacked jurisdiction to hear San [**86] Diego's mandate claim. According to the state, in *Kinlaw, supra, 54 Cal. 3d 326*, we "unequivocally held that the orderly determination of [unfunded] mandate questions demands that only one claim on any particular alleged mandate be entertained by the courts at any given time." Thus, if a test claim is pending, "other potential claims must be held in abeyance" Applying this principle, the state asserts [****30] that, since "the test claim litigation was pending" in the Los Angeles action when San Diego filed its cross-complaint seeking mandamus relief, "the superior court lacked jurisdiction from the outset, and the resulting judgment is a nullity. That defect cannot be cured by the

settlement of the test claim, which occurred after judgment was entered herein."

In *Kinlaw*, we held that *HN9*[¶] individual taxpayers and recipients of government benefits lack standing to enforce section 6 because the applicable administrative procedures, which "are the exclusive means" for determining and enforcing the state's section 6 obligations, "are available only to local agencies and school districts directly affected by a state mandate . . ." (*Kinlaw, supra, 54 Cal. 3d at p. 328.*) In reaching this conclusion, we explained that the reimbursement right under section 6 "is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." (*Id. at p. 334.*) We concluded that "[n]either public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to [****31] such revenues." (*Id. at p. 335.*)

In finding that individuals do not have standing to enforce the section 6 rights of local agencies, we made several observations in *Kinlaw* pertinent to operation of the statutory process as it applies to entities that do have standing. Citing Government Code section 17500, we explained that "the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6 . . . because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process." (*Kinlaw, supra, 54 Cal. 3d at p. 331.*) Thus, the governing statutes "establish[] procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." (*Id. at p. 333.*) Specifically, "[t]he legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies . . ." (*Id. at p. 331.*) Describing [****32] the Commission's application of the test-claim procedure to claims regarding exclusion of adult MIP's from Medi-Cal, we observed: "The test claim by the County of Los Angeles was filed prior to that [**87] proposed by Alameda County. The Alameda County claim was rejected for that reason. (See [Gov. Code,] § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the [adult MIP exclusion] issues Los Angeles County declined a request from Alameda County that it be included in the test claim" (*Id. at*

¹⁰ The judgment dismissed all of San Diego's other claims.

p. 331, fn. 4.)

Consistent with our observations in *Kinlaw*, we here agree with the state that the trial court should not have proceeded to resolve San Diego's claim for reimbursement under section 6 while the Los Angeles action was pending. A contrary conclusion would undermine one of "the express purpose[s]" OF THE STATUTORY PROCEDURE: to "avoid[] multiple proceedings . . . addressing the same claim that a reimbursable state mandate has been created." (*Kinlaw, supra, 54 Cal. 3d at p. 333.*)

CA(3) (3) However, we reject the state's assertion that the error was jurisdictional. **HN10** The power of superior courts to perform mandamus review ****323** *****145** of administrative decisions derives in part from article VI, section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 138 [93 Cal. Rptr. 234, 481 P.2d 242]; *Lipari v. Department of Motor Vehicles* (1993) 16 Cal. App. 4th 667, 672 [20 Cal. Rptr. 2d 246].) That section gives "[t]he Supreme Court, courts of appeal, [and] superior courts . . . original jurisdiction in proceedings for extraordinary relief in the nature of mandamus . . ." (*Cal. Const., art. VI, § 10.*) "The jurisdiction thus vested may not lightly be deemed to have been destroyed." (*Garrison v. Rourke* (1948) 32 Cal. 2d 430, 435 [196 P.2d 884], overruled on another ground in *Keane v. Smith* (1971) 4 Cal. 3d 932, 939 [95 Cal. Rptr. 197, 485 P.2d 261].) "While the courts are subject to reasonable statutory regulation of procedure and other matters, they will maintain their constitutional powers in order effectively to function as a separate department of government. [Citations.] Consequently an intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*****34** *Garrison, supra, at p. 436.*) **CA(2b)** (2b) Here, we find no statutory provision that either "expressly provide[s]" (*id. at p. 435*) or otherwise "clearly indicate[s]" (*id. at p. 436*) that the Legislature intended to divest all courts other than the court hearing the test claim of their mandamus jurisdiction.

Rather, following *Dowdall v. Superior Court* (1920) 183 Cal. 348 [191 P. 685] (*Dowdall*), we interpret the governing statutes as simply vesting primary jurisdiction in the court hearing the test claim. In *Dowdall*, we determined the jurisdictional effect of Code of Civil Procedure former section 1699 on actions to settle the account of trustees of a testamentary trust. Code of Civil Procedure former section 1699 provided in part: "Where any trust ***88** has been created by or under any will to continue after distribution, the Superior Court shall not

lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." (Stats. 1889, ch. 228, § 1, p. 337.) We explained that, under this section, "the superior court, sitting in probate upon the distribution of an estate wherein ******35** the will creates a trust, retain[ed] jurisdiction of the estate for the purpose of the settlement of the accounts under the trust." (*Dowdall, supra, 183 Cal. at p. 353.*) However, we further observed that "the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction thereof." (*Ibid.*)

Similarly, we conclude that, **HN11** under the statutes governing determination of unfunded mandate claims, the court hearing the test claim has primary jurisdiction. Thus, if an action asserting the same unfunded ******36** mandate claim is filed in any other superior court, that court, upon being informed of the pending test claim, should postpone the proceeding before it and allow the court having primary jurisdiction to determine the test claim.

However, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction. As we explained in *Dowdall, HN12* a court that refuses to defer to another court's primary jurisdiction "is not without jurisdiction." (*Dowdall, supra, 183 Cal. at p. 353.*) Accordingly, notwithstanding pendency of the Los Angeles action, the trial court here did not lack jurisdiction to determine San Diego's mandamus petition. (See *Collins v. Ramish* (1920) 182 Cal. 360, 366-369 [188 P. 550] [although trial court erred in refusing to abate action because of former action pending, new trial was not warranted on issues that the trial court correctly decided]; *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal. App. 4th 760, 772 *****146** [25 Cal. Rptr. 2d 192] ****324** (*Garamendi*) ["rule of exclusive concurrent jurisdiction is not 'jurisdictional' in the sense that failure to ******37** comply renders subsequent proceedings

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void"]; *Stearns v. Los Angeles City School Dist.* (1966) 244 Cal. App. 2d 696, 718 [53 Cal. Rptr. 482, 21 A.L.R.3d 164] [where trial court errs in failing to stay proceedings in [*89] deference to jurisdiction of another court, reversal would be frivolous absent errors regarding the merits].) ¹¹

The trial court's failure to defer to the primary jurisdiction of the court hearing the Los Angeles action did not prejudice the state. Contrary to the state's assertion, the trial court did not "usurp" the Commission's "authority to determine, in the first [****38] place, whether or not legislation creates a mandate." The Commission had already exercised that authority in the Los Angeles action. Moreover, given the settlement of the Los Angeles action, which included vacating the judgment in that action, the trial court's exercise of jurisdiction here did not result in one of the principal harms that the statutory procedure seeks to prevent: multiple decisions regarding an unfunded mandate question. Finally, the lack of an administrative record specifically relating to San Diego's claim did not prejudice the state *HN13* [↑] because the threshold determination of whether a statute imposes a state mandate is an issue of law. (*County of Fresno v. Lehman* (1991) 229 Cal. App. 3d 340, 347 [280 Cal. Rptr. 310].) To the extent that an administrative record was necessary, the record developed in the Los Angeles action could have been submitted to the trial court. ¹² (See *Los Angeles Unified School Dist. v. State of California* (1988) 199 Cal. App. 3d 686, 689 [245 Cal. Rptr. 140].)

[****39] We also find that, on the facts of this case, San Diego's failure to submit a test claim to the Commission before seeking judicial relief did not affect the superior court's jurisdiction. *HN14* [↑] Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (*Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal. App. 4th 621, 641

¹¹ In *Garamendi*, *supra*, 20 Cal. App. 4th at pages 771-775, the court discussed procedural requirements for raising a claim that another court has already exercised its concurrent jurisdiction. Given our conclusion that the trial court's error here was not jurisdictional, we express no opinion about this discussion in *Garamendi* or the sufficiency of the state's efforts to raise the issue in this case.

¹² Notably, in discussing the options still available to San Diego, the state asserts that San Diego "might have been able to go to superior court and file a [mandamus] petition based on the record of the prior test claim."

[21 Cal. Rptr. 2d 453]; *County of Contra Costa v. State of California* (1986) 177 Cal. App. 3d 62, 73-77 [222 Cal. Rptr. 750] (*County of Contra Costa*.) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (*County of Contra Costa, supra*, 177 Cal. App. 3d at p. 77.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case. [Citations.]" (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal. 3d 861, 870 [226 Cal. Rptr. 119, 718 P.2d 106]; see also *County of Contra Costa, supra*, 177 Cal. App. 3d [****40] at pp. 77-78.)

[*90] We agree with the trial court and the Court of Appeal that the futility exception applied in this case. As we have previously noted, San Diego invoked this exception by alleging in its cross-complaint that the Commission's denial of its claim was "virtually certain" because the Commission had "previously denied the claims of other counties, ruling that county medical care programs for [adult MIP's] are not state-mandated and, therefore, counties are not entitled to reimbursement . . ." Given that the Commission rejected the Los Angeles claim (which alleged the same unfunded mandate claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile. Therefore, we reject the state's jurisdictional argument and proceed to the merits of the appeal.

[**325] [***147] V. EXISTENCE OF A MANDATE UNDER SECTION 6

CA(4) [↑] (4) In determining whether there is a mandate under section 6, we turn to our decision in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d 830 [244 Cal. Rptr. 677, 750 P.2d 318] (*Lucia Mar*). There, [****41] we discussed section 6's application to *Education Code section 59300*, which "requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped." (*Lucia Mar, supra*, at p. 832.) Before 1979, the Legislature had statutorily required school districts "to contribute to the education of pupils from the districts at the state schools [citations] . . ." (*Id.* at pp. 832-833.) The Legislature repealed the statutory requirements in 1979 and, on July 12, 1979, the state assumed full-funding responsibility. (*Id.* at p. 833.) On July 1, 1980, when section 6 became effective, the state

still had full-funding responsibility. On June 28, 1981, Education Code section 59300 took effect. (*Lucia Mar, supra, at p. 833.*)

Various school districts filed a claim seeking reimbursement under section 6 for the payments that Education Code section 59300 requires. The Commission denied the claim, finding that the statute did not impose on the districts a new program or higher level of service. The trial court and Court of Appeal agreed, the latter "reasoning that a shift in the funding of an existing program [****42] is not a new program or a higher level of service" under section 6. (*Lucia Mar, supra, 44 Cal. 3d at p. 834.*)

We reversed, finding that a contrary result would "violate the intent underlying section 6" (*Lucia Mar, supra, 44 Cal. 3d at p. 835.*) That section "was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the[] [*91] restrictions on the taxing and spending power of the local entities" that articles XIII A and XIII B of the California Constitution imposed. (*Lucia Mar, supra, at pp. 835-836.*) "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 . . . because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely [****43] by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6" (*Id. at p. 836, italics added, fn. omitted.*) We thus concluded in *Lucia Mar* "that because [Education Code] section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—an obligation the school districts did not have at the time article XIII B was adopted—it calls for [the school districts] to support a 'new program' within the meaning of section 6." (*Ibid.*, fn. omitted.)

The similarities between *Lucia Mar* and the case before us "are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-197[8] the state and county shared the cost of caring for [adult MIP's] under the Medi-Cal program. . . .

[F]ollowing enactment of [article XIII A], the state took full responsibility for both programs." (*Kinlaw, supra, 54 Cal. 3d at p. 353* (dis. opn. of Broussard, J.)) As to both programs, the Legislature cited adoption of article [****44] XIII A of the California Constitution, and specifically its effect on tax revenues, as the basis for the state's assumption of full funding responsibility. (Stats. 1979, ch. 237, § 10, p. 493; Stats. 1979, ch. 282, § 106, p. 1059.) "Then in 1981 (for handicapped children) and 1982 (for [adult MIP's]), the state sought to shift some of the burden back to the counties." (*Kinlaw, supra, [**326] [***148] 54 Cal. 3d at p. 353* (dis. opn. of Broussard, J.))

Adopting the Commission's analysis in the Los Angeles action, the state nevertheless argues that *Lucia Mar* "is inapposite." The school program at issue in *Lucia Mar* "had been wholly operated, administered and financed by the state" and "was unquestionably a 'state program.'" " " 'In contrast,' " the state argues, " 'the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for' " it under section 17000 and its predecessors. ¹³ The courts have interpreted section 17000 as "impos[ing] upon counties a duty to [*92] provide hospital and medical services to indigent residents. [Citations.]" (*Board of Supervisors [****45] v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].) Thus, the state argues, the source of San Diego's obligation to provide medical care to adult MIP's is section 17000, not the 1982 legislation. Moreover, because the Legislature enacted section 17000 in 1965, and section 6 does not apply to "mandates enacted prior to January 1, 1975," there is no reimbursable mandate. Finally, the state argues that, because section 17001 give counties "complete discretion" in setting eligibility and service standards under section 17000, there is no mandate. A contrary conclusion, the state asserts, "would erroneously expand the definition of what constitutes a 'new program' under" section 6. As we explain, we reject these arguments.

[****46] A. *The Source and Existence of San Diego's Obligation*

¹³"County General Assistance in California dates from 1855, and for many years afforded the only form of relief to indigents." (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677 [94 Cal. Rptr. 279, 483 P.2d 1231] (*Mooney*).) Section 17000 is substantively identical to former section 2500, which was enacted in 1937. (Stats. 1937, chs. 369, 464, pp. 1097, 1406.)

1. *The Residual Nature of the Counties' Duty Under Section 17000*

The state's argument that San Diego's obligation to provide medical care to adult MIP's predates the 1982 legislation contains numerous errors. First, the state misunderstands San Diego's obligation under *section 17000*. That *HN15* section creates "the residual fund" to sustain indigents "who cannot qualify . . . under any specialized aid programs." (*Mooney, supra*, 4 Cal. 3d at p. 681, italics added; see also *Board of Supervisors v. Superior Court, supra*, 207 Cal. App. 3d at p. 562; *Boehm v. Superior Court (1986)* 178 Cal. App. 3d 494, 499 [223 Cal. Rptr. 716] [general assistance "is a program of last resort"].) By its express terms, the statute requires a county to relieve and support indigent persons *only* "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (§ 17000.)¹⁴ "Consequently, to the extent that the state or federal governments provide[d] care for [adult MIP's], the [C]ounty's obligation to do so [was] [****47] reduced . . ." (*Kinlaw, supra*, 54 Cal. 3d at p. 354, fn. 14 (dis. opn. of Broussard, J.))¹⁵

¹⁴ See also *County of Los Angeles v. Frisbie (1942)* 19 Cal. 2d 634, 639 [122 P.2d 526] (construing former section 2500); *Jennings v. Jones (1985)* 165 Cal. App. 3d 1083, 1091 [212 Cal. Rptr. 134] (counties must support all indigent persons "having no other means of support"); *Union of American Physicians & Dentists v. County of Santa Clara (1983)* 149 Cal. App. 3d 45, 51, fn. 10 [196 Cal. Rptr. 602]; *Rogers v. Detrich (1976)* 58 Cal. App. 3d 90, 95 [128 Cal. Rptr. 261] (counties have duty of support "where such support is not otherwise furnished").

¹⁵ In asserting that Medi-Cal coverage did not supplant San Diego's obligation under *section 17000*, the dissent incorrectly relies on *Madera Community Hospital v. County of Madera (1984)* 155 Cal. App. 3d 136 [201 Cal. Rptr. 768] (*Madera*) and *Cooke, supra*, 213 Cal. App. 3d 401. (Dis. opn. of Kennard, J., *post*, at p. 115.) In *Madera*, the court voided a county ordinance that extended county benefits under *section 17000* only to persons "meeting all eligibility standards for the Medi-Cal program." (*Madera, supra*, 155 Cal. App. 3d at p. 150.) The court explained: "Because all funding for the Medi-Cal program comes from either the federal or the state government . . ., [c]ounty has denied any financial obligation whatsoever from county funds for the medical care of its indigent and poor residents." (*Ibid.*) Thus, properly understood, *Madera* held only that Medi-Cal does not relieve counties of their obligation to provide medical care to persons who are "indigent" within the meaning of *section 17000* but who are ineligible for Medi-Cal. The limit of *Madera's* holding is

[****48] [**327] [****149] As we have explained, the state began providing adult MIP's with medical care under Medi-Cal in 1971. Although it initially required counties to [*93] contribute generally to the costs of Medi-Cal, it did not set forth a specific amount for coverage of MIP's. The state was primarily responsible for the costs of the program, and the counties were simply required to contribute funds to defray the state's costs. Beginning with the 1978-1979 fiscal year, the state paid all costs of the Medi-Cal program, including the cost of medical care for adult MIP's. Thus, when section 6 was adopted in November 1979, to the extent that Medi-Cal provided medical care to adult MIP's, San Diego bore no financial responsibility for these health care costs.¹⁶

The California Attorney General has expressed a similar understanding [****49] of Medi-Cal's effect on the counties' medical care responsibility under *section 17000*. After the 1971 extension of Medi-Cal coverage to MIP's, Fresno County sought an opinion regarding the scope of its duty to provide medical care under *section 17000*. It asserted that the 1971 repeal of former section 14108.5, which declared the Legislature's concern with the counties' problems in caring for indigents not eligible for Medi-Cal, evidenced a legislative intent to preempt the field of providing health services. (56 Ops. Cal. Atty. Gen., *supra*, at p. 571.) The Attorney General disagreed, concluding that the 1971 change "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (*Id.* at p. 569.) The Attorney General explained: "The statement of concern acknowledged the obligation

apparent from the court's reliance on a 1979 opinion of the Attorney General discussing the scope of a county's authority under *section 17000*. (*Madera, supra*, 155 Cal. App. 3d at pp. 151-152.) The Attorney General explained that "[t]he county obligation [under *section 17000*] to provide general relief extends to those indigents who do not qualify under specialized aid programs, . . . including Medi-Cal." (62 Ops. Cal. Atty. Gen. 70, 71, fn. 1 (1979).) Moreover, the *Madera* court expressly recognized that state and federal programs "alleviate, to a greater or lesser extent, [a] [c]ounty's burden." (*Madera, supra*, 155 Cal. App. 3d at p. 151.) In *Cooke*, the court simply made a passing reference to *Madera* in dictum describing the coverage history of Medi-Cal. (*Cooke, supra*, 213 Cal. App. 3d at p. 411.) It neither analyzed the issue before us nor explained the meaning of the dictum that the dissent cites.

¹⁶ As we have previously explained, even before 1971 the state, through the county option, assumed much of the financial responsibility for providing medical care to adult MIP's.

of counties to continue to provide medical assistance under *section 17000*; the removal of the statement of concern was not accompanied by elimination of such duty on the part of the counties, *except as the addition of [MIP's] to the Medi-Cal program would remove the burden on the counties to provide medical care for such persons.*" (*Id. at [****50] p. 571, italics added.*)

[*94] Indeed, the Legislature's statement of intent in an uncodified section of the 1982 legislation excluding adult MIP's from Medi-Cal suggests that it also shared our understanding of *section 17000*. Section 8.3 of the 1982 Medi-Cal revisions expressly declared the Legislature's intent "[i]n eliminating [M]edically [I]ndigent [A]dults from the Medi-Cal program" (Stats. 1982, ch. 328, § 8.3, p. 1575; Stats. 1982, ch. 1594, § 86, p. 6357.) It stated in part: "It is further the intent of the Legislature to provide counties with as much flexibility as possible in organizing county health services to serve *the population being transferred.*" (Stats. 1982, ch. 328, § 8.3, p. 1576; Stats. 1982, ch. 1594, § 86, p. 6357, italics added.) If, as the state contends, counties had always been responsible under *section 17000* for the medical care of adult MIP's, the description of adult MIP's as "the population being transferred" would have been inaccurate. By so describing adult MIP's, the Legislature indicated its understanding that counties did not have this responsibility while adult MIP's were eligible for Medi-Cal. These sources fully support **[****51]** our rejection of the state's argument that the 1982 legislation did not impose a mandate because, under *section 17000*, counties had always borne the responsibility for providing medical care to adult MIP's.

2. The State's Assumption of Full Funding Responsibility for Providing Medical Care to Adult MIP's Under Medi-Cal

To support its argument that it never relieved counties of their obligation under *section [**328] [****150] 17000* to provide medical care to adult MIP's, the state characterizes as "temporary" the Legislature's assumption of full-funding responsibility for adult MIP's. According to the state, "any ongoing responsibility of the county was, at best, only temporarily, partially, alleviated (and never supplanted)." The state asserts that the Court of Appeal thus "erred by focusing on one phase in th[e] shifting pattern of arrangements" for funding indigent health care, "a focus which led to a myopic conclusion that the state alone is forever responsible for funding the health care for" adult MIP's.

A comparison of the 1978 and 1979 statutes that

eliminated the counties' share of Medi-Cal costs refutes the state's claim. The Legislature expressly limited **[****52]** the effect of the 1978 legislation to one fiscal year, providing that the state "shall pay" each county's Medi-Cal cost share "for the period from July 1, 1978, to June 30, 1979." (Stats. 1978, ch. 292, § 33, p. 610.) The Legislative Counsel's Digest explained that this section would require the state to pay "[a]ll county costs for Medi-Cal" for "the 1978-79 fiscal year only." (Legis. Counsel's Dig., Sen. Bill No. 154, 4 Stats. 1978 (Reg. Sess.), Summary Dig., p. 71.) The digest further explained that the purpose of the bill containing this section was "the *partial* relief of local government from the *temporary* difficulties brought about by the approval of Proposition 13." **[*95]** (*Id. at p. 70, italics added.*) Clearly, the Legislature knew how to include words of limitation when it intended the effects of its provisions to be temporary.

By contrast, the 1979 legislation contains no such limiting language. It simply provided: "*Section 14150 of the Welfare and Institutions Code is repealed.*" (Stats. 1979, ch. 282, § 74, p. 1043.) In setting forth the need to enact the legislation as an urgency statute, the Legislature explained: "The adoption of Article XIII A . . . **[****53]** . . . may cause the curtailment or elimination of programs and services which are vital to the state's public health, safety, education, and welfare. In order that such services not be interrupted, it is necessary that this act take effect immediately." (Stats. 1979, ch. 282, § 106, p. 1059.) In describing the effect of this legislation, the Legislative Counsel first explained that, "[u]nder existing law, the counties pay a specified annual share of the cost of Medi-Cal. (Legis. Counsel's Dig., Assem. Bill No. 8, 4 Stats. 1979 (Reg. Sess.), Summary Dig., p. 79.) Referring to the 1978 legislation, it further explained that "[f]or the 1978-79 fiscal year only, the state pays . . . [P] . . . [a]ll county costs for Medi-Cal" (*Ibid.*) The 1979 legislation, the digest continued, "provid[ed] for state assumption of all county costs of Medi-Cal." (*Ibid.*) We find nothing in the 1979 legislation or the Legislative Counsel's summary indicating a legislative intent to eliminate the counties' cost share of Medi-Cal only temporarily.

The state budget process for the 1980-1981 fiscal year confirms that the Legislature's assumption of all Medi-Cal costs was not viewed as **[****54]** "temporary." In the summary of his proposed budget, then Governor Brown described Assembly Bill No. 8, 1981-1982 Regular Session, generally as "a long-term local financing measure" (Governor's Budget for 1980-1981 as submitted to Legislature (1979-1980 Reg. Sess.))

Summary of Local Government Fiscal Relief, p. A-30) through which "[t]he total cost of [the Medi-Cal] program was *permanently* assumed by the State" (*Id.* at p. A-32, italics added.) Similarly, in describing to the Joint Legislative Budget Committee the Medi-Cal funding item in the proposed budget, the Legislative Analyst explained: "Item 287 includes the state cost of 'buying out' the county share of Medi-Cal expenditures. Following passage of Proposition 13, [Senate Bill No.] 154 appropriated \$ 418 million to relieve counties of all fiscal responsibility for Medi-Cal program costs. Subsequently, [Assembly Bill No.] 8 was enacted, *which made permanent state assumption of county Medi-Cal costs.*" (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1980-1981 Budget Bill, Assem. Bill No. 2020 (1979-1980 Reg. Sess.) at p. 721, italics added.) Thus, the state errs in asserting that the 1979 [****55] legislation eliminated the counties' financial support of Medi-Cal "only temporarily."

[*96] [329] [***151]** 3. *State Administration of Medical Care for Adult MIP's Under Medi-Cal*

The state argues that, unlike the school program before us in *Lucia Mar*, supra, 44 Cal. 3d 830, which "had been wholly operated, administered and financed by the state," the program for providing medical care to adult MIP's "has never been operated or administered by" the state. According to the state, Medi-Cal was simply a state "reimbursement program" for care that section 17000 required counties to provide. The state is incorrect.

One of the legislative goals of Medi-Cal was "to allow eligible persons to secure basic health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 104.) "In effect, this meant that poorer people could have access to a private practitioner of their choice, and not be relegated to a county hospital program." (*California Medical Assn. v. Brian* (1973) 30 Cal. App. 3d 637, 642 [106 Cal. Rptr. 555].) [****56] Medi-Cal "provided for reimbursement to both public and private health care providers for medical services rendered." (*Lackner*, supra, 97 Cal. App. 3d at p. 581.) It further directed that, "[i]nsofar as practical," public assistance recipients be afforded "free choice of arrangements under which they shall receive basic health care." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 115.) Finally, since its inception, Medi-Cal has permitted county boards of supervisors to "prescribe rules which authorize the county hospital to integrate its

services with those of other hospitals into a system of community service which offers free choice of hospitals to those requiring hospital care. The intent of this section is to eliminate discrimination or segregation based on economic disability so that the county hospital and other hospitals in the community share in providing services to paying patients and to those who qualify for care in public medical care programs." (§ 14000.2.) Thus, "Medi-Cal eligibles were to be able to secure health care in the same manner employed by the general public (i.e., in the private sector or at a county facility)." (1974 Legis. Analyst's Rep., [****57] supra, at p. 625; see also Preliminary Rep., supra, at p. 17.) By allowing eligible persons "a choice of medical facilities for treatment," Medi-Cal placed county health care providers "in competition with private hospitals." (*Hall*, supra, 23 Cal. App. 3d at p. 1061.)

Moreover, administration of Medi-Cal over the years has been the responsibility of various state departments and agencies. (§ 10720-10721, 14061-14062, 14105, 14203; *Belsh*, supra, 13 Cal. 4th at p. 751; *Morris*, supra, 67 Cal. 2d at p. 741; Summary of Major Events, supra, at pp. 2-3, 15.) Thus, **HN16** "[i]n adopting the Medi-Cal program the state Legislature, for the most part, shifted indigent medical care from being a county responsibility to a State [*97] responsibility under the Medi-Cal program. [Citation.]" (*Bay General Community Hospital v. County of San Diego* (1984) 156 Cal. App. 3d 944, 959 [203 Cal. Rptr. 184] (*Bay General*); see also Preliminary Rep., supra, at p. 18 [with certain exceptions, Medi-Cal "shifted to the state" the responsibility for administration of the medical care provided to eligible persons].) We therefore reject the state's assertion [****58] that, while Medi-Cal covered adult MIP's, county facilities were the sole providers of their medical care, and counties both operated and administered the program that provided that care.

The circumstances we have discussed readily distinguish this case from *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App. 4th 805 [38 Cal. Rptr. 2d 304], on which the state relies. There, the court rejected the claim that *Penal Code section 987.9*, which required counties to provide criminal defendants with certain defense funds, imposed an unfunded state mandate. Los Angeles filed the claim after the state, which had enacted appropriations between 1977 and 1990 "to reimburse counties for their costs under" the statute, made no appropriation for the 1990-1991 fiscal year. (*County of Los Angeles v. Commission on State Mandates*, supra, at p. 812.) In rejecting the claim, [**330] [***152] the court first held

that there was no state mandate because *Penal Code section 987.9* merely implemented the requirements of federal law. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at pp. 814-816.) Thus, the court stated, "[a]ssuming, arguendo, [****59] the provisions of [*Penal Code*] *section 987.9* [constituted] a new program" under section 6, there was no state mandate. (*County of Los Angeles v. Commission on State Mandates*, *supra*, at p. 818.) Here, of course, it is unquestionably the state that has required San Diego to provide medical care to indigent persons.

In dictum, the court also rejected the argument that, under *Lucia Mar*, *supra*, 44 Cal. 3d 830, the state's "decision not to reimburse the counties for their programs under [*Penal Code*] *section 987.9*" imposed a new program by shifting financial responsibility for the program to counties. (*County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal. App. 4th at p. 817.) The court explained: "In contrast [to *Lucia Mar*], the program here has never been operated or administered by the State of California. The counties have always borne legal and financial responsibility for implementing the procedures under [*Penal Code*] *section 987.9*. The state merely reimbursed counties for specific expenses incurred by the counties in their operation of a program for which they had a primary legal and financial responsibility." (*Ibid.*) Here, [****60] as we have explained, between 1971 and 1983, the state administered and bore financial responsibility for the medical care that adult MIP's received under Medi-Cal. The Medi-Cal program was not simply a [*98] method of reimbursement for county costs. Thus, the state's reliance on this dictum is misplaced.¹⁷

In summary, our discussion demonstrates the Legislature excluded adult MIP's from Medi-Cal *knowing* and *intending* that the 1982 legislation would trigger the counties' responsibility to provide medical care as providers of last resort under *section 17000*. Thus, through the 1982 legislation, the Legislature attempted to do precisely that which the voters enacted section 6 to prevent: "transfer[] to [counties] the fiscal responsibility for providing services [****61] which the state believed should be extended to the public."¹⁸

¹⁷ Because *County of Los Angeles v. Commission on State Mandates*, *supra*, 32 Cal. App. 4th 805, is distinguishable, we need not (and do not) express an opinion regarding the court's analysis in that decision or its conclusions.

¹⁸ The state properly does not contend that the provision of

(*County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56; see also *City of Sacramento v. State of California*, *supra*, 50 Cal. 3d at p. 68 [A "central purpose" of section 6 was "to prevent the state's transfer of the cost of government from itself to the local level."].) Accordingly, we view the 1982 legislation as having mandated a "new program" on counties by "compelling them to accept financial responsibility in whole or in part for a program," i.e., medical care for adult MIP's, "which was funded entirely by the state before the advent of article XIII B."¹⁹ (*Lucia Mar*, *supra*, 44 Cal. 3d at p. 836.)

[****62] A contrary conclusion would defeat the purpose of section 6. Under the state's interpretation of that section, because *section 17000* was enacted before 1975, the Legislature could eliminate the *entire* Medi-Cal program and shift to the counties under *section 17000* complete financial responsibility for medical care that the state has been providing [**331] [****153] since 1966. However, the taxing and spending limitations imposed by articles XIII A and XIII B would greatly limit the ability of counties to meet their expanded *section 17000* obligation. "County taxpayers would be forced to accept new taxes or see the county forced to cut existing programs further . . ." (*Kinlaw*, *supra*, 54 Cal. 3d at p. 351 (dis. opn. of Broussard, J.)) As we have previously explained, the voters, recognizing that articles XIII A and XIII B left counties "ill equipped" to assume such increased financial responsibilities, adopted section 6 precisely to avoid this result. (*County of Los Angeles*, [*99] *supra*, 43 Cal. 3d at p. 61.) Thus, it was the voters who decreed that we must, as the state puts it, "focus[] on one phase in th[e] shifting pattern of [financial] arrangements" [****63] between the state and the counties. Under section 6, the state simply cannot "compel[] [counties] to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent

medical care to adult MIP's is not a "program" within the meaning of section 6. (See *County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56 [section 6 applies to "programs that carry out the governmental function of providing services to the public"].)

¹⁹ Alternatively, the 1982 legislation can be viewed as having mandated an increase in the services that counties were providing through existing *section 17000* programs, by adding adult MIP's to the indigent population that counties already had to serve under that section. (See *County of Los Angeles*, *supra*, 43 Cal. 3d at p. 56 ["subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs'"].)

of article XIII B" ²⁰ (*Lucia Mar. supra, 44 Cal. 3d at p. 836.*)

[**64]** B. *County Discretion to Set Eligibility and Service Standards*

CA(5a)[↑] (5a) The state next argues that, because San Diego had statutory discretion to set eligibility and service standards, there was no reimbursable mandate. Citing *section 16704*, the state asserts that the 1982 legislation required San Diego to spend MISA funds "only on those whom the county deems eligible under *§ 17000*," "gave the county exclusive authority to determine the level and type of benefits it would provide," and required counties "to include [adult MIP's] in their *§ 17000* eligibility **only to the extent state funds were available and then only for 3 years.**" (Original emphasis.) ²¹ **[****65]** According to the state, under *section 17001*, "[t]he counties **[*100]** have complete discretion over the determination of eligibility, scope of benefits and how the services will be provided." ²²

The state exaggerates the extent of a county's discretion under *section 17001*. It is true "case law . . . has recognized that **HN22[↑]** *section 17001* confers broad discretion upon the counties in performing their statutory duty to provide general assistance benefits to needy residents. [Citations.]" (*Robbins v. [**332]* **[***154]** *Superior Court* (1985) 38 Cal. 3d 199, 211 [211 Cal. Rptr. 398, 695 P.2d 695] (*Robbins*).) However, there are "clear-cut limits" to this discretion. (*Ibid.*) **CA(6)[↑]** (6) The counties may exercise their discretion "only within fixed boundaries. In administering General Assistance relief the county acts as an agent of the state. [Citation.] **HN23[↑]** When a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, the agency's regulations must be consistent, not in **[****66]** conflict with the statute, and reasonably necessary to effectuate its purpose. (Gov. Code, *§ 11374.*)" (*Mooney, supra, 4 Cal. 3d at p. 679.*) Thus, the counties' eligibility and service standards must "carry out" the objectives of *section 17000*. (*Mooney, supra, 4 Cal. 3d at p. 679; see also Poverty Resistance Center v. Hart* (1989) 213 Cal. App. 3d 295, 304-305 [261 Cal. Rptr. 545]; *§ 11000* ["provisions of law relating to a public assistance program shall be fairly and equitably construed to effect the stated objects and purposes of the program"].) County standards that fail to

maximum allocation under *Section 16702*." (Stats. 1982, ch. 1594, *§ 70*, p. 6346.) **HN19[↑]** *Section 16704, subdivision (c)(3)*, provided in relevant part: "Any person whose income and resources meet the income and resource criteria for certification for services pursuant to *Section 14005.7* other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided. Such persons may be held financially liable for these services based upon the person's ability to pay. A county may not establish a payment requirement which would deny medically necessary services. This section shall not be construed to mandate that a county provide any specific level or type of health care service . . . **HN20[↑]**]. The provisions of this paragraph shall become inoperative if a court ruling is issued which decrees that the provisions of this paragraph mandates [*sic*] that additional state funds be provided and which requires that additional state reimbursement be made to counties for costs incurred under this paragraph. This paragraph shall be operative only until June 30, 1983, unless a later enacted statute extends or deletes that date." (Stats. 1982, ch. 1594, *§ 70*, pp. 6346-6347.)

²⁰In reaching a contrary conclusion, the dissent ignores the electorate's purpose in adopting section 6. The dissent also mischaracterizes our decision. We do not hold that "whenever there is a change in a state program that has the effect of increasing a county's financial burden under *section 17000* there must be reimbursement by the state." (Dis. opn. of Kennard, J., *post*, at p. 116.) Rather, we hold that **HN17[↑]** *section 6* prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6. Whether the state may discontinue assistance that it initiated after section 6's adoption is a question that is not before us.

²¹**HN18[↑]** As amended in 1982, *section 16704, subdivision (c)(1)*, provided in relevant part: "The [county board of supervisors] shall assure that it will expend [MISA] funds only for the health services specified in *Sections 14132* and *14021* provided to persons certified as eligible for such services pursuant to *Section 17000* and shall assure that it will incur no less in net costs of county funds for county health services in any fiscal year than the amount required to obtain the

²²**HN21[↑]** *Section 17001* provides: "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county."

carry out section 17000's objectives "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris, supra*, 67 Cal. 2d at p. 737.) **HN24** Courts, which have " 'final responsibility for the interpretation of the law,' " must strike them down. (*Id.* at p. 748.) Indeed, despite the counties' statutory discretion, "courts have consistently invalidated . . . county welfare regulations that fail to meet statutory requirements. [Citations.]" (*Robbins, supra*, 38 Cal. 3d at p. 212.)

1. Eligibility

CA(5b) (5b) Regarding eligibility, ******67** we conclude that counties must provide medical care to all adult MIP's. As we emphasized in *Mooney*, **HN25** section 17000 requires counties to relieve and support " 'all indigent persons lawfully resident therein, "when such persons are not supported and relieved by their relatives" or by some other means.' " (*Mooney, supra*, 4 Cal. 3d at p. 678; see also *Bernhardt v. Board of Supervisors* (1976) 58 Cal. App. 3d 806, 811 [130 Cal. Rptr. 189].) Moreover, section 10000 declares that the statutory "purpose" of division 9 of the Welfare and Institutions Code, which includes section 17000, "is to provide for protection, care, and assistance to the **[*101]** people of the state in need thereof, and to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to all of its needy and distressed." (Italics added.) Thus, **HN26** counties have no discretion to refuse to provide medical care to "indigent persons" within the meaning of section 17000 who do not receive it from other sources. ²³ (See *Bell v. Board of Supervisors* (1994) 23 Cal. App. 4th 1695, 1706 [28 Cal. Rptr. 2d 919] [eligibility standards may not "defeat the ******68** purpose of the statutory scheme by depriving qualified recipients of mandated support"]; *Washington v. Board of Supervisors* (1993) 18 Cal. App. 4th 981, 985 [22 Cal. Rptr. 2d 852] [courts have repeatedly "voided county ordinances which have attempted to redefine eligibility standards set by state statute"].)

Although section 17000 does not define the term

²³We disapprove *Bay General, supra*, 156 Cal. App. 3d at pages 959-960, insofar as it (1) states that a county's responsibility under section 17000 extends only to indigents as defined by the county's board of supervisors, and (2) suggests that a county may refuse to provide medical care to persons who are "indigent" within the meaning of section 17000 but do not qualify for Medi-Cal.

"indigent persons," the 1982 legislation made clear that all adult MIP's fall within this category for purposes of defining a county's obligation to provide medical care. ²⁴ As part of its exclusion of adult MIP's, that legislation required counties to ******69** participate in the MISA program. (Stats. 1982, ch. 1594, § 68, 70, 86, pp. 6343-6347, 6357.) Regarding that program, the 1982 legislation amended section 16704, subdivision (c)(1), to require *****333** ******155** that a county board of supervisors, in applying for MISA funds, "assure that it will expend such funds only for [specified] health services . . . provided to persons certified as eligible for such services pursuant to Section 17000 . . ." (Stats. 1982, ch. 1594, § 70, p. 6346.) At the same time, the 1982 legislation amended section 16704, subdivision (c)(3), to provide that "[a]ny person whose income and resources meet the income and resource criteria for certification for services pursuant to Section 14005.7 other than for the aged, blind, or disabled, shall not be excluded from eligibility for services to the extent that state funds are provided." (Stats. 1982, ch. 1594, § 70, p. 6346.) As the state correctly explains, under this provision, "counties had to include [Medically Indigent Adults] in their [section] 17000 eligibility" standards. By requiring counties to make all adult MIP's eligible for services paid for with MISA funds, while at the same time ******70** requiring counties to promise to spend such funds *only* on those certified as eligible under section 17000, the Legislature established that all adult MIP's are "indigent persons" for purposes of the counties' duty to provide medical care under section 17000. Otherwise, the counties could not comply with their promise.

[*102] Our conclusion is not affected by language in section 16704, subdivision (c)(3), making it "operative only until June 30, 1985, unless a later enacted statute extends or deletes that date." ²⁵ As we have explained, the subdivision established that **HN27** adult MIP's are "indigent persons" within the meaning of section 17000 for medical care purposes. As we have also

²⁴Our conclusion is limited to this aspect of a county's duty under section 17000. We express no opinion regarding the scope of a county's duty to provide other forms of relief and support under section 17000.

²⁵The 1982 legislation made the subdivision operative until June 30, 1983. (Stats. 1982, ch. 1594, § 70, p. 6347.) In 1983, the Legislature repealed and reenacted section 16704, and extended the operative date of subdivision (c)(3) to June 30, 1985. (Stats. 1983, ch. 323, § 131.1, 131.2, pp. 1079-1080.)

explained, section 17000 requires counties to relieve and support all "indigent persons." Thus, even if [****71] the state is correct in asserting that section 16704, subdivision (c)(3), is now inoperative and no longer prohibits counties from excluding adult MIP's from eligibility for medical services, section 17000 has that effect.²⁶

Additionally, the coverage history of Medi-Cal demonstrates that the Legislature has always viewed all adult MIP's as "indigent persons" within the [****72] meaning of section 17000 for medical care purposes. As we have previously explained, when the Legislature created the original Medi-Cal program, which covered only categorically linked persons, it "declar[ed] its concern with the problems which [would] be facing the counties with respect to the medical care of indigent persons who [were] not covered" by Medi-Cal, "whose medical care [had to] be financed entirely by the counties in a time of heavily increasing medical costs." (Stats. 1966, Second Ex. Sess. 1965, ch. 4, § 2, p. 116 [enacting former § 14108.5].) Moreover, to ensure that the counties' Medi-Cal cost share would not leave counties "with insufficient funds to provide hospital care for those persons not eligible for Medi-Cal," the Legislature also created the county option. (*Hall, supra*, 23 Cal. App. 3d at p. 1061.) Through the county option, "the state agreed to assume all county health care costs . . . in excess of county costs incurred during the 1964-1965 fiscal year, adjusted for population increases." (*Lackner, supra*, 97 Cal. App. 3d at p. 586.) Thus, the Legislature expressly recognized that the categorically linked persons initially eligible [****73] for Medi-Cal did not constitute all "indigent persons" entitled to medical care under section 17000, and required the state to share in the financial responsibility for providing that care.

In adding adult MIP's to Medi-Cal in 1971, the Legislature extended Medi-Cal coverage to noncategorically linked persons "who [were] financially unable to pay for their medical care." (Legis. Counsel's Dig., Assem. Bill No. 949, 3 Stats. 1971 (Reg. Sess.) Summary Dig., p. 83.) This [*103] description was consistent with prior judicial decisions that, for purposes

of a county's duty to provide "indigent persons" with hospitalization, [****156] had [**334] defined the term to include a person "who has insufficient means to pay for his maintenance in a private hospital after providing for those who legally claim his support." (*Goodall v. Brite* (1936) 11 Cal. App. 2d 540, 550 [54 P.2d 510].)

Moreover, the fate of amendments to section 17000 proposed at the same time suggests that, in the Legislature's view, the category of "indigent persons" entitled to medical care under section 17000 extended even beyond those eligible for Medi-Cal as MIP's. The June 17, 1971, version of [****74] Assembly Bill No. 949 amended section 17000 by adding the following: "however, the health needs of such persons shall be met under [Medi-Cal]." (Assem. Bill No. 949 (1971 Reg. Sess.) § 53.3, as amended June 17, 1971.) The Assembly deleted this amendment on July 20, 1971. (Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971, p. 37.) Regarding this change, the Assembly Committee on Health explained: "The proposed amendment to Section 17000, . . . which would have removed the counties' responsibilities as health care provider of last resort, is deleted. This change was originally proposed to clarify the guarantee to hold counties harmless from additional Medi-Cal costs. It is deleted since it cannot remove the fact that counties are, by definition, a 'last resort' for any person, with or without the means to pay, who does not qualify for federal or state aid." (Assem. Com. on Health, Analysis of Assem. Bill No. 949 (1971 Reg. Sess.) as amended July 20, 1971 (July 21, 1971), p. 4.)

The Legislature's failure to amend section 17000 in 1971 figured prominently in the Attorney General's interpretation of that section only two years later. In a 1973 published opinion, the Attorney [****75] General stated that the 1971 inclusion of MIP's in Medi-Cal "did not alter the duty of the counties to provide medical care to those indigents not eligible for Medi-Cal." (56 Ops.Cal.Atty.Gen., *supra*, at p. 569.) He based this conclusion on the 1971 legislation, relevant legislative history, and "the history of state medical care programs." (*Id. at p. 570*.) The opinion concluded: "The definition of medically indigent in [the chapter establishing Medi-Cal] is applicable only to that chapter and does not include all those enumerated in section 17000. If the former medical care program, by providing care only for a specific group, public assistance recipients, did not affect the responsibility of the counties to provide such service under section 17000, we believe the most recent expansion of the medical assistance program does not affect, absent an express

²⁶ Given our analysis, we express no opinion about the statement in *Cooke, supra*, 213 Cal. App. 3d at page 412, footnote 9, that the "life" of section 16704, subdivision (c)(3), "was implicitly extended" by the fact that the "paragraph remains in the statute despite three subsequent amendments to the statute"

legislative intent to the contrary, the duty of the counties under section 17000 to continue to provide services to those eligible under section 17000 but not under [Medi-Cal]." (*ibid.*, italics added.) **HN28** [↑] The Attorney General's opinion, although not binding, is entitled to considerable weight. **[*104]** (*Freedom [****76] Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal. 4th 821, 829 [25 Cal. Rptr. 2d 148, 863 P.2d 218].) Absent controlling authority, it is persuasive because we presume that the Legislature was cognizant of the Attorney General's construction of section 17000 and would have taken corrective action if it disagreed with that construction. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 17 [270 Cal. Rptr. 796, 793 P.2d 2].)

In this case, of course, we need not (and do not) decide whether San Diego's obligation under section 17000 to provide medical care extended beyond adult MIP's. Our discussion establishes, however, that the obligation extended at least that far. The Legislature has made it clear that all adult MIP's are "indigent persons" under section 17000 for purposes of San Diego's obligation to provide medical care. Therefore, the state errs in arguing that San Diego had discretion to refuse to provide medical care to this population. ²⁷

[**77] [**335] [***157]** 2. Service Standards

CA(7) [↑] (7) A number of statutes are relevant to the state's argument that San Diego had discretion in setting service standards. Section 17000 requires in general terms that counties "relieve and support" indigent persons. Section 10000, which sets forth the purpose of the division containing section 17000,

²⁷ Although asserting that nothing required San Diego to provide "all" adult MIP's with medical care, the state never precisely identifies which adult MIP's were legally entitled to medical care and which ones were not. Nor does the state ever directly assert that some adult MIP's were not "indigent persons" under section 17000. On the contrary, despite its argument, the state seems to suggest that San Diego's medical care obligation under section 17000 extended even beyond adult MIP's. It asserts: "At no time prior to or following 1983 did Medi-Cal ever provide medical services to, or pay for medical services provided to, all persons who could not afford such services and therefore might be deemed 'medically indigent.' . . . For some period prior to 1983, Medi-Cal paid for services for some indigent adults under its 'medically indigent adults' category. . . . [A]t no time did the state ever assume financial responsibility for all adults who are too indigent to afford health care." (Original emphasis.)

declares the "legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life," so "as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society." (§ 10000.) **HN29** [↑] Section 17000, as authoritatively interpreted, mandates that medical care be provided to indigents and section 10000 requires that such care be provided promptly and humanely. The duty is mandated by statute. There is no discretion concerning whether to provide such care" (*Tailfeather v. Board of Supervisors* (1996) 48 Cal. App. 4th 1223, 1245 [56 Cal. Rptr. 2d 255] (*Tailfeather*).)

Courts construing section 17000 have held that **HN30** [↑] it "imposes a mandatory duty upon all counties to provide 'medically necessary care,' not just **[*105]** emergency **[****78]** care. [Citation.]" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal. App. 4th 1096, 1108 [18 Cal. Rptr. 2d 487]; see also *Gardner v. County of Los Angeles* (1995) 34 Cal. App. 4th 200, 216 [40 Cal. Rptr. 2d 271]; § 16704.1 [prohibiting a county from requiring payment of a fee or charge "before [it] renders medically necessary services to . . . persons entitled to services under Section 17000"].) It further "ha[s] been interpreted . . . to impose a minimum standard of care below which the provision of medical services may not fall." (*Tailfeather, supra*, 48 Cal. App. 4th at p. 1239.) In *Tailfeather*, the court stated that "section 17000 requires provision of medical services to the poor at a level which does not lead to unnecessary suffering or endanger life and health . . ." (*Id. at p. 1240*.) In reaching this conclusion, it cited *Cooke, supra*, 213 Cal. App. 3d at page 404, which held that section 17000 requires counties to provide "dental care sufficient to remedy substantial pain and infection." (See also § 14059.5 [defining "[a] service [as] 'medically necessary' . . . when it is reasonable and necessary to protect life, to **[****79]** prevent significant illness or significant disability, or to alleviate severe pain"].)

During the years for which San Diego sought reimbursement, Health and Safety Code section 1442.5, former subdivision (c) (former subdivision (c)), also spoke to the level of services that counties had to provide under Welfare and Institutions Code section 17000. ²⁸ **[****81]** As enacted in September 1974,

²⁸ The state argues that former subdivision (c) is irrelevant to our determination because, like section 17000, it "predate[d] 1975." Our previous analysis rejecting this argument in connection with section 17000 applies here as well.

15 Cal. 4th 68, *105; 931 P.2d 312, **335; 61 Cal. Rptr. 2d 134, ***157; 1997 Cal. LEXIS 630, ****81

HN31 former subdivision (c) provided that, whether a county's duty to provide care to all indigent people "is fulfilled directly by the county or through alternative means, the availability of services, and the quality of the treatment received by people who cannot afford to pay for their health care shall be the same as that available to nonindigent people receiving health care services in private facilities in that county." (Stats. 1974, ch. 810, § 3, p. 1765.) The express "purpose and intent" of the act that contained former subdivision (c) was "to insure that the duty of counties to provide health care to indigents [was] properly and continuously fulfilled." (Stats. 1974, ch. 810, § 1, p. 1764.) Thus, until its repeal in September 1992,²⁹ former subdivision (c) "[r]equire[d] that the availability [****80] and quality of services provided to indigents directly by the county or alternatively be the same as that available to nonindigents in private facilities in that county." (Legis. Counsel's Dig., Sen. Bill No. 2369, 2 Stats. 1974 (Reg. Sess.) Summary Dig., p. 130; see also *Gardner v. County of Los Angeles*, *supra*, 34 Cal. App. 4th at p. 216; [*106] *Board of Supervisors v. Superior Court*, *supra*, 207 Cal. App. 3d at p. 564 [former subdivision (c) required that care provided "be comparable to that enjoyed by the nonindigent".])³⁰ "For the 1990-91 fiscal year," the Legislature qualified this obligation by providing: "nothing in [former] subdivision (c) . . . shall require any county to exceed the standard of care provided by the state Medi-Cal program. Notwithstanding any other provision of law, counties shall not be required to increase eligibility or expand the scope of services in the 1990-91 fiscal year for their programs." (Stats. 1990, ch. 457, § 23, p. 2013.)

Although we have identified statutes relevant to service standards, we need not here define the precise contours

²⁹ Statutes 1992, chapter 719, section 2, page 2882, repealed former subdivision (c) and enacted a new subdivision (c) in its place. This urgency measure was approved by the Governor on September 14, 1992, and filed with the Secretary of State on September 15, 1992.

³⁰ **HN32** We disapprove *Cooke*, *supra*, 213 Cal. App. 3d at page 410, to the extent it held that *Health and Safety Code section 1442.5*, former subdivision (c), was merely "a limitation on a county's ability to close facilities or reduce services provided in those facilities," and was irrelevant absent a claim that a "county facility was closed [or] that any services in [the] county . . . were reduced." Although former subdivision (c) was contained in a section that dealt in part with closures and service reductions, nothing limited its reach to that context.

of San Diego's statutory health care obligation. The state argues generally that San Diego had discretion regarding the services it provided. However, [****82] the state fails to identify either the specific services that San Diego provided under its CMS program or which of those services, if any, were not required under the governing statutes. Nor does the state argue that San Diego could have eliminated all services and complied with statutory requirements. Accordingly, we reject the state's argument that, because San Diego had some discretion in providing services, the 1982 legislation did not impose a reimbursable mandate.³¹

VI. MINIMUM REQUIRED EXPENDITURE

CA(8) (8) The Court of Appeal held that, under the governing statutes, the Commission must initially determine the precise amount of any reimbursement due San Diego. It therefore reversed the damages portion of the trial court's judgment and remanded the matter to the Commission for this [****83] determination. Nevertheless, the Court of Appeal affirmed the trial court's finding that the Legislature required San Diego to spend at least \$ 41 million on its CMS program for fiscal years 1989-1990 and 1990-1991. In affirming this finding, the Court of Appeal relied primarily on *section 16990, subdivision (a)*, as it read at all relevant times. The state contends this provision did not mandate that San Diego spend any minimum amount on the CMS program. It further asserts that the Court of Appeal's "ruling in effect sets a damages baseline, in contradiction to [its] ostensible reversal of the damage award."

[*107] Former *section 16990, subdivision (a)*, set forth the financial maintenance-of-effort requirement for counties that received funding under the California Healthcare for the Indigent Program (CHIP). The Legislature enacted CHIP in 1989 to implement Proposition 99, the Tobacco Tax and Health Protection Act of 1988 (codified at Rev. & Tax. Code, § 30121 et seq.). Proposition 99, which the voters approved on November 8, 1988, increased the tax on tobacco products and allocated the resulting revenue in part to medical and hospital care for certain persons who could not [****84] afford those services. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 248, 254 [279 Cal. Rptr. 325, 806 P.2d*

³¹ During further proceedings before the Commission to determine the amount of reimbursement due San Diego, the state may argue that particular services available under San Diego's CMS program exceeded statutory requirements.

1360].) During the 1989-1990 and 1990-1991 fiscal years, **HN33** former section 16990, subdivision (a), required counties receiving CHIP funds, "at a minimum," to "maintain a level of financial support of county funds for health services at least equal to its county match and any overmatch of county funds in the 1988-89 fiscal year," adjusted annually as provided. (Stats. 1989, ch. 1331, § 9, p. 5427.) Applying this provision, the Court of Appeal affirmed the trial court's finding that the state had required San Diego to spend in fiscal years 1989-1990 and 1990-1991 **[**337]** **[***159]** at least \$ 41 million on the CMS program.

We agree with the state that this finding is erroneous. Unlike participation in MISA, which was mandatory, participation in CHIP was voluntary. In establishing CHIP, the Legislature appropriated funds "for allocation to counties *participating* in" the program. (Stats. 1989, ch. 1331, § 10, p. 5436, italics added.) Section 16980, subdivision (a), directed the State Department of Health Services to make CHIP payments **[****85]** "upon application of the county assuring that it will comply with" applicable provisions. Among the governing provisions were former sections 16990, subdivision (a), and 16995, subdivision (a), which provided: "To be eligible for receipt of funds under this chapter, a county may not impose more stringent eligibility standards for the receipt of benefits under Section 17000 or reduce the scope of benefits compared to those which were in effect on November 8, 1988." (Stats. 1989, ch. 1331, § 9, p. 5431.)

However, San Diego has cited no provision, and we have found none, that *required* eligible counties to participate in the program or apply for CHIP funds. Through Revenue and Taxation Code section 30125, which was part of Proposition 99, the electorate directed that funds raised through Proposition 99 "shall be used to supplement existing levels of service and not to fund existing levels of service." (See also Stats. 1989, ch. 1331, § 1, 19, pp. 5382, 5438.) Counties not wanting to supplement their existing levels of service, and which therefore did not want CHIP funds, were not bound by the program's requirements. Those counties, including San Diego, that chose **[*108]** to **[****86]** seek CHIP funds did so voluntarily. ³² Thus, the Court of Appeal

³² Consistent with the electorate's direction, in its application for CHIP funds, San Diego assured the state that it would "[e]xpend [CHIP] funds only to supplement existing levels of services provided and not to fund existing levels of service . . ." Because San Diego's initial decision to seek CHIP funds was voluntary, the evidence it cites of state threats to withhold

erred in concluding that former section 16990, subdivision (a), mandated a minimum funding requirement for San Diego's CMS program.

Nor did former section 16991, subdivision (a)(5), which the trial court and Court of Appeal also cited, establish a minimum financial obligation for San Diego's CMS program. Former section 16991 generally "establish[ed] a procedure for the allocation of funds to each county receiving funds from the [MISA] . . . for the provision of services to persons meeting certain Medi-Cal **[****87]** eligibility requirements, based on the percentage of newly legalized individuals under the federal Immigration Reform and Control Act (IRCA)." (Legis. Counsel's Dig., Assem. Bill No. 75, 4 Stats. 1989 (Reg. Sess.) Summary Dig., p. 548.) Former section 16991, subdivision (a)(5), required the state, for fiscal years 1989-1990 and 1990-1991, to reimburse a county if its combined allocation from various sources was less than the funding it received under section 16703 for fiscal year 1988-1989. ³³ Nothing about this state reimbursement requirement imposed on San Diego a minimum funding requirement for its CMS program.

[**88]** Thus, we must reverse the judgment insofar as it finds that former sections 16990, subdivision (a), and 16991, subdivision (a)(5), established a \$ 41 million spending floor for San Diego's CMS program. Instead, the various statutes that we have previously discussed (e.g., § 10000, 17000, and Health & **[**338]** **[****160]** Saf. Code, § 1442.5, former subd. (c)), the cases construing those statutes, and any other relevant

CHIP funds if it eliminated the CMS program is irrelevant.

³³ **HN34** Former section 16991, subdivision (a)(5), provided in full: "If the sum of funding that a county received from its allocation pursuant to Section 16703, the amount of reimbursement it received from federal State Legalization Impact Assistance Grant [(SLIAG)] funding for indigent care, and its share of funding provided in this section is less than the amount of funding the county received pursuant to Section 16703 in fiscal year 1988-89 the state shall reimburse the county for the amount of the difference. For the 1990-91 fiscal year, if the sum of funding received from its allocation, pursuant to Section 16703 and the amount of reimbursement it received from [SLIAG] Funding for indigent care that year is less than the amount of funding the county received pursuant to Section 16703 in the 1988-89 fiscal year, the state shall reimburse the amount of the difference. If the department determines that the county has not made reasonable efforts to document and claim federal SLIAG funding for indigent care, the department shall deny the reimbursement." (Stats. 1989, ch. 1331, § 9, p. 5428.)

authorities must guide the Commission's determination of the level of services that San Diego had to provide and any reimbursement to which it is entitled.

[*109] VII. REMAINING ISSUES

CA(9)[↑] (9) The state raises a number of additional issues. It first complains that a mandamus proceeding under Code of Civil Procedure section 1085 was an improper vehicle for challenging the Commission's position. It asserts that, under Government Code section 17559, review by administrative mandamus under Code of Civil Procedure section 1094.5 is the exclusive method for challenging a Commission decision denying a mandate claim. The Court of Appeal rejected this argument, reasoning that the trial court had jurisdiction under Code of Civil Procedure section 1085 because, under section [****89] 6, the state has a ministerial duty of reimbursement when it imposes a mandate.

Like the Court of Appeal, but for different reasons, we reject the state's argument. HN35[↑] "[M]andamus pursuant to [Code of Civil Procedure] section 1094.5, commonly denominated 'administrative' mandamus, is mandamus still. It is not possessed of 'a separate and distinctive legal personality. It is not a remedy removed from the general law of mandamus or exempted from the latter's established principles, requirements and limitations.' [Citations.] The full panoply of rules applicable to 'ordinary' mandamus applies to 'administrative' mandamus proceedings, except where modified by statute. [Citations.]" (Woods v. Superior Court (1981) 28 Cal. 3d 668, 673-674 [170 Cal. Rptr. 484, 620 P.2d 1032].) Where the entitlement to mandamus relief is adequately alleged, a trial court may treat a proceeding brought under Code of Civil Procedure section 1085 as one brought under Code of Civil Procedure section 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked. (Woods, supra, 28 Cal. 3d at pp. 673-674; Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d [****90] 802, 813-814 [140 Cal. Rptr. 442, 567 P.2d 1162].) Thus, even if San Diego identified the wrong mandamus statute, the error did not affect the trial court's ability to grant mandamus relief.

"In any event, distinctions between traditional and administrative mandate have little impact on this appeal" (McIntosh v. Aubry (1993) 14 Cal. App. 4th 1576, 1584 [18 Cal. Rptr. 2d 680].) HN36[↑] The determination whether the statutes here at issue

established a mandate under section 6 is a question of law. (County of Fresno v. Lehman, supra, 229 Cal. App. 3d at p. 347.) In reaching our conclusion, we have relied on no facts that are in dispute. Where, as here, a "purely legal question" is at issue, courts "exercise independent judgment . . . , no matter whether the issue arises by traditional or administrative mandate. [Citations.]" (McIntosh, supra, 14 Cal. App. 4th at p. 1584.) As the state concedes, even under Code of Civil Procedure section 1094.5, a judgment must "be reversed if based on erroneous conclusions of law." Thus, any differences between the two mandamus statutes have had no impact on our analysis.

[*110] The state next contends that the trial [****91] court prejudicially erred in denying the "peremptory disqualification" motion that the Director of the Department of Finance filed under Code of Civil Procedure section 170.6. We will not review this ruling, however, because HN37[↑] it is reviewable only by writ of mandate under Code of Civil Procedure section 170.3, subdivision (d). (People v. Webb (1993) 6 Cal. 4th 494, 522-523 [24 Cal. Rptr. 2d 779, 862 P.2d 779]; People v. Hull (1991) 1 Cal. 4th 266 [2 Cal. Rptr. 2d 526, 820 P.2d 1036].)

Nor can we address the state's argument that the trial court erred in granting a preliminary injunction. The May 1991 order granting the HN38[↑] preliminary injunction was "immediately and separately appealable" under Code of Civil Procedure section 904.1, subdivision (a)(6). (Art Movers, Inc. v. Ni West, Inc. (1992) 3 Cal. App. 4th 640, 645 [4 Cal. Rptr. 2d 689].) Thus, the state's attempt to challenge the order in an appeal filed after entry of final judgment in December 1992 [**339] [****161] was untimely.³⁴ (See Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 251 [256 Cal. Rptr. 194].) Moreover, the state's attempt to appeal the order granting [****92] the preliminary injunction is moot because of (1) the trial court's July 1 order granting a peremptory writ of mandate, which expressly "supersede[d] and replace[d]" the preliminary injunction order and (2) entry of final judgment. (Sheward v. Citizens' Water Co. (1891) 90 Cal. 635, 638-639 [27 P. 439]; People v. Morse (1993) 21 Cal. App. 4th 259, 264-265 [25 Cal. Rptr. 2d 816]; Art Movers, Inc., supra, 3 Cal. App. 4th at p. 647.)

³⁴ Despite its argument here, when it initially appealed, the state apparently recognized that it could no longer challenge the May 1991 order. In its March 1993 notice of appeal, it appealed only from the judgment entered December 18, 1992, and did not mention the May 1991 order.

Finally, the state requests that we reverse the trial court's reservation of jurisdiction regarding an award of attorney fees. This request is premature. In the judgment, the trial court "retain[ed] jurisdiction to determine any right to and amount of attorneys' fees" [***93] This provision does not declare that San Diego in fact has a right to an award of attorney fees. Nor has San Diego asserted such a right. As San Diego states, at this point, "[t]here is nothing for this Court to review." We will not give an advisory ruling on this issue.

VIII. DISPOSITION

The judgment of the Court of Appeal is affirmed insofar as it holds that the exclusion of adult MIP's from Medi-Cal imposed a mandate on San Diego within the meaning of section 6. The judgment is reversed insofar as it holds that the state required San Diego to spend at least \$ 41 million on the CMS program in fiscal years 1989-1990 and 1990-1991. The matter is [*111] remanded to the Commission to determine whether, and by what amount, the statutory standards of care (e.g., *Health & Saf. Code, § 1442.5*, former subd. (c); *Welf. & Inst. Code, § 10000, 17000*) forced San Diego to incur costs in excess of the funds provided by the state, and to determine the statutory remedies to which San Diego is entitled.

George, C. J., Mosk, J., Baxter, J., Anderson, J., * [****94] and Aldrich, J., ** concurred.

Dissent by: KENNARD

Dissent

KENNARD, J.

I dissent.

As part of an initiative measure placing spending limits on state and local government, the voters in 1979 added article XIII B to the California Constitution. Section 6 of

* Presiding Justice, Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

** Associate Justice, Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

this article provides that when the state "mandates a new program or higher level of service on any local government," the state must reimburse the local government for the cost of such program or service. Under subdivision (c) of this constitutional provision, however, the state "may, but need not," provide such reimbursement *if the state mandate was enacted before January 1, 1975. (Cal. Const., art. XIII B, § 6, subd. (c).)* Subdivision (c) is the critical provision here.

Because the counties have for many decades been under a state mandate to provide for the poor, a mandate that existed before the voters added article XIII B to the state Constitution, the express language of subdivision [***95] (c) of section 6 of article XIII B exempts the state from any *legal obligation* to reimburse the counties for the cost of medical care to the needy. The fact that for a certain period after 1975 the state directly paid under the state Medi-Cal program for these costs did not lead to the creation of a new mandate once the state stopped doing so. To hold to the contrary, as the majority does, is to render subdivision (c) a nullity.

The issue here is not whether the poor are entitled to medical care. They are. The issue is whether the state or the counties must pay for this care. The majority places this obligation on the state. The counties' [**340] [***162] win, however, may be a pyrrhic victory. For, in anticipation of today's decision, the Legislature has enacted legislation that will drastically reduce the counties' share of other state revenue, as discussed in part III below.

I

Beginning in 1855, California imposed a legal obligation on the counties to take care of their poor. (*Mooney v. Pickett* (1971) 4 Cal. 3d 669, 677-678 [*112] [94 Cal. Rptr. 279, 483 P.2d 1231].) Since 1965, this obligation has been codified in *Welfare and Institutions Code* [****96] *section 17000*. (Stats. 1965, ch. 1784, § 5, p. 4090.) That statute states in full: "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." (*Welf. & Inst. Code, § 17000*.) Included in this is a duty to provide medical care to indigents. (*Board of Supervisors v. Superior Court* (1989) 207 Cal. App. 3d 552, 557 [254 Cal. Rptr. 905].)

A brief overview of the efforts by federal, state, and local governments to furnish medical services to the poor may be helpful.

Before March 1, 1966, the date on which California began its Medi-Cal program, medical services for the poor "were provided in different ways and were funded by the state, county, and federal governments in varying amounts." (Assem. Com. on Public Health, Preliminary Rep. on Medi-Cal (Feb. 29, 1968) p. 3.) The Medi-Cal program, which California adopted to implement the federal Medicaid program (*42 U.S.C. § 1396 et seq.*; see *Morris [****97] v. Williams (1967) 67 Cal. 2d 733, 738 [63 Cal. Rptr. 689, 433 P.2d 697]*), at first limited eligibility to those persons "linked" to a federal categorical aid program by being over age 65, blind, disabled, or a member of a family with dependent children. (Legis. Analyst, Rep. to Joint Legis. Budget Com., Analysis of 1971-1972 Budget Bill, Sen. Bill No. 207 (1971 Reg. Sess.), pp. 548, 550.) Persons not linked to federal programs were ineligible for Medi-Cal; they could obtain medical care from the counties. (*County of Santa Clara v. Hall (1972) 23 Cal. App. 3d 1059, 1061 [100 Cal. Rptr. 629]*.)

In 1971, the Legislature revised Medi-Cal by extending coverage to certain so-called "noncategorically linked" persons, or "medically indigent persons." (Stats. 1971, ch. 577, § 12, 13, 22.5, 23, pp. 1110-1111, 1115.) The revisions included a formula for determining each county's share of Medi-Cal costs for the 1972-1973 fiscal year, with increases in later years based on the assessed value of property. (*Id.* at § 41, 42, pp. 1131-1133.)

In 1978, California voters added to the state Constitution article XIII A (Proposition 13), which severely limited property taxes. In that [****98] same year, to help the counties deal with the drastic drop in local tax revenue, the Legislature assumed the counties' share of Medi-Cal costs. (Stats. 1978, ch. 292, § 33, p. 610.) In 1979, the Legislature relieved the counties of their obligation to share in Medi-Cal costs. (Stats. 1979, ch. 282, § 106, p. 1059.) [*113] Also in 1979, the voters added to the state Constitution article XIII B, which placed spending limits on state and local governments and added the mandate/reimbursement provisions at issue here.

In 1982, the Legislature removed from Medi-Cal eligibility the category of "medically indigent persons" that had been added in 1971. The Legislature also transferred funds for indigent health care services from the state to the counties through the Medically Indigent

Services Account. (Stats. 1982, ch. 328, § 6, 8.3, 8.5, pp. 1574-1576; Stats. 1982, ch. 1594, § 19, 86, pp. 6315, 6357.) Medically Indigent Services Account funds were then combined with county health service funds to provide health care to persons not eligible for Medi-Cal (Stats. 1982, ch. 1594, § 86, p. 6357), and counties were to provide health services to persons in this category "to the extent [****99] that state funds are provided" (*id.*, § 70, p. 6346).

From 1983 through June 1989, the state fully funded San Diego County's program for furnishing medical care to the poor. Thereafter, in fiscal years 1989-1990 and 1990-1991, the state partially funded San Diego [**341] [***163] County's program. In early 1991, however, the state refused to provide San Diego County full funding for the 1990-1991 fiscal year, prompting a threat by the county to terminate its indigent medical care program. This in turn led the Legal Aid Society of San Diego to file an action against the County of San Diego, asserting that *Welfare and Institutions Code section 17000* imposed a legal obligation on the county to provide medical care to the poor. The county cross-complained against the state. The county argued that the state's 1982 removal of the category of "medically indigent persons" from Medi-Cal eligibility mandated a "new program or higher level of service" within the meaning of *section 6 of article XIII B of the California Constitution*, because it transferred the cost of caring for these persons to the county. Accordingly, the county contended, section 6 required the state to reimburse [****100] the county for its cost of providing such care, and prohibited the state from terminating reimbursement as it did in 1991. The county eventually reached a settlement with the Legal Aid Society of San Diego, leading to a dismissal of the latter's complaint.

While the County of San Diego's case against the state was pending, litigation was proceeding in a similar action against the state by the County of Los Angeles and the County of San Bernardino. In that action, the Superior Court for the County of Los Angeles entered a judgment in favor of Los Angeles and San Bernardino Counties. The state sought review in the Second District Court of Appeal in Los Angeles. In December 1992, the parties to the Los Angeles case entered into a settlement agreement providing for dismissal of the appeal and vacating of the superior court judgment. [*114] The Court of Appeal thereafter ordered that the superior court judgment be vacated and that the appeal be dismissed.

The County of San Diego's action against the state,

however, was not settled. It proceeded on the county's claim against the state for reimbursement of the county's expenditures for medical care to the indigent.¹ The majority [****101] holds that the county is entitled to such reimbursement. I disagree.

II

Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, *except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] . . . [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.*" (Italics added.)²

[****102] Of importance here is *Welfare and Institutions Code section 17000* (hereafter sometimes *section 17000*). It imposes a legal obligation on the counties to provide, among other things, medical services to the poor. (*Board of Supervisors v. Superior Court, supra*, 207 Cal. App. 3d at p. 557; *County of San Diego v. Vilorio* (1969) 276 Cal. App. 2d 350, 352 [80 Cal. Rptr. 869].) *Section 17000* was enacted long before, and has existed continuously since, January 1, 1975, the date set forth in *subdivision (c) of section 6 of article XIII B of the California Constitution*. Thus, *section 17000* falls within subdivision (c)'s language of "[l]egislative mandates enacted prior to January 1, 1975," rendering it exempt from the reimbursement provision of section 6.

Contrary to the majority's conclusion, the Legislature's 1982 legislation removing the category of "medically indigent persons" from Medi-Cal did not meet *California Constitution, article XIII B, section 6's* requirement of imposing on local government "a new program or higher level of service," and therefore did not entitle the counties to reimbursement [**342] [***164] from the

¹ I agree with the majority that the superior court had jurisdiction to decide this case. (Maj. opn., ante, at pp. 85-90.)

² Section 6 of article XIII B pertains to two types of mandates: new programs and higher levels of service. The words "such subvention" in the first paragraph of this constitutional provision makes the subdivision (c) exemption applicable to both types of mandates.

state under section 6 of article [****103] XIII B. The counties' legal obligation to provide medical care arises from *section 17000*, not from the subsequently enacted [**115] 1982 legislation. The majority itself concedes that the 1982 legislation merely "trigger[ed] the counties' responsibility to provide medical care as providers of last resort under *section 17000*." (Maj. opn., ante, at p. 98.) Although certain actions by the state and the federal government during the 1970's and 1980's may have alleviated the counties' financial burden of providing medical care for the indigent, those actions did not supplant or remove the counties' existing legal obligation under *section 17000* to furnish such care. (*Cooke v. Superior Court* (1989) 213 Cal. App. 3d 401, 411 [261 Cal. Rptr. 706]; *Madera Community Hospital v. County of Madera* (1984) 155 Cal. App. 3d 136, 151 [201 Cal. Rptr. 768].)

The state's reimbursement obligation under *section 6 of article XIII B of the California Constitution* arises only if, after January 1, 1975, the date mentioned in subdivision (c) of section 6, the state imposes on the counties "a new program or higher level of service." That did not occur here. As I pointed out above, [****104] the counties' legal obligation to provide for the poor arises from *section 17000*, enacted long before the January 1, 1975, cutoff date set forth in subdivision (c) of section 6. That statutory obligation remained in effect when, during a certain period after 1975, the state assumed the financial burden of providing medical care to the poor, in an effort to help the counties deal with a drastic drop in local revenue as a result of the voters' passage of Proposition 13, which severely limited property taxes. Because the counties' statutory obligation to provide health care to the poor was created before 1975 and has existed unchanged since that time, the state's 1982 termination of Medi-Cal eligibility for "medically indigent persons" did not create a "new program or higher level of service" within the meaning of section 6 of article XIII B, and therefore did not obligate the state to reimburse the counties for their expenditures in health care for the poor.

III

In imposing on the state a legal obligation to reimburse the counties for their cost of furnishing medical services to the poor, the majority's holding appears to bail out financially strapped counties. Not so.

Today's [****105] decision will immediately result in a reduction of state funds available to the counties. Here is why. In 1991, the Legislature added *section 11001.5*

to the Revenue and Taxation Code, providing that 24.33 percent of the moneys collected by the Department of Motor Vehicles as motor vehicle license fees must be deposited in the State Treasury to the credit of the Local Revenue Fund. In anticipation of today's decision, the Legislature stated in subdivision (d) of this statute: "This section shall cease to be operative on [*116] the first day of the month following the month in which the Department of Motor Vehicles is notified by the Department of Finance of a final judicial determination by the California Supreme Court or any California court of appeal [that]: [P] . . . [P] (2) The state is obligated to reimburse counties for costs of providing medical services to medically indigent adults pursuant to Chapters 328 and 1594 of the Statutes of 1982." (*Rev. & Tax. Code, § 11001.5, subd. (d)*; see also *id.*, § 10753.8, subd. (b).)

The loss of such revenue, which the Attorney General estimates at "hundreds of millions of dollars," may put the counties in a serious financial [****106] bind. Indeed, realization of the scope of this revenue loss appears to explain why the County of Los Angeles, after a superior court victory in its action seeking state reimbursement for the cost of furnishing medical care to "medically indigent persons," entered into a settlement with the state under which the superior court judgment was effectively obliterated by a stipulated reversal. (See *Nearby v. Regents of University of California (1992) 3 Cal. 4th 273 [10 Cal. Rptr. 2d 859, 834 P.2d 119]*.) In a letter addressed to the Second District Court of Appeal, sent while the County of Los Angeles was engaged in settlement negotiations with the state, the county's attorney referred to the legislation mentioned above in these terms: "This legislation was quite clearly written with this case in mind. Consequently, [**343] [***165] to pursue this matter, *the County of Los Angeles risks losing a funding source it must have to maintain its health services programs at current levels.* The additional funding that might flow to the County from a final judgment in its favor in this matter, is several years away and is most likely of a lesser amount than this County's share of [****107] *the vehicle license fees.*" (Italics added.) Thus, the County of Los Angeles had apparently determined that a legal victory entitling it to reimbursement from the state for the cost of providing medical care to the category of "medically indigent persons" would not in fact serve its economic interests.

I have an additional concern. According to the majority, whenever there is a change in a state program that has the effect of increasing a county's financial burden under section 17000 there must be reimbursement by the

state. This means that so long as section 17000 continues to exist, an increase in state funding to a particular county for the care of the poor, once undertaken, may be irreversible, thus locking the state into perpetual financial assistance to that county for health care to the needy. This would, understandably, be a major disincentive for the Legislature to ever increase the state's funding of a county's medical care for the poor.

The rigidity imposed by today's holding will have unfortunate consequences should the state's limited financial resources prove insufficient to [*117] reimburse the counties under section 6 of article XIII B of the California Constitution [****108] for the "new program or higher level of service" of providing medical care to the poor under section 17000. In that event, the state may be required to modify this "new program or higher level of service" in order to reconcile the state's reimbursement obligation with its finite resources and its other financial commitments. Such modifications are likely to take the form of limitations on eligibility for medical care or on the amount or kinds of medical care that the counties must provide to the poor under section 17000. A more flexible system—one that actively encouraged shared state and county responsibility for indigent medical care, using a variety of innovative funding mechanisms—would be less likely to result in a curtailment of medical services to the poor.

And if the Legislature is unable or unwilling to appropriate funds to comply with the majority's reimbursement order, the law allows the county to file "in the Superior Court of the County of Sacramento an action in declaratory relief to declare the mandate unenforceable and enjoin its enforcement." (Gov. Code, § 17612, subd. (c); see maj. opn., *ante*, at p. 82.) Such a declaration would do nothing to alleviate the [****109] plight of the poor.

Conclusion

The dispute in this case ultimately arises from a collision between the taxing limitations on the counties imposed by article XIII A of the state Constitution and the preexisting, open-ended mandate imposed on them under Welfare and Institutions Code section 17000 to provide medical care for the poor. As I have explained, the Legislature's assumption thereafter of some of the resulting financial burden to the counties did not repeal section 17000's mandate, nor did the Legislature's later termination of its financial support create a new mandate. In holding to the contrary, the majority

imposes on the Legislature an obligation that the Legislature does not have under the law.

I recognize that my resolution of this issue--that under existing law the state has *no legal obligation* to reimburse the counties for health expenditures for the poor--would leave the counties in the same difficult position in which they find themselves now: providing funding for indigent medical care while maintaining other essential public services in a time of fiscal austerity. But complex policy questions such as the structuring and funding of indigent medical care [****110] are best left to the counties, the Legislature, and ultimately the electorate, rather than to the courts. It is the counties that must figure out how to allocate the limited budgets imposed on them by the electorate's adoption of articles XIII A and XIII B of the California Constitution among indigent medical care programs and a host of other pressing [*118] and essential needs. It is the Legislature that must decide whether to furnish financial assistance to the counties so [***166] they [**344] can meet their *section 17000* obligations to provide for the poor, and whether to continue to impose the obligations of *section 17000* on the counties. It is the electorate that must decide whether, given the ever-increasing costs of meeting the needs of indigents under *section 17000*, counties should be afforded some relief from the taxing and spending limits of articles XIII A and XIII B, both enacted by voters' initiative. These are hard choices, but for the reasons just given they are better made by the representative branches of government and the electorate than by the courts.

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Document (1)

1. *County of Fresno v. State, 53 Cal. 3d 482*

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County of Fresno v. State

Supreme Court of California

April 22, 1991.

No. S015637.

Reporter

53 Cal. 3d 482 *; 808 P.2d 235 **; 280 Cal. Rptr. 92 ***; 1991 Cal. LEXIS 1363 ****; 91 Daily Journal DAR 4617; 91 Cal. Daily Op. Service 2870

COUNTY OF FRESNO, Plaintiff and Appellant, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents.

Prior History: [****1] Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.

Core Terms

local government, costs, mandates, reimbursement, taxes, user fee, the Act, subvention, facially, taxation, powers, voters, new program, appropriations, expenses, levy, increased level of service, mandated costs, limitations, subdivision, initiative, provisions, regulation, Statewide, programs, spending, charges, Ballot

Case Summary

Procedural Posture

Appellant county sought review of a judgment from the Court of Appeal (California), which affirmed the trial court's dismissal of appellant's petition for writ of mandate that sought a declaration that the state reimbursement statute, Cal. Gov't Code § 17556(d), was facially unconstitutional under Cal. Const. art. XIII B, § 6.

Overview

Appellant county filed a petition for writ of mandate and a complaint for declaratory relief against respondents, state, commission, and others, that sought to vacate respondent commission's decision, and sought a declaration that Cal. Gov't Code § 17556(d) was unconstitutional under Cal. Const. art. XIII B, § 6. The trial court denied appellant's petition for writ of mandate and complaint for declaratory relief. The appellate court affirmed. The court granted review for determination on whether § 17556(d) was facially constitutional under Cal. Const. art. XIII B, § 6. The court rejected appellant's argument that the state's enactment of § 17556(d) created a new exception to the reimbursement requirement of Cal. Const. art. XIII B, § 6. The court held that the § 17556(d) was facially constitutional under Cal. Const. art. XIII B, § 6. The court affirmed the appellate court's judgment.

Outcome

The court affirmed the appellate court's judgment, and affirmed the dismissal of appellant county's petition for writ of mandate because the state's reimbursement statute was facially constitutional under the California constitution.

LexisNexis® Headnotes

Powers

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

HN1 **Congressional Duties & Powers, Spending & Taxation**

See Cal. Const. art. XIII B, § 6.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > Local Governments > Administrative Boards

Governments > Local Governments > Claims By & Against

HN2 **Congressional Duties & Powers, Spending & Taxation**

Cal. Gov't Code §§ 17500-17630 is enacted to implement Cal. Const. art. XIII B, § 6. Cal. Gov't Code § 17500. A quasi-judicial body is created called the Commission on State Mandates to hear and decide upon any claim by a local government that the local government is entitled to be reimbursed by the state for costs as required by Cal. Const. art. XIII B, § 6. Cal. Gov't. Code § 17551(a).

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

HN3 **Congressional Duties & Powers, Spending & Taxation**

Costs is defined as costs mandated by the state for any increased costs that the local government is required to incur as a result of any statute, or any executive order implementing any statute, which mandates a new program or higher level of service of any existing program within the meaning of Cal. Const. art. XIII B, § 6. Cal. Gov't. Code § 17514.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > Local Governments > Duties &

HN4 **Congressional Duties & Powers, Spending & Taxation**

Cal. Gov't Code § 17556(d) declares that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

HN5 **Congressional Duties & Powers, Spending & Taxation**

Cal. Const. arts. XIII A, XIII B work in tandem, together restricting the California government's power both to levy and to spend taxes for public purposes.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Tax Law > State & Local Taxes > General Overview

HN6 **Congressional Duties & Powers, Spending & Taxation**

Cal. Const. art. XIII B intention is to apply to taxation specifically that provides permanent protection for taxpayers from excessive taxation, and a reasonable way to provide discipline in tax spending at state and local levels.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

HN7 **Congressional Duties & Powers, Spending & Taxation**

The relevant appropriations subject to limitation is defined as any authorization to expend during a fiscal year the proceeds of taxes. Cal. Const. art. XIII B, § 8(b). Proceeds of taxes is defined as including all tax revenues and the proceeds to government from regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably

borne by government in providing the regulation, product, or service. Cal. Const. art. XIII B, § 8(c). Excess proceeds from licenses, charges, and fees are taxes.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > Local Governments > Finance

HN8 [📄] **Congressional Duties & Powers, Spending & Taxation**

Cal. Const. art. XIII B, § 6 is included in recognition that Cal. Const. art. XIII A severely restricts the taxing powers of local governments. The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that are ill equipped to handle the task.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > Local Governments > Duties & Powers

HN9 [📄] **Congressional Duties & Powers, Spending & Taxation**

Cal. Gov't Code § 17556(d) provides that the commission shall not find costs mandated by the state if, after a hearing, the commission finds that the local government has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A county filed a test claim with the Commission on State Mandates seeking, under *Cal. Const., art. XIII B, § 6* (state must provide subvention of funds to reimburse local governments for costs of state-mandated programs or increased levels of service), reimbursement

from the state for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.). The commission found the county had the authority to charge fees to pay for the program, and the program was thus not a reimbursable state-mandated program under Gov. Code, § 17556, subd. (d), which provides that costs are not state-mandated if the agency has the authority to levy a charge or fee sufficient to pay for the program. The county filed a petition for writ of mandate and a complaint for declaratory relief against the state. The trial court denied relief. (Superior Court of Fresno County, No. 379518-4, Gary S. Austin, Judge.) The Court of Appeal, Fifth Dist., No. F011925, affirmed.

The Supreme Court affirmed the decision of the Court of Appeal. The court held, as to the single issue on review, that Gov. Code, § 17556, subd. (d), was facially constitutional under *Cal. Const., art. XIII B, § 6*. It held art. XIII B was not intended to reach beyond taxation, and § 6 was included in art. XIII B in recognition that *Cal. Const., art. XIII A*, severely restricted the taxing powers of local governments. It held that *art. XIII B, § 6* was designed to protect the tax revenues of local governments from state mandates that would require an expenditure of such revenues and, when read in textual and historical context, requires subvention only when the costs in question can be recovered solely from tax revenues. Accordingly, the court held that Gov. Code, § 17556, subd. (d), effectively construed the term "cost" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that such a construction is altogether sound. (Opinion by Mosk, J., with Lucas, C. J., Broussard, Panelli, Kennard, J.J., and Best (Hollis G.), J., * concurring. Separate concurring opinion by Arabian, J.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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CA(1) [📄] (1)

State of California § 11—Reimbursement to Local Governments for State-mandated Costs—Costs for Which Fees May Be Levied—Validity of Exclusion.

—In a proceeding by a county seeking reversal of a

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

decision by the Commission on State Mandates that the state was not required by Cal. Const., art. XIII B, § 6, to reimburse the county for costs incurred in implementing the Hazardous Materials Release Response Plans and Inventory Act (Health & Saf. Code, § 25500 et seq.), the trial court properly found that Gov. Code, § 17556, subd. (d) (costs are not state-mandated if agency has authority to levy charge or fee sufficient to pay for program), was facially constitutional. Cal. Const., art. XIII B, was intended to apply to taxation and was not intended to reach beyond taxation, as is apparent from its language and confirmed by its history. It was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues; read in its textual and historical contexts, it requires subvention only when the costs in question can be recovered solely from tax revenues. Gov. Code, § 17556, subd. (d), effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes, and that construction is altogether sound. Accordingly, Gov. Code, § 17556, subd. (d), is facially constitutional under Cal. Const., art. XIII B, § 6.

[See 9 **Witkin**, Summary of Cal. Law (9th ed. 1988) Taxation, § 124.]

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B. C. Barnum, County Counsel (Kern), and Patricia J. Randolph, Deputy County Counsel, as Amici Curiae on behalf of Plaintiff and Appellant.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, N. Eugene Hill, Assistant Attorney General, and Richard M. Frank, Deputy Attorney General, for Defendants and Respondents.

Judges: Mosk, J. Lucas, C.J., Broussard, J., Panelli, J., Kennard, J., Best (Hollis G.), J., * concur. Arabian, J.,

concurring.

Opinion by: MOSK

Opinion

[*484] [**236] [***93] MOSK, J.

We granted review in this proceeding to decide whether section 17556, subdivision (d), of the Government Code (section 17556(d)) is facially valid under article XIII B, section 6, of the California Constitution (article XIII B, section 6).

HN1^(↑) Article XIII B, section 6, provides: "Whenever the Legislature or [****2] any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [P] (a) Legislative mandates requested by the local agency affected; [P] (b) Legislation defining a new crime or changing an existing definition of a crime; or [P] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

The Legislature enacted HN2^(↑) Government Code sections 17500 through 17630 to implement article XIII B, section 6. (Gov. Code, § 17500.) It created a "quasi-judicial body" (*ibid* .) called the Commission on State Mandates (commission) (*id* ., § 17525) to "hear and decide upon [any] claim" by a local government that the local government "is entitled to be reimbursed by the state for costs" as required by article XIII B, section 6. (Gov. Code, § 17551, subd. (a).) It defined HN3^(↑) "costs" as "costs mandated by the state"—"any increased [****3] costs" that the local government "is required to incur . . . as a result of any statute . . . , or any executive order implementing any statute . . . , which mandates a new program or higher level of service of any existing program" within the meaning of article XIII B, section 6. (Gov. Code, § 17514.) Finally,

*Presiding Justice, Court of Appeal, Fifth Appellate District, sitting under assignment by the Chairperson of the Judicial

Council.

HN4 in section 17556(d) it declared that "The commission shall not find costs mandated by the state . . . if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

For the reasons discussed below, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

[*485] I. FACTS AND PROCEDURAL HISTORY

The present proceeding arose after the Legislature enacted the Hazardous Materials Release Response Plans and Inventory Act (Act). (Health & Saf. Code, § 25500 et seq.) The Act establishes minimum statewide standards for business and area plans relating to the handling and release or threatened release of hazardous materials. (*Id.*, § 25500.) It requires local governments to implement its provisions. **[****4]** (*Id.*, § 25502.) To cover the costs they may incur, it authorizes them to collect fees from those who handle hazardous materials. (*Id.*, § 25513.)

The County of Fresno (County) implemented the Act but chose not to impose the authorized fees. Instead, it filed a so-called "test" or initial claim with the commission (Gov. Code, § 17521) seeking reimbursement from the State of California (State) under article XIII B, section 6. After a hearing, the commission rejected the claim. In its statement of decision, the commission made the following findings, among others: the Act constituted a "new program"; the County did indeed incur increased **[**237] [***94]** costs; but because it had authority under the Act to levy fees sufficient to cover such costs, section 17556(d) prohibited a finding of reimbursable costs.

The County then filed a petition for writ of mandate and complaint for declaratory relief against the State, the commission, and others, seeking vacation of the commission's decision and a declaration that section 17556(d) is unconstitutional under article XIII B, section 6. While the matter was pending, the commission amended its statement of decision to include another basis for denial **[****5]** of the test claim: the Act did not constitute a "program" under the rationale of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (*County of Los Angeles*), because it did not impose unique requirements on local governments.

After a hearing, the trial court denied the petition and

effectively dismissed the complaint. It determined, *inter alia*, that mandate under *Code of Civil Procedure section 1094.5* was the County's sole remedy, and that the commission was the sole properly named respondent. It also determined that section 17556(d) is constitutional under article XIII B, section 6. It did not address the question whether the Act constituted a "program" under *County of Los Angeles*. Judgment was entered accordingly.

The Court of Appeal affirmed. It held the Act did indeed constitute a "program" under *County of Los Angeles*, *supra*, 43 Cal.3d 46. It also held section 17556(d) is constitutional under article XIII B, section 6.

[*486] CA(1) (1) We granted review to decide a single issue, i.e., whether section 17556(d) is facially constitutional under article XIII B, section 6.

[**6] II. DISCUSSION**

We begin our analysis with the California Constitution. At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new "special taxes." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

HN5 "Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and **[****7]** to spend [taxes] for public purposes." (*City of Sacramento*, *supra*, 50 Cal.3d at p. 59, fn. 1.)

HN6 Article XIII B of the Constitution was intended to apply to taxation specifically, to provide "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232],

quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an "appropriations limit" for both state and local governments (*Cal. Const., art. XIII B, § 8, subd. (h)*) and allows no "appropriations subject to limitation" in excess thereof (*id.*, § 2). (See *County of Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 446.) It defines **HN7** the relevant "appropriations subject to limitation" as "any authorization to expend during a fiscal year the proceeds of taxes" (*Cal. Const., art. XIII B, § 8, subd. (b)*.) It defines "proceeds of ******8** taxes" as including "all tax revenues and the proceeds to . . . government from," inter alia, "regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by [government] in providing ****238** *****95** the regulation, product, or service" (*Cal. Const., art. XIII B, § 8, subd. (c)*, italics added.) Such "excess" proceeds from "licenses," "charges," and "fees" "are but ***487** taxes " for purposes here. (*County of Placer v. Corin*, *supra*, 113 Cal.App.3d at p. 451, italics in original.)

Article XIII B of the Constitution, however, was not intended to reach beyond taxation. That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax] sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, ******9** p. 16.)

HN8 Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles*, *supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse . . . local government for the costs [of a state-mandated new] program or

higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.

In view of the foregoing analysis, ******10** the question of the facial constitutionality of section 17556(d) under article XIII B, section 6, can be readily resolved. As noted, **HN9** the statute provides that "The commission shall not find costs mandated by the state . . . if, after a hearing, the commission finds that" the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Considered within its context, the section effectively construes the term "costs" in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound. As the discussion makes clear, the Constitution requires reimbursement only for those expenses that are recoverable solely from taxes. It follows that section 17556(d) is facially constitutional under article XIII B, section 6.

The County argues to the contrary. It maintains that section 17556(d) in essence creates a new exception to the reimbursement requirement of article XIII B, section 6, for self-financing programs and that the Legislature cannot create exceptions to the reimbursement requirement beyond those enumerated in the ******11** Constitution.

We do not agree that in enacting section 17556(d) the Legislature created a new exception to the reimbursement requirement of article ***488** XIII B, section 6. As explained, the Legislature effectively and properly construed the term "costs" as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the requirement. Therefore, they need not be explicitly excepted from its reach.

The County nevertheless argues that no matter how characterized, section 17556(d) is indeed inconsistent with article XIII B, section 6. Its contention is in substance as follows: the source of section 17556(d) is former *Revenue and Taxation Code section 2253.2*; at the time of Proposition 4, subdivision (b)(4) of that former section stated that the State Board of Control shall not allow a claim for reimbursement of costs mandated by the state if the legislation contains a self-financing authority; the ****239** *****96** drafters of Proposition 4 incorporated some of the provisions of

former *Revenue and Taxation Code section 2253.2* into article XIII B, section 6, but did not incorporate former subdivision (b)(4); their failure to do so reveals [****12] an intent to treat as immaterial the presence or absence of a "self-financing" provision; and such an intent is confirmed by the "legislative history" set out at page 55 in *Spirit of 13, Inc., Summary of Proposed Implementing Legislation and Drafters' Intent*: "the state may not arbitrarily declare that it is not going to comply with Section 6 . . . if the state provides new compensating revenues."

In our view, the County's argument is unpersuasive. Even if we assume *arguendo* that the intent of those who drafted Proposition 4 is as claimed, what is crucial here is the intent of those who voted for the measure. (See *County of Los Angeles, supra*, 43 Cal.3d 46, 56.) There is no substantial evidence that the voters sought what the County assumes the drafters desired. Moreover, the "legislative history" cited above cannot be considered relevant; it was written and circulated after the passage of Proposition 4. As such, it could not have affected the voters in any way.

To avoid this result, the County advances one final argument: "Based on the authority of [section 17556(d)], the Commission on State Mandates refuses to hear mandates on [****13] the merits once it finds that the authority to charge fees is given by the Legislature. This position is taken whether or not fees can actually or legally be charged to recover the entire costs of the program."

[*489] The County appears to be making one or both of the following arguments: (1) the commission applies section 17556(d) in an unconstitutional manner; or (2) the Act's self-financing authority is somehow lacking. Such contentions, however, miss the designated mark. They raise questions bearing on the constitutionality of section 17556(d) as applied and the legal efficacy of the authority conferred by the Act. The sole issue on review, however, is the facial constitutionality of section 17556(d).

III. CONCLUSION

For the reasons set forth above, we conclude that section 17556(d) is facially constitutional under article XIII B, section 6.

The judgment of the Court of Appeal is affirmed.

Lucas, C. J., Broussard, J., Panelli, J., Kennard, J., and

Best (Hollis G.), J., * concurred.

[****14]

Concur by: ARABIAN

Concur

ARABIAN, J., Concurring.

I concur in the determination that Government Code section 17556, subdivision (d) ¹ (section 17556(d)), does not offend *article XIII B, section 6, of the California Constitution (article XIII B, section 6)*. In my estimation, however, the constitutional measure of the issue before us warrants fuller examination than the majority allow. A literalistic analysis begs the question of whether the Legislature had the authority to act statutorily upon a subject matter the electorate has spoken to constitutionally through the initiative process.

Article XIII B, section 6, unequivocally commands that "the state shall provide a subvention of funds to reimburse . . . local government for the costs of [a new] program or increased level of service" except as specified therein. Article XIII B does not define this reference to "costs." (See *Cal. Const., art. XIII B, § 8*.) Rather, the Legislature assumed the [****15] task of explicating the related concept of "costs mandated by the state" when it created the Commission on State Mandates and enacted procedures intended to implement *article XIII B, section 6*, more effectively. (See § 17500 et seq.) As part of this statutory scheme, it exempted the state from its constitutionally imposed subvention obligation under certain enumerated circumstances. Some of these exemptions the electorate expressly contemplated in approving *article XIII B, section 6* (§ 17556, subs. (a), (c), & (g); see [**240] [***97] § 17514), while others are strictly of legislative formulation and derive from [*490] former *Revenue and Taxation Code section 2253.2*. (§ 17556, subs. (b), (d), (e), & (f).)

The majority find section 17556 valid notwithstanding

* Presiding Justice, Court of Appeal, Fifth Appellate District, assigned by the Chairperson of the Judicial Council.

¹ Unless otherwise indicated, all further statutory references are to the Government Code.

the mandatory language of article XIII B, section 6, based on the circular and conclusory rationale that "the Legislature effectively and properly construed the term 'costs' as excluding expenses that are recoverable from sources other than taxes. In a word, such expenses are outside of the scope of the [subvention] requirement. Therefore, they need not be explicitly excepted from its reach." (Maj. opn., ante, at p. 488.) In my view, [****16] excluding or otherwise removing something from the purview of a law is tantamount to creating an exception thereto. When an exclusionary implication is clear from the import or effect of the statutory language, use of the word "except" should not be necessary to construe the result for what it clearly is. In this circumstance, "I would invoke the folk wisdom that if an object looks like a duck, walks like a duck and quacks like a duck, it is likely to be a duck." (*In re Deborah C.* (1981) 30 Cal.3d 125, 141 [177 Cal.Rptr. 852, 635 P.2d 446] (conc. opn. by Mosk, J.))

Of at least equal importance, section 17500 et seq. constitutes a legislative implementation of article XIII B, section 6. As such, the overall statutory scheme must comport with the express constitutional language it was designed to effectuate as well as the implicit electoral intent. Eschewing semantics, I would squarely and forthrightly address the fundamental and substantial question of whether the Legislature could lawfully enlarge upon the scope of article XIII B, section 6, to include exceptions not originally designated in the initiative.

I do not hereby seek to undermine [****17] the majority holding but rather to set it on a firmer constitutional footing. "[S]tatutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative rather than defeat them. In so doing, sections of the Constitution, as well as the codes, will be harmonized where reasonably possible, in order that all may stand." (*Rose v. State of California* (1942) 19 Cal.2d 713, 723 [123 P.2d 505]; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58 [233 Cal.Rptr. 38, 729 P.2d 202].) To this end, it is a fundamental premise of our form of government that "the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and . . . it is competent for the Legislature to exercise all powers not forbidden" (*People v. Coleman* (1854) 4 Cal. 46, 49.) "Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested [****18] in the

[*491] Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] *In other words, 'we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited.'* [Citation.] [P] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.' [Citations.]" (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1, 488 P.2d 161], italics added.) "Specifically, the express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms. [Citations.]" (*Dean v. Kuchel* (1951) 37 Cal.2d 97, 100 [230 P.2d 811].)

As [****19] the majority opinion impliedly recognizes, neither the language nor the intent of article XIII B conflicts with the exercise of legislative prerogative we review today. Of paramount significance, neither section 6 nor any other provision of article XIII B prohibits statutory delineation of additional [**241] [***98] circumstances obviating reimbursement for state mandated programs. (See *Dean v. Kuchel*, supra, 37 Cal.2d at p. 101; *Roth Drugs, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, 729 [57 P.2d 1022]; see also *Kehrlein v. City of Oakland* (1981) 116 Cal.App.3d 332, 338 [172 Cal.Rptr. 111].)

Furthermore, the initiative was "[b]illed as a flexible way to provide discipline in government spending" by creating appropriations limits to restrict the amount of such expenditures. (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 447 [170 Cal.Rptr. 232]; see *Cal. Const., art. XIII B, § 1.*) By their nature, user fees do not affect the equation of local government spending: While they facilitate implementation of newly mandated state programs or increased [****20] levels of service, they are excluded from the "appropriations subject to limitations" calculation and its attendant budgetary constraints. (See *Cal. Const., art. XIII B, § 8*; see also *City Council v. South* (1983) 146 Cal.App.3d 320, 334 [194 Cal.Rptr. 110]; *County of Placer v. Corin*, supra, 113 Cal.App.3d at pp. 448-449; *Cal. Const., art. XIII B, § 3, subd. (b)*; cf. *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505 [246 Cal.Rptr. 21] ["fees not exceeding the

reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of "special taxes" [limited by *California Constitution, article XIII A*]q "; *Terminal Plaza Corp. v. City* [*492] and *County of San Francisco (1986) 177 Cal.App.3d 892, 906 [223 Cal.Rptr. 379]* [same].)

This conclusion fully accommodates the intent of the voters in adopting article XIII B, as reflected in the ballot materials accompanying the proposition. [****21] (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281]*.) In general, these materials convey that "[t]he goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending." (*County of Los Angeles v. State of California, supra, 43 Cal.3d at p. 61; Huntington Park Redevelopment Agency v. Martin (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220]*.) To the extent user fees are not borne by the general public or applied to the general revenues, they do not bear upon this purpose. Moreover, by imputation, voter approval contemplated the continued imposition of reasonable user fees outside the scope of article XIII B. (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Limitation of Government Appropriations, Special Statewide Elec. (Nov. 6, 1979), arguments in favor of and against Prop. 4, p. 18 [initiative "WILL curb excessive user fees imposed by local government" [****22] but "will NOT eliminate user fees . . ."]; see *County of Placer v. Corin, supra, 113 Cal.App.3d at p. 452*.)

"The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California, supra, 43 Cal.3d at p. 56*; see *City of Sacramento v. State of California (1990) 50 Cal.3d 51, 66 [266 Cal.Rptr. 139, 785 P.2d 522]*.) "Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs." (*County of Los Angeles v. State of California, supra, 43 Cal.3d at*

p. 61.) [****23] An exemption from reimbursement for state mandated programs for which local governments are authorized to charge offsetting user fees does not frustrate or compromise these goals or otherwise disturb the balance of local government financing [**242] [***99] and expenditure. ² (See *County of Placer v. Corin, supra, 113 Cal.App.3d at p. 452, [*493] fn. 7*.) Article XIII B, section 8, subdivision (c), specifically includes regulatory licenses, user charges, and user fees in the appropriations limitation equation only "to the extent that those proceeds exceed the costs reasonably borne by [the governmental] entity in providing the regulation, product, or service"

[****24] The self-executing nature of article XIII B does not alter this analysis. "It has been uniformly held that the legislature has the power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. [Citations.]" (*Chesney v. Byram (1940) 15 Cal.2d 460, 465 [101 P.2d 1106]*.) "Legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." [Citations.]" (*Id.*, at pp. 463-464; see also *County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750]*.) Section 17556(d) is not "merely [a] transparent attempt[] to do indirectly that which cannot lawfully be done directly." (*Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d 521, 541 [234 Cal.Rptr. 795]*.) [****25] On the contrary, it creates no conflict with the constitutional directive it subserves. Hence, rather than pursue an interpretive expedient, this court should expressly declare that it operates as a valid legislative implementation thereof.

"[Initiative] provisions of the Constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. [Citations.] As

²This conclusion also accords with the traditional and historical role of user fees in promoting the multifarious functions of local government by imposing on those receiving a service the cost of providing it. (Cf. *County of Placer v. Corin, supra, 113 Cal.App.3d at p. 454* ["Special assessments, being levied only for improvements that benefit particular parcels of land, and not to raise general revenues, are simply not the type of exaction that can be used as a mechanism for circumventing these tax relief provisions. [Citation.]."])

opposed to that principle, however, 'in examining and ascertaining the intention of the people with respect to the scope and nature of those . . . powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, . . . indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result [****26] to flow from the application of those powers and that they do not so apply.' [Citation.]" (*Hunt v. Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628-629 [191 P.2d 426].)

[*494] This court is not infrequently called upon to resolve the tension of apparent or actual conflicts in the express will of the people. ³ Whether that expression emanates directly from the ballot or indirectly through legislative implementation, each deserves our fullest estimation and effectuation. Given the historical and abiding role of government by initiative, I decline to circumvent that responsibility and accept uncritically the Legislature's self-validating statutory scheme as the basis for approving [***100] the exercise [**243] of its prerogative. It is not enough to say a broader constitutional analysis yields the same result and therefore is unnecessary. We provide a higher quality of justice harmonizing rather than ignoring the diverse voices of the people, for such is the nature of our office.

[****27]

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³ See, e.g., *Zumwalt v. Superior Court* (1989) 49 Cal.3d 167 [260 Cal.Rptr. 545, 776 P.2d 247]; *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197 [182 Cal.Rptr. 324, 643 P.2d 941]; *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171 [148 Cal.Rptr. 875, 583 P.2d 729]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575 [131 Cal.Rptr. 361, 551 P.2d 1193]; *Blotter v. Farrell* (1954) 42 Cal.2d 804 [270 P.2d 481]; *Dean v. Kuchel*, *supra*, 37 Cal.2d 97; *Hunt v. Mayor & Council of Riverside*, *supra*, 31 Cal.2d 619.



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Document (1)

1. *Kinlaw v. State of California, 54 Cal. 3d 326*

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Kinlaw v. State of California

Supreme Court of California

August 30, 1991

No. S014349

Reporter

54 Cal. 3d 326 *; 814 P.2d 1308 **; 285 Cal. Rptr. 66 ***; 1991 Cal. LEXIS 3745 ****; 91 Daily Journal DAR 10744; 91 Cal. Daily Op. Service 7086

FRANCES KINLAW et al., Plaintiffs and Appellants, v.
THE STATE OF CALIFORNIA et al., Defendants and
Respondents

Prior History: [****1] Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.

Department of Health Services, challenged an order of the court of appeal (California), which ruled that plaintiffs, medically indigent adults and taxpayers, had standing to seek enforcement of Cal. Const. art., XIII B, § 6. The court of appeal held that their class action seeking declaratory and injunctive relief was not barred by the availability of administrative remedies.

Disposition: The judgment of the Court of Appeal is reversed.

Overview

Plaintiffs, medically indigent adults and taxpayers, filed a class-action suit against defendants, State of California and the Director of the Department of Health Services. Plaintiffs sought enforcement of Cal. Const. art. XIII B, § 6, which imposed on defendant state an obligation to reimburse local agencies for the cost of most programs and services they were required to provide pursuant to a state mandate. Plaintiffs requested restoration of Medi-Cal, from which they were removed under 1982 Stats. ch. 328, or reimbursement to the county for the cost of providing health care to them. The trial court granted summary judgment to defendants. On appeal, the court of appeal held that plaintiffs had standing and that the action was not barred by the availability of administrative remedies. Defendants appealed. The court reversed and concluded that plaintiffs lacked standing. The legislature adopted a comprehensive legislative scheme with the express intent of providing the exclusive remedy for a claimed violation of art. XIII, § 6. The administrative remedy created was adequate to fully implement art. XIII, § 6. Plaintiffs had no right to any reimbursement for health care services.

Core Terms

funds, reimbursement, local agency, state mandate, school district, costs, local government, healthcare, mandates, medically indigent, merits, superior court, state-mandated, effective, subvention, taxpayers, programs, Finance, appropriations limit, test claim, obligations, injunction, Italics, entity, financial responsibility, new program, expenditures, declaration, residents, spending limit

Case Summary

Procedural Posture

Defendant State of California and the Director of the

HN3  **Local Governments, Finance**

Outcome

The court reversed and ruled that plaintiffs, medically indigent adults and taxpayers, lacked standing. The legislature established administrative procedures for local agencies and school districts directly affected by a state mandate to seek reimbursement for the cost of programs and services. The legislature's comprehensive scheme was the exclusive means by which the state's obligations were to be determined and enforced.

1982 Cal. Stats. ch. 328 removed medically indigent adults from the state Medi-Cal program effective January 1, 1983.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Governments > Local Governments > Claims By & Against

HN4  **Right to Jury Trial, Actions in Equity**

An injunction against enforcement of a state mandate is available only after the legislature fails to include funding in a local government claims bill following a determination by the Commission on State Mandates that a state mandate exists. Cal. Gov't Code §17612.

Administrative Law > Agency Rulemaking > State Proceedings

LexisNexis® Headnotes

Governments > State & Territorial Governments > Finance

Governments > Legislation > Initiative & Referendum

HN1  **State & Territorial Governments, Finance**

Cal. Const. art. XIII B, § 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate, if the local agencies were not under a preexisting duty to fund the activity.

Governments > State & Territorial Governments > Finance

HN2  **State & Territorial Governments, Finance**

See Cal. Const. art. XIII B, § 6.

Governments > Local Governments > Finance

Public Health & Welfare
Law > Healthcare > General Overview

HN5  **Agency Rulemaking, State Proceedings**

The legislature enacted comprehensive administrative procedures for resolution of claims arising out of Cal. Const. art. XIII B, § 6. Cal. Gov't Code § 17500.

Administrative Law > Agency Rulemaking > State Proceedings

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > Joinder of Claims

Civil Procedure > Pleading & Practice > Joinder of Claims & Remedies > General Overview

HN6  **Agency Rulemaking, State Proceedings**

The legislature created the Commission on State Mandates (Commission), Cal. Gov't Code § 17525, to adjudicate disputes over the existence of a state-mandated program, Cal. Gov't Code §§ 17551, 17557, and to adopt procedures for submission and adjudication of reimbursement claims. Cal. Gov't Code § 17553. The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and Research, and a

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public member experienced in public finance. Cal. Gov't Code § 17525. The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies, Cal. Gov't Code § 17554, establishes the method of payment of claims, Cal. Gov't Code §§ 17558, 17561, and creates reporting procedures which enable the legislature to budget adequate funds to meet the expense of state mandates. Cal. Gov't Code §§ 17562, 17600, 17612(a).

Administrative Law > Agency Rulemaking > State Proceedings

HN7 Agency Rulemaking, State Proceedings

Pursuant to procedures which the Commission on State Mandates (Commission) is authorized to establish, Cal. Gov't Code § 17553, local agencies and school districts are to file claims for reimbursement of state-mandated costs with the Commission, Cal. Gov't Code §§ 17551, 17560, and reimbursement is to be provided only through this statutory procedure. Cal. Gov't Code §§ 17550, 17552.

Governments > Local Governments > General Overview

HN8 Governments, Local Governments

"Local agency" means any city, county, special district, authority, or other political subdivision of the state. Cal. Gov't Code § 17518.

Education Law > Administration & Operation > Elementary & Secondary School Boards > Authority of School Boards

HN9 Elementary & Secondary School Boards, Authority of School Boards

"School district" means any school district, community college district, or county superintendent of schools. Cal. Gov't Code § 17519.

Administrative Law > Agency Rulemaking > State Proceedings

HN10 Agency Rulemaking, State Proceedings

The first reimbursement claim filed which alleges that a state mandate is created under a statute or executive order is treated as a "test claim." Cal. Gov't Code § 17521. A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. Cal. Gov't Code § 17553. Any interested organization or individual may participate in the hearing. Cal. Gov't Code § 17555.

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Administrative Law > Agency Rulemaking > State Proceedings

HN11 Administrative Law, Judicial Review

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. Cal. Gov't Code § 17555. The Commission on State Mandates (Commission) must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting parameters and guidelines for reimbursement of any claims relating to that statute or executive order. Cal. Gov't Code § 17557. Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. Cal. Gov't Code § 17620 et seq. Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to *Cal. Civ. Proc. Code § 1094.5*. Cal. Gov't Code § 17559.

Administrative Law > Agency Rulemaking > State Proceedings

HN12 Agency Rulemaking, State Proceedings

The parameters and guidelines adopted by the Commission on State Mandates must be submitted to

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the controller, who is to pay subsequent claims arising out of the mandate. Cal. Gov't Code § 17558. Executive orders mandating costs are to be accompanied by an appropriations bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. Cal. Gov't Code § 17561(a) and (b). Regular review of the costs is to be made by the legislative analyst, who must report to the legislature and recommend whether the mandate should be continued. Cal. Gov't Code § 17562.

Administrative Law > Agency Rulemaking > State Proceedings

HN13 **Agency Rulemaking, State Proceedings**

The Commission on State Mandates is also required to make semiannual reports to the legislature of the number of mandates found and the estimated reimbursement cost to the state. Cal. Gov't Code § 17600. The legislature must then adopt a local government claims bill. If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, and an injunction against enforcement. Cal. Gov't Code § 17612. Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. Cal. Gov't Code § 17615 et seq.

Administrative Law > Agency Rulemaking > State Proceedings

HN14 **Agency Rulemaking, State Proceedings**

See Cal. Gov't Code § 17552.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Constitutional Law > Substantive Due Process > Scope

Administrative Law > Agency Rulemaking > State Proceedings

HN15 **Separation of Powers, Constitutional**

Controls

Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the legislature.

Governments > Local Governments > Finance

Public Health & Welfare
Law > Healthcare > General Overview

HN16 **Local Governments, Finance**

Cal. Gov't Code § 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to *Cal. Const. art. XIII B, § 6*.

Governments > Local Governments > Finance

HN17 **Local Governments, Finance**

See Cal. Gov't Code § 17563.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

Public Health & Welfare
Law > Healthcare > General Overview

HN18 **Judgments, Declaratory Judgments**

The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission on State Mandates has determined that a mandate exists and the legislature has failed to include the cost in a local government claims bill, and only on petition by the county. Cal. Gov't Code § 17612.

Headnotes/Summary

Summary**CALIFORNIA OFFICIAL REPORTS SUMMARY**

Medically indigent adults and taxpayers brought an action pursuant to *Code Civ. Proc., § 526a*, against the state, alleging that it had violated *Cal. Const., art. XIII B, § 6* (reimbursement of local governments for state-mandated new programs), by shifting its financial responsibility for the funding of health care for the poor onto the county without providing the necessary funding, and that as a result the state had evaded its constitutionally mandated spending limits. The trial court granted summary judgment for the State after concluding plaintiffs lacked standing to prosecute the action. (Superior Court of Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, Judges.) The Court of Appeal, First Dist., Div. Two, Nos. A041426 and A043500, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, holding the administrative procedures established by the Legislature (Gov. Code, § 17500 et seq.), which are available only to local agencies and school districts directly affected by a state mandate, were the exclusive means by which the state's obligations under *Cal. Const., art. XIII B, § 6*, were to be determined and enforced. Accordingly, the court held plaintiffs lacked standing to prosecute the action. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.)

Headnotes**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

CA(1)[📄] (1)**State of California § 7—Actions—State-mandated Costs—Reimbursement—Exclusive Statutory Remedy.**

-- Gov. Code, § 17500 et seq., creates an administrative forum for resolution of state mandate claims arising under *Cal. Const., art. XIII B, § 6*, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions

to declare unfunded mandates invalid. In view of the comprehensive nature of the legislative scheme, and from the expressed intent, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce *Cal. Const., art. XIII B, § 6*.

CA(2)[📄] (2)**State of California § 7—Actions—State-mandated Costs—Reimbursement—Private Action to Enforce—Standing.**

--In an action by medically indigent adults and taxpayers seeking to enforce *Cal. Const., art. XIII B, § 6*, for declaratory and injunctive relief requiring the state to reimburse the county for the cost of providing health care services to medically indigent adults who, prior to 1983, had been included in the state Medi-Cal program, the Court of Appeal erred in holding that the existence of an administrative remedy (Gov. Code, § 17500 et seq.) by which affected local agencies could enforce their constitutional right under art. XIII B, § 6 to reimbursement for the cost of state mandates did not bar the action. Because the right involved was given by the Constitution to local agencies and school districts, not individuals either as taxpayers or recipients of government benefits and services, the administrative remedy was adequate to fully implement the constitutional provision. The Legislature has the authority to establish procedures for the implementation of local agency rights under art. XIII B, § 6; unless the exercise of a constitutional right is unduly restricted, a court must limit enforcement to the procedures established by the Legislature. Plaintiffs' interest, although pressing, was indirect and did not differ from the interest of the public at large in the financial plight of local government. Relief by way of reinstatement to Medi-Cal pending further action by the state was not a remedy available under the statute, and thus was not one which a court may award.

[See 7 **Witkin**, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 112.]

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Judges: Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, and Arabian, JJ., concurring. Separate dissenting opinion by Broussard, J., with Mosk, J., concurring.

Opinion by: BAXTER

Opinion

[*328] [**1309] [***67] Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of [****2] article XIII B (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to *Code of Civil Procedure section 526a* and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

[**1310] [***68] We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts

directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

State Mandates

HN1 [¶] Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation [****3] to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

[*329] "**HN2** [¶] Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIII B, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any [****4] fiscal year . . . shall be adjusted as follows: [para.] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

Plaintiffs' Action

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981-1982 Reg. Sess.) (AB 799) (**HN3**) Stats. 1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in ******5** the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly ***330** situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution.¹

******6** ****1311** *****69** At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission).²

¹ The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

² On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (*Code Civ. Proc.*, §

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state ******7** mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6.³

******8** ***331** III

Enforcement of Article XIII B, Section 6

In 1984, almost five years after the adoption of article XIII B, **HN5** the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (§ 17500.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school

1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles v. State of California*, No. B049625.)

³ Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

HN4) An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, § 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under *Section 6 of Article XIII B of the California Constitution*. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary [****9] and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Costs," which commences with section 17500, **HN6** the Legislature created the Commission (§ 17525), to adjudicate disputes over the existence of a state mandated program (§§ 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (§ 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and [**1312] [***70] Research, and a public member experienced in public finance. (§ 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (§ 17554), ⁴ establishes the method of [**332] payment of claims (§§ 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state [****10] mandates (§§ 17562, 17600, 17612, subd. (a).)

HN7 Pursuant to procedures which the Commission was authorized to establish (§ 17553), local agencies ⁵

⁴ The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (§ 17555.)

and school districts ⁶ are to file claims for reimbursement of state-mandated costs with the Commission (§§ 17551, 17560), and reimbursement is to be provided [****11] only through this statutory procedure. (§§ 17550, 17552.)

HN10 The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (§ 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (§ 17553.) Any interested organization or individual may participate in the hearing. (§ 17555.)

HN11 A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (§ 17555.) The Commission [****12] must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (§ 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (§ 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to *Code of Civil Procedure section 1094.5*. (§ 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. **HN12** The parameters and guidelines adopted by the Commission must be submitted to the Controller, who is to pay subsequent claims arising out of the mandate. (§ 17558.) Executive orders mandating costs are to be accompanied by an appropriations

⁵ **HN8** 'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (§ 17518.)

⁶ **HN9** 'School district' means any school district, community college district, or county superintendant of schools." (§ 17519.)

[*333] bill to cover the costs if the costs are not included [****13] in the budget bill, and in subsequent years the costs must be included in the budget bill. (§ 17561, subs. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst, who must report to the Legislature and recommend whether the mandate should be continued. (§ 17562.) HN13 [↑] The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (§ 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable, [**1313] [***71] and an injunction against enforcement. (§ 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (§ 17615 et seq.)

CA(1) [↑] (1) It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum [****14] for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. The statutory scheme also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (§ 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIII B of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution. . . ." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, HN14 [↑] section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." [****15] (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6.

[*334] IV

Exclusivity

CA(2) [↑] (2) Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn v. Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610-611 [46 P. 607]; *Silver v. Watson* (1972) 26 Cal.App.3d 905, 909 [103 Cal.Rptr. 576]; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 506 [19 Cal.Rptr. 668]; *Elliott v. Superior Court* (1960) 180 Cal.App.2d 894, 897 [5 Cal.Rptr. 116].) [****16] The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse . . . local governments . . .*" (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6. HN15 [↑] Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*People v. [**1314] [***72] Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; [****17] *Chesney v. Byram* (1940) 15 Cal.2d 460, 463 [101 P.2d 1106]; *County of Contra Costa v. State of*

California (1986) 177 Cal.App.3d 62, 75 [222 Cal.Rptr. 750].)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost [*335] of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIII B or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, *HN16* [¶] section 17563 gives the [****18] local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "*HN17* [¶] Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (§ 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, and any other interested person." [****19] (§ 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive.⁷

⁷ Plaintiffs' argument, that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions, is not persuasive. The legislative statement of intent to relegate

The alternative relief plaintiffs seek -- reinstatement [****20] to Medi-Cal pending further action by the state -- is not a remedy available under the statute, and thus is not one which this court may award. *HN18* [¶] The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists [*336] and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (§ 17612.)⁸

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those [****21] officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance [**1315] [***73] was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard.⁹

all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

⁸ Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000 and 17001*, and by judicial action. (See, e.g., *Mooney v. Pickett* (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].)

⁹ For this reason, it would be inappropriate to address the merits of plaintiffs' claim in this proceeding. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063].) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

[****22] Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

Dissent by: BROUSSARD

Dissent

ROUSSARD, J.

I dissent. For nine years the Legislature has defied the mandate of article XIII B of the California Constitution (hereafter article XIII B). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the [*337] Legislature computes its own appropriations limit as if it fully funded the program. [****23] The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation -- the medically indigent who are denied adequate health care -- have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIII B; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIII B does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court* (1991) 53 Cal.3d 442 [279 Cal.Rptr. 834, 807 P.2d 1063] permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should

reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIII B. To prevent the state from avoiding the spending limits imposed [****24] by article XIII B, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIII B was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. Facts and Procedural History

Plaintiffs -- citizens, taxpayers, and persons in need of medical care -- allege that [**1316] [***74] the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that [****25] as a result the state is violating article XIII B. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned [*338] itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds.¹

At hearings below, plaintiffs presented uncontradicted evidence [****26] regarding the enormous impact of these statutory changes upon the finances and

¹ The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care They may enforce the obligation imposed on the county by *Welfare and Institutions Code sections 17000 and 17001*, and by judicial action." (Maj. opn., ante, p. 336, fn. 8)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

population of Alameda County. That county now spends about \$ 40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIII B became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than \$ 20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated" "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need" "The system is clogged to the breaking point. . . . All community clinics . . . are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. [****27] As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people"

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIII B, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIII B, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda [***339] County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment [****28] for defendants were reversed. We granted review.

II. Standing

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIII B.*

Plaintiffs first claim standing as taxpayers under *Code of Civil Procedure section 526a*, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county . . . , may be maintained [**1317] [***75] against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. . . ." As in *Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 439 [261 Cal.Rptr. 574, 777 P.2d 610]*, however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under *Code of Civil Procedure section 526a*, because there is an independent basis for permitting them to proceed." Plaintiffs here [****29] seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIII B. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 9 [270 Cal.Rptr. 796, 793 P.2d 2]*, which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIII B. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIII B.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty.² Such an action may be brought by any person

² It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council (1973) 31 Cal.App.3d 48, 56 [107 Cal.Rptr. 214]* (overruled on other grounds in *Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 596 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]*), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for

"beneficially [****30] interested" in the issuance of the writ. (*Code Civ. Proc.*, § 1086.) In *Carsten [**340] v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [166 Cal.Rptr. 844, 614 P.2d 276], we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796-797, quoting 3 Davis, *Administrative Law Treatise* (1st ed. 1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520 [170 Cal.Rptr. 724], which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner v. City Council*, *supra*, 31 Cal.App.3d 48, [****31] which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop* (1924) 193 Cal. 498 [225 P. 862], which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com.*, *supra*, 27 Cal.3d 793, held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge [**1318] [****76] a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6] held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board* (1969) 275 Cal.App.2d 14 [79 Cal.Rptr. 662] held that a member of a student organization had standing [****32] to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did

summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127-128 [109 Cal.Rptr. 724].)

not.

[****33] No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, [**341] plaintiff Kinlaw, a 60-year-old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's [****34] MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency . . . pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention.³

This argument would be sound if the county were already meeting its obligations to MIA's under *Welfare [****35]* and *Institutions Code section 17000*. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs

³The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

54 Cal. 3d 326, *341; 814 P.2d 1308, **1318; 285 Cal. Rptr. 66, ***76; 1991 Cal. LEXIS 3745, ****35

here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See Mooney v. Pickett (1971) 4 Cal.3d 669 [94 Cal.Rptr. 279, 483 P.2d 1231].) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIII B ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule [****36] that a plaintiff must be beneficially interested. "Where the question is one of public right [*342] and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question [**1319] [***77] enforced." (Bd. of Soc. Welfare v. County of L. A. (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) We explained in Green v. Obledo (1981) 29 Cal.3d 126, 144 [172 Cal.Rptr. 206, 624 P.2d 256], that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. . . . It has often been invoked by California courts. [Citations.]"

Green v. Obledo presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families [****37] with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145.)

We again invoked the exception to the requirement for a beneficial interest in Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted Green v. Obledo, supra, 29 Cal.3d 126, 144, and concluded that "[t]he question in this case involves a public right to voter [****38] outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439.) We should reach the same conclusion here.

B. Government Code sections 17500- 17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIII B.

Four years after the enactment of article XIII B, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIII B, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, state Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIII B. (Gov. Code, § 17551, [*343] subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov. Code, § 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means [****39] for enforcement of article XIII B, and since that remedy is expressly limited to claims by local agencies or school districts (Gov. Code, § 17552), plaintiffs lack standing to enforce the constitutional provision. ⁴ I

⁴The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

disagree, for two reasons.

[**40] [**1320] [***78]** First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words -- "the sole and exclusive procedure by which a local agency or school district may claim reimbursement" -- limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius* -- "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (Henderson v. Mann Theatres Corp. (1976) 65 Cal.App.3d 397, 403 [135 Cal.Rptr. 266].) **[****41]**

The case is similar in this respect to Common Cause v. Board of Supervisors, supra, 49 Cal.3d 432. Here defendants contend that the counties' right of action under Government Code sections 17551- 17552 impliedly excludes **[*344]** any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in

The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax. Code, §§ 2201- 2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62 [222 Cal.Rptr. 750].) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

the proceedings [citations]." (49 Cal.3d at p. 440, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551- 17552 contain no limitation **[****42]** on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in Rosado v. Wyman (1970) 397 U.S. 397 [25 L.Ed.2d 442, 90 S.Ct. 1207]. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420 [25 L.Ed.2d at p. 460].) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

[**43]** Second, article XIII B was enacted to protect taxpayers, not governments. Section 1 and 2 of article XIII B establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIII B prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIII B, and the taxpayer-citizen can appear only if a government **[**1321] [***79]** has first instituted proceedings, is inconsistent with the ethos that led to article XIII B. The drafters of article XIII B and the voters who enacted it would not accept that the state Legislature -- the principal body regulated by the article -- could establish a procedure **[*345]** under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state **[****44]** financial officials.

One obvious reason is that in the never-ending attempts

of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into forgoing their rights to enforce article XIII B. An example is the Brown-Presley Trial Court Funding Act (Gov. Code, § 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation. ⁵ The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIII B.

[**45]** The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for

⁵(a) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate; provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988-89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [para.] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov. Code, § 77203.5, italics added.)

"As used in this chapter, 'state-mandated local program' means any and all reimbursements owed or owing by operation of either Section 6 of Article XIII B of the California Constitution, or Section 17561 of the Government Code, or both." (Gov. Code, § 77005, italics added.)

MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to **[*346]** determine the amount of the mandate -- which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIII B requires that standing to enforce that measure be given to those harmed by its violation -- in this case, the medically indigent -- and not be vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

*C. Even if plaintiffs lack standing **[****46]** this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see McKinny v. Board of Trustees (1982) 31 Cal.3d 79, 90 [181 Cal.Rptr. 549, 642 P.2d 460]), we recognized **[**1322]** **[***80]** an exception to this rule in our recent decision in Dix v. Superior Court, supra, 53 Cal.3d 442 (hereafter *Dix*). In *Dix*, the victim of a crime sought to challenge the trial court's decision to recall a sentence under *Penal Code section 1170*. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under *Penal Code section 1170, subdivision (d)*. We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing **[****47]** arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution . . . , we have jurisdiction to 'review the decision of a Court of Appeal in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues -- standing and merits. Nothing in

article VI, section 12(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing] the second subject addressed and resolved in its decision.' (Pp. 454-455, fn. 8.)

I see no grounds on which to distinguish *Dix*. The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the [****48] mandamus proceeding brought by the County of Los Angeles (see maj. opn., ante, p. 330, fn. 2) shows that it is not opposed to an appellate decision on the merits.

[*347] The majority, however, notes that various state officials -- the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research -- did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (Maj. opn., ante, p. 336, fn. 9.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae.⁶

[****49] The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great

⁶ It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honiq* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318], in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the state Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

significance, far more significant than any raised in *Dix*. Judges rarely recall sentencing under *Penal Code section 1170, subdivision (d)*; when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their [**1323] [***81] rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIII B. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may [****50] inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. Conclusion as to standing.

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude [*348] that plaintiffs have standing both as persons "beneficially interested" under *Code of Civil Procedure section 1086* and under the doctrine of *Green v. Obledo, supra, 29 Cal.3d 126*, to bring an action to determine whether the state has violated its duties under article XIII B. The remedy given local agencies and school districts by Government Code sections 17500- 17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

[****51]

III. Merits of the Appeal

A. State funding of care for MIA's.

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources.⁷

⁷ *Welfare and Institutions Code section 17000* provides that

From 1971 until 1982, and thus at the time article XIII B became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under *Welfare and Institutions Code section 17000* to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIII B became effective in 1980 the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIII B became effective. The state funded all such needs of MIA's.

[**52] In 1982, the Legislature passed Assembly Bill No. 799 (1981-1982 Reg. Sess.; Stats. 1982, ch. 328, pp. 1568-1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was [*349] initially relatively constant, generally more than \$ 400 million per year. By 1990, however, state [**82] funding [**1324] had decreased to less than \$ 250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIII B "appropriations limit," i.e., as part [***53] of the base amount of appropriations on which subsequent annual adjustments for cost-of-living and population changes would be calculated. About \$ 1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because

"[e]very county . . . shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979-1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. The function of article XIII B.

Our recent decision in *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486-487 [280 Cal.Rptr. 92, 808 P.2d 235] (hereafter *County of Fresno*), explained the function of article XIII B and its relationship to article XIII A, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIII A was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.' (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231-232 [149 Cal.Rptr. 239, 583 P.2d 1281].) [***54] The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.' (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1.)

"Article XIII B of the Constitution was intended . . . to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446 [170 Cal.Rptr. 232], [***55] quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument [*350] in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (*Cal. Const., art. XIII B, § 8, subd. (h)*) and allows no 'appropriations

subject to limitation' in excess thereof (*id.*, § 2). [8] (See County of Placer v. Corin, *supra*, 113 Cal.App.3d at p. 446.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes' (Cal. Const., art. XIII B, § 8, subd. (b).)" (County of Fresno, supra, 53 Cal.3d at p. 486.)

[****56] Under section 3 of article XIII B the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount. 9

[**1325] [***83] Absent such an agreement, however, section 6 of article XIII B generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIII B. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service" 10

⁸Article XIII B, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

⁹Section 3 of article XIII B reads in relevant part: "The appropriations limit for any fiscal year . . . shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part . . . from one entity of government to another, then for the year in which such transfer becomes effective the appropriation limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount. . . ."

¹⁰Section 6 of article XIII B further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

[****57] "Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See County of Los Angeles [v. State of California (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*ibid.*; see Lucia Mar Unified School Dist. v. Honig, *supra*, 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax [**351] revenues of local governments from state mandates that would require expenditure of such revenues." (County of Fresno, supra, 53 Cal.3d at p. 487.)

C. *Applicability of article XIII B to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from [****58] 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIII B. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIII B took effect. The purpose of article XIII B supports the plaintiffs' position.

As we have noted, article XIII A of the Constitution (Proposition 13) and article XIII B are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIII B, enacted one year later, froze both state and county appropriations at the level of the 1978-1979 budgets -- a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIII B further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear [****59] that article XIII B was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIII B, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIII B

was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County taxpayers [**1326] [***84] would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIII B.

Our decisions interpreting article XIII B demonstrate that the state's [****60] subvention requirement under section 6 is not vitiated simply because the [*352] "program" existed before the effective date of article XIII B. The alternate phrase of section 6 of article XIII B, "higher level of service[.]" . . . must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.'* (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 [233 Cal.Rptr. 38, 729 P.2d 202], italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues [****61] imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when *Education Code section 59300* (hereafter *section 59300*), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIII B. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by *section 59300*

imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that *section 59300* called for only an "adjustment of costs" of educating the severely handicapped, and that *"a shift in the funding of an existing program is not a new program or a higher level of service"* within the meaning of article XIII B. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 834, italics added.)

We reversed, [****62] rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [para.] . . . To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIII B. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIII A, which severely limited the taxing [*353] power of local governments. . . . [para.] The intent of the section would plainly be violated if the state could, while retaining administrative control [11] of programs it has supported with state [***85] tax money, [**1327] simply shift the cost of the programs to local government [****63] on the theory that the shift does not violate section 6 of article XIII B because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar*

¹¹ The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIII B, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

Unified School Dist. v. Honig, supra, 44 Cal.3d at pp. 835-836, fn. omitted, italics added.)

[****64] The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar*, prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971-1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830*: [****65] "[B]ecause *section 59300* shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts -- *an obligation the school districts did not have at the time article XIII B was adopted* -- it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of [*354] article XIII B. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" ¹² suspended when article XIII B became effective. I fail to see the distinction between a case -- *Lucia Mar* -- in which no existing statute as of 1979 imposed an obligation on the local government and one -- this case -- in which the statute existing in 1979 imposed no obligation on local government.

[****66] The state's argument misses the salient point.

¹² The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIII B was enacted, the voters did not know which programs would be temporary and which permanent.

As I have explained, the application of section 6 of article XIII B does not depend upon when the program was created, but upon who had the burden of funding it when article XIII B went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIII B became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera (1984) 155 Cal.App.3d 136 [201 Cal.Rptr. 768]* and *Cooke v. Superior Court (1989) 213 Cal.App.3d 401 [261 Cal.Rptr. 706]*, which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide precisely [**1328] [***86] the same level of [****67] services as the state provided under Medi-Cal. ¹³ Both are correct, but irrelevant to this case. ¹⁴ The county's obligation to MIA's is defined by *Welfare and Institutions Code section 17000*, not by the former Medi-Cal program. ¹⁵ If the [*355] state, in transferring an

¹³ It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court (1989) 207 Cal.App.3d 552, 564 [254 Cal.Rptr. 905]*.)

¹⁴ Certain language in *Madera Community Hospital v. County of Madera, supra, 155 Cal.App.3d 136*, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds*, notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151.) *Welfare and Institutions Code section 17000* by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

¹⁵ The county's right to subvention funds under article XIII B arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "mandated" by the state; i.e., that Alameda County

obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

[****68] The state's arguments are also undercut by the fact that it continues to use the approximately \$ 1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIII B. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. Conclusion

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIII A of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIII B which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIII B both to those persons whom it was designed to protect -- the citizens and taxpayers [****69] -- and to those harmed by its violation -- the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIII B and postpones the day when the medically indigent will receive adequate health care.

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has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at pp. 836-837.)



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1. *County of Los Angeles v. State of California, 43 Cal. 3d 46*

Client/Matter: -None-

Search Terms: County of Los Angeles v. State of California, 43 Cal. 3d 46

Search Type: Natural Language

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Content Type
Cases

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-None-

County of Los Angeles v. State of California

Supreme Court of California

January 2, 1987

L.A. No. 32106

Reporter

43 Cal. 3d 46 *; 729 P.2d 202 **; 233 Cal. Rptr. 38 ***; 1987 Cal. LEXIS 273 ****

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents. CITY OF SONOMA et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA et al., Defendants and Respondents

repeal, increased cost, new program, incidental, workers' compensation benefits, cost of living, state-mandated, discipline, effected

Case Summary

Subsequent History: [****1] Appellants' petition for a rehearing was denied February 26, 1987.

Prior History: Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges. The Court of Appeal, Second Dist., Div. Five, affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings (B001713 and B003561).

Disposition: The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Core Terms

workers' compensation, reimbursement, local agency, increased level of service, local government, costs, Taxation, employees, mandated, programs, appropriation, benefits, subvention, changes, plenary power, subdivision, electorate, increases, repeal, constitutional provision, higher level of service, pro tanto

Procedural Posture

Appellant county and city sought review of a decision of the Court of Appeals, Third Appellate District, Second Division (California), which held that state-mandated increases in workers' compensation benefits, that do not exceed the rise in the cost of living, were not costs which must be borne by respondent state under Cal. Const. art. XIII B, and its legislative implementing statutes.

Overview

Proceedings were initiated to determine whether legislation, which increased certain workers' compensation benefit payments, was subject to the command of Cal. Const. art. XIII B that local government costs mandated by respondent state must be funded by respondent. Appellant county and city sought review of the appellate court decision which held that state-mandated increases in workers' compensation benefits, that did not exceed the rise in the cost of living, were not costs which must be borne by respondent under Cal. Const. art. XIII B. On appeal, the court agreed that the State Board of Control properly denied appellants' claims but the court's conclusion rested on entirely new grounds. Thus, the judgment was reversed on a finding that appellants' petitions for writs of mandate to compel approval of appellants' claims

lacked merit and should have been denied outright. The court concluded that Cal. Const. art. XIII B, § 6 had no application to, and respondent need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations received.

Outcome

The judgment of the court of appeal was reversed in favor of respondent state. The court concluded that appellant county and city's reimbursement claims were both properly denied by the California State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

LexisNexis® Headnotes

Governments > Local Governments > Finance

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Governments > Legislation > Interpretation

Governments > Public Improvements > General Overview

Workers' Compensation & SSDI > Coverage > Employment Status > Governmental Employees

HN1 [↓] **Local Governments, Finance**

The legislative intent of the Cal. Const. art. XIII B was subvention for the expense or increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state

residents or entities. In using the word "programs" the commonly understood meaning of the term was meant, as in programs which carry out the governmental function of providing services to the public.

Governments > Legislation > Expiration, Repeal & Suspension

HN2 [↓] **Legislation, Expiration, Repeal & Suspension**

It is ordinarily to be presumed that the legislature by deleting an express provision of a statute intended a substantial change in the law.

Governments > Legislation > Interpretation

HN3 [↓] **Legislation, Interpretation**

In construing the meaning of the constitutional provision, the court's inquiry is not focussed on what the legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted Cal. Const. art. XIII B. To determine this intent, the court must look to the language of the provision itself.

Governments > Local Governments > Elections

Governments > Legislation > Enactment

Governments > Legislation > Types of Statutes

HN4 [↓] **Local Governments, Elections**

Although a bill for state subvention for the incidental cost to local governments of general laws may be passed by simple majority vote of each house of the legislature pursuant to Cal. Const. art. IV, § 8(b), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by Cal. Const. art. XIII B. Cal. Rev. & Tax. Code § 2255(c). Revenue bills must be passed by two-thirds vote of each house of the legislature. Cal. Const. art. IV, § 12(d).

43 Cal. 3d 46, *46; 729 P.2d 202, **202; 233 Cal. Rptr. 38, ***38; 1987 Cal. LEXIS 273, ****1

Governments > State & Territorial
Governments > Relations With Governments

various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

Workers' Compensation & SSDI > Benefit
Determinations > General Overview

Governments > Legislation > Effect &
Operation > General Overview

Governments > Local Governments > Duties &
Powers

Workers' Compensation &
SSDI > Coverage > General Overview

Governments > Public Improvements > General
Overview

HN7 [↓] Legislation, Effect & Operation

Business & Corporate Compliance > ... > Disability
& Unemployment Insurance > Unemployment
Compensation > Scope & Definitions

Cal. Const. art. XIV, § 4 gives the legislature plenary power, unlimited by any provision of the California Constitution, over workers' compensation.

Workers' Compensation & SSDI > General
Overview

Governments > Legislation > Effect &
Operation > General Overview

Workers' Compensation & SSDI > Administrative
Proceedings > Awards > Enforcement

Workers' Compensation &
SSDI > Coverage > General Overview

Workers' Compensation & SSDI > Administrative
Proceedings > Judicial Review > General Overview

HN8 [↓] Legislation, Effect & Operation

Workers' Compensation & SSDI > ... > Course of
Employment > Activities Related to
Employment > Emergencies

See Cal. Const. art. XIV, § 4.

HN5 [↓] State & Territorial Governments, Relations With Governments

In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the workers' compensation program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. Cal. Lab. Code § 3201 et seq. Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of Cal. Const. art. XIII B, § 6.

Governments > Legislation > Expiration, Repeal &
Suspension

HN9 [↓] Legislation, Expiration, Repeal & Suspension

A pro tanto repeal of conflicting state constitutional provisions removes "insofar as necessary" any restrictions which would prohibit the realization of the objectives of the new article.

Headnotes/Summary

Summary CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service

Governments > Legislation > Interpretation

HN6 [↓] Legislation, Interpretation

In the absence of irreconcilable conflict among their

mandated by the state for workers' compensation benefits. The trial court found that Cal. Const., art. XIII B, § 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted art. XIII B, § 6, their intent was not to require that state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by art. XIII B, § 6. Finally, the court held that no pro tanto repeal of Cal. Const., art. XIV, § 4 (workers' compensation), was intended or made necessary by the adoption of art. XIII B, § 6. (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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CA(1) (1)

State of California § 12—Fiscal Matters—Appropriations—Reimbursement to Local Governments—Costs to Be Reimbursed.

--When the voters adopted Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

CA(2) (2)

Statutes § 18—Repeal—Effect—"Increased Level of Service."

--The statutory definition of the phrase "increased level of service," within the meaning of Rev. Tax. Code, § 2207, subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See Am.Jur.2d, Statutes, § 384.]

CA(3) (3)

Constitutional Law § 13—Construction of Constitutions—Language of Enactment.

--In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

CA(4) (4)

Constitutional Law § 13—Construction of Constitutions—Language of Enactment—"Program"

--The word "program," as used in Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the

state.

CA(5)[↓] (5)

**State of California § 12—Fiscal Matters—
Appropriations—Reimbursement to Local
Governments—Increases in Workers' Compensation
Benefits.**

--The provisions of *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for nw programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of *art. XIII B, § 6*. Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182 [203 Cal. Rptr. 258]*, to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees by covered by unemployment insurance.)

[See *Cal. Jur. 3d*, State of California, § 78.]

CA(6)[↓] (6)

**Constitutional Law § 14—Construction of
Constitutions—Reconcilable and Irreconcilable
Conflicts.**

--Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

CA(7)[↓] (7)

**Constitutional Law § 14—Construction of
Constitutions—Reconcilable and Irreconcilable
Conflicts—Pro Tanto Repeal of Constitutional**

Provision.

--The goals of *Cal. Const., art. XIII B, § 6* (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of *art. XIII B, § 6*, did not effect a pro tanto repeal of *Cal. Const., art. XIV, § 4*, which gives the Legislature plenary power over workers' compensation.

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Judges: Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.

Opinion by: GRODIN

Opinion

[*49] [**203] [***38] We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases [***39] in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing [****3] statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. CA(1) (1) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. HN1 Rather, the drafters and the electorate had in mind subvention for the expense or [**50] increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' [****4] compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of [**204] service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [para.] (a) Legislative mandates requested by the local agency affected; [para.] (b) Legislation defining a new crime or changing an existing definition of a crime; or [para.] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No [****5] definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning. ¹

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which [**51] employers, [****6] including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from \$ 231 per week to \$ 262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from \$ 55,000 to \$ 75,000. No appropriation

¹ The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[The] initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates

The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [para.] (1) will not allow the state government to force programs on local governments without the state paying for them."

[*40]** for increased state-mandated costs was made in this legislation.²

[**7]** Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207.³ They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to **[**205]** pay the increased benefits until the state provided reimbursement.

[**8]** The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly **[*52]** excepted from the requirement of state reimbursement

in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they did not, in the view of the trial court, create an "increased level of service" in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922, p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from \$ 73.50 to \$ 168, and the maximum from \$ 262.50 to \$ 336. For permanent partial disability the weekly wage was raised from a minimum of \$ 45 to \$ 105, and from a maximum **[****9]** of \$ 105 to \$ 210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, § 4453.) A \$ 10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from \$ 75,000 to \$ 85,000 for deaths in 1983, and to \$ 95,000 for deaths on or after January 1, 1984. (Lab. Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[notwithstanding] section 6 of Article XIIB of the California Constitution and section 2231 . . . of the Revenue and Taxation **[***41]** Code." (Stats. 1982, ch. 922, § 17, p. 3372.)⁴

[**10]** Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

⁴ The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

² The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.

Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of \$ 510 on which to base benefits, an unspecified appropriation was included.

³ The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or [*53] section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact [****11] of changes in the burden of proof in some workers' compensation proceedings (*Lab. Code, § 3202.5*); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (*Lab. Code, §§ 3601- 3602*); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (*Lab. Code, § 4551.*)

The court also held: "[The] changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego [**206] appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service" ⁵ described in subdivision (a) of Revenue and Taxation Code section 2207 [****12]. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of

⁵ The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased [****13] level of service." The court concluded that the repeal of section 2231 in 1975 (*Stats. 1975, ch. 486, § 7, pp. 999-1000*) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the [*54] definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon (1976) 16 Cal.3d 465, 470 [128 Cal. Rptr. 1, 546 P.2d 289].*) ⁶ On that basis the court [****42] concluded that increased costs were no longer tantamount to an increased level of service.

[****14] The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of living. The judgment in the second, or "Sonoma" case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions. ⁷

⁶ The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (*Cf. California Employment Stabilization Co. v. Payne (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].*) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.

The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., *Stats. 1973, chs. 1021 and 1023.*)

⁷ We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining [****15] the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 [**207] was adopted. That provision used the same "increased level of service" phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [para.] (a) Any law . . . which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code § 2207.) As noted, however, the definition of that term which had been [*55] included in *Revenue and Taxation Code section 2164.3* as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced *section 2164.3* in 1973, was repealed and a new section 2231 enacted. (Stats. 1975, ch. 486, §§ 6 & 7, p. 999.)⁸ Prior to repeal, *Revenue and Taxation Code section 2164.3* [****16], and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that "'Increased level of service' means any requirement mandated by state law or executive

reconsider the claim after making the additional findings. (See *Code Civ. Proc. § 1094.5, subd. (f).*)

⁸ Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[the] state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange v. Flounoy* (1974) 42 Cal. App. 3d 908, 913 [117 Cal. Rptr. 224].)

regulation . . . which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

[****17] [***43] *CA(2)* (2) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. *HN2* "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal. App. 3d 394, 402 [150 Cal. Rptr. 286]; see also *Eu v. Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased [****18] level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been [*56] aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

CA(3) (3) *HN3* In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal. Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands [**208] that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' [****19] compensation is not a new program, the parties have focussed on whether providing higher

benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

CA(4) (4) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term -- programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and ******20** do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pam., Proposed Amend. to Cal. Const. with arguments ******44** to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not ***57** for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. ******21** Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and

provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal. Rptr. 673, 547 P.2d 449]; *Biq Sur Properties v. Mott* (1976) 63 Cal. App. 3d 99, 105 [132 Cal. Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

HN4 Were section 6 construed to require state subvention for the incidental cost to local governments ******22** of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as ******209** applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.⁹ Certainly no such intent is reflected in the language or history of article XIII B or section 6.

******23** **CA(5)** (5) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation ***58** benefits that employees of private individuals or organizations receive.¹⁰ Workers' compensation is not a program

⁹Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal. Rptr. 239, 583 P.2d 1281].)

¹⁰The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal. App. 3d 182

administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. **HN5** [↑] In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See *****45** Lab. Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject ******24** to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

CA(6) [↑] **(6) HN6** [↑] Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed ******25** to give effect to all parts. (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 1 Cal.3d 801, 813-814 [114 Cal. Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal. Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal. Rptr. 781, 669 P.2d 17].)

HN7 [↑] Our concern over potential conflict arises because article XIV, section 4, ¹¹ gives the ****210**

[203 Cal. Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

¹¹ **HN8** [↑] Section 4: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all

Legislature "plenary power, unlimited by any provision of **[*59]** this Constitution" over workers' compensation.

persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.

"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

43 Cal. 3d 46, *59; 729 P.2d 202, **210; 233 Cal. Rptr. 38, ***45; 1987 Cal. LEXIS 273, ****25

Although seemingly unrelated to workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is [****26] intended [***46] to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

[****27] The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural [*60] limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma [****28] concedes that so construed article XIII B would restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision

such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with [**211] and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal. Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article [****29] XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that [*61] amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) [****30] ~~HNG~~ A pro tanto repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization [***47] of the objectives of the new article. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691-692 [97 Cal. Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 115-117 [148 Cal. Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power -- the disciplining of attorneys -- that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30

43 Cal. 3d 46, *61; 729 P.2d 202, **211; 233 Cal. Rptr. 38, ***47; 1987 Cal. LEXIS 273, ****30

Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving [****31] the objectives of article XIV, section 4, and no pro tanto repeal need be found.

CA(7)(7) (7) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal. Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage -- costs which all employers must bear -- neither threatens excessive taxation or governmental spending, [****32] nor shifts from the state to a local agency the expense of providing governmental services.

[**212] Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in [*62] benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal -- whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the [****33] plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Concur by: MOSK

Concur

MOSK, J. I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither *article XIII B, section 6, of the Constitution* nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments [****34] because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living [*63] adjustment. I agree with the Court of Appeal that this was permissible.

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SB-1437 Accomplice liability for felony murder. (2017-2018)

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Senate Bill No. 1437

CHAPTER 1015

An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

- (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
- (b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
- (c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
- (d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
- (e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.
- (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SEC. 2. Section 188 of the Penal Code is amended to read:

188. (a) For purposes of Section 187, malice may be express or implied.
- (1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
 - (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
 - (3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.
 - (b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

SEC. 3. Section 189 of the Penal Code is amended to read:

189. (a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.
- (b) All other kinds of murders are of the second degree.
 - (c) As used in this section, the following definitions apply:
 - (1) "Destructive device" has the same meaning as in Section 16460.
 - (2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.
 - (3) "Weapon of mass destruction" means any item defined in Section 11417.
 - (d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.
 - (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

SEC. 4. Section 1170.95 is added to the Penal Code, to read:

1170.95. (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

SEC. 5. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 19, 2020, I served the:

- **Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued March 19, 2020**
- **Test Claim filed by the County of Los Angeles on December 31, 2019**

Accomplice Liability for Felony Murder, 19-TC-02
Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)
County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 19, 2020 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/18/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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DEPARTMENT OF
FINANCE

GAVIN NEWSOM - GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

RECEIVED
June 19, 2020
**Commission on
State Mandates**

Exhibit B

June 19, 2020

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Response to Test Claim 19-TC-02, Accomplice Liability for Felony Murder

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 19-TC-02 submitted to the Commission on State Mandates (Commission) by the County of Los Angeles (Claimant). The Claimant alleges there are state-mandated, reimbursable costs associated with Chapter 1015, Statutes of 2018 (SB 1437).

California's felony murder rule creates liability for murder for actors and their accomplices who kill another person during the commission of a felony. The felony murder statute has been applied even when a death was accidental, unintentional, or unforeseen but occurred during the course of certain crimes. In *People v. Dillon*, the California Supreme Court commented on the necessity to fix the interpretation of the statute, and the Legislature recognized that there was a need for a statutory change to the felony murder rule to more equitably sentence persons in accordance with their involvement in the crime.

SB 1437, Chapter 1015, Statutes of 2018 added Penal Code § 1170.95 and became effective on January 1, 2019. SB 1437 makes it unlawful for a person to be held liable for murder if that person did not act with careless disregard or indifference to human life and did not kill or intend to kill the victim. The law also makes it possible for those in prison for felony murder to petition for resentencing. If the court determines the petitioner has proven the prima facie showing he/she qualifies for a resentencing hearing, the petitioner can request to be appointed counsel for the hearing, and the District Attorney's Office has the burden of showing the petitioner had the intent to kill. As a result of SB 1437, the Claimant is seeking reimbursement for the increased costs incurred by the Public Defender's Office and the District Attorney's Office to prepare for and appear at resentencing hearings. The claimant reports a cost of \$1,798,780 for fiscal year 2018-19 and estimates it will incur a cost of \$1,767,447 in 2019-20 to comply with SB 1437.

Government Code section 17556 directs the Commission to determine costs are not mandated by the state if certain criteria are met, as outlined in the statute. Finance believes SB 1437 is subject to Government Code section 17556, subdivision (g), the "crimes and infractions" exclusion since SB 1437 changed the application of and the penalty for the felony murder rule. Accordingly, the Commission should deny this claim because SB 1437 does not impose costs mandated by the state

Sincerely,

Chris Hill 4/

ERIKA LI
Program Budget Manager

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 19, 2020, I served the:

- **Finance’s Comments on the Test Claim filed June 19, 2020**

Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

By making it available on the Commission’s website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 19, 2020 at Sacramento, California.

Lorenzo Duran

Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/22/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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June 26, 2020

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

Ms. Hasmik Yaghobyan
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Accomplice Liability for Felony Murder, 19-TC-02
Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)
County of Los Angeles, Claimant

Dear Ms. Li and Ms. Yaghobyan:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision by **July 17, 2020**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.¹

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, September 25, 2020** at 10:00 a.m. via Zoom. The Proposed Decision will be issued on or about September 11, 2020.

¹ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Ms. Li and Ms. Yaghobyan

June 26, 2020

Page 2

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names of the people who will be speaking for inclusion on the witness list and so that detailed instructions regarding how to participate as a witness in this meeting on Zoom can be provided to them. When calling or emailing, please identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Heather Halsey", with a long horizontal flourish extending to the right.

Heather Halsey
Executive Director

ITEM ____

TEST CLAIM

DRAFT PROPOSED DECISION

Penal Code Sections 188, 189, and 1170.95 as added or amended by
Statutes 2018, Chapter 1015 (SB 1437)

Accomplice Liability for Felony Murder

19-TC-02

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, Chapter 1015, which added Penal Code sections 188 and 189 and amended Penal Code section 1170.95, with respect to accomplice liability for felony murder.

Generally, to prove the crime of murder, the prosecution must show that the defendant performed an act that took a human life and that the defendant had the necessary state of mind or “malice aforethought” to commit that act.¹ However, under prior law, if a killing occurred during the commission of certain other felony offences, then malice and the intent to kill could be presumed or implied to support a conviction of murder. For example, under the felony-murder rule, if a person is killed, even accidentally or by an accomplice while the defendant committed certain other felonies, the defendant could be convicted of murder without the prosecutor having to prove that the defendant intended or had the state of mind to kill.² Similarly, the natural and probable consequences doctrine allows for a conviction of murder without the need to prove the defendant’s state of mind, if the killing was a natural and probable consequence of the “targeted” crime committed by the defendant.³

The test claim statute amended Penal Code sections 188 and 189, and added section 1170.95, to limit the application of the felony-murder rule and the natural and probable consequences doctrine to only those who have either an intent to kill or who were major participants in the underlying crime and acted with reckless indifference to human life. Thus, the law no longer allows a person to be convicted of murder simply based on implied or presumed intent. To apply these standards retroactively, Penal Code section 1170.95 sets forth a petition process allowing

¹ Penal Code sections 187, 188.

² *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; Penal Code section 189, as last amended by Statutes 2010, chapter 178.

³ *People v. Chiu* (2014) 59 Cal.4th 155, 158.

those who were convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, to request the court to vacate the murder conviction and to resentence the petitioner on the remaining counts. The statute requires county district attorneys and public defenders, when appointed to defend the petitioner, to participate in the process and the hearing on the petition.

Staff finds, however, that the test claim statute, and the costs and activities alleged by the claimant, do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 because the test claim statute eliminated a crime within the meaning of Government Code section 17556(g). Staff recommends that the Commission on State Mandates (Commission) deny this Test Claim.

Procedural History

Statutes 2018, chapter 1015, was enacted on September 30, 2018, and became effective on January 1, 2019. The claimant filed the Test Claim on December 31, 2019. The Department of Finance (Finance) filed comments on the Test Claim on June 19, 2020. Commission staff issued the Draft Proposed Decision on June 26, 2020.⁴

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”⁵

Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Was the Test Claim timely filed?	Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive	<i>Timely filed</i> – The test claim statute became effective on January 1, 2019. The claimant filed this Test Claim on December 31, 2019, within 12

⁴ Exhibit D, Draft Proposed Decision.

⁵ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue	Description	Staff Recommendation
	<p>order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.”</p> <p>Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.⁶</p>	<p>months of the effective date of the test claim statute.</p>
<p>Does the test claim statute impose a reimbursable state-mandated program on local agencies under article XIII B, section 6 of the California Constitution?</p>	<p>The test claim statute amended Penal Code sections 188 and 189, which define murder and malice, to limit the definition of murder to be applicable only to those who have either an intent to kill or who were major participants in the crime and acted with reckless indifference to human life.</p> <p>The test claim statute added section 1170.95 to the Penal Code which sets forth a petition process requiring county district attorneys and public defenders, when appointed, to participate in hearings to vacate convictions under the felony-murder rule or the natural and probable causes doctrine and to resentence petitioners solely on their other crimes. To be eligible for a hearing, the person convicted of murder had to have been convicted of murder under the felony-murder rule or the natural and probable causes doctrine and could not have been convicted under Penal Code Sections 188 and 189 as amended by the test claim</p>	<p><i>Deny</i> – Sections 188 and 189 of the Penal Code do not impose any requirements on local government and, thus, they do not impose a state-mandated program.</p> <p>Penal Code section 1170.95 imposes requirements on county district attorneys and public defenders. However, those requirements do not impose costs mandated by the state.</p> <p>The test claim statute eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless the defendant’s intent to kill is proved beyond a reasonable doubt or the defendant was a major participant acting with reckless indifference to human life. In so doing, the test claim statute eliminated a crime within the meaning of Government Code section 17556(g) and therefore, the Commission cannot find costs mandated by the state.</p>

⁶ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

Issue	Description	Staff Recommendation
	<p>statute, because the petitioner’s intent to kill was not proven beyond a reasonable doubt and the petitioner was not a major participant in the crime acting with reckless indifference to human life.</p> <p>Government Code section 17556 provides in relevant part: “The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:</p> <p>¶ . . . ¶</p> <p>(g) The statute . . . eliminated a crime or infraction . . .”</p>	

Staff Analysis

A. This Test Claim Was Timely Filed.

Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.⁷

The test claim statute became effective on January 1, 2019.⁸ The claimant filed this Test Claim on December 31, 2019.⁹ Since the deadline to file the Test Claim was by January 1, 2020, this Test Claim, filed on December 31, 2019, was timely filed within 12 months of the effective date of the test claim statute.

B. Penal Code Sections 188 and 189, as Amended by the Test Claim Statute, Do Not Impose Any Requirements on Local Government.

The test claim statute amended sections 188 and 189 of the Penal Code, which defined murder and malice, to limit the definition of murder to be applicable only to the actual killer, someone

⁷ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

⁸ Statutes 2018, chapter 1015.

⁹ Exhibit A, Test Claim, page 1.

with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life. These code sections do not impose any requirements on local government. Accordingly, staff finds that Penal Code sections 188 and 189 do not impose a state-mandated program.

C. Penal Code Section 1170.95, as Added by the Test Claim Statute, Does Not Impose “Costs Mandated by the State” Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17556(g).

Penal Code section 1170.95 imposes requirements on county district attorneys and public defenders. However, those requirements do not impose costs mandated by the state.

1. Penal Code section 1170.95 allows a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine to file a petition to have their conviction vacated and to be resentenced, and imposes new requirements on counties to prosecute and defend that petition.

The test claim statute added section 1170.95 to the Penal Code which sets forth a petition and hearing process. To be eligible for a hearing, a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable causes doctrine and could not have been convicted under Penal Code Sections 188 and 189 as amended by the test claim statute, because the petitioner’s intent to kill was not proved beyond a reasonable doubt or the petitioner was not a major participant in the crime acting with reckless indifference to human life. The burden is on the person convicted of murder to file and serve a petition requesting resentencing.¹⁰ Although the statute states that the “person convicted of felony murder or murder under a natural and probable consequences theory” will file the petition, the more likely scenario is that the person’s defense counsel will write, file, and serve the petition. After the petition is filed, the court reviews the petition for sufficiency. If requested in the petition, the court shall also appoint counsel to the petitioner.¹¹

The plain language of the test claim statute requires county district attorneys to file and serve a response to a petition within 60 days from the date the petition is served.¹² The court shall vacate the murder conviction and recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in

¹⁰ Penal Code section 1170.95 (a) and (b)(1).

¹¹ Penal Code section 1170.95(c).

¹² Penal Code section 1170.95(c).

other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.¹³

The petitioners have a constitutional right to assistance of counsel.¹⁴ The right to counsel “applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake,”¹⁵ which includes a right to counsel during these petition proceedings. In California, indigent defendants in criminal proceedings are represented by the county public defender’s office and the state is represented by the county district attorney’s office. Therefore, Penal Code section 1170.95 imposes new requirements on county district attorneys and public defenders to represent their clients during the petition proceedings under Penal Code section 1170.95.

2. The requirements imposed on counties by Penal Code section 1170.95 do not result in costs mandated by the state because the test claim statute eliminates a crime within the meaning of Government Code section 17556(g).

Government Code section 17556(g), which implements article XIII B, section 6 provides that the Commission “shall not find costs mandated by the state” when the “statute or executive order created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction.” The test claim statute changed the elements of the crime of murder and, in so doing, “vacated” or eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless it is proven beyond a reasonable doubt, that the defendant had the intent to kill or was a major participant acting with reckless indifference to human life and, thus, there are no costs mandated by the state within the meaning of Government Code section 17556(g).

Conclusion

Based on the forgoing analysis, staff finds that the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

¹³ Penal Code section 1170.95(d).

¹⁴ *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 citing *Gideon v. Wainwright* (1963) 372 U.S. 335.

¹⁵ *Mempa v. Rhay* (1967) 389 U.S. 128, 134; and Government Code section 27706.

BEFORE THE
 COMMISSION ON STATE MANDATES
 STATE OF CALIFORNIA

<p>IN RE TEST CLAIM</p> <p>Penal Code sections 188, 189, and 1170.95 Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant</p>	<p>Case No.: 19-TC-02</p> <p><i>Accomplice Liability for Felony Murder</i></p> <p>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.</p> <p><i>(Adopted September 25, 2020)</i></p>
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DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 25, 2020. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	Vote
Lee Adams, County Supervisor	
Mark Hariri, Representative of the State Treasurer, Vice-Chairperson	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the State Controller	

Summary of the Findings

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, Chapter 1015, which added Penal Code sections 188 and 189 and amended Penal Code section 1170.95, with respect to accomplice liability for felony murder.

Generally, to prove the crime of murder, the prosecution must show that the defendant performed an act that took a human life and that the defendant had the necessary state of mind or “malice aforethought” to commit that act.¹⁶ However, under prior law, if a killing occurred during the commission of another crime, then malice and the intent to kill could be presumed or implied to support a conviction of murder. For example, under the felony-murder rule, if a person is killed, even accidentally or by an accomplice while the defendant committed certain other felonies, the defendant could be convicted of murder without the prosecutor having to prove that the defendant intended or had the state of mind to kill.¹⁷ Similarly, the natural and probable consequences doctrine allows for a conviction of murder without the need to prove the defendant’s state of mind, if the killing was a natural and probable consequence of the “targeted” crime committed by the defendant.¹⁸

The test claim statute amended Penal Code sections 188 and 189, and added section 1170.95, to limit the definition of murder to be applicable only to those who have either an intent to kill or who were major participants in the underlying crime and acted with reckless indifference to human life. Thus, the law no longer allows a person to be convicted of murder simply based on implied or presumed intent. To apply these standards retroactively, Penal Code section 1170.95 sets forth a petition process allowing petitioners who were convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, to request the court to vacate the murder conviction and to resentence the petitioner on the remaining counts. The statute requires county district attorneys and public defenders, when appointed to defend the petitioner, to participate in the process and the hearing on the petition. The court shall vacate the murder conviction and recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.¹⁹

¹⁶ Penal Code sections 187, 188.

¹⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; Penal Code section 189, as last amended by Statutes 2010, chapter 178.

¹⁸ *People v. Chiu* (2014) 59 Cal.4th 155, 158.

¹⁹ Penal Code section 1170.95(d).

The Commission finds that this Test Claim was timely filed within 12 months of the effective date of the test claim statute.

The Commission finds that sections 188 and 189 of the Penal Code, as amended by the test claim statute, do not impose any requirements on local government and, thus, do not impose a state-mandated program. Penal Code sections 188 and 189 define “malice” and “murder” and, as amended, limit the definition of murder to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life.

The Commission further finds that Penal Code section 1170.95 imposes new requirements on county district attorneys and public defenders to participate in the petition process, however those requirements do not impose costs mandated by the state. Government Code section 17556(g), which implements article XIII B, section 6 provides that the Commission “shall not find costs mandated by the state” when the “statute or executive order created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction.” The test claim statute changed the elements of the crime of murder and, in so doing, “vacated” or eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless it is proven beyond a reasonable doubt, that the defendant had the intent to kill or was a major participant acting with reckless indifference to human life and, thus, there are no costs mandated by the state within the meaning of Government Code section 17556(g).

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2019	The effective date of Statutes 2018, chapter 1015, amending Penal Code sections 188, 189, and enacting Penal Code section 1170.95.
12/31/2019	The claimant filed the Test Claim. ²⁰
04/17/2020	The Department of Finance (Finance) requested a 60-day extension of time to file comments on the Test Claim, which was approved for good cause.
06/19/2020	Finance filed comments on the Test Claim. ²¹
06/26/2020	Commission staff issued the Draft Proposed Decision. ²²

²⁰ Exhibit A, Test Claim.

²¹ Exhibit B, Finance’s Comments on the Test Claim.

²² Exhibit D, Draft Proposed Decision.

II. Background

A. A History of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine

1. The History of the Felony-Murder Rule in California

Generally, to be convicted of murder, proof must be shown that the defendant performed an act that took the life of a human being and had the necessary state of mind to commit that act.²³ Application of the felony-murder rule, however, removes the need to prove the defendant's malice, or state of mind.

[T]he two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. From this profound legal difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

Despite this broad factual spectrum, the Legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an offense listed in section 189: regardless of the defendant's individual culpability with respect to that homicide, he must be adjudged a first degree murderer and sentenced to death or life imprisonment with or without possibility of parole — the identical punishment inflicted for deliberate and premeditated murder with malice aforethought.²⁴

The felony-murder rule derives from English law.²⁵ In 1850, the California Legislature codified the felony-murder rule.²⁶ In 1872, the Legislature enacted the Penal Code with the inclusion of

²³ Penal Code section 187 defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Penal Code section 188 defines “malice.”

²⁴ *People v. Dillon* (1983) 34 Cal.3d 441, 476-477 citing Penal Code section 190 et seq.

²⁵ Exhibit X, Bald, *Rejoining Moral Culpability With Criminal Liability: Reconsideration of the Felony Murder Doctrine for the Current Time* (2017) 44 J. Legis. 239, 241-242, <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1679&context=jleg> (accessed on April 16, 2020); Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 546-547, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr> (accessed on April 10, 2020).

²⁶ Statutes 1850, chapter 99, page 229; *People v. Dillon* (1983) 34 Cal.3d 441, 465.

the felony-murder rule codified at Penal Code section 189.²⁷ Section 189(a) enumerates a list of felonies and if a killing occurs during the commission of one of the enumerated felonies, even if the death is unknown to the defendant or is accidental, then the defendant could be convicted of murder in the first-degree without the need for proof of the defendant’s malice. The California Supreme Court explained the purpose of the felony-murder rule as follows:

The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation omitted.] “The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.”²⁸

A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life, other than the felonies enumerated in Penal Code section 189, constitutes “at least second degree murder.”²⁹

The application of the felony-murder rule has been strongly criticized.³⁰ Three states have abolished it and several others have tempered its impact by lessening the degree of murder or homicide that can be charged.³¹ The California Supreme Court has characterized the felony-murder rule as a “‘barbaric’ concept that has been discarded in the place of its origin”³² and “a ‘highly artificial concept’ which ‘deserves no extension beyond its required application’”³³ and that “‘in almost all cases in which it is applied it is unnecessary’ and ‘it erodes the relation between criminal liability and moral culpability.’”³⁴

²⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 467-468.

²⁸ *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

²⁹ *People v. Ford* (1964) 60 Cal.2d 772, 795.

³⁰ *People v. Dillon* (1983) 34 Cal.3d 441.

³¹ Exhibit X, Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 547-548, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr> (accessed on April 10, 2020).

³² *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 583, footnote 6.

³³ *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 582.

³⁴ *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Washington* (1965) 62 Cal.2d 777.

While acknowledging that it was not empowered to overrule the Legislature, the court took a step toward reestablishing the relationship between criminal liability and culpability in *People v. Dillon*.³⁵ In that case, a 17-year-old was convicted of first-degree murder under the felony-murder rule for the shooting death of a property owner during an attempted robbery.³⁶ The defendant and several others armed themselves and entered a marijuana grow to steal some plants. The property owner and his security, also armed, responded.³⁷ The defendant heard gun fire. In the ensuing confusion, the defendant panicked and thinking that he was soon to be shot, the defendant shot the property owner nine times only stopping when his gun was empty.³⁸ Weighing the facts of the crime — the immaturity of the defendant, his panic and lack of intent to kill, only the defendant was charged with any type of homicide — against the punishment of life in prison, the court found the application of the felony-murder rule was unconstitutional in this case and reduced the defendant’s sentence from first-degree murder to second-degree murder.³⁹

2. The History of the Natural and Probable Consequences Doctrine in California

The natural and probable consequences doctrine allows for a conviction for any crime, including murder, without the need to prove the defendant’s malice or state of mind, if the “nontargeted” crime was a natural and probable consequence of the “targeted” crime that the defendant aided and abetted.⁴⁰

There are two distinct forms of culpability for aiders and abettors. “First, an aider and abettor with the necessary mental state is guilty of the intended crime [target offense]. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also ‘for any other offense that was a “natural and probable consequence” of the crime aided and abetted [nontarget offense].’”⁴¹

The nontarget offense is a natural and probable consequence if it was foreseeable by an objective, reasonable person.⁴² Like the felony-murder rule, the natural and probable

³⁵ *People v. Dillon* (1983) 34 Cal.3d 441, 465.

³⁶ *People v. Dillon* (1983) 34 Cal.3d 441, 450.

³⁷ *People v. Dillon* (1983) 34 Cal.3d 441, 451-452.

³⁸ *People v. Dillon* (1983) 34 Cal.3d 441, 482.

³⁹ *People v. Dillon* (1983) 34 Cal.3d 441, 488-489.

⁴⁰ Exhibit X, Goldstick, *Accidental Vitiating: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1290, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr> (accessed on April 10, 2020).

⁴¹ *People v. Chiu* (2014) 59 Cal.4th 155, 158 citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117. Internal citations omitted in original.

⁴² *People v. Chiu* (2014) 59 Cal.4th 155, 161-162.

consequences doctrine has been strongly criticized by legal scholars.⁴³ Indeed, the majority of states do not adhere to it and the Model Penal Code does not include it.⁴⁴

The California Supreme Court took another step toward reestablishing the relationship between criminal liability and culpability in *People v. Chiu*.⁴⁵ In that case, high school students were gathered after school. The defendant made a remark to a young woman. Her friends engaged in a verbal exchange with defendant and his friends. A brawl broke out. One of the defendant's friends drew a gun and shot and killed one of the woman's friends.⁴⁶ The defendant was convicted of first-degree premeditated murder.⁴⁷ The court explained that liability under the natural and probable consequences doctrine is vicarious. The defendant didn't intend for the nontarget offense, the shooting, to happen. So, the defendant's intent is imposed vicariously from the shooter's premeditation.⁴⁸ The court noted that premeditation "is uniquely subjective and personal" making it "too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved...."⁴⁹ The court held that the natural and probable consequences doctrine cannot support a conviction of first-degree premeditated murder.⁵⁰

3. The U.S. Supreme Court Cases Analyzing the Range of Criminal Liability Under the Felony Murder Rule.

The U.S. Supreme Court examined the criminal liability of under the felony-murder rule in two key cases that, when read together, form the two extremes on the continuum of criminal accomplice conduct. The first of these, *Enmund v. Florida*⁵¹ (hereinafter *Enmund*), presented a constitutional challenge under the Eighth Amendment ban against cruel and unusual

⁴³ Exhibit X, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 243-244, <https://works.bepress.com/john-decker/2/download/> (accessed on April 17, 2020); Goldstick, *Accidental Vitiatio: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1285, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr> (accessed on April 10, 2020).

⁴⁴ Exhibit X, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 380, <https://works.bepress.com/john-decker/2/download/> (accessed on April 17, 2020).

⁴⁵ *People v. Chiu* (2014) 59 Cal.4th 155.

⁴⁶ *People v. Chiu* (2014) 59 Cal.4th 155, 159-160.

⁴⁷ *People v. Chiu* (2014) 59 Cal.4th 155, 158.

⁴⁸ *People v. Chiu* (2014) 59 Cal.4th 155, 164-165.

⁴⁹ *People v. Chiu* (2014) 59 Cal.4th 155, 166.

⁵⁰ *People v. Chiu* (2014) 59 Cal.4th 155, 166-167.

⁵¹ *Enmund v. Florida* (1982) 458 U.S. 782.

punishment.⁵² Enmund and his companions planned to rob a couple in their home. Enmund remained in the car as the getaway driver while his companions robbed and ultimately killed the couple.⁵³ Even though Enmund did not kill, attempt to kill, or intend to kill, he was convicted of first-degree murder and sentenced to death.⁵⁴ The court held that the sentence of death was cruel and unusual punishment under the Eighth Amendment and that criminal liability must be limited to a defendant's participation in the crime.⁵⁵

In *Tison v Arizona*⁵⁶ (hereinafter *Tison*) the issue was whether the rule in *Enmund* had been properly applied in the state court.⁵⁷ The Tison brothers broke their father and his cellmate, both convicted murderers, out of prison using a large ice chest full of guns. After their car was disabled by a flat tire, the group carjacked a family of four and drove them into the desert to exchange vehicles. Their father indicated he was "thinking about" killing the family and sent the Tison brothers to bring the family some water. When the brothers were returning from retrieving the water from one of the cars, their father and his cellmate shot each of the family members, killing the parents and infant and mortally wounding the teenaged niece, who later died at the scene. The brothers at no point attempted to intervene or render aid to the victims. The group then fled and were apprehended during a shootout with police some days later.⁵⁸ Applying the felony-murder rule, the brothers were convicted of four counts of murder and sentenced to death.⁵⁹ In applying their own holding in *Enmund*, the court noted that the facts in *Tison* were different from those of *Enmund*. *Enmund* had examined the criminal participant who neither killed nor intended to kill and whose participation in the underlying crime was minor. The facts of *Tison* didn't fit that scenario. Although the Tison brothers were not participants who had killed or who intended to kill, the court found that the brothers were not minor participants and that they knew that their acts would likely result in the death of an innocent person.⁶⁰ The court focused on the importance of the brothers' mental state, but noted that the intent to kill is not necessarily a determinant of culpability.⁶¹ Indeed, the court reasoned, "This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'" ⁶² The court held that engaging in criminal acts that present a grave risk of death

⁵² *Enmund v. Florida* (1982) 458 U.S. 782, 787.

⁵³ *Enmund v. Florida* (1982) 458 U.S. 782, 783-784.

⁵⁴ *Enmund v. Florida* (1982) 458 U.S. 782, 785 and 787.

⁵⁵ *Enmund v. Florida* (1982) 458 U.S. 782, 800-801.

⁵⁶ *Tison v Arizona* (1987) 481 U.S. 137.

⁵⁷ *Tison v Arizona* (1987) 481 U.S. 137, 145-146.

⁵⁸ *Tison v Arizona* (1987) 481 U.S. 137, 139-141.

⁵⁹ *Tison v Arizona* (1987) 481 U.S. 137, 141-143.

⁶⁰ *Tison v Arizona* (1987) 481 U.S. 137, 150-152.

⁶¹ *Tison v Arizona* (1987) 481 U.S. 137, 156-157 [noting as examples the defenses of self-defense and provocation].

⁶² *Tison v Arizona* (1987) 481 U.S. 137, 157.

is acting with reckless indifference for human life and this mental state, along with the resulting death, may be part of decision process for setting a sentence.⁶³

4. The California Supreme Court Case Analyzing Criminal Liability Under the Felony-Murder Rule

Against the backdrop of the *Enmund* and *Tison* cases, the California Supreme Court in *People v. Banks*⁶⁴ considered the felony-murder special circumstances conviction of a getaway driver who was sentenced to life imprisonment without parole.⁶⁵ At issue was Proposition 115⁶⁶ which had extended death penalty eligibility to major participants in felonies who demonstrated reckless indifference to human life under the felony-murder rule. Prior to Proposition 115, aiders and abettors had to have an intent to kill to be sentenced to death or life imprisonment without parole.⁶⁷ The court had never reviewed a case involving death penalty eligibility for aiders and abettors.⁶⁸ The court examined the two U.S. Supreme Court decisions, *Enmund* and *Tison*. Harmonizing the decisions into the *Tison-Enmund* standard, the Court concluded that punishment must relate to the individual's culpability and the determination of such culpability requires individualized analysis.⁶⁹ The court reversed the sentence of life imprisonment without parole.⁷⁰

B. The Test Claim Statute, Statutes 2018, Chapter 1015, Amended Sections 188 and 189 and Added Section 1170.95 to the Penal Code to Limit the Application of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine.

1. The Test Claim Statute

During the 2017-2018 legislative session, the Senate, citing the decision in *People v. Banks*, adopted Concurrent Resolution 48, which set forth the factual bases upon which the Legislature would seek to align penalty with criminal liability in the application of the felony-murder rule and the natural and probable consequences doctrine. The factual bases included: prison overcrowding with the housing of inmates at an average of 130 percent of capacity, the \$70,836 annual cost to taxpayers to house an inmate, the fundamental unfairness in punishing felons in a manner not commensurate with their individual culpability, and the felony-murder rule had been limited or rejected by several states and is no longer followed in England where it originated.

⁶³ *Tison v Arizona* (1987) 481 U.S. 137, 157-158.

⁶⁴ *People v. Banks* (2015) 61 Cal.4th 788.

⁶⁵ *People v. Banks* (2015) 61 Cal.4th 788, 794-795.

⁶⁶ Proposition 115, Primary Election (June 5, 1990).

⁶⁷ *People v. Banks* (2015) 61 Cal.4th 788, 798.

⁶⁸ *People v. Banks* (2015) 61 Cal.4th 788, 800-801.

⁶⁹ *People v. Banks* (2015) 61 Cal.4th 788, 800-805.

⁷⁰ *People v. Banks* (2015) 61 Cal.4th 788, 812.

The resolution resolves, “That the Legislature recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime.”⁷¹

The Legislature followed through on the resolution with the passage of the test claim statute, Statutes 2018, chapter 1015, which limited the applicability of the felony-murder rule and the natural and probable consequences doctrine.

It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.⁷²

Statutes 2018, chapter 1015, section 1(g) further states the Legislature’s intent: “Except as stated in subdivision (e) of Section 189 of the Penal Code [regarding felony murder], a conviction for murder requires that a person act with malice aforethought. A person’s culpability for murder must be premised upon that person’s own actions and subjective mens rea [mental state].”

Thus, the test claim statute amended Penal Code sections 188 and 189. Penal Code section 188 was amended to add subdivision (a)(3), which states as follows:

(3) Except as stated in subdivision (e) of Section 189 [regarding felony murder], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

Penal Code section 189 was amended to add subdivision (e), which specifies the proof necessary to apply the felony-murder rule; that is, the liability for murder is limited to the actual killer, someone with the intent to kill who assisted the killer, or a major participant who acted with reckless indifference to human life.

Penal Code section 1170.95 was added to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, who would not have been convicted under the amended Penal Code sections 188 and 189, can obtain a review by filing a petition to have their murder conviction vacated and to be resentenced on any remaining counts:

(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the

⁷¹ Exhibit X, Senate Concurrent Resolution 48 (2017-2018 Reg. Sess.), resolution chapter 175.

⁷² Statutes 2018, chapter 1015, section 1(f).

petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b)(1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d)(1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails

to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

The legislative history supporting the test claim statute cites to the disproportionately long sentences, the lack of deterrent effect, and that other countries had abandoned the felony-murder rule.⁷³ Appropriations committees in both houses detailed the high costs involved in implementing the bill which included: the courts' costs to conduct the hearings, the Department of Corrections and Rehabilitation's costs to transport and supervise inmates going to hearings and to review records, as well as the costs to local governments for the time of district attorneys and public defenders to prepare for and appear at the hearings.⁷⁴ The Senate Appropriations Committee also noted the downstream savings on incarceration costs.⁷⁵ The bill passed both houses. As one court observed, "[t]hus, the Legislature's dual intents — making conviction and punishment commensurate with liability, and reducing prison overcrowding by eliminating lengthy sentences where unwarranted — dovetailed."⁷⁶

2. The California Appellate Court Upholds Constitutionality of Test Claim Statute.

The constitutionality of the test claim statute was challenged in *People v. Superior Court (Gooden)*, after petitioners, convicted of murder under both the felony murder rule and the natural and probable consequences doctrine, petitioned the court to have their murder

⁷³ Exhibit X, Senate Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), April 24, 2018, pages 3-8; see also, Assembly Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), June 26, 2018, pages 4-7.

⁷⁴ Exhibit X, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1; Assembly Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), Aug. 8, 2018, page 1.

⁷⁵ Exhibit X, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1.

⁷⁶ *People v. Munoz* (2019) 39 Cal.App.5th 738, 763.

convictions vacated under Penal Code section 1170.95.⁷⁷ The People moved to dismiss the petitions on the ground that the test claim statute, which the voters did not approve, invalidly amended Propositions 7⁷⁸ and 115⁷⁹, which increased the punishments for murder and augmented the list of predicate offenses for first-degree felony murder liability under Penal Code section 189.⁸⁰ The California Constitution provides that the Legislature may only amend or repeal a statute enacted by voter initiative if there is voter approval or as provided in the initiative.⁸¹ The Legislature may also amend statutes enacted by the voters if the initiative neither authorizes nor prohibits such action.⁸² The court held that the test claim statute was not an invalid amendment to Proposition 7 or Proposition 115 because it neither added to, nor took away from, the initiatives and, therefore, the test claim statute was constitutional in that respect.⁸³

Specifically, the amendments made by Proposition 7 did three things to increase the punishment for murder: 1) set the penalty for murder in the first-degree at death, or confinement for life without possibility of parole, or confinement for 25 years to life; 2) set the penalty for murder in the second-degree at confinement for 15 years to life; and 3) expanded the list of special circumstances that would result in a conviction of murder in the first-degree.⁸⁴ The prosecution argued that the test claim statute changed the penalties for murder. The court reasoned that such an argument stemmed from confusing the elements of murder⁸⁵ and the punishment for murder.⁸⁶ As the court explained, “the language of Proposition 7 demonstrates the electorate intended the initiative to increase the punishments, or consequences, for persons who have been convicted of murder. Senate Bill 1437 did not address the same subject matter. . . . Instead, it

⁷⁷ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270.

⁷⁸ Proposition 7, General Election (Nov. 7, 1978).

⁷⁹ Proposition 115, Primary Election (June 5, 1990).

⁸⁰ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 274.

⁸¹ California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279.

⁸² California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280 citing *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.

⁸³ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275.

⁸⁴ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280-281.

⁸⁵ “Every crime consists of a group of elements laid down by the statute or law defining the offense and every one of these elements must exist or the statute is not violated.” (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281, quoting *People v. Anderson* (2009) 47 Cal.4th 92, 101.)

⁸⁶ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281.

amended the mental state requirements for murder.”⁸⁷ The court held that the test claim statute did not amend Proposition 7.⁸⁸

The amendments made by Proposition 115 added kidnapping, train wrecking, and sex offenses to the list of felonies that can result in a charge of murder. Like the test claim statute, Proposition 115 changed the circumstances under which a person may be liable for murder. The issue, reasoned the court, was whether the test claim statute addressed what Proposition 115 authorized or prohibited. The court concluded that the test claim statute only changed the mental state necessary for a murder conviction, not the listed felonies which were the subject of Proposition 115.⁸⁹ The court held that the test claim statute did not deprive the voters from what they enacted under either initiative.⁹⁰

The test claim statute is currently under review by the California Supreme Court to determine whether it applies to *attempted* murder liability under the natural and probable consequences doctrine.⁹¹

III. Positions of the Parties

A. County of Los Angeles

The claimant alleges that the test claim statute results in reimbursable increased costs mandated by the state. Specifically, the claimant alleges that the test claim statute “requires the County to provide representation, prosecution, and housing to the petitioners who file a resentencing petition” under Penal Code section 1170.95.⁹² The claimant argues that the test claim statute “does not eliminate the felony murder rule” but rather revises “the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied

⁸⁷ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

⁸⁸ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 286.

⁸⁹ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 287, footnote omitted.

⁹⁰ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 289.

⁹¹ *People v. Lopez*, California Supreme Court, Case No. S258175, review granted November 13, 2019, on the following question:

The petitions for review are granted. The issues to be briefed and argued are limited to the following: (1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868, 143 Cal.Rptr.3d 659, 279 P.3d 1131 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 and *People v. Chiu* (2014) 59 Cal.4th 155, 172 Cal.Rptr.3d 438, 325 P.3d 972?

⁹² Exhibit A, Test Claim, page 5.

malice, unless he or she personally committed the homicidal act.”⁹³ The claimant alleges new requirements on District Attorneys, Public Defenders, Alternate Public Defenders, and Sheriffs as follows:

[T]he subject law mandates the following activities on Public Defender:

- a) To file a petition with the court that sentenced the petitioner if: 1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; 2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder; and 3) The petitioner could not be convicted of first or second degree murder because of changes to sections 188 or 189 of the Penal Code effective January 1, 2019. (Penal Code §§ 1170.95 (a), (1), (2), and (3));
- b) If the Court reviews the petition and determines that the petitioner has proven the *prima facie* showing that he/she qualifies for resentencing who has requested a counsel, the court appoints a counsel to represent the petitioner. The Counsel will have to prepare for attendance at the resentencing hearing. (Penal Code § 1170.95 (c));
- c) In preparing for and appearing at the re-sentencing hearing, counsel will have to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators, and draft legal briefs for presentation to the court. (Penal Code §§ 1170.95 (c) & (d) (1)); and
- d) Participation of counsel in training to competently represent the petitioners. (Penal Code§ 1170.95 (c))

On average, it will take at least: a) 25 hours per case excluding visitation with clients, b) additional investigation hours, and c) four (4) to five (5) hours of research. In total, a minimum of 30 hours per case.⁹⁴ [¶] . . . [¶]

[A]fter the petitioner serves his/her petition on the prosecution, the prosecutor shall:

- a) File a response within 60 days of service of the petition. The petitioner may file and serve a reply within 30 days after the prosecutor response is served. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause. Within 60

⁹³ Exhibit A, Test Claim, Section 5, page 2.

⁹⁴ Exhibit A, Test Claim, Section 5, pages 6-7. Footnotes omitted. See also Section 6, Declaration of Harvey Sherman, the Deputy-in-Charge of the Public Integrity Assurance Section, Los Angeles County Public Defender’s Office.

days after the order to show cause is issued, the court will set a resentencing hearing date. (Penal Code § 1170.95 (c))

b) Preparation and attendance at the resentencing hearing. (Penal Code § 1170.95 (d) (1))

c) To prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. The prosecutors may rely on the record of conviction or offer new or additional evidence to meet their respective burdens or request additional documents. (Penal Code § 1170.95 (d) (3))

d) Retention and utilization of experts to evaluate the petitioner's eligibility for resentencing. (Penal Code § 1170.95 (d) (3))

e) Participation of counsel in training for a competent prosecution. (Penal Code § 1170.95 (d) (3))

On average, it will take at least 20 hours per case for obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time due to the loss of records that will be used to establish the firm basis for the petition.⁹⁵

The claimant had the following costs complying with the requirements of the test claim statute:

Department	FY 2018-19	FY 2019-20
District Attorney	\$1,592,284	\$1,295,852
Public Defender	\$ 206,496	\$ 471,595
Total	\$1,798,780	\$1,767,447⁹⁶

Relying on the statistics provided to the Senate Committee on Appropriations by the California Department of Corrections and Rehabilitation, the claimant's statewide cost estimate is about \$18,153,459.⁹⁷

The claimant alleges that there are no funding sources to cover these costs.⁹⁸ Finally, the claimant alleges that "none of the exceptions in Government Code Section 17556 excuse the state from reimbursing Claimant for the costs associated with the implementing the required activities."⁹⁹

⁹⁵ Exhibit A, Test Claim, Section 5, pages 7-8. Footnotes omitted. See also Section 6, Declaration of Brock Lunsford, the Deputy-in-Charge of the Murder Resentencing Unit, County of Los Angeles District Attorney's Office.

⁹⁶ Exhibit A, Test Claim, Section 5, page 8; see also Section 6, Declaration of Sung Lee, Departmental Finance Manager, Los Angeles County Public Defender's Office and Declaration of Ping Yu, Accounting Officer, County of Los Angeles District Attorney's Office.

⁹⁷ Exhibit A, Test Claim, Section 5, pages 9-10; see also Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.) May 14, 2018, page 3.

⁹⁸ Exhibit A, Test Claim, Section 5, pages 10.

⁹⁹ Exhibit A, Test Claim, Section 5, page 13.

B. Department of Finance

Finance filed comments on June 19, 2020, recommending that the Commission deny the test claim as follows: “Finance believes SB 1437 is subject to Government Code section 17556, subdivision (g), the ‘crimes and infractions’ exclusion since SB 1437 changed the application of and the penalty for the felony murder rule. Accordingly, the Commission should deny this claim because SB 1437 does not impose costs mandated by the state.”¹⁰⁰

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁰¹ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government]”¹⁰²

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁰³
2. The mandated activity constitutes a “program” that either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹⁰⁴
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁰⁵
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not

¹⁰⁰ Exhibit B, Finance’s Comments on the Test Claim, at p. 2.

¹⁰¹ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁰² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁰³ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

¹⁰⁴ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 [reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56].

¹⁰⁵ *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁰⁶

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.¹⁰⁷ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁰⁸ In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁰⁹

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations, effective April 1, 2018, defines “12 months” as 365 days.¹¹⁰

The test claim statute became effective on January 1, 2019,¹¹¹ resulting in a January 1, 2020 deadline for the filing of a test claim. The claimant filed this Test Claim on December 31, 2019, within twelve months of the effective date.¹¹² Accordingly, this Test Claim was timely filed.

B. Penal Code Sections 188 and 189, as Amended by the Test Claim Statute, Do Not Impose Any Requirements on Local Government.

As indicated in the Background, the test claim statute amended sections 188 and 189 of the Penal Code, which define “malice” and “murder,” to limit the application of the felony-murder rule and the natural and probable consequences doctrine to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life. These code sections do not impose any requirements on local government and, thus, they do not impose a state-mandated program.

¹⁰⁶ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

¹⁰⁷ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

¹⁰⁸ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

¹⁰⁹ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

¹¹⁰ California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

¹¹¹ Statutes 2018, chapter 1015.

¹¹² Exhibit A, Test Claim, page 1.

C. Penal Code Section 1170.95, as Added by the Test Claim Statute, Does Not Impose “Costs Mandated by the State” Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17556(g).

Penal Code section 1170.95 imposes requirements on county district attorneys and public defenders. However, those requirements do not impose costs mandated by the state.

- 1. Penal Code section 1170.95 allows a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine to file a petition to have their conviction vacated and to be resentenced, and imposes new requirements on counties to prosecute and defend that petition.**

As indicated in the Background, the claimant seeks reimbursement for Penal Code section 1170.95, which sets forth a petition and hearing process for persons convicted of first- or second-degree murder under the felony-murder rule or the natural and probable causes doctrine to seek to vacate their conviction and to be resentenced, when it is alleged that the petitioner did not have the intent to kill or was not a major participant in the crime acting with reckless indifference to human life.¹¹³

The process begins with a person convicted under the felony-murder rule or the natural and probable consequences doctrine filing a petition with the sentencing court and serving the petition on the county district attorney and the petitioner’s defense counsel or the county public defender.¹¹⁴ Although the statute states that the person convicted will file the petition, the more likely scenario, as alleged by the claimant, is that the petitioner’s defense counsel will write, file, and serve the petition. After the petition is filed, the court will review the petition for sufficiency. If requested in the petition, the court shall also appoint counsel to the petitioner.¹¹⁵

The plain language of the test claim statute requires county district attorneys to file and serve a response to a petition within 60 days from the date the petition is served.¹¹⁶ If the parties agree or if the court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the parties can waive the hearing and, in such cases, the court shall vacate the petitioner’s conviction and resentence the petitioner without a hearing.¹¹⁷ If the court sets a hearing, the district attorney bears the burden of proof to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.¹¹⁸ If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner

¹¹³ Penal Code section 1170.95(a).

¹¹⁴ Penal Code section 1170.95(a) and (b)(1).

¹¹⁵ Penal Code section 1170.95(c).

¹¹⁶ Penal Code section 1170.95(c).

¹¹⁷ Penal Code section 1170.95(d)(2).

¹¹⁸ Penal Code section 1170.95(d)(3).

shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.¹¹⁹

The petitioners have a constitutional right to assistance of counsel.¹²⁰ The right to counsel “applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake,”¹²¹ which includes a right to counsel during petition proceedings under section 1170.95. In California, indigent defendants in criminal proceedings are represented by the county public defender’s office and the people are represented by the county district attorney’s office.

Therefore, county district attorneys and public defenders representing indigent defendants are required to represent their clients in the petition process and hearing pursuant to Penal Code section 1170.95, and these requirements are new.

2. The requirements imposed on counties by Penal Code section 1170.95 do not result in costs mandated by the state because the test claim statute eliminates a crime within the meaning of Government Code section 17556(g).

Article XIII B, section 6 is not intended to provide reimbursement for the enforcement or elimination of crime. Government Code section 17556(g), which implements article XIII B, section 6 and must be presumed constitutional by the Commission,¹²² provides that the Commission “shall not find costs mandated by the state” when the “statute or executive order created a new crime or infraction, *eliminated a crime or infraction*, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction.” As described below, the test claim statute eliminates a crime or infraction under Government Code section 17556(g) and, thus, there are no costs mandated by the state.

Under prior law, the felony-murder rule and the natural and probable consequences doctrine allowed the prosecution to convict a defendant of murder without proving the defendant’s state of mind.¹²³ The test claim statute changed that. One of the reasons the test claim statute was enacted was “to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.”¹²⁴ Thus, as amended, Penal Code sections 188 and 189 now require proof beyond a reasonable doubt that the defendant intended to kill or that the defendant was a major participant in the crime who acted with reckless indifference to human life in order for the

¹¹⁹ Penal Code section 1170.95(d)(3).

¹²⁰ *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 citing *Gideon v. Wainwright* (1963) 372 U.S. 335.

¹²¹ *Mempa v. Rhay* (1967) 389 U.S. 128, 134; Government Code section 27706.

¹²² California Constitution, article III, section 3.5.

¹²³ Penal Code section 189, as last amended by Statutes 2010, chapter 178; *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; *People v. Chiu* (2014) 59 Cal.4th 155, 158.

¹²⁴ Statutes 2018, chapter 1015, section 1(e).

defendant to be found guilty of first- or second-degree murder. As explained in *Gooden*, these amendments changed the elements of the crime of murder by now requiring proof that the defendant had the requisite mental state at the time of the crime to support a conviction of murder.¹²⁵ A conviction of murder can no longer be found when malice is imputed or implied based solely on the defendant's participation in a crime.

Penal Code section 1170.95 was enacted to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony murder rule or the natural and probable consequences doctrine, who would not have been convicted of murder under the Penal Code sections 188 and 189 as amended by the test claim statute, to obtain a review by filing a petition to have the murder conviction vacated and to be resentenced on any remaining counts. Penal Code section 1170.95(d) states that the court shall "vacate the murder conviction and . . . recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.

Thus, the test claim statute eliminates the crime of murder under the felony-murder rule and the natural and probable consequences doctrine for those who either lacked intent to kill or who were not major participants acting with reckless indifference to human life.

Accordingly, the Commission finds that Penal Code section 1170.95, as added by the test claim statute, eliminates a crime within the meaning of Government Code section 17556(g) and therefore, the Commission cannot find costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

¹²⁵ *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 26, 2020, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued June 26, 2020**

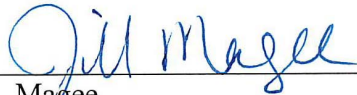
Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 26, 2020 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/22/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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SAN JOAQUIN
— COUNTY —
Greatness grows here.

Exhibit D
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Tom Patti, Vice Chair, Third District
Miguel Villapudua, First District
Chuck Winn, Fourth District
Bob Elliott, Fifth District

Rachél DeBord, Clerk of the Board of Supervisors

July 17, 2020



Ms. Keely Bosler, Chairperson
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA

RE: Accomplie Liability for Felony Murder, 19-TC-02 – Support

Dear Ms. Bosler:

On behalf of the San Joaquin County Board of Supervisors, I am writing in support of the test claim submitted by Los Angeles County for the Accomplie Liability for Felony Murder Test Claim, which is scheduled for hearing on September 25, 2020.

As noted in the test claim, SB 1437 (Skinner, 2018) redefined liability in first-degree and second-degree murder convictions. Specifically, SB 1437 establishes a statutory mechanism (Penal Code section 1170.95) that allows previously convicted inmates or parolees to petition the sentencing court to vacate (overturn) their murder conviction and applies this retroactively. SB 1437 is a State mandate, but no funding has been provided to local governments to fulfill the requirements of the legislation. In addition, there is significant workload associated with reviewing petitions including reviewing each homicide file in order to assess and make a determination on the number of eligible defendants and which petition filings to prioritize. These extensive files include: trial transcripts, crime reports, investigation, motions, probation reports and other documents to determine initial eligibility.

Based on information received from the California Department of Corrections and Rehabilitation (CDCR), there are currently 432 incarcerated individuals serving time for sentences originating from San Joaquin County for first- or second-degree murder convictions and 78 people on lifetime parole for first- or second-degree murder convictions. This has resulted in 107 petitions being filed to date and has required staff to be reassigned to handle this new workload. Eligible applicants in San Joaquin County could exceed 500 clients who have been incarcerated for decades. The Departments remain understaffed to handle the increase in workload resulting from SB 1437.

In the Los Angeles County test claim, the costs for this unfunded mandated are estimated at \$1,767,447 for the District Attorney and Public Defender and the costs statewide are estimated at \$18,153,459 based on the Senate Committee on Appropriation Analysis of SB 1437. For San Joaquin County the current costs to date to implement SB 1437 for both the District Attorney and the Public Defender has been \$1,648,657.

In closing, we agree with the Los Angeles test claim that the requirements in SB 1437 for both District Attorney's and Public Defenders are unfunded mandates and should be reimbursable costs paid for by the State of California. If you have any questions about this letter please contact our County Administrator, Monica Nino at (209) 468-3203.

Sincerely,



Katherine M. Miller, Chair
San Joaquin County Board of Supervisors

c: San Joaquin Board of Supervisors
San Joaquin Legislative Delegation
Members, Commission on State Mandates
Geoffrey Neill, California State Association of Counties
Elizabeth Espinosa, Urban Counties of California

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On July 21, 2020, I served the:

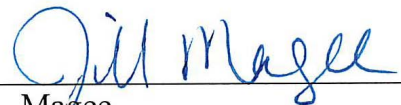
- **Notice of Extension Request Approval and Postponement of Hearing issued July 21, 2020**
- **Claimant's Request for Extension of Time and Postponement of Hearing filed July 21, 2020**
- **Notice of Change of Representation filed July 17, 2020**
- **San Joaquin County Board of Supervisors' Chair's Comments on the Draft Proposed Decision filed July 17, 2020**

Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)
County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 21, 2020 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/20/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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August 10, 2020

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RECEIVED
August 10, 2020
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LATE FILING

Exhibit E

RE: Accomplice Liability for Felony Murder, 19-TC-02 - Support

Dear Ms. Bosler:

On behalf of the California Public Defenders Association, the largest statewide organization of criminal defense practitioners, with a membership in excess of 4000 individuals, this letter is being submitted to express our support of the test claim submitted by Los Angeles County, which is scheduled for hearing on September 25, 2020, and to explain the basis for our collective disagreement with the analysis and conclusion of the Department of Finance’s staff, as set forth in its draft proposed decision regarding 19-TC-02 – at least as far as Penal Code section 1170.95 is concerned.

In its draft decision, DOF staff acknowledges that, by enacting Penal Code section 1170.95, Senate Bill 1437 does impose additional requirements on county district attorneys and appointed counsel for indigent petitioners, which did not previously exist; however staff concludes that these new costs are not reimbursable under article XIII B, section 6 of the California Constitution, because, in addition to enacting Penal Code section 1170.95, Senate Bill 1437 also amended Penal Code sections 188 and 189, thereby eliminating a crime, within the meaning of Government Code section 17556(g). (Draft Proposed Decision, p. 3.) This reasoning is flawed for two reasons: (1) No crime was eliminated by SB 1437’s amendments to section 188 and 189; these amendments merely modified the elements of an existing crime, the crime of Murder, and (2) Even if SB 1437 could be viewed as eliminating a crime (by virtue of its amendments to sections 188 and 189), Penal Code section 1170.95, the resentencing provision of SB 1147, does not relate directly to the enforcement of the crime or infraction.

I. SUBDIVISION (g) OF GOVERNMENT CODE SECTION 17556 HAS NO APPLICATION TO SB 1437, BECAUSE IT NEITHER ELIMINATED A CRIME NOR CHANGED THE PENALTY FOR A CRIME

Government Code section 17556 prohibits the commission from finding costs mandated by the state to be reimbursable, if, after a hearing, the commission finds that ¶“(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.” (Gov. Code, § 17556 (g).)



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SB 1437 did not create a new crime, eliminate a crime, or change the penalty for a crime. As far back as 1872, the crime of Murder, codified in California’s Penal Code, at section 187, has been defined as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Also, since 1872, “Malice” has been defined by Section 188 of the Penal Code, as “express” [“when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature”] and “implied” [“when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart”].

With the enactment of SB 1437, the definition of malice was clarified by the Legislature, to provide that “malice shall not be imputed to a person based solely on his or her participation in a crime.” (2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437), § 2.) With this change, the Legislature did not eliminate the crime of murder or change its penalty – it amended the definition of “malice”.

Senate Bill 1437 also amended Penal Code section 189, which, since 1872, has described the two degrees of Murder – murder in the first degree and murder in the second degree. It did not eliminate either crime; nor, did it change the penalty for either crime. The pertinent amendments to section 189 clarified the circumstances under which a perpetrator or attempted perpetrator of a predicate felony offense, in which death occurs, is criminally liable for murder, restricting those circumstances to require that: (1) the person be the actual killer, or (2) the person, intending to kill, aided and abetted the commission of a first degree murder, or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. (2018 Cal. Legis. Serv. Ch. 1015 (S.B. 1437), § 3.) These amendments neither eliminated the crime of Murder, nor did it change the penalty for conduct punishable as murder.

II. EVEN IF THE AMENDMENTS TO PENAL CODE SECTION 189 COULD BE VIEWED AS ELIMINATING A CRIME, PENAL CODE SECTION 1170.95, THE RESENTENCING PROVISION OF SB 1437, DOES NOT DIRECTLY RELATE TO THE “ENFORCEMENT” OF ANY CRIME

DOF’s proposed decision quotes, but then entirely ignores, the limiting language in subdivision (g) of Government Code section 17556, “but only for that portion of the statute *relating directly to the enforcement* of the crime or infraction.” Thus, its flawed conclusion.



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Assuming, arguendo, that SB 1437, in part, eliminated a class of conduct formerly punishable as murder (death resulting from certain felonious acts committed by a person acting as an aider or abettor to the principal, who was not the killer, did not intend to kill another person, was not a major participant, and did not display reckless indifference to human life), the resentencing statute enacted by SB 1437, Penal Code section 1170.95, does *not* relate directly to the *enforcement* of any crime.

The common understanding of “enforce the law” is “to make sure that people obey the law.”¹ Nothing about the proceedings now authorized by Penal Code section 1170.95 could reasonably construed as “relating directly to the enforcement of the crime” of Murder. Such an interpretation makes no sense. Resentencing proceedings aren’t law enforcement – they are a type of “justice enforcement.” They come into existence when the lawmakers decide that prior treatment of specified acts was unjust, modify the treatment of those who commit those acts, and provide relief to those who, at some point in the past, committed those acts. They exist to effectuate fair and just treatment of individuals under the laws. When it enacted SB 1437, the California Legislature concluded that it was unjust to punish certain felonious acts resulting in unintended deaths as Murder, and so, in addition to amending Penal Code sections 188 and 189, it enacted Penal Code section 1170.95, to restore justice to those eligible individuals who were convicted and sentenced for the crime of Murder based on felonious acts they committed in the past, but who could not be convicted of murder today. This cannot reasonably come within the meaning of “law enforcement.”

CONCLUSION

The considerable financial burden SB 1436 has placed on local government, specifically those reasonable and necessary expenses incurred by the counties in providing legal services to handle these complex postconviction proceedings, are reimbursable. The 4000 members of the California Public Defenders Association support the test claim and urge the honorable members of the Commission to reject the proposed decision and grant the test claim.

Respectfully submitted,

s/LAURA ARNOLD/

LAURA ARNOLD
First Vice President & Amicus Chair
California Public Defenders Association

¹ <https://www.merriam-webster.com/dictionary/enforce%20the%20law#:~:text=%3A%20to%20make%20sure%20that%20people,is%20to%20enforce%20the%20law>.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 11, 2020, I served the:

- **California Public Defenders Association's (CPDA's) Late Comments on the Draft Proposed Decision filed August 10, 2020**

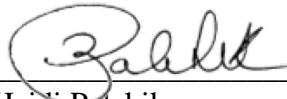
Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 11, 2020 at Sacramento, California.



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Mailing List

Last Updated: 8/4/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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County of San Diego

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August 14, 2020

Via Drop Box

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RE: Interested Party County of San Diego’s Comments on Proposed Decision
Accomplice Liability for Felony Murder, 19-TC-02
Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

Dear Ms. Halsey:

The County of San Diego (the “County”) respectfully requests the Commission reconsider the conclusion in its proposed decision that Section 1170.95 of the Penal Code (“Section 1170.95”) falls within the exception set forth in Section 17556(g) of the Government Code (“Section 17556(g)”). Section 1170.95 does not eliminate a crime. Section 1170.95 simply creates a post-conviction petition procedure.

Section 1170.95 does not Eliminate a Crime

Section 1170.95 does not eliminate the crime of murder. Section 1170.95 does not define the crime of murder. Indeed, Section 1170.95 has absolutely no substantive impact on the crime of murder. It simply creates a procedural mechanism for a person previously convicted of murder to challenge their conviction.

Section 1170.95 is found in Part 2 of the Penal Code, which is entitled “Of Criminal Procedure,” instead of Part 1, entitled “Of Crimes and Punishments.” This indicates Section 1170.95 sets forth a procedure, not a substantive crime.¹ Section

¹ See Decision in *Youth Offender Parole Hearings, 17-TC-29*, at 53 (noting that a statute fell within Part 3 of the Penal Code (“Of Imprisonment and the Death Penalty”) and not Part 2 (“Of Criminal Procedure”) and finding that fact persuasive as to whether the statute related to procedure or penalties).

1170.95 is purely a procedural device, not a substantive change in the existence of a crime.²

The Commission's proposed decision holds that the amendments to Sections 188 and 189 of the Penal Code "changed the elements of the crime of murder." (Proposed Decision at 26-27.)³ But Section 1170.95 should be analyzed separately from Sections

² Nor does the statute "change[] the penalty for a crime," another exception set forth Section 17556(g). In order to change the penalty for a crime, a crime must have been committed in the first place. Section 1170.95 provides a methodology to vacate a sentence based on the assumption that the crime of murder was not even committed. "The effect of a successful petition under section 1170.95 is to vacate the judgment...as if no judgment had ever been rendered." *People v. Superior Court (Gooden)*, 42 Cal. App. 5th 270, 286, (2019), *review denied* (Feb. 19, 2020) (internal quotation marks and citations omitted); *see also People v. Nash*, -- Cal. Rptr. 3d --, 2020 WL 4461245, at *12 (Cal. Ct. App. Aug. 3, 2020). ("[S]ection 1170.95 does not provide for resentencing a defendant who stands convicted of murder, but for resentencing a defendant whose murder conviction has been vacated based on a change to the offense of murder.")

³ The County respectfully disagrees with this conclusion as well and submits that Sections 188 and 189 also did not eliminate a crime. Those sections merely changed a **theory of liability** for the crime of murder. The crime of murder still exists. *See, e.g., People v. Chun*, 45 Cal. 4th 1172, 1184 (2009) (explaining the felony-murder rule is a **theory** of malice that supports a conviction for the crime of murder); *People v. Chiu*, 59 Cal. 4th 155, 166 (2014) (natural and probable consequences is a **theory of liability** for the crime of murder).

Indeed, in order to convict a defendant of the crime of murder, a jury need not reach a unanimous decision as to the defendant's theory of liability for the crime of murder—it must only agree that the defendant is liable for the crime of murder. *See People v. Quiroz*, 215 Cal. App. 4th 65, 74 (2013) ("[W]e have also held that a jury need not agree on the legal theory underlying a single murder charge. This rule applies whether the choice is between premeditated murder and felony-murder theories, or between direct liability and aiding and abetting liability theories") (internal citations omitted); *People v. Jenkins*, 22 Cal. 4th 900, 1024–25, *as modified* (June 28, 2000) ("It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty.")

However, the Commission need not necessarily reach this question because the test claim seeks reimbursement for the increased costs incurred due to the resentencing petition process, which is found only in Section 1170.95. (Test Claim at 5 (test claim statute "requires the County to provide representation, prosecution, and housing to petitioners who file a resentencing petition under the subject law."))

188 and 189. Test claims seek reimbursement for “increased costs which a local agency...is required to incur...as a result of **any statute**...which mandates a new program or higher level of service...” Cal. Gov’t Code § 17514. Section 1170.95 is a separate statute enacted by SB 1437, and thus in this test claim, the Commission should independently consider the specific issue of whether Section 1170.95 eliminated a crime.

Indeed, in the Commission’s proposed decision, the Commission initially analyzed Sections 188 and 189 distinctly from Section 1170.95, finding that Sections 188 and 189 are not a state-mandated program because they do not impose requirements on local government, but finding that Section 1170.95 does impose requirements on local government. (See Proposed Decision at pp. 24-26.) The Commission should similarly separately analyze whether the Section 17556(g) exception applies to each individual statute.

The proposed decision also implicitly acknowledges in some places that Section 1170.95 did not make a substantive change to the crime of murder but only provides a petition process. See Proposed Decision at 16 (“Penal Code section 1170.95 was added to provide a **petition and hearing process** by which [petitioners] **can obtain a review by filing a petition**”); *id.* at 26 (County employees must “represent their clients during **the petition proceedings** under section 1170.95”); *id.* at 27 (“Penal Code section 1170.95 was enacted to provide a **petition and hearing process**”) (emphasis added). This petition and hearing process provides a method to reverse a conviction, but it does not change the crime of murder itself. See *id.* at 27. Accordingly, Section 1170.95 does not fall within the exception set forth in Section 17556(g).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge, information or belief.

THOMAS E. MONTGOMERY, County Counsel

By: 
CHRISTINA SNIDER, Senior Deputy

EXHIBIT A

42 Cal.App.5th 270
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Petitioner,
v.
The SUPERIOR COURT OF SAN
DIEGO COUNTY, Respondent;
Allen Gooden, Real Party in Interest.
The People, Petitioner,
v.
The Superior Court of San
Diego County, Respondent;
Marty Dominguez, Real Party in Interest.

Do75787
|
Do75790
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Filed 11/19/2019

Synopsis

Background: Petitioners, who had been convicted of murder, filed petitions to vacate their convictions and for resentencing under procedures established in senate bill that amended mens rea requirement for murder and restricted application of felony-murder rule and natural and probable consequences doctrine. Following consolidation, the Superior Court, San Diego County, Nos. CR61365 and CR105918, [Louis R. Hanoian, J.](#), denied the People's motions to dismiss petitions on grounds that senate bill invalidly amended voter-approved initiatives that increased punishments for murder and augmented list of predicate offenses for first degree felony-murder liability. The People filed petitions for writs of mandate and/or prohibition, seeking order directing the Superior Court to vacate its order and enter new order granting dismissal motions.

Holdings: The Court of Appeal, [McConnell, P.J.](#), held that:

senate bill did not amend initiative that increased punishments for first- and second-degree murder, and

senate bill did not amend initiative that augmented list of predicate offenses for first degree felony-murder liability.

Petitions denied.

[O'Rourke, J.](#), dissented with statement.

See also, [2019 WL 6125910](#).

Procedural Posture(s): Appellate Review; Post-Conviction Review.

****241** Original consolidated proceedings in mandate challenging order of the Superior Court of San Diego County, [Louis R. Hanoian](#), Judge. Petitions denied. (Super. Ct. No. CR61365) (Super. Ct. No. CR105918)

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No appearance for Respondent.

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[McCONNELL](#), P.J.

***274 I**

INTRODUCTION

In 2018, the Legislature passed and the Governor signed into law Senate Bill No. 1437 (Senate Bill 1437), legislation that prospectively amended the mens rea requirements for the offense of murder and restricted the circumstances under which a person can be liable for murder under the felony-murder rule or the natural and probable consequences doctrine. (Stats. 2018, ch. 1015.) Senate Bill 1437 also established a procedure permitting certain qualifying persons who were previously convicted of felony murder or murder under the natural and probable consequences doctrine to petition the courts that sentenced them to vacate their murder convictions and obtain resentencing on any remaining counts. (*Id.*, § 3.)

Real parties in interest were convicted of murder and petitioned for vacatur of their convictions and resentencing under the procedures established by Senate Bill 1437. The People moved to dismiss the petitions on grounds that Senate Bill 1437, which the voters did not approve, invalidly amended Proposition 7 (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978); Proposition 7) and Proposition 115 (Prop. 115, as approved by voters, Primary Elec. (June 5, 1990); Proposition 115), voter initiatives that increased the punishments for murder and augmented the list of predicate offenses for first degree felony-murder liability, respectively. The trial court rejected the People’s argument and denied the motions to dismiss. The People filed petitions for writs of mandate and/or prohibition in our court, asking us to *275 direct the trial court to vacate its order denying the motions to dismiss and enter a new order granting the motions.

**242 Like the trial court, we conclude Senate Bill 1437 was not an invalid amendment to Proposition 7 or Proposition 115 because it neither added to, nor took away from, the initiatives. Therefore, we deny the People’s petitions for writ relief.

II

BACKGROUND

A

In 2018, the Legislature enacted and the Governor signed Senate Bill 1437, effective January 1, 2019. (Stats. 2018, ch. 1015.) An uncodified section of the law expressing the Legislature’s findings and declarations states the law was “necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (*Id.*, § 1, subd. (f).) It further provides that the legislation was needed “to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.” (*Id.*, § 1, subd. (e).)

Under the felony-murder rule as it existed prior to Senate Bill 1437, a defendant who intended to commit a specified felony could be convicted of murder for a killing during the felony, or attempted felony, without further examination of his or her mental state. (*People v. Chun* (2009) 45 Cal.4th 1172, 1182, 91 Cal.Rptr.3d 106, 203 P.3d 425 (*Chun*).) “The felony-murder rule impute[d] the requisite malice for a murder conviction to those who commit[ted] a 1 homicide during the perpetration of a felony inherently dangerous to human life.”¹ (*Id.* at p. 1184, 91 Cal.Rptr.3d 106, 203 P.3d 425.) “The purpose of the felony-murder rule [was] to deter those who commit[ted] the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during *276 the perpetration or attempted perpetration of the felony.” (*People v. Cavitt* (2004) 33 Cal.4th 187, 197, 14 Cal.Rptr.3d 281, 91 P.3d 222.)

1 Felony murder was designated as first degree murder if the predicate felony was enumerated in Penal Code section 189 and second degree murder if it was not specified in section 189, but was still inherently dangerous to human life. (*Chun, supra*, 45 Cal.4th at p. 1182, 91 Cal.Rptr.3d 106, 203 P.3d 425.)

Independent of the felony-murder rule, the natural and probable consequences doctrine rendered a defendant liable for murder if he or she aided and abetted the commission of a criminal act (a target offense), and a principal in the target offense committed murder (a nontarget offense) that, even if unintended, was a natural and probable consequence of the target offense. (*People v. Chiu* (2014) 59 Cal.4th 155, 161–162, 172 Cal.Rptr.3d 438, 325 P.3d 972.) “Because the nontarget offense [was] unintended, the mens rea of the aider and abettor with respect to that offense [was] irrelevant and culpability [was] imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.” (*People v. Flores* (2016) 2 Cal.App.5th 855, 867, 206 Cal.Rptr.3d 732.)

Senate Bill 1437 restricted the application of the felony murder rule and the natural and probable consequences doctrine, as applied to murder, by amending **243 Penal 2 Code section 189,² which defines the degrees of murder. (Stats. 2018, ch. 1015, § 3.) Section 189, subdivision (e), as amended, provides that a participant in a specified felony is liable for murder for a death during the commission of the

offense only if one of the following is proven: “(1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and 3 acted with reckless indifference to human life”³

2 All further statutory references are to the Penal Code, unless otherwise noted.

3 Section 189, subdivision (e) does not apply when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties. (*Id.*, subd. (f).)

Senate Bill 1437 also “added a crucial limitation” to section 188, the statutory provision that defines malice for purposes of murder. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1099, 252 Cal.Rptr.3d 33, review granted (Nov. 13, 2019, S258175) — Cal.5th —, 254 Cal.Rptr.3d 638, 451 P.3d 777, 2019 WL 5997422.) As amended, section 188 provides in pertinent part as follows: “Except as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (*Id.*, subd. (a)(3).)

Finally, Senate Bill 1437 added section 1170.95 to the Penal Code. Section 1170.95 permits a person convicted of felony murder or murder under a *277 natural and probable consequences theory to petition the sentencing court to vacate the murder conviction and resentence the person on any remaining counts if the following conditions are met: “(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of [the] changes to [s]ection 188 or 189 made effective January 1, 2019.” (*Id.*, subd. (a).)

If the petitioner makes a prima facie showing of entitlement to relief, the court must issue an order to show cause and, absent

a waiver and stipulation by the parties, hold a hearing to determine whether to vacate the murder conviction, recall the sentence, and resentence the petitioner. (§ 1170.95, subs. (c) & (d)(1).) At the resentencing hearing, the parties may rely on the record of conviction or offer new or additional evidence, and the prosecution bears the burden of proving beyond a reasonable doubt the petitioner is ineligible for resentencing. (*Id.*, subd. (d)(3).)

If the petitioner is found eligible for relief, the murder conviction must be vacated and the petitioner resented “on any remaining counts in the same manner as if the petitioner had not been [*sic*] previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.” (§ 1170.95, subd. (d)(1).) If the petitioner is found eligible for relief, but “murder was charged generically[] and the target offense was not charged,” the petitioner’s murder conviction **244 must be “redesignated as the target offense or underlying felony for resentencing purposes.” (*Id.*, subd. (e).)

The Legislature passed Senate Bill 1437 by a two-thirds vote in the Senate and a less-than-two-thirds majority in the Assembly.

B

Real parties in interest Allen Gooden and Marty Dominguez were convicted of murder in unrelated proceedings. Gooden was convicted of first degree felony murder in 1982 for the death of a neighbor during a burglary. He was sentenced to 25 years to life for the murder conviction. Dominguez was found guilty of second degree murder in 1990 after a companion killed a pedestrian under facts suggesting the jury may have relied on the natural and probable consequence doctrine. He was sentenced to 15 years to life for the murder conviction. Real parties in interest filed petitions under section 1170.95 requesting vacatur of their murder convictions and resentencing.

*278 The People moved to dismiss the petitions on grounds that Senate Bill 1437, which voters did not approve, impermissibly amended two voter-approved initiatives, Proposition 7 and Proposition 115. According to the People, these alleged amendments violated article II, section 10, subdivision (c) of the California Constitution, which states in pertinent part as follows: “The Legislature may amend or repeal an initiative statute by another statute that becomes

effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.”⁴

⁴ In the trial court, the People argued [section 1170.95](#) violates the separation of powers doctrine and The Victim's Bill of Rights Act of 2008, commonly known as Marsy's Law. The People do not pursue these arguments on appeal. However, we have considered and rejected these arguments in a companion case issued concurrently herewith. (*People v. Lamoureux* (Nov. 19, 2019, D075794) — Cal.App.5th —, 255 Cal.Rptr.3d 253, 2019 WL 6125910.)

Proposition 7, commonly known as the Briggs Initiative, increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (Prop. 7, §§ 1–2.) It increased the punishment for second degree murder from a term of five, six, or seven years to a term of 15 years to life. (*Ibid.*) Further, it amended section 190.2 to expand the special circumstances under which a person convicted of first degree murder may be punished by death or life imprisonment without the possibility of parole (LWOP). (*Id.*, §§ 5–6.) Proposition 7 did not authorize the Legislature to amend or repeal its provisions without voter approval.

Proposition 115, known as the “Crime Victims Justice Reform Act,” amended [section 189](#), among other statutory and constitutional provisions. It amended [section 189](#) to add kidnapping, train wrecking, and certain sex offenses to the list of predicate offenses giving rise to first degree felony-murder liability. (Prop. 115, § 9.) Proposition 115 authorized the Legislature to amend its provisions, but only by a two-thirds vote of each house. (*Id.*, § 30.)

The trial court consolidated real party in interests' cases and denied the motions. The court found Senate Bill 1437 did not amend Proposition 7 because it did “not reduce sentences for first or second degree-murder.” Further, the court found Senate Bill 1437 did not amend Proposition 115 because it did not “in any way modif[y]” the predicate offenses on which first degree felony-murder liability may be ****245** based. Therefore, the court found Senate Bill 1437 was not an invalid legislative amendment.

The People filed petitions for writs of mandate and/or prohibition in our court, requesting us to direct the trial court

to vacate its order and enter a new ***279** order granting the motions. We issued orders to show cause why the requested relief should not be granted and consolidated the appellate proceedings. At our request, the Attorney General filed an amicus curiae brief on the issues presented in the petitions. In its brief, the Attorney General urged us to deny the People's petitions on grounds that Senate Bill 1437 did not amend Proposition 7 or Proposition 115.

III

DISCUSSION

A

Under [article II, section 10 of the California Constitution](#), a statute enacted by voter initiative may be amended or repealed by the Legislature only with the approval of the electorate, unless the initiative statute provides otherwise. (*Cal. Const., art. II, § 10*, subd. (c).) The purpose of this limitation is to “ ‘protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.’ ” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186 (*Kelly*)).

An issue that often arises in litigation involving the constitutionality of a legislative enactment under [article II, section 10 of the California Constitution](#) is whether the legislative enactment in question in fact amends an initiative statute. Our Supreme Court has described an amendment as “ ‘a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.’ ”⁵ (*Pearson, supra*, 48 Cal.4th at pp. 570–571, 107 Cal.Rptr.3d 265, 227 P.3d 858; *Kelly, supra*, 47 Cal.4th at pp. 1026–1027, 103 Cal.Rptr.3d 733, 222 P.3d 186 [“[F]or purposes of [article II, section 10](#), subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it.”].) When confronted with the task of determining whether legislation amends a voter initiative, the Supreme Court has asked the following question: “[W]hether ***280** [the legislation] prohibits what the initiative authorizes, or authorizes what the initiative prohibits.” (*Pearson*, at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858; see *People v. Cooper* (2002) 27 Cal.4th 38, 47, 115 Cal.Rptr.2d 219, 37 P.3d 403 (*Cooper*)).

5 Citing language used by the Courts of Appeal in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 76 Cal.Rptr.2d 342, and *Mobilepark West Homeowners Association v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 41 Cal.Rptr.2d 393, the People contend legislation amends an initiative statute whenever it alters the “scope or effect” of the initiative statute. However, the Supreme Court has declined to “endorse such an expansive definition,” which “in some respects conflicts with the language” the Supreme Court has applied in its decisions. (*Kelly, supra*, 47 Cal.4th at p. 1026, fn. 19, 103 Cal.Rptr.3d 733, 222 P.3d 186; see *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 570–571, 107 Cal.Rptr.3d 265, 227 P.3d 858 (*Pearson*).) Without addressing the viability of the definitions discussed in the *Quackenbush* and *Mobilepark* decisions, we will apply the definition of amendment endorsed by our Supreme Court.

In undertaking this analysis, the Supreme Court has cautioned that not all legislation concerning “the same subject matter as an initiative, or event augment[ing] an initiative’s provisions, is necessarily an amendment” to the initiative. (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858.) On the **246 contrary, “[t]he Legislature remains free to address a “ ‘related but distinct area’ ” [citations] or a matter that an initiative measure “does not specifically authorize or prohibit.” ’ ” (*Ibid.*; see also *Cooper, supra*, 27 Cal.4th at p. 47, 115 Cal.Rptr.2d 219, 37 P.3d 403; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830, 81 Cal.Rptr.3d 461.)

B

This appeal turns on whether Senate Bill 1437 amended Proposition 7 or Proposition 115 under the standards just discussed. If Senate Bill 1437 amended one or both initiatives, as the People contend, Senate Bill 1437 violates [article II, section 10, subdivision \(c\) of the California Constitution](#) because it was not approved by the voters (or for purposes of the alleged amendments to Proposition 115, two-thirds of each legislative house). However, if Senate Bill 1437 did not amend either initiative, as the real parties in interest and Attorney General claim, there is no constitutional violation.

1

a

We begin with whether Senate Bill 1437 amended Proposition 7. To resolve this question, we must determine what the voters contemplated when they enacted the initiative. (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858.) “We first consider the initiative’s language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, [we] may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.” (*Ibid*)

Therefore, we start with the express language of Proposition 7. In pertinent part, the initiative provided as follows: “Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without *281 possibility of parole, or confinement in the state prison for a term of 25 years to life ... [¶] Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.” (Prop. 7, § 2.) Additionally, the initiative expanded the special circumstances which can subject a person convicted of first degree murder to a punishment of death or LWOP. (*Id.*, §§ 5-6.) Each of these provisions increases the possible punishments for the offense of murder. From the language of Proposition 7, therefore, it is apparent voters approved the initiative to enhance punishments for persons who have been convicted of murder.

The People contend Senate Bill 1437—which, as noted *ante*, amended the mens rea requirements for the offense of murder—“effectively change[d] the penalties for murder,” and therefore “took away” from Proposition 7, “by changing the very definitions [of murder] relied upon by the voters” In so doing, the People conflate two distinct concepts—the elements of murder and the punishment imposed for murder. The elements of an offense and punishment are, as all parties seemingly agree, closely and historically related. Indeed, for a crime to exist, there must exist both a prohibited act and punishment. (§ 15 [a crime is an “act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction ... [a] punishment[]”];

****247** *People v. Vasilyan* (2009) 174 Cal.App.4th 443, 449–450, 94 Cal.Rptr.3d 260 [“That there must be a substantive crime and a punishment for that crime in order to constitute a criminal offense has been long recognized.”]; see *Alleyne v. United States* (2013) 570 U.S. 99, 106, 133 S.Ct. 2151, 186 L.Ed.2d 314 [recognizing the “historic link between crime and punishment”].)

However, the elements of an offense and the punishment for an offense plainly are not synonymous. (*People v. Anderson* (2009) 47 Cal.4th 92, 119, 97 Cal.Rptr.3d 77, 211 P.3d 584 [“A ... penalty provision is not an element of an offense”]; see *People v. Banks* (2015) 61 Cal.4th 788, 801, 189 Cal.Rptr.3d 208, 351 P.3d 330 [“ [T]he definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. ’ ”].) “Every crime consists of a group of elements laid down by the statute or law defining the offense and every one of these elements must exist or the statute is not violated. This group of essential elements is known as the “corpus delicti,” the body or the elements of the crime.’ ” (*Anderson*, at p. 101, 97 Cal.Rptr.3d 77, 211 P.3d 584.) Punishment, however, “has always meant a “fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for [the] crime or offense committed by him.” ’ ” (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1107, 232 Cal.Rptr.3d 714, 417 P.3d 191.) In other words, a punishment is the consequence of a finding of guilt intended to further the public policy goals of retribution and deterrence. (*Ibid.*)

***282** As discussed *ante*, the language of Proposition 7 demonstrates the electorate intended the initiative to increase the punishments, or consequences, for persons who have been convicted of murder. Senate Bill 1437 did not address the same subject matter. It did not prohibit what Proposition 7 authorizes by, for example, prohibiting a punishment of 25 years to life for first degree murder or 15 years to life for second degree murder. Nor did it authorize what Proposition 7 prohibits by, for instance, permitting a punishment of less than 25 years for first degree murder or less than 15 years for second degree murder. In short, it did not address punishment at all. Instead, it amended the mental state requirements for murder, which “is perhaps as close as one might hope to come to a core criminal offense ‘element.’ ” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 493, 120 S.Ct. 2348, 147 L.Ed.2d 435.)

Thus, Senate Bill 1437 presents a classic example of legislation that addresses a subject related to, but distinct

from, an area addressed by an initiative. (*Kelly, supra*, 47 Cal.4th at pp. 1025–1026, 103 Cal.Rptr.3d 733, 222 P.3d 186; see *Pearson, supra*, 48 Cal.4th at pp. 572–573, 107 Cal.Rptr.3d 265, 227 P.3d 858 [legislation allowing postconviction discovery addressed area related to, but distinct from, initiative governing pretrial discovery]; *Cooper, supra*, 27 Cal.4th at pp. 46–47, 115 Cal.Rptr.2d 219, 37 P.3d 403 [legislation limiting availability of presentence conduct credits for offenders did not amend Briggs Initiative provision authorizing postsentence conduct credits]; *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 27, 26 Cal.Rptr.3d 687 (*Knight*) [legislation according rights and responsibilities for domestic partners did not amend initiative limiting marriage to persons of the opposite sex].) The Legislature is free to enact such legislation without voter approval. (*Kelly*, at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186.)

The People concede Proposition 7 addressed “the penalties for murder,” not the elements of murder. However, they claim the electorate intended its voter-approved ****248** penalties to apply to murder as the offense was understood at the time Proposition 7 was passed, not as murder may later be defined based on subsequent legislative changes. They point to language in the initiative indicating the increased punishments were for persons convicted of “murder in the first-degree” and “murder in the second-degree,” and claim these terms specifically incorporated by reference the then-existing definitions of first and second degree murder, as interpreted by statute and judicial authorities. In support of this argument, they rely on a tool of statutory construction discussed in *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 195 P.2d 1 (*Palermo*), which provides: “[W]here a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified” (*Id.* at pp. 58–59, 195 P.2d 1.)

We do not find this rule applicable here. Instead, we believe a cognate rule discussed in the *Palermo* decision is more apt under the circumstances: ***283** “[W]here the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time” (*Palermo, supra*, 32 Cal.2d at p. 59, 195 P.2d 1.)

The Supreme Court decision of *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d 602, 69 P.3d 446, is instructive. There, the defendant was convicted of conspiracy to commit murder and sentenced under a statute, enacted in 1955, which provided as follows: “[T]he punishment [for conspiracy to murder] shall be that *prescribed for murder in the first degree.*” (*Id.* at p. 864, 134 Cal.Rptr.2d 602, 69 P.3d 446.) The *Hernandez* court considered whether the statutory reference to punishment “‘prescribed for murder in the first degree’” was intended to fix the penalty permanently at the punishment for first degree murder as it existed in 1955, when the conspiracy statute was enacted, or whether it was intended to account for subsequent changes in the penalty for first degree murder. (*Id.* at pp. 864–865, 134 Cal.Rptr.2d 602, 69 P.3d 446.) It concluded the reference was general and therefore not intended to freeze the punishment for first degree murder as it existed in 1955. (*Id.* at p. 865, 134 Cal.Rptr.2d 602, 69 P.3d 446.) We find the *Hernandez* court’s analysis applicable in this case, given the clear similarities between the language at issue here (“‘murder in the first degree’” and “murder in the second degree”) and the language considered in the *Hernandez* decision (punishment “‘prescribed for murder in the first degree’”). (*Id.* at pp. 864, 865, 134 Cal.Rptr.2d 602, 69 P.3d 446.)

Additionally, we note that Proposition 7 did not identify specific provisions of the Penal Code pertaining to the offense of murder, as opposed to the punishments for murder. If the drafters of Proposition 7 had intended to incorporate the definition of murder as the offense was understood in 1978, we expect the initiative, at minimum, would have cited or referred to the statutory provisions defining murder (§ 187), malice (§ 188), or the degrees of murder (§ 189). (*People v. Jones* (1995) 11 Cal.4th 118, 123, 44 Cal.Rptr.2d 164, 899 P.2d 1358 [statute cited Penal Code provision “all but expressly ... [b]ut that [did] not effect adoption by specific reference”]; cf. *In re Oluwa* (1989) 207 Cal.App.3d 439, 445, 255 Cal.Rptr. 35 [statute incorporated Penal Code article through “specific and pointed reference”].) However, it did not, which suggests the voters did not intend to **249 freeze the definition of murder in place as it existed in 1978.

Further, Proposition 7 did not include any time-specific limitations when referring to first or second degree murder, as we might expect if the voters had intended to permanently wall off the definition of murder from future consideration by the Legislature. (*Doe v. Saenz* (2006) 140 Cal.App.4th 960, 981, 45 Cal.Rptr.3d 126 [reference to statute was general, not specific, *284 where it did not incorporate statute in a “time-

specific way”]; *Sneed v. Saenz* (2004) 120 Cal.App.4th 1220, 1238, 16 Cal.Rptr.3d 563 [same].) For example, Proposition 7 did not state, “Every person guilty of murder in the first degree, *as that offense is presently defined by statute and judicial authorities*, shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life.” It is not our role to rewrite the initiative by inserting language the drafters never included and the voters never considered. (*People v. Guzman* (2005) 35 Cal.4th 577, 587, 25 Cal.Rptr.3d 761, 107 P.3d 860 [“ ‘[I]nser[ing]’ additional language into a statute ‘violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes.’ ”]; see § 1858.) For all these reasons, we reject the People’s argument that Proposition 7 specifically incorporated, thereby freezing in place, the definition of murder as it existed in 1978.

b

“Since the language of the initiative is unambiguous, we need not look to other indicia of the voters’ intent.” (*Knight, supra*, 128 Cal.App.4th at p. 25, 26 Cal.Rptr.3d 687.) To the extent the ballot materials are relevant, however, they do not support the People’s contention that Senate Bill 1437 thwarted the voters’ intent in passing Proposition 7.

The Analysis prepared by the Legislative Analyst described Proposition 7 as follows: “**Background:** [¶] Under existing law, a person convicted of *first degree murder* can be punished in one of three ways: (1) by death, (2) by a sentence of life in prison without the possibility of parole, or (3) by a life sentence with the possibility of parole, in which case the individual would become eligible for parole after serving seven years. A person convicted of *second degree murder* can be sentenced to 5, 6, or 7 years in prison.... [¶] **Proposal:** [¶] This proposition would (1) increase the penalties for first and second degree murder, (2) expand the list of special circumstances requiring a sentence of either death or life imprisonment without the possibility of parole, and (3) revise existing law relating to mitigating and aggravating circumstances.” (Ballot Pamph., Gen. Elect. (Nov. 7, 1978), analysis by Legis. Analyst, at p. 32 (Ballot Pamphlet).)

In the portion of the ballot materials presenting the argument in favor of Proposition 7, proponents urged voters to approve the initiative because “the people ha[d] been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law ha[d]

been thwarted by powerful anti-death penalty politicians in the State Legislature. [¶] In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their *285 influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible. [¶] That is why 470,000 concerned citizens signed petitions to give [voters] the opportunity to vote on this new, tough death penalty law.” (Ballot Pamphlet, argument in favor of Prop. 7, p. 34.)

These materials all concern the issue of punishment. By contrast, they are silent **250 on the critical issues addressed by Senate Bill 1437. They do not mention the mens rea element of murder or any other requirement necessary for a person to be liable for murder. They do not mention sections 187 (defining murder), 188 (defining malice), or 189 (defining the degrees of murder). Further, they do not discuss the felony-murder rule or the natural and probable consequences doctrine. These ballot materials buttress our conclusion that voters intended Proposition 7 to strengthen the punishments for persons convicted of murder, not to reaffirm or amend the substantive offense of murder.

The legislative history of Senate Bill 1437 does not assist the People either. The People note that the Office of Legislative Counsel sent an opinion letter to Assemblymember Jim Cooper, dated June 20, 2018, in which it purportedly advised that Senate Bill 1437 was an invalid amendment to Proposition 7. However, as real parties in interest explain, there is some uncertainty as to whether the letter—which did not identify by title the pending legislation on which the Office of Legislative Counsel was commenting—pertained to Senate Bill 1437 or, alternatively, Assembly Bill No. 3104, a bill that was not enacted, but would have amended *Penal Code* sections 189, 190, and 190.2, among others, if it had passed.

We need not resolve this uncertainty because, even assuming the letter pertained to Senate Bill 1437, opinions of the Office of Legislative Counsel, while entitled to considerable weight, are not binding. (*Mundy v. Superior Court* (1995) 31 Cal.App.4th 1396, 1404, 37 Cal.Rptr.2d 568.) Here, the two-page Office of Legislative Counsel’s letter was not persuasive, as it defined a legislative amendment in a manner our Supreme Court has never endorsed (using the *Quackenbush* definition of amendment discussed *ante*). Further, it gave no consideration to the differences between the elements of a crime and the punishment for a crime. It also did not address whether the references in Proposition

7 to “first degree murder” and “second degree murder” were specific or general under the *Palermo* rule of statutory construction. For all these reasons, we do not find the letter persuasive. (See *St. John’s Well Child & Family Child Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 982, 116 Cal.Rptr.3d 195, 239 P.3d 651.)

*286 c

Finally, the People contend that irrespective of whether the Legislature may make prospective changes to the offense of murder, it may not retroactively “allow[] someone who was convicted of murder, lawfully and as a matter of historical fact, to secure a sentence less than that mandated in section 190 when they were convicted by eliminating their sentence altogether.” Therefore, they argue the resentencing procedure established by section 1170.95 violates Proposition 7, even if the remainder of Senate Bill 1437 does not.

The People’s constitutional attack on the resentencing procedure established in section 1170.95 assumes a petitioner’s murder conviction is fixed and the resentencing procedure merely provides an avenue by which a petitioner may obtain a more lenient sentence for the extant conviction. However, that is not the case. The effect of a successful petition under section 1170.95 “ ‘ ‘is to vacate the judgment ... as if no judgment had ever been rendered.’ ” (*People v. Martinez* (2017) 10 Cal.App.5th 686, 718, 216 Cal.Rptr.3d 814; cf. *People v. Sumstine* (1984) 36 Cal.3d 909, 920, 206 Cal.Rptr. 707, 687 P.2d 904 [“When the issuance of a writ of habeas corpus vacates the underlying judgment of conviction, the judgment ceases to exist for **251 all purposes.”].) Thus, the resentencing procedure established by section 1170.95—like the remainder of the statutory changes implemented by Senate Bill 1437—does not amend Proposition 7.

d

In sum, the voters who enacted Proposition 7 considered and approved increased punishments for persons convicted of murder, including additional means by which such persons could be punished by death or LWOP. However, the text of the initiative and the ballot materials for the initiative do not demonstrate an intent to freeze the substantive elements of murder in place as they existed in 1978. Therefore, Senate Bill 1437—which did not address the issue of punishments

for persons convicted of murder—cannot be considered an amendment to Proposition 7.

2

We turn now to whether Senate Bill 1437 amended Proposition 115. For many of the same reasons discussed *ante*, we conclude the issues addressed by Senate Bill 1437 are distinct from the subject matter of Proposition 115. Therefore, we agree with the real parties in interest and Attorney General that Senate Bill 1437 did not amend Proposition 115.

***287** As noted, Proposition 115 added kidnapping, train wrecking, and certain sex offenses to the list of predicate felonies giving rise to first degree felony-murder liability. (Prop. 115, § 9.) Because Proposition 115 altered the circumstances under which a person may be liable for murder, Senate Bill 1437—which likewise changed the conditions under which a person may be liable for murder—indisputably addresses a matter related to the subject considered by voters. However, as our Supreme Court has cautioned, that alone does not render the Legislature’s actions invalid. (*Kelly, supra*, 47 Cal.4th at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186.) Instead, the question we must ask ourselves is whether Senate Bill 1437 addresses a matter that the initiative specifically authorizes or prohibits. (*Ibid.*)

We conclude it does not. Senate Bill 1437 did not augment or restrict the list of predicate felonies on which felony murder may be based, which is the pertinent subject matter of Proposition 115.⁶ It did not address any other conduct which might give rise to a conviction for murder. Instead, it amended the mental state necessary for a person to be liable for murder, a distinct topic not addressed by Proposition 115’s text or ballot materials.

⁶ In addition to augmenting the list of predicate felonies for first degree felony murder, Proposition 115 amended numerous constitutional and statutory provisions that, according to the People, are not at issue here.

The People do not contend otherwise. Instead, they emphasize that Proposition 115 reenacted [section 189](#) in full. Because the initiative reenacted [section 189](#) in full, they argue the following language from Proposition 115 precludes the Legislature from amending, by simple majority, *any* portion

of [section 189](#), even those portions of [section 189](#) that the initiative did not change in any substantive way: “*The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.*” (Prop. 115, § 30, italics added.) We disagree.

Under [article IV, section 9 of the California Constitution](#), a statute must be reenacted in full as amended if any part of ****252** it is amended. (Cal. Const., art. IV, § 9.) “The rationale for compelling reenactment of an entire statutory section when only a part is being amended is to avoid ‘the enactment of statutes in terms so blind that legislators themselves [are] ... deceived in regard to their effect’ ” and the risk that “the public, from the difficulty of making the necessary examination and comparison, [will] fail[] to become appr[]ised of the changes made in the laws.” [Citation.] Consequently, a substantial part of almost any statutory initiative will include a restatement of existing provisions with only minor, nonsubstantive changes—or no changes ***288** at all.” (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 208, 240 Cal.Rptr.3d 52, 430 P.3d 345 (*Commission*)).

In view of this constitutional mandate, the Supreme Court has rejected the claim the People present here. In *Commission*, voters approved an initiative: (1) reenacting an existing statutory section, including provisions with minor changes or no changes (to comply with Cal. Const., art. IV, § 9); and (2) limiting future legislative enactments to the initiative, unless approved by voters or two-thirds of each house in the Legislature (as permitted by Cal. Const., art. II, § 10, subd. (c)). (*Commission, supra*, 6 Cal.5th at p. 211, 240 Cal.Rptr.3d 52, 430 P.3d 345.) The Supreme Court rejected an argument claiming the limiting language categorically precluded the Legislature from amending those portions of the existing statutory section that were reenacted in the ballot measure without substantive change. (*Id.* at pp. 214–215, 240 Cal.Rptr.3d 52, 430 P.3d 345.) As the court explained, a contrary holding would “unduly burden the people’s willingness to amend existing laws by initiative,” and would not “comport[] with the Legislature’s ability to change statutory provisions outside the scope of the existing provisions voters plausibly had a purpose to supplant through an initiative.” (*Id.* at p. 214, 240 Cal.Rptr.3d 52, 430 P.3d 345.) Thus, the court concluded: “When technical reenactments are required under [article IV, section 9 of the](#)

Constitution—yet involve no substantive change in a given statutory provision—the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process.” (*Ibid.*)

As in *Commission*, the initiative in question restates a statutory provision in full (§ 189) to comply with constitutional mandates. Further, as noted *ante*, there are no indicia in the language of the initiative or its ballot materials indicating the voters intended to address any provision of section 189, except the list of predicate felonies for purposes of the felony-murder rule. Therefore, we conclude the limiting language in Proposition 115, like the limiting language in *Commission*, does not preclude the Legislature from amending provisions of the reenacted statute that were subject to technical restatement to ensure compliance with article IV, section 9 of the California Constitution.⁷

⁷ The People argue the *Commission* decision is distinguishable because the limiting language in the initiative considered in *Commission* (“The provisions of this act shall not be amended by the Legislature,” *Commission, supra*, 6 Cal.5th at p. 211, 240 Cal.Rptr.3d 52, 430 P.3d 345), differs from the limiting language used in Proposition 115 (“The statutory provisions contained in this measure may not be amended by the Legislature,” Prop. 115, § 30). We disagree and, therefore, ascribe no significance to these minor differences.

3

In closing, we reiterate a bedrock principle underpinning the rule limiting legislative amendments to voter initiatives: “[T]he voters should get *289 what they enacted, not

more and not less.” (**253 *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114, 86 Cal.Rptr.2d 884, 980 P.2d 433.) Here, the voters who approved Proposition 7 and Proposition 115 got, and still have, precisely what they enacted—stronger sentences for persons convicted of murder and first degree felony-murder liability for deaths occurring during the commission or attempted commission of specified felony offenses. By enacting Senate Bill 1437, the Legislature has neither undermined these initiatives nor impinged upon the will of the voters who passed them.

IV

DISPOSITION

The petitions are denied.

I CONCUR:

IRION, J.

O’Rourke, J., dissenting.

I respectfully dissent. For the reasons expressed in my dissent in *People v Lamoureux* (Nov. 19, 2019, D075794) — Cal.App.5th —, 255 Cal.Rptr.3d 253, 2019 WL 6125910, filed concurrently herewith, I would grant the People’s petition.

All Citations

42 Cal.App.5th 270, 255 Cal.Rptr.3d 239, 19 Cal. Daily Op. Serv. 10,984, 2019 Daily Journal D.A.R. 10,676

EXHIBIT B

2020 WL 4461245

Court of Appeal, Fifth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Angelique Elandra NASH, Defendant and Appellant.

F079509

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Filed 08/03/2020

Synopsis

Background: After being convicted of felony murder with a burglary special-circumstance finding and having the finding reversed on appeal, [2015 WL 4880841](#), petitioner sought relief from her felony murder conviction under procedures established in senate bill which amended felony murder rule and natural and probable consequences doctrine by restricting murder liability to those who actually killed, who acted with intent to kill, or who were major participants in underlying felony and acted with reckless indifference. The Superior Court, Kern County, No. BF131808B, [John S. Somers, J.](#), dismissed petition. Petitioner appealed.

Holdings: The Court of Appeal, [Meehan, J.](#), held that:

senate bill did not unconstitutionally amend voter-approved initiative that increased punishments for first- and second-degree murder;

senate bill did not unconstitutionally amend voter-approved initiative that expanded the scope of felony-murder rule by adding five qualifying felonies;

petition process available to those convicted of felony murder under senate bill did not unconstitutionally amend voter-approved initiative providing crime victims with the right to prompt and final conclusion of the case and requiring consideration of victims' safety prior to post-judgment release decision; and

petition process available under senate bill did not violate the separation of powers doctrine.

Reversed and remanded.

[Poochigian, J.](#), filed concurring and dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Codenotes**Prior Version Recognized as Unconstitutional**

[Cal. Penal Code § 803](#).

APPEAL from a judgment of the Superior Court of Kern County. [John S. Somers, Judge](#). (Super. Ct. No. BF131808B)

Attorneys and Law Firms

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[Xavier Becerra](#), Attorney General, [Thomas S. Patterson](#), Assistant Attorney General, [Tamar Pachter](#) and [Nelson R. Richards](#), Deputy Attorneys General, as Amicus Curiae on behalf of Defendant and Appellant.

[Cynthia J. Zimmer](#), District Attorney, [Terrance J. McMahon](#) and [Terry P. Pelton](#), Deputy District Attorneys, for Plaintiff and Respondent.

OPINION

[MEEHAN, J.](#)

INTRODUCTION

*1 In 2010, appellant Angelique Elandra Nash participated in a residential burglary during which one of her codefendants struck the elderly homeowner.¹ The victim later died as the result of blunt force [trauma to the head](#). Appellant; her sister, Katila Nash; and her sister's boyfriend, David Moses, all of whom were under the age of 18 years at the time of the crime, were subsequently arrested and charged as adults in connection with the victim's murder. ([Welf. & Inst. Code, § 707](#), former subd. (d)(1), (d)(2).) In her third trial, appellant was convicted of first degree felony murder with the special circumstance finding that the murder was committed while appellant was engaged in the commission of burglary. ([Pen. Code, §§ 187, subd. \(a\), 189, 190.2, subds. \(a\)\(17\)\(G\) & \(d\).](#))^{2, 3} Appellant was sentenced to 25 years to life in prison. (§ 190.5, subd. (b).)

- 1 We rely on our prior decision in the nonpublished opinion of *People v. Nash*, 2015 WL 4880841 (Aug. 14, 2015, F068239) for the factual and procedural history.
- 2 Katila Nash and David Moses, both of whom entered the victim's house while appellant remained outside, were convicted in the first trial.
- 3 All further statutory references are to the Penal Code unless otherwise specified.

In a prior opinion, this court reversed the jury's burglary special-circumstance finding on the ground it was unsupported by substantial evidence that appellant was a major participant in the underlying burglary, in accordance with the California Supreme Court's then-recent decision in *People v. Banks* (2015) 61 Cal.4th 788, 189 Cal.Rptr.3d 208, 351 P.3d 330. Appellant's sentence remained 25 years to life in prison. (§ 190, subd. (a).)

On September 30, 2018, the Governor signed Senate Bill No. 1437 into law. Effective January 1, 2019, Senate Bill No. 1437 “amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f) (Senate Bill No. 1437 or Sen. Bill No. 1437).) The bill amended sections 188 and 189, and added section 1170.95, which provides a process for those convicted of felony murder or murder under a natural and probable consequences theory to petition for relief based on the change to the law. (Sen. Bill No. 1437, §§ 2–4.)

When Moses hit the victim inside her residence, appellant was outside acting as a lookout and, as previously stated, this court concluded she was not a major participant in the underlying burglary. Following the enactment of Senate Bill No. 1437, appellant, represented by counsel, filed a petition under section 1170.95, subdivision (a), seeking relief from her felony murder conviction on the ground that she was “not the actual killer, did not act with the intent to kill, [and] was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) The prosecutor opposed the motion on the same grounds now advanced by respondent on appeal, as discussed in the sections that follow.

*2 After hearing argument and taking the matter under submission, the trial court rejected the prosecutor's contentions that Senate Bill No. 1437 amends Proposition 115 (the Crime Victims Justice Reform Act) and Proposition 9 (the Victims' Bill of Rights Act of 2008: Marsy's Law (Marsy's Law)) in violation of the California Constitution, but the court agreed that at least as to retroactive application, Senate Bill No. 1437 is an unconstitutional amendment of Proposition 7 (the Briggs Initiative). The trial court dismissed appellant's petition and she filed a timely notice of appeal challenging the judgment. (§ 1237.)

Appellant and the Attorney General, through an amicus brief, argue that Senate Bill No. 1437 is constitutional and urge reversal of the judgment.⁴ Respondent, the Kern County District Attorney, argues that Senate Bill No. 1437 is an unconstitutional amendment of Propositions 7, 115 and 9, and that it impermissibly infringes on powers vested in the judicial and executive branches of government, in violation of the separation of powers doctrine.

- 4 We grant appellant's unopposed requests for judicial notice of the ballot material for Proposition 7 and Proposition 115, and the prior record on appeal. (Evid. Code, §§ 452, subd. (c), 459; *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 22, fn. 10, 92 Cal.Rptr.3d 286, 205 P.3d 207.)

These arguments were considered and rejected by the Court of Appeal for the Fourth District, Division One, in *People v. Lamoureux* and *People v. Superior Court (Gooden)*. (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 246, 255 Cal.Rptr.3d 253 [Sen. Bill No. 1437 does not violate Props. 7, 115 or 9, or separation of powers doctrine] (*Lamoureux*); *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 289, 255 Cal.Rptr.3d 239 [Sen. Bill No. 1437 does not violate Props. 7 or 115] (*Gooden*).)⁵ Subsequently, the other Courts of Appeal considering these issues have agreed with the analyses in *Lamoureux* and *Gooden*. (*People v. Solis* (2020) 46 Cal.App.5th 762, 784, 259 Cal.Rptr.3d 854 (*Solis*); *People v. Cruz* (2020) 46 Cal.App.5th 740, 747, 260 Cal.Rptr.3d 166 (*Cruz*); accord, *People v. Lopez* (2020) 51 Cal.App.5th 589, 594, — Cal.Rptr.3d —; *People v. Alaybue* (2020) 51 Cal.App.5th 207, 211, — Cal.Rptr.3d —; *People v. Johns* (2020) 50 Cal.App.5th 46, 54-55, 263 Cal.Rptr.3d 611; *People v. Prado* (2020) 49 Cal.App.5th 480, 492, 263 Cal.Rptr.3d 79; *People v. Smith* (2020) 49 Cal.App.5th 85, 91–92, review granted July 22, 2020, No. S262835; *People v. Bucio* (2020) 48 Cal.App.5th 300, 306,

261 Cal.Rptr.3d 692.) We find the aforementioned decisions well-reasoned and persuasive, and we join them.

⁵ *Lamoureux* and *Gooden* were decided by the same panel, with one justice dissenting

On the grounds set forth below, we conclude the trial court erred in finding that Senate Bill No. 1437 unconstitutionally amends Proposition 7. We also reject respondent's claims that Senate Bill No. 1437 unconstitutionally amends Proposition 115 and Proposition 9 and that it violates the separation of powers doctrine. Accordingly, we reverse the judgment and remand this matter for further proceedings under section 1170.95.

DISCUSSION

I. Claim Senate Bill No. 1437 Amends Voter Initiatives in Violation of California Constitution

A. Constitutional Limitation on Amendment of Voter Initiatives

This appeal requires us to determine whether Senate Bill No. 1437, which effected changes to the Penal Code relating to murder, unconstitutionally amends Proposition 7, Proposition 115 or Proposition 9, all ballot initiatives passed by voters. When laws are enacted by voter initiative, subsequent legislative acts are limited by the California Constitution, which provides that “[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.” (Cal. Const., art. II, § 10, subd. (c); accord, *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568, 107 Cal.Rptr.3d 265, 227 P.3d 858 (*Pearson*); *People v. Kelly* (2010) 47 Cal.4th 1008, 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186 (*Kelly*).

*3 “[T]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to “protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.” [Citation.]” (*Kelly, supra*, 47 Cal.4th at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186, quoting *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484, 76 Cal.Rptr.2d 342 (*Proposition 103 Enforcement Project*)). “[C]ourts have a duty to ‘ ‘jealously guard’ ’ the people's initiative power, and hence to ‘ ‘apply a liberal construction to this power wherever it is

challenged in order that the right’ ’ to resort to the initiative process ‘ ‘be not improperly annulled’ ’ by a legislative body.” (*Kelly, supra*, at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186, quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, 38 Cal.Rptr.2d 699, 889 P.2d 1019.)

An amendment in this context has been described “as ‘a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.’ ” (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858; accord, *People v. Cooper* (2002) 27 Cal.4th 38, 44, 115 Cal.Rptr.2d 219, 37 P.3d 403 (*Cooper*)). In contrast with the restrictions on amendment, the Legislature is not “precluded from enacting laws addressing the general subject matter of an initiative” (*Kelly, supra*, 47 Cal.4th at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186), and it “remains free to address a ‘ ‘related but distinct area’ ’ [citations] or a matter that an initiative measure ‘does not specifically authorize or prohibit’ ” (*id.* at pp. 1025–1026, 103 Cal.Rptr.3d 733, 222 P.3d 186; accord, *Pearson, supra*, at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858).

B. Standard of Review

We review questions of statutory and voter initiative interpretation de novo (*People v. Gonzales* (2018) 6 Cal.5th 44, 49, 237 Cal.Rptr.3d 193, 424 P.3d 280 (*Gonzales*); *John v. Superior Court* (2016) 63 Cal.4th 91, 95, 201 Cal.Rptr.3d 459, 369 P.3d 238), and the same principles that govern statutes enacted by the Legislature apply to voter initiatives (*Gonzales, supra*, at p. 49, 237 Cal.Rptr.3d 193, 424 P.3d 280; *Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858). “We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure.” (*Pearson, supra*, at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858; accord, *Gonzales, supra*, at pp. 49–50, 237 Cal.Rptr.3d 193, 424 P.3d 280; *John v. Superior Court, supra*, at pp. 95–96, 201 Cal.Rptr.3d 459, 369 P.3d 238.)

C. Overview of Senate Bill No. 1437

Senate Bill No. 1437 was enacted “to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.” (Stats. 2018, ch. 1015, § 1, subd. (e).) The Legislature declared, as previously set forth, that it was necessary to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (*Id.*, subd. (f).)

To that end, Senate Bill No. 1437 amended [section 188](#), defining malice, and [section 189](#), defining the degrees of murder, to address liability based on felony murder and the natural and probable consequences doctrine. As amended, [section 188](#) now provides, “Except as stated in [subdivision \(e\) of Section 189](#), in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” (*Id.*, subd. (a)(3).)

*4 [Subdivision \(e\) of section 189](#), added by Senate Bill No. 1437, provides: “A participant in the perpetration or attempted perpetration of a felony listed in [subdivision \(a\)](#) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer[;] [\[¶\]](#) (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree[; and] [\[¶\]](#) (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in [subdivision \(d\) of Section 190.2](#).” However, [subdivision \(e\)](#) is inapplicable “when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties.” (§ 89, subd. (f).)

Senate Bill No. 1437 also added [section 1170.95 to the Penal Code](#), which provides, in relevant part: “A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining

counts when all of the following conditions apply: [\[¶\]](#) (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [\[¶\]](#) (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[; and] [\[¶\]](#) (3) The petitioner could not be convicted of first or second degree murder because of changes to [Section 188 or 189](#) made effective January 1, 2019.” (*Id.*, subd. (a).)

If a petition is filed, as in this case, [section 1170.95](#) provides that “[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.” (*Id.*, subd. (c).) “[T]he court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence....” (*Id.*, subd. (d)(1).)

D. Proposition 7

1. Background

Although the trial court rejected the prosecutor's other arguments, it agreed that at least as to retroactive application in this case, Senate Bill No. 1437 unconstitutionally amends Proposition 7 and it dismissed appellant's petition for relief under [section 1170.95](#) on that ground. Appellant and the Attorney General claim error.

Proposition 7, which was passed by voters on November 7, 1978, repealed and replaced [sections 190, 190.1, 190.2, 190.3, 190.4 and 190.5](#). (Voter Information Guide, Gen. Elec. (Nov. 7, 1978) text of Prop. 7, §§ 1–12, pp. 33, 41–46 (Voter Information Guide); see [Cal. Const., art. IV, § 9](#) [“A section of a statute may not be amended unless the section is re-

enacted as amended.”.) Proposition 7 was a direct response to 1977 death penalty legislation (*People v. Boyce* (2014) 59 Cal.4th 672, 693, 175 Cal.Rptr.3d 481, 330 P.3d 812; Voter Information Guide, *supra*, arguments in favor of and against Prop. 7, pp. 34–35), and it “substantially increase[d] the punishment for persons convicted of first and second degree murder” (*Cooper, supra*, 27 Cal.4th at p. 42, 115 Cal.Rptr.2d 219, 37 P.3d 403; accord, *People v. Bright* (1996) 12 Cal.4th 652, 662, fn. 7, 49 Cal.Rptr.2d 732, 909 P.2d 1354 (maj. opn.), abrogated on another ground by *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6, 21 Cal.Rptr.3d 179, 100 P.3d 870). Prior to the passage of Proposition 7, the punishment for first degree murder was death, life in prison without the possibility of parole or life in prison with the possibility of parole, and the punishment for second degree murder was five, six or seven years in prison. (Former § 190; Voter Information Guide, *supra*, § 1, p. 33.) Under Proposition 7, the punishment for first degree murder was increased to death, life in prison without the possibility of parole or 25 years to life in prison, and the punishment for second degree murder was increased to 15 years to life in prison. (§ 190; Voter Information Guide, *supra*, § 2, p. 33.)

*5 Proposition 7 also “added several special circumstances to section 190.2 (see subs. (a)(8), (9), (11)–(16), (19)), expanded the list of felonies subject to the ‘felony-murder’ special circumstance, and deleted the requirement that a felony murder be willful, deliberate, and premeditated. (Compare former § 190.2, subd. (c)(3) (Stats. 1977, ch. 316, § 9, p. 1257) with present § 190.2, subd. (a)(17).) For the most part, these additions broadened the class of persons subject to the most severe penalties known to our criminal law.” (*People v. Weidert* (1985) 39 Cal.3d 836, 844, 218 Cal.Rptr. 57, 705 P.2d 380; accord, *People v. Spears* (1983) 33 Cal.3d 279, 281–282, 188 Cal.Rptr. 454, 655 P.2d 1289; *Gooden, supra*, 42 Cal.App.5th at p. 278, 255 Cal.Rptr.3d 239; *People v. Epps* (1986) 182 Cal.App.3d 1102, 1121, 227 Cal.Rptr. 625.)

Proposition 7 “did not authorize the Legislature to amend its provisions without voter approval.” (*Cooper, supra*, 27 Cal.4th at p. 44, 115 Cal.Rptr.2d 219, 37 P.3d 403, citing *In re Oluwa* (1989) 207 Cal.App.3d 439, 445–446, 255 Cal.Rptr. 35 (*Oluwa*)). Therefore, as the parties recognize, amendment of Proposition 7 through legislative action is precluded by the California Constitution (Cal. Const., art. II, § 10, subd. (c)), and we must determine whether Senate Bill No. 1437 takes away from any provision of Proposition 7 (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858; accord, *Cooper, supra*, at p. 44, 115 Cal.Rptr.2d 219, 37 P.3d 403).⁶

6 Respondent does not claim that Senate Bill No. 1437 adds to Proposition 7 or substitutes any of its provisions.

2. Analysis

In concluding that Senate Bill No. 1437 unconstitutionally amends Proposition 7, the trial court stated the Legislature was “attempting to accomplish indirectly what it cannot do directly” and “drastically reduce sentences for first and second degree murder as to particular individuals previously convicted of those crimes.” Respondent agrees and the arguments she advances on appeal fall into the following general categories: Senate Bill No. 1437 changes the scope or effect of Proposition 7 by limiting the class of persons subject to sentencing for murder, thereby eliminating murder sentences as mandated by the voters; crime and punishment are not merely “ ‘related but distinct area[s]’ ” the Legislature “remains free to address”; Proposition 7 froze or incorporated by reference murder as it was then defined in 1978; and Senate Bill No. 1437 frustrates voter intent. (*Kelly, supra*, 47 Cal.4th at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186.)

a. Senate Bill No. 1437 Does Not Take Away From Proposition 7's Provisions

We begin with the plain language of Proposition 7. (*Gonzales, supra*, 6 Cal.5th at p. 49, 237 Cal.Rptr.3d 193, 424 P.3d 280; *Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858.) As summarized above and set forth by the Court of Appeal in *Gooden*, Proposition 7 provides in relevant part that “ ‘[e]very person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life... [¶] Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.’ (Prop. 7, § 2.) Additionally, the initiative expanded the special circumstances which can subject a person convicted of first degree murder to a punishment of death or LWOP. (*Id.*, §§ 5–6.) Each of these provisions increases the possible punishments for the offense of murder. From the language of Proposition 7, therefore, it is apparent voters approved the initiative to enhance punishments for persons who have been convicted of murder.” (*Gooden, supra*, 42 Cal.App.5th

at pp. 280–281, 255 Cal.Rptr.3d 239; accord, *Cruz, supra*, 46 Cal.App.5th at pp. 753–754, 260 Cal.Rptr.3d 166; *Solis, supra*, 46 Cal.App.5th at pp. 772–773, 259 Cal.Rptr.3d 854.) The intended purpose of Proposition 7 to increase sentences for murder in general and to toughen the death penalty law in particular is clearly articulated in the ballot material, which describes the 1977 death penalty legislation as “weak and ineffective” and urges that “Proposition 7 will give every Californian the protection of the nation’s toughest, most effective death penalty laws.” (Voter Information Guide, *supra*, argument in favor of Prop. 7, p. 34.)

*6 Relying on *Proposition 103 Enforcement Project*, respondent argues that Senate Bill No. 1437 amends Proposition 7 by changing its “ ‘ ‘ ‘the scope or effect’ ” ’ ” (*Prop. 103 Enforcement Project, supra*, 64 Cal.App.4th at pp. 1484–1485, 76 Cal.Rptr.2d 342.) Respondent reasons that because Senate Bill No. 1437 narrows the statutory definition of murder, it reduces the number of defendants eligible to be convicted of murder. This, in turn, necessarily reduces the number of defendants serving sentences for murder as provided for in Proposition 7, evidencing change to the scope or effect of the initiative.

The scope or effect language underpinning respondent’s argument traces back more than 40 years to *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 145 Cal.Rptr. 819, a decision in which the Court of Appeal defined a statutory amendment as “ ‘any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form’ ” (*Id.* at p. 776, 145 Cal.Rptr. 819, quoting Sutherland, *Statutory Construction* (4th ed. 1972) § 22.01, p. 105.) However, in *Kelly*, the California Supreme Court expressly questioned prior decisions defining amendment so broadly, including *Cory* (*Kelly, supra*, 47 Cal.4th at pp. 1026–1027 & fn. 19, 103 Cal.Rptr.3d 733, 222 P.3d 186), and concluded that it was “sufficient to observe that for purposes of article II, section 10, subdivision (c) [of the California Constitution], an amendment includes a legislative act that changes an existing initiative statute by taking away from it[]” (*id.* at pp. 1026–1027, 103 Cal.Rptr.3d 733, 222 P.3d 186). Thus, our analysis is necessarily guided by *Kelly*’s definition of amendment rather than by language parsed from an appellate court opinion and questioned by our high court. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 197–198, 112 Cal.Rptr.3d 746, 235 P.3d 62, quoting *Auto Equity Sales, Inc.*

v. Superior Court (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 [“ ‘Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.’ ”]; accord, *Cruz, supra*, 46 Cal.App.5th at p. 750, fn. 3, 260 Cal.Rptr.3d 166; *Solis, supra*, 46 Cal.App.5th at p. 772, fn. 2, 259 Cal.Rptr.3d 854; *Gooden, supra*, 42 Cal.App.5th at p. 279, fn. 5, 255 Cal.Rptr.3d 239.)

*7 Respondent views the scope or effect language too broadly, disconnected from the plain language of Proposition 7 and Senate Bill No. 1437. In enacting Proposition 7, the voters mandated harsher punishment—that is, increased sentences—for those convicted of murder, but the measure did not speak to the substantive offense of murder. (*Gooden, supra*, 42 Cal.App.5th at p. 282, 255 Cal.Rptr.3d 239; accord, *Cruz, supra*, 46 Cal.App.5th at p. 758, 260 Cal.Rptr.3d 166; *Solis, supra*, 46 Cal.App.5th at pp. 775–776, 259 Cal.Rptr.3d 854.) Respondent asserts that Senate Bill No. 1437 takes away, or eliminates, the sentence mandated by Proposition 7, but Senate Bill No. 1437 does not invalidate or otherwise change the sentence for murder dictated by the voters in enacting Proposition 7. Rather, Senate Bill No. 1437 restricts the bases for murder liability to those individuals who actually killed, who acted with the intent to kill, or who were major participants in the underlying felony and acted with reckless indifference to human life (§ 189, subd. (e)), and in those cases where the law affords relief, the underlying conviction no longer stands. While the class of individuals standing convicted of murder may be reduced in light of Senate Bill No. 1437’s changes to the felony-murder rule and the natural and probable consequences doctrine, the legislation does not change or take away from the sentences those convicted of murder are subject to, which is the mandate of Proposition 7.

The authorities relied on by respondent in support of her argument—*People v. Armogeda* (2015) 233 Cal.App.4th 428, 182 Cal.Rptr.3d 606; *Prop. 103 Enforcement Project, supra*, 64 Cal.App.4th 1473, 76 Cal.Rptr.2d 342; and *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 41 Cal.Rptr.2d 393—offer no assistance, either. In those decisions, the Courts of Appeal concluded that the legislation being challenged impermissibly amended prior voter initiatives, but the courts so held on the unremarkable grounds that rather than legislating in a merely related area, the challenged legislation clearly, directly and specifically added to or took away from the law that was enacted by the voters. (*People v. Armogeda, supra*, at pp. 434–436, 182 Cal.Rptr.3d 606 [Postrelease Community Supervision Act of 2011 (the

Act) unconstitutionally amended Prop. 36 where Prop. 36 mandated treatment rather than incarceration for certain nonviolent drug offenses or drug-related parole violations and the Act allowed for incarceration in those instances]; *Prop. 103 Enforcement Project, supra*, at pp. 1486–1494, 76 Cal.Rptr.2d 342 [Legislature took away and changed scope and effect of Prop. 103 when it removed from Insurance Commissioner ratemaking determinations vested by the voters, and statute enacted did not further purposes of Prop. 103, as required for amendment]; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West, supra*, at pp. 41–43, 41 Cal.Rptr.2d 393 [the city's passage of an ordinance purportedly clarifying a comprehensive rent control measure enacted by voters was an unconstitutional amendment where the measure adequately defined its scope of coverage without need for any follow-up ordinances and ordinance went beyond clarification by expanding the scope of the measure and adding provisions to it].)

b. Crime and Punishment are Related but Distinct Areas

As previously stated, the Legislature is not “precluded from enacting laws addressing the general subject matter of an initiative[]” (*Kelly, supra*, 47 Cal.4th at p. 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186), and it “remains free to address a ‘related but distinct area’ [citations] or a matter that an initiative measure ‘does not specifically authorize or prohibit[]’” (*id.* at pp. 1025–1026, 103 Cal.Rptr.3d 733, 222 P.3d 186; accord, *Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858). Respondent argues, however, that “[c]rimes and punishment are not ‘related but distinct areas.’” As the *Gooden* court points out, this conflates the crime of murder with the punishment for murder. (*Gooden, supra*, 42 Cal.App.5th at p. 281, 255 Cal.Rptr.3d 239; accord, *Cruz, supra*, 46 Cal.App.5th at p. 755, 260 Cal.Rptr.3d 166; *Solis, supra*, 46 Cal.App.5th at p. 772, 259 Cal.Rptr.3d 854.)

Crime and punishment are related, with the crime or offense necessarily informing the punishment, but they “plainly are not synonymous.” (*Gooden, supra*, 42 Cal.App.5th at p. 281, 255 Cal.Rptr.3d 239; § 15 [defining crime], 16 [kinds of crime], 18 [punishment], 19 [same], 19.2 [same], 19.4 [same].) A substantive offense defines or sets forth the elements of a crime (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899, 135 Cal.Rptr.2d 30, 69 P.3d 951; *Gooden, supra*, at p. 281, 255 Cal.Rptr.3d 239, citing *People v. Anderson* (2009) 47 Cal.4th 92, 101, 97 Cal.Rptr.3d 77, 211 P.3d 584), while “a punishment is the consequence of

a finding of guilt intended to further the public policy goals of retribution and deterrence” (*Gooden, supra*, at p. 281, 255 Cal.Rptr.3d 239, citing *People v. Ruiz* (2018) 4 Cal.5th 1100, 1107, 232 Cal.Rptr.3d 714, 417 P.3d 191). As such, we agree with *Gooden* that “Senate Bill 1437 presents a classic example of legislation that addresses a subject related to, but distinct from, an area addressed by an initiative.” (*Gooden, supra*, at p. 282, 255 Cal.Rptr.3d 239; accord, *Cruz, supra*, 46 Cal.App.5th at p. 756, 260 Cal.Rptr.3d 166.)

c. Voters Neither Froze Nor Incorporated by Specific Reference Murder as it Stood in 1978

*8 Respondent also argues, as she did in the trial court, that “[w]hen the voters passed Proposition 7, which specifically referenced first and [second] degree murder, they incorporated those provisions (... §§ 187, 188, and 189) into Proposition 7 as those laws existed at that time,” and that Senate Bill No. 1437 requires “a greater mental state for [first] degree murder than was required when Proposition 7 was overwhelmingly passed by voters.” However, respondent's position is not supported by any authority on this point nor is it further elucidated. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029, 81 Cal.Rptr.3d 299, 189 P.3d 300 [“ ‘[E]very brief should contain a legal argument with citation of authorities on the points made.’ ”]; accord, *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363–364, 178 Cal.Rptr.3d 185, 334 P.3d 573.) Appellant and the Attorney General agree the argument lacks merit, but they differ in their approaches.

Appellant characterizes the argument as analogous to that in *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 485, 71 Cal.Rptr.2d 606 (*Californians for Political Reform Foundation*), which involved a challenge over the definition of the term “contribution.” At issue was whether a Fair Political Practices Commission regulation that “excepted from the statutory definition of ‘contribution’ payments by a sponsoring organization to establish and administer its [political action committee (PAC)]” amended Proposition 208, a voter initiative that “prohibits a PAC from accepting from any person a contribution totaling more than \$500 per calendar year.” (*Id.* at pp. 480–481, 71 Cal.Rptr.2d 606.) The plaintiff, in challenging the regulation, argued that “the electorate expressed its intent to ‘freeze’ into place [a] then-existing definition of ‘contribution’ in the regulations.” (*Id.* at p. 485, 71 Cal.Rptr.2d 606.) The Court of Appeal flatly rejected the argument, pointing out the plaintiff's failure to

cite to any supporting evidence, the absence of any language in the initiative purporting to define or redefine the term, the absence of any language restricting the authority to regulate in the area in question, and the absence of anything in the ballot material evidencing voter intent on the issue. (*Ibid.*)

The Attorney General characterizes the issue as one of incorporation by reference. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 195 P.2d 1 (*Palermo*)). In *Palermo*, the California Supreme Court stated, “[W]here a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and ... the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary.” (*Id.* at pp. 58–59, 195 P.2d 1.) Conversely, “‘where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time ...’” (*Id.* at p. 59, 195 P.2d 1.) However, “[t]he *Palermo* rule is not to be applied in a vacuum” (*People v. Fong* (2013) 217 Cal.App.4th 263, 267, 158 Cal.Rptr.3d 221, quoting *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505, 86 Cal.Rptr.2d 43), and the California Supreme Court has clarified that “where the words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, ‘the determining factor will be ... legislative intent[.]’” (*In re Jovan B.* (1993) 6 Cal.4th 801, 816, 25 Cal.Rptr.2d 428, 863 P.2d 673; accord, *People v. Fong, supra*, at p. 267, 158 Cal.Rptr.3d 221; *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 981, 45 Cal.Rptr.3d 126).

The absence of both supporting authority and more specific legal argument leave the contours of respondent's theory undeveloped, but regardless, we agree with appellant's and the Attorney General's position that the argument lacks merit. There is nothing in the plain language of Proposition 7, or in the ballot material, that suggests voters, in calling for harsher punishment for those convicted of murder, intended to “‘freeze’” the substantive offense of murder as it was understood in 1978. (*Californians for Political Reform Foundation, supra*, 61 Cal.App.4th at p. 485, 71 Cal.Rptr.2d 606.) The absence of any support in the plain language or ballot material also dooms respondent's contention that the reference to murder in Proposition 7 specifically incorporated by reference the substantive offense of murder as it stood

in 1978. (*In re Jovan B., supra*, 6 Cal.4th at p. 816, 25 Cal.Rptr.2d 428, 863 P.2d 673; accord, *People v. Fong, supra*, 217 Cal.App.4th at p. 267, 158 Cal.Rptr.3d 221; *Doe v. Saenz, supra*, 140 Cal.App.4th at p. 981, 45 Cal.Rptr.3d 126.)

*9 In *Gooden*, the Court of Appeal found the California Supreme Court's decision in *People v. Hernandez* instructive and we agree. (*Gooden, supra*, 42 Cal.App.5th at p. 283, 255 Cal.Rptr.3d 239, citing *People v. Hernandez* (2003) 30 Cal.4th 835, 864–865, 134 Cal.Rptr.2d 602, 69 P.3d 446, disapproved on another ground by *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32, 144 Cal.Rptr.3d 84, 281 P.3d 1, disapproved on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, 200 Cal.Rptr.3d 265, 367 P.3d 649.) In *People v. Hernandez*, the court, addressing the crime of conspiracy, considered the following language, added by the Legislature in 1955: “[W]hen two or more persons conspire to commit murder, ‘the punishment shall be that prescribed for murder in the first degree.’” (*People v. Hernandez, supra*, at p. 864, 134 Cal.Rptr.2d 602, 69 P.3d 446, quoting § 182.) At that time—1955—“the punishment for conspiracy to commit murder was death or life imprisonment, at the discretion of the jury or the court.” (*Ibid.*, citing former § 190.) The court agreed with the parties that the statutory reference to the penalty for murder was general rather than specific and the statute “incorporates whatever punishment the law prescribed for first degree murder when the conspiracy was committed.” (*Id.* at p. 865, 134 Cal.Rptr.2d 602, 69 P.3d 446.) Proposition 7's reference to first and second degree murder is analogous to the reference found to be general in *People v. Hernandez*. (*Gooden, supra*, at p. 283, 255 Cal.Rptr.3d 239.)

Gooden also observed, “If the drafters of Proposition 7 had intended to incorporate the definition of murder as the offense was understood in 1978, we expect the initiative, at minimum, would have cited or referred to the statutory provisions defining murder (§ 187), malice (§ 188), or the degrees of murder (§ 189).” (*Gooden, supra*, 42 Cal.App.5th at p. 283, 255 Cal.Rptr.3d 239; accord, *Californians for Political Reform Foundation, supra*, 61 Cal.App.4th at p. 485, 71 Cal.Rptr.2d 606 [“If in fact it were the intent of the proponents of the initiative to freeze into place the then-existing regulatory definition of ‘contribution,’ it would have been easy enough to do so.”].) “Further, Proposition 7 did not include any time-specific limitations when referring to first or second degree murder, as we might expect if the voters had intended to permanently wall off the definition of murder from future consideration by the Legislature.” (*Gooden, supra*, at p. 283, 255 Cal.Rptr.3d 239; accord, *Californians for*

Political Reform Foundation, supra, at p. 485, 71 Cal.Rptr.2d 606.)

Also instructive is the decision in *Oluwa*, which interpreted the following language added to section 190 under Proposition 7: “ ‘The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code [article 2.5] shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.’ ” (*Oluwa, supra*, 207 Cal.App.3d at p. 442, 255 Cal.Rptr. 35.) The defendant in *Oluwa* claimed that Proposition 7 authorized him to receive more liberal custody credits under section 2933, which was added to article 2.5 several years after the passage of Proposition 7. (*Oluwa, supra*, at pp. 442–444, 255 Cal.Rptr. 35.) The Court of Appeal disagreed, concluding that Proposition 7 specifically incorporated by reference an article of the Penal Code, which at the time contained only sections 2930, 2931 and 2932. (*Oluwa, supra*, at p. 445, 255 Cal.Rptr. 35; accord, *Cooper, supra*, 27 Cal.4th at p. 44, 115 Cal.Rptr.2d 219, 37 P.3d 403.) Further, the *Oluwa* court observed, “[T]he legislative analysis accompanying the initiative specifically addressed the availability of conduct credits and advised voters that those persons sentenced to 15 years to life in prison would have to serve a minimum of 10 years before becoming eligible for parole. Thus, contrary to [the defendant’s] assertion, the electorate clearly intended service of 10 calendar years by a second degree murderer before parole consideration.” (*Oluwa, supra*, at p. 445, 255 Cal.Rptr. 35; accord, *Cooper, supra*, at p. 45, 115 Cal.Rptr.2d 219, 37 P.3d 403.)⁷

⁷ In *Cooper*, the California Supreme Court, while agreeing that the reference to article 2.5 in Proposition 7 is specific rather than general, distinguished the *postsentence* credits at issue in *Oluwa* (*Cooper, supra*, 27 Cal.4th at p. 44, 115 Cal.Rptr.2d 219, 37 P.3d 403) and concluded that “the trial court’s restriction of *presentence* conduct credits under section 2933.1 [was] not inconsistent with former section 190 and [did] not otherwise circumvent the intent of the electorate in adopting the Briggs Initiative[]” (*id.* at p. 48, 115 Cal.Rptr.2d 219, 37 P.3d 403).

*10 In contrast with the article 2.5 credits at issue in *Oluwa*, Proposition 7 contains no such specific references with respect to the substantive offenses of first and second

degree murder, and the ballot material contains nothing suggesting any such intent. Thus, whether characterized as freezing the law of murder as it was in 1978 (*Californians for Political Reform Foundation, supra*, 61 Cal.App.4th at p. 485, 71 Cal.Rptr.2d 606), or incorporating the law of murder as it was in 1978 by specific reference (*Palermo, supra*, 32 Cal.2d at pp. 58–59, 195 P.2d 1), neither the plain language of Proposition 7 nor the ballot material supports respondent’s position.

Finally, to the extent that respondent’s argument suggests mere reference to first and second degree murder in the statutes amended by Proposition 7 evidences voters’ knowledge of the definition of murder and intent to preserve that definition as it existed in 1978, we are unpersuaded. Under the California Constitution, “a statute must be reenacted in full as amended if any part of it is amended.” (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 206, 240 Cal.Rptr.3d 52, 430 P.3d 345 (*Com. on State Mandates*), citing Cal. Const., art. IV, § 9; accord, *People v. Guzman* (2019) 8 Cal.5th 673, 686, 256 Cal.Rptr.3d 112, 453 P.3d 1130; Gov. Code, § 9605, subd. (a).) In *Com. on State Mandates*, the California Supreme Court explained, “When technical reenactments are required under article IV, section 9 of the Constitution—yet involve no substantive change in a given statutory provision—the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute. This interpretation of article II of the Constitution is consistent with the people’s precious right to exercise the initiative power. [Citation.] It also comports with the Legislature’s ability to change statutory provisions outside the scope of the existing provisions voters plausibly had a purpose to supplant through an initiative.” (*Id.* at p. 214, 240 Cal.Rptr.3d 52, 430 P.3d 345.) Here, the references to first and second degree murder were confined to technical restatements of the statutes, in accordance with the California Constitution and Government Code section 9605.

d. Voter Intent Not Ascertainable from Silence on Matter

Finally, respondent contends that “[t]he concern expressed in the arguments, together with the significant changes made to

the penalties for murder, make clear the intent of the electorate to secure the community against violent crime by imposing longer prison terms or the death penalty on defendants who were convicted of murder. Under no reading of the arguments, the Legislative Analyst's discussion or the proposition itself did the people express a willingness or desire to permit the Legislature to re-define what is required for murder so as to narrow the range of offenders to which it would apply." While we agree with the first proposition, the second is contrary to established principles governing statutory interpretation.

It bears repeating that "[i]f the statutory language is not ambiguous, then the plain meaning of the language governs. [Citation.] If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006, 22 Cal.Rptr.3d 869, 103 P.3d 270; accord, *People v. Ruiz*, *supra*, 4 Cal.5th at p. 1106, 232 Cal.Rptr.3d 714, 417 P.3d 191; *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 901, 135 Cal.Rptr.2d 30, 69 P.3d 951; *Gooden*, *supra*, 42 Cal.App.5th at p. 284, 255 Cal.Rptr.3d 239.) "[W]e may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Pearson*, *supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858; accord, *Wishnev v. The Northwestern Mutual Life Ins. Co.* (2019) 8 Cal.5th 199, 210, 254 Cal.Rptr.3d 638, 451 P.3d 777 (*Wishnev*); *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350, 195 Cal.Rptr.3d 773, 362 P.3d 417.)

*11 Here, respondent's argument is not founded on any language in Proposition 7 or information in the ballot material. Instead, respondent purports to divine the electorate's intent on this issue from its silence. Respondent's argument, in other words, is purely speculative. (*People v. Laird* (2018) 27 Cal.App.5th 458, 465, 238 Cal.Rptr.3d 313; *Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191, 147 Cal.Rptr.3d 696 ["Just as the silence of a dog trained to bark at intruders suggests the absence of intruders, this silence speaks loudly. It is indicative of a lack of voter intent"].)

As explained in *Gooden*, the ballot materials "all concern the issue of punishment. By contrast, they are silent on the critical issues addressed by Senate Bill 1437. They do not mention the mens rea element of murder or any other requirement necessary for a person to be liable for murder. They do not mention section[s] 187 (defining murder), 188 (defining malice), or 189 (defining the degrees of murder). Further,

they do not discuss the felony-murder rule or the natural and probable consequences doctrine. These ballot materials buttress our conclusion that voters intended Proposition 7 to strengthen the punishments for persons convicted of murder, not to reaffirm or amend the substantive offense of murder." (*Gooden*, *supra*, 42 Cal.App.5th at p. 285, 255 Cal.Rptr.3d 239; accord, *Cruz*, *supra*, 46 Cal.App.5th at p. 756, 260 Cal.Rptr.3d 166.)⁸

8 Respondent mentions that the Legislature "further ignored the Legislative Counsel's advice in pursuit of this unconstitutional assertion of legislative primacy over the voters' will." This passing reference pertains to a letter submitted as an exhibit to the People's opposition to appellant's section 1170.95 petition in the trial court. On appeal, respondent does not place any great weight on the letter, but we note that the letter takes the position we have already rejected: by reducing the class of individuals who may be convicted of murder, Senate Bill No. 1437 amends Proposition 7 by one, changing its scope and two, changing the definition of murder relied on by the voters. The Court of Appeal in *Gooden* addressed the letter, noting uncertainty surrounding whether the letter pertained to Senate Bill No. 1437 or Assembly Bill No. 3104, which was not enacted but would have, in relevant part, amended sections 189, 190 and 190.2. (*Gooden*, *supra*, 42 Cal.App.5th at p. 285, 255 Cal.Rptr.3d 239; Assem. Bill No. 3104 (2017-2018 Reg. Sess.)) *Gooden* concluded that regardless, the letter was neither binding nor persuasive. (*Gooden*, *supra*, at p. 285, 255 Cal.Rptr.3d 239; *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 982, 116 Cal.Rptr.3d 195, 239 P.3d 651 ["[A]n opinion of the Legislative Counsel is entitled to respect, [but] its weight depends on the reasons given in its support."].) As stated, we have already addressed and rejected the reasoning set forth in the letter and nothing in the letter persuades us to the contrary.

e. Retroactive Petition Process Under Section 1170.95

Respondent also argues that even if prospective application of Senate Bill No. 1437 passes constitutional muster, retroactive application does not. Respondent contends that voter intent

to increase sentences for first and second degree murder “unquestionably precludes the Legislature from retroactively redefining murder to vacate convictions that were lawful at the time they were entered, reducing the punishment that the electorate mandated for murder and effectively granting a legislative commutation.” “[T]he voters unquestionably intended that those convicted of murder received life until that sentence was lawfully changed.”

12 Respondent asserts that separating the offense of murder from the punishment requires parsing Proposition 7 with “‘artificial, scalpel-like precision’*” but we disagree. As we have explained, the Legislature may address related areas of law and respondent’s arguments improperly conflate the crime with the punishment. Voters were concerned with ensuring harsh sentences for those convicted of murder, but in enacting Proposition 7, they did not purport to address the substantive offense of murder and thus did not preclude or otherwise restrict the Legislature from acting in this related area. Critically, [section 1170.95](#) does not provide for resentencing a defendant who stands convicted of murder, but for resentencing a defendant whose murder conviction has been vacated based on a change to the offense of murder. (*Id.*, subd. (a).) In our view, this is a distinction with a difference.

In rejecting this line of attack advanced by respondent, the *Gooden* court reasoned that it “assumes a petitioner’s murder conviction is fixed and the resentencing procedure merely provides an avenue by which a petitioner may obtain a more lenient sentence for the extant conviction. However, that is not the case. The effect of a successful petition under [section 1170.95](#) ‘ “ ‘is to vacate the judgment ... as if no judgment had ever been rendered.’ ” ’ [Citations.] Thus, the resentencing procedure established by [section 1170.95](#)—like the remainder of the statutory changes implemented by Senate Bill 1437—does not amend Proposition 7.” (*Gooden, supra*, 42 Cal.App.5th at p. 286, 255 Cal.Rptr.3d 239, quoting *People v. Martinez* (2017) 10 Cal.App.5th 686, 718, 216 Cal.Rptr.3d 814 & citing *People v. Sumstine* (1984) 36 Cal.3d 909, 920, 206 Cal.Rptr. 707, 687 P.2d 904.) We agree with respondent that “[t]he voters should get what they enacted, not more and not less[]” (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858), but Senate Bill No. 1437 does not deprive them of what they enacted.

E. Proposition 115

1. Background

Next, in 1990, voters enacted Proposition 115, entitled the Crime Victims Justice Reform Act, “to adopt ‘comprehensive reforms ... needed in order to restore balance and fairness to our criminal justice system’ ” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340, 276 Cal.Rptr. 326, 801 P.2d 1077, quoting Voter Information Guide, Primary Elec. (June 5, 1990) text of Prop. 115, §§ 1–30, pp. 33, 65–69), and “[t]o achieve that purpose, the measure adopts a variety of changes and additions to [the] state Constitution and statutes[]” (*Raven v. Deukmejian, supra*, at p. 340, 276 Cal.Rptr. 326, 801 P.2d 1077). Relevant to the constitutional challenge at issue in this appeal, Proposition 115 amended [section 189](#) to add the following offenses to the felony-murder rule: kidnapping, train wrecking and sex offenses under sections 286, 288, 288a and 289. (Voter Information Guide, *supra*, text of Prop. 115, *supra*, § 9, p. 66; *Raven v. Deukmejian, supra*, 52 Cal.3d at p. 344, 276 Cal.Rptr. 326, 801 P.2d 1077.)⁹ Voters provided that Proposition 115 may be amended only “by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors[]” (Voter Information Guide, *supra*, text of Prop. 115, § 30, p. 69).

⁹ Section 288a was subsequently renumbered to section 287. (Stats, 2018, ch. 423, § 49.)

2. Analysis

The trial court rejected the prosecution’s claim that Senate Bill No. 1437 unconstitutionally amends Proposition 115, but on appeal, respondent renews the argument. Respondent acknowledges that Proposition 115 did not alter [section 189](#) other than to add five crimes to the felony-murder rule, that the amendment to [section 189](#) necessitated a full reenactment of the statute pursuant to the California Constitution, and that with respect to technical reenactments involving no substantive change, “the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process.” (*Com. on State Mandates, supra*, 6 Cal.5th at p. 214, 240 Cal.Rptr.3d 52, 430 P.3d 345, citing Cal. Const., art. IV, § 9.) However, respondent contends that “[t]his conclusion applies *unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of

the statute[] (*Com. on State Mandates, supra*, at p. 214, 240 Cal.Rptr.3d 52, 430 P.3d 345, italics in original),’ ” and here, the voters permitted the Legislature to amend Proposition 115 only “by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors[]” (Voter Information Guide, *supra*, text of Prop. 115, § 30, p. 69). Respondent also contends that Proposition 115 did not merely reenact [section 189](#) because “[r]emoving culpability from accomplices and felony murder cannot be said to be anything other than at odds with” the goals of just punishment for violent criminals and comprehensive reform needed to restore balance and fairness to the criminal justice system.

*13 Distilled to its essence, respondent’s claim is that rather than a technical reenactment, the measure “directly amended” [section 189](#) and requires a two-thirds majority in both houses for legislative amendment, thereby precluding the Legislature from making *any* substantial changes to [section 189](#). We reject the argument.

Proposition 115 expanded the scope of the felony-murder rule by adding five qualifying felonies, but effected no other substantive change to [section 189](#) and the technical reenactment of [section 189](#) in full, required by the California Constitution, did not insulate [section 189](#) from any and all future changes by the Legislature. To the contrary, the Legislature retains authority to amend through the ordinary legislative process unless the provision at issue—here, the elements of murder—is integral to the electorate’s goal in enacting the earlier measure or there is some other indication that the voters intended to limit the Legislature’s ability to amend the provision at issue via the ordinary legislative process. (*Com. on State Mandates, supra*, 6 Cal.5th at p. 214, 240 Cal.Rptr.3d 52, 430 P.3d 345.) To find otherwise is directly contrary to the California Supreme Court’s conclusion in *Com. of State Mandates*, which included the following observation: “Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people’s willingness to amend existing laws by initiative.” (*Ibid.*)

The relevant question is whether Senate Bill No. 1437 impermissibly amends Proposition 115 by taking away from the change to [section 189](#) mandated by the voters in enacting the measure. (*Kelly, supra*, 47 Cal.4th at p. 1027, 103 Cal.Rptr.3d 733, 222 P.3d 186.) As the change to [section 189](#) effected by Senate Bill No. 1437 does not take away

from or alter the scope of the felony-murder rule with respect to qualifying offenses, it does not amend Proposition 115. (*Gooden, supra*, 42 Cal.App.5th at p. 287, 255 Cal.Rptr.3d 239; accord, *Cruz, supra*, 46 Cal.App.5th at p. 747, 260 Cal.Rptr.3d 166; *Solis, supra*, 46 Cal.App.5th at p. 773, 259 Cal.Rptr.3d 854.)

We perceive no ambiguity with the text of Proposition 115 and respondent does not argue otherwise, but we note that the absence of any indication that Senate Bill No. 1437 thwarts the voters’ intent in enacting Proposition 115. Respondent asserts that Proposition 115 added language to [section 190.2, subdivisions \(c\) and \(d\)](#), that is nearly identical to [section 189, subdivision \(e\)](#), added by Senate Bill No. 1437, and she argues that “[h]ad the voters wanted the additional requirements for accomplices to apply to ... § 189, they would have codified it as such.” However, “ ‘[w]e cannot presume that ... the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.’ ” (*People v. Valencia* (2017) 3 Cal.5th 347, 364, 220 Cal.Rptr.3d 230, 397 P.3d 936.)

Here, the stated goals of the initiative were “to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.” (Voter Information Guide, *supra*, text of Prop. 115, § 1, p. 33.) The arguments in favor of Proposition 115 generally focused on cutting down on costs and delays in the criminal justice system, and on improving the death penalty law. (*Id.* at pp. 34–35.) Neither the text of Proposition 115 nor the ballot material speaks to the elements of murder and as that matter was not before the voters, we cannot speculate as to their thoughts on it. (*People v. Valencia, supra*, 3 Cal.5th at p. 380, 220 Cal.Rptr.3d 230, 397 P.3d 936.)

F. Proposition 9

1. Background

*14 Respondent also claims that the [section 1170.95](#) petition process available to those convicted of felony murder or murder under a natural and probable consequences theory violates the California Constitution as amended by

Proposition 9, a crime victims' rights initiative known as Marsy's Law. (*In re Vicks* (2013) 56 Cal.4th 274, 282, 153 Cal.Rptr.3d 471, 295 P.3d 863; *Santos v. Brown* (2015) 238 Cal.App.4th 398, 404, 189 Cal.Rptr.3d 234.) The stated purpose of Proposition 9, enacted by voters in 2008, is to “[p]rovide victims with rights to justice and due process[.]” and to “[i]nvoke the rights of families of homicide victims to be spared the ordeal of prolonged and unnecessary suffering, and to stop the waste of millions of taxpayer dollars, by eliminating parole hearings in which there is no likelihood a murderer will be paroled, and to provide that a convicted murderer can receive a parole hearing no more frequently than every three years, and can be denied a follow-up parole hearing for as long as 15 years.” (Voter Information Guide, *supra*, text of Prop. 9, § 3, ¶¶ 1–2, p. 129.)

The measure “includes both constitutional and statutory amendments. The constitutional provisions recognize various rights of victims of crime and of the people of California” (*In re Vicks*, *supra*, 56 Cal.4th at p. 282, 153 Cal.Rptr.3d 471, 295 P.3d 863), while “[m]ost of the law's statutory amendments relate to parole” (*id.* at p. 283, 153 Cal.Rptr.3d 471, 295 P.3d 863). The voters limited the legislative amendment of Proposition 9 as follows: “The statutory provisions of this act shall not be amended by the Legislature except by a statute passed in each house by roll-call vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters. However, the Legislature may amend the statutory provisions of this act to expand the scope of their application, to recognize additional rights of victims of crime, or to further the rights of victims of crime by a statute passed by a majority vote of the membership of each house.” (Voter Information Guide, *supra*, text of Prop. 9, § 9, p. 132.)

Respondent claims that the petition process under section 1170.95 is unconstitutional because it violates the right of crime victims to finality of judgment and does not consider the safety of victims, their families and the public with respect to release. Relevant to these claims, Proposition 9 amended the California Constitution to include the following findings and declarations: “The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials....” (Cal. Const., art. I, § 28, subd. (a)(4).) Further, “[v]ictims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-

judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end.” (*Id.*, subd. (a)(6).)

Proposition 9 also amended the California Constitution to provide that victims are entitled “[t]o a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings” (Cal. Const., art. I, § 28, subd. (b)(9)), and “[t]o have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made” (*id.*, subd. (b)(16)).

2. Finality

With respect to postconviction release proceedings and decisions, Proposition 9 provides victims with the right to notice, to be present and to be heard. (*Lamoureux*, *supra*, 42 Cal.App.5th at pp. 264–265, 255 Cal.Rptr.3d 253, citing Cal. Const., art. I, § 28, subd. (b)(7), (b)(8).) Thus, although Proposition 9 provides victims with the right to “prompt and final conclusion of ... any related postjudgment proceedings” (Cal. Const., art. I, § 28, subd. (b)(9)), the measure “did not foreclose post-judgment proceedings altogether” and instead “expressly contemplated the availability of such postjudgment proceedings” (*Lamoureux*, *supra*, at pp. 264–265, 255 Cal.Rptr.3d 253.) Consistent with this interpretation, other postjudgment proceedings enacted after 2008 have specifically recognized the existence of victims' rights under Proposition 9. (*Id.* at p. 265, 255 Cal.Rptr.3d 253, citing § 1170.126, subd. (m) & *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1300, 155 Cal.Rptr.3d 856 [Prop. 36]; § 1170.18, subd. (o) [Prop. 47]; § 1170.91, subd. (b)(6) [providing recall and resentencing process for current or former military members suffering from certain mitigating problems or conditions].)

*15 As the court in *Lamoureux* stated, “[i]t would be anomalous and untenable for us to conclude, as the People impliedly suggest, that the voters intended to categorically foreclose the creation of any new postjudgment proceedings not in existence at the time Marsy's Law was approved simply because the voters granted crime victims a right to a ‘prompt

and final conclusion' of criminal cases.” (*Lamoureux, supra*, 42 Cal.App.5th at p. 265, 255 Cal.Rptr.3d 253, quoting Cal. Const., art. I, § 28, subd. (b)(9), fn. omitted.) We agree. Neither the plain language of the initiative nor the ballot material suggests that in enacting Proposition 9, voters intended to prohibit the Legislature from creating new postjudgment proceedings. (*Pearson, supra*, 48 Cal.4th at p. 571, 107 Cal.Rptr.3d 265, 227 P.3d 858.)

Moreover, subdivisions (c) and (d)(1) of section 1170.95 provide specific time limits, which may be extended only upon a showing of good cause. This ensures victims receive a prompt and final conclusion with respect to postjudgment proceedings initiated under section 1170.95. (*Lamoureux, supra*, 42 Cal.App.5th at p. 265, fn. 6, 255 Cal.Rptr.3d 253.)

3. Public Safety Considerations

As well, *Lamoureux*, assuming without deciding that the petition process under section 1170.95 qualifies as a postjudgment release decision, rejected the claim that the process infringes on the “right [t]o have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made.” (*Lamoureux, supra*, 42 Cal.App.5th at p. 265, 255 Cal.Rptr.3d 253, quoting Cal. Const., art. I, § 28, subd. (b)(16).) The court explained, “The People are correct that the safety of the victim and the public are not pertinent to whether a court may vacate the petitioner's murder conviction and resentence the petitioner.” (*Lamoureux, supra*, at p. 265, 255 Cal.Rptr.3d 253.) However, under section 1170.95, subdivision (d), “[i]f a court rules a petitioner is entitled to vacatur of his or her murder conviction, it must then resentence the petitioner on any remaining counts. [Citation.] During resentencing, the court may weigh the same sentencing factors it considers when it initially sentences a defendant, including whether the defendant presents ‘a serious danger to society’ and ‘[a]ny other factors [that] reasonably relate to the defendant or the circumstances under which the crime was committed.’ (Cal. Rules of Court, rule 4.421(b)(1), (c).) At minimum, [therefore,] the trial court's ability to consider these factors during resentencing ensures the safety of the victim, the victim's family, and the general public are ‘considered,’ as required by Marsy's Law. (Cal. Const., art. I, § 28, subd. (b)(16).)” (*Lamoureux, supra*, at p. 266, 255 Cal.Rptr.3d 253.)

4. Findings and Declarations Under Subdivision (a)

Finally, respondent cites subdivisions (a)(4) and (a)(6) of article I, section 28 of the California Constitution, quoted in part I.C.1. of the Discussion, in support of her argument. However, unlike subdivision (b), which sets forth victims' rights that are enforceable under subdivision (c) in any court having jurisdiction over the case, the findings and declarations set forth in subdivision (a) are “not an independent source of enforceable rights.” (*Lamoureux, supra*, 42 Cal.App.5th at p. 266, 255 Cal.Rptr.3d 253, citing *People v. Superior Court (Johnson)* (2004) 120 Cal.App.4th 950, 956, 15 Cal.Rptr.3d 921; see *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 792–793, 3 Cal.Rptr.3d 703, 74 P.3d 795 [statutory findings and declarations provided guidance in carrying out bill's provisions, not binding limitations].) Likewise, to the extent that respondent's argument relies on the preamble in sections 2 and 3 of Proposition 9, these findings and declarations and statements of purpose and intent “ ‘do not confer power, determine rights, or enlarge the scope of [the] measure.’ ” (*Lamoureux, supra*, at p. 266, 255 Cal.Rptr.3d 253, quoting *People v. Guzman* (2005) 35 Cal.4th 577, 588, 25 Cal.Rptr.3d 761, 107 P.3d 860.) Accordingly, on these grounds, we reject respondent's claim that section 1170.95 violates Proposition 9.

II. Claim Senate Bill No. 1437 Violates Separation of Powers Doctrine

A. Separation of Powers Doctrine

*16 Next, respondent argues that the petition process under section 1170.95 violates the separation of powers doctrine by impermissibly intruding into a core judicial function insofar as it requires that convictions be vacated even in cases in which judgment is final. Respondent also argues that the availability of relief in cases in which judgment is final usurps the governor's pardon power.

“The California Constitution establishes a system of state government in which power is divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal. Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further states that those charged with the exercise of one power may not exercise any other (Cal. Const., art. III, § 3).” (*People v. Bunn* (2002) 27 Cal.4th 1, 14, 115 Cal.Rptr.2d 192, 37 P.3d 380 (*Bunn*)). The primary purpose of the separation of powers doctrine

“ ‘is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government[]’ ” (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 557, 117 Cal.Rptr.2d 168, 41 P.3d 3), as well as to avoid overreaching by one governmental branch against another (*Bunn, supra*, at p. 16, 115 Cal.Rptr.2d 192, 37 P.3d 380). While there is some interdependence among the branches, the Constitution “does vest each branch with certain ‘core’ [citation] or ‘essential’ [citation] functions that may not be usurped by another branch.” (*Id.* at p. 14, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

“ ‘Although the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions long have recognized that, in reality, the separation of powers doctrine “ ‘does not mean that the three departments of our government are not in many respects mutually dependent’ ” [citation], or that the actions of one branch may not significantly affect those of another branch.’ ” (*Briggs v. Brown* (2017) 3 Cal.5th 808, 846, 221 Cal.Rptr.3d 465, 400 P.3d 29, quoting *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 913 P.2d 1046.) Instead, it is violated “only when the actions of a branch of government defeat or materially impair the inherent functions of another branch.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662, 128 Cal.Rptr.2d 104, 59 P.3d 174.)

B. Material Impairment of Core Judicial Function

We turn first to respondent's argument that the retroactive petition process under section 1170.95 intrudes into a core judicial function insofar as it authorizes relief in cases in which judgment is final. “Our Constitution vests ‘[t]he legislative power of this State ... in the California Legislature which consists of the Senate and Assembly’ (Cal. Const. art. IV, § 1.) It is in the nature of state constitutions that they, unlike the federal Constitution, generally do not grant only limited powers. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 29 [30 Cal.Rptr.3d 30, 113 P.3d 1062].) Consequently, ‘unlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution.’ (*Id.* at p. 31 [30 Cal.Rptr.3d 30, 113 P.3d 1062].) Lying at the core of that plenary authority is the power to enact laws. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254 [135 Cal.Rptr.3d 683, 267 P.3d 580].) It has been said that pursuant to that

authority, ‘[t]he Legislature has the *actual* power to pass any act it pleases,’ subject only to those limits that may arise elsewhere in the state or federal Constitutions.” (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 497–498, 196 Cal.Rptr.3d 732, 363 P.3d 628.)

*17 “[O]rdinarily a final judgment is conclusive.” (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 980, 139 Cal.Rptr.3d 3, 272 P.3d 977; accord, *Marine Forests Society v. California Coastal Com.*, *supra*, 36 Cal.4th at p. 25, 30 Cal.Rptr.3d 30, 113 P.3d 1062) However, as set forth above, “it is the function of the legislative branch to define crimes and prescribe punishments, and ... such questions are in the first instance for the judgment of the Legislature alone.” (*In re Lynch* (1972) 8 Cal.3d 410, 414, 105 Cal.Rptr. 217, 503 P.2d 921; accord, *People v. Chun* (2009) 45 Cal.4th 1172, 1183, 91 Cal.Rptr.3d 106, 203 P.3d 425; *Manduley v. Superior Court, supra*, 27 Cal.4th at p. 552, 117 Cal.Rptr.2d 168, 41 P.3d 3, 27 Cal.4th 887A at p. 552; see *Howard Jarvis Taxpayers Assn. v. Padilla, supra*, 62 Cal.4th at p. 499, 196 Cal.Rptr.3d 732, 363 P.3d 628 [“The principal function of a legislature is ‘to enact wise and well-formed and needful laws [citation]’ ”].)¹⁰

¹⁰ As respondent points out, “ ‘[t]he power of the people through the statutory initiative is coextensive with the power of the Legislature.’ ” (*Manduley v. Superior Court, supra*, 27 Cal.4th at p. 552, 117 Cal.Rptr.2d 168, 41 P.3d 3, 27 Cal.4th 887A at p. 552.) The claim here, however, is that the Legislature impermissibly intruded into core functions of the judicial and executive branches by upending final judgments and exercising clemency.

1. Cases Holding Final Judgments Yield to Broader Penal Reform

As respondent acknowledges, there is authority for the proposition that where broader penal reform is at issue, “some legislative interference with final court judgments is permissible.” In *Way v. Superior Court* (1977) 74 Cal.App.3d 165, 141 Cal.Rptr. 383 (*Way*), the Court of Appeal considered a challenge to the repeal of the Indeterminate Sentencing Law and enactment of the Uniform Determinate Sentencing Act of 1976 (Determinate Sentencing Act), effective July 1, 1977. (*Way, supra*, at pp. 168–169, 141 Cal.Rptr. 383). “In contrast to the [Indeterminate Sentencing Law], which was designed ‘to mitigate the punishment[,] place emphasis upon the reformation of the offender,’ and ‘make the

punishment fit the criminal rather than the crime’ [citation], the [Determinate Sentencing] Act declares that ‘the purpose of imprisonment for crime is *punishment*. This purpose is best served by ... provision for uniformity in the sentences of offenders....’ (Pen. Code, § 1170, subd. (a)(1).) [¶] To achieve *total* uniformity, ... section 1170.2 provides for retroactive application of the [Determinate Sentencing] Act to prisoners incarcerated under the [Indeterminate Sentencing Law].” (*Id.* at p. 169, 141 Cal.Rptr. 383.)

The Determinate Sentencing Act was challenged by a group of judges on the ground that it violated the separation of powers doctrine. (*Way, supra*, 74 Cal.App.3d at pp. 169–170, 141 Cal.Rptr. 383.) The Court of Appeal concluded that the Legislature lacked the power to grant a commutation or pardon, a power vested exclusively in the Governor (*id.* at pp. 175–176, 141 Cal.Rptr. 383), but that the motivation underlying section 1170.2 was “to restructure punishments for criminal conduct and to make them uniform to the extent reasonably possible[]” (*Way, supra*, at p. 177, 141 Cal.Rptr. 383). As such, the statute “undertook no act of mercy, grace, or forgiveness toward past offenders, such as characterizes true commutations.” (*Ibid.*) Although existing prison terms were shortened under the Determinate Sentencing Act, it was “purely incidental to the main legislative purpose” (*Ibid.*)¹¹

¹¹ As discussed further, *post*, the California Supreme Court cited the commutation analysis in *Way* with approval when it rejected a challenge to legislation providing for the destruction of marijuana arrest or conviction records, a challenge premised on legislative interference with executive clemency power. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117–118, 145 Cal.Rptr. 674, 577 P.2d 1014 (*Younger*).

*18 The court further concluded that the retroactive change did not disturb the rule “that once a judgment in a criminal case becomes final, it may not be reduced by subsequent legislative action.” (*Way, supra*, 74 Cal.App.3d at p. 179, 141 Cal.Rptr. 383.) The court explained, “The distinction is that in this case final judgments will be reduced only as an incident of a major and comprehensive reform of an entire penal system. In view of the legislative objective, the final judgment rule must yield.” (*Id.* at p. 180, 141 Cal.Rptr. 383.)

Two years later, another Court of Appeal considered whether section 209, which was amended under the Determinate

Sentencing Act to provide that kidnapping for robbery was punishable by life with the possibility of parole, applied retroactively to a defendant serving a sentence of life without the possibility of parole under the prior version of the statute. (*People v. Community Release Bd.* (1979) 96 Cal.App.3d 792, 794, 158 Cal.Rptr. 238.) The amendment to section 209 was not expressly retroactive and the court concluded that because the amendment was ameliorative, it was to be applied retroactively “ ‘to every case to which it constitutionally could apply.’ ” (*People v. Community Release Bd., supra*, at p. 799, 158 Cal.Rptr. 238, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745, 48 Cal.Rptr. 172, 408 P.2d 948.) Relying on *Way*, the court further concluded that the amendment applied retroactively to the case before it, notwithstanding that judgment was final, because “the retroactivity feature was merely incidental to the proper legislative function of revising the penal laws.” (*People v. Community Release Bd., supra*, at p. 800, 158 Cal.Rptr. 238.) The court observed, “We therefore take it as settled that legislation reducing punishment for crime may constitutionally be applied to prisoners whose judgments have become final.” (*Ibid.*)

Subsequently, the Court of Appeal in *In re Chavez* considered a 2001 amendment to a statute criminalizing the filing of a false personal income tax return. (*In re Chavez* (2004) 114 Cal.App.4th 989, 992, 8 Cal.Rptr.3d 395 (*Chavez*)). Under the Determinate Sentencing Act, the punishment for the crime was 16 months, two years or three years. (*Id.* at p. 994, 8 Cal.Rptr.3d 395.) In 1983, the statute was revised pursuant to an extensive bill (*id.* at pp. 994–995, 8 Cal.Rptr.3d 395), and that revision resulted in the inclusion of language reflecting an indeterminate sentence of “ ‘not more than three years’ ” (*id.* at p. 995, 8 Cal.Rptr.3d 395). The statute was renumbered in 1993 but retained the language reflecting an indeterminate sentence. (*Ibid.*) In 2001, the statute was amended again to return the punishment to that provided for under the Determinate Sentencing Act: 16 months, two years or three years. (*Id.* at pp. 991–992, 8 Cal.Rptr.3d 395.)

At issue in *Chavez* was whether the two defendants who were serving indeterminate sentences under the prior version of the statute were entitled to benefit from the 2001 amendment despite the finality of their judgments. (*Chavez, supra*, 114 Cal.App.4th at pp. 992–993, 8 Cal.Rptr.3d 395.) The court concluded that the statute was amended in 2001 to effect a nonsubstantive correction resulting from an earlier drafting error with respect to the indeterminate sentence language and that the amendment was intended to apply retroactively to all whom it could apply. (*Id.* at pp. 998–

999, 8 Cal.Rptr.3d 395.) The Attorney General argued that the amendment did not apply in cases where judgment was final because the “amendment was not passed as part of a major and comprehensive reform of the entire penal system.” (*Id.* at p. 1000, 8 Cal.Rptr.3d 395.) The court rejected the argument, stating, “It ... appears settled that a final judgment is not immune from the Legislature’s power to adjust prison sentences for a legitimate public purpose. [Citations.] We conclude that the purpose of achieving equality and uniformity in felony sentencing is a legitimate public purpose to which the finality of judgment must yield.” (*Ibid.*, fn. omitted.)

2. *Bunn* Decision

*19 Notwithstanding the foregoing authority, respondent relies on the California Supreme Court’s decision in *Bunn* in support of her argument that the Legislature may not subvert final judgments. We are not persuaded that *Bunn* applies, however.

Prior to 1994, the statutes of limitations applicable to felony sex crimes committed against children were three and six years, and the Legislature determined that these periods were inadequate given the problems inherent in sex crimes against children: delay in reporting, the victims’ difficulty in recalling and recounting the abuse, and “their vulnerability to adults in positions of authority and trust.” (*Bunn, supra*, 27 Cal.4th at p. 6, 115 Cal.Rptr.2d 192, 37 P.3d 380 [discussing former §§ 800 & 801].) In response, the Legislature enacted a statute that, following subsequent amendments, “authorize[d] prosecution for criminal acts committed many years beforehand—and where the original limitations period ha[d] expired—as long as prosecution beg[an] within a year of a victim’s first complaint to the police” (*Stogner v. California* (2003) 539 U.S. 607, 609, 123 S.Ct. 2446, 156 L.Ed.2d 544 [addressing § 803, former subd. (g)]) (*Stogner*); *Bunn, supra*, at pp. 6–11, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

In *People v. Frazer*, the California Supreme Court upheld the statute as constitutional in the face of a challenge on ex post facto and due process grounds. (*People v. Frazer* (1999) 21 Cal.4th 737, 742–743, 88 Cal.Rptr.2d 312, 982 P.2d 180, abrogated by *Stogner, supra*, 539 U.S. at pp. 632–633, 123 S.Ct. 2446 [holding § 803, former subd. (g)’s revival of a time-barred prosecution violates ex post facto clause].) Subsequently, in the companion cases of *Bunn* and *King*, the California Supreme Court considered a challenge to section

803, former subdivision (g), on the ground that the statute violated the separation of powers doctrine. (*Bunn, supra*, 27 Cal.4th at p. 5, 115 Cal.Rptr.2d 192, 37 P.3d 380; *People v. King* (2002) 27 Cal.4th 29, 31, 115 Cal.Rptr.2d 214, 37 P.3d 398 (*King*)). Relying on the United States Supreme Court’s separation of powers analysis in *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (*Plaut*), which involved a statute of limitations issue in a civil suit for damages, the California Supreme Court concluded that section 803, former subdivision (g), was unconstitutional insofar as the “refiling provision supplants final judgments, and thus invades the judicial power in violation of the separation of powers clause of the California Constitution (art. III, § 3).” (*King, supra*, at p. 31, 115 Cal.Rptr.2d 214, 37 P.3d 398; accord, *Bunn, supra*, at p. 25, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

In *Bunn*, the court observed, “*Plaut* ... declared, in almost talismanic form, that Congress lacks the power to ‘reopen’ [citation], ‘correct’ [citation], ‘reverse’ [citation], ‘revise’ [citation], ‘vacate’ [citation], or ‘annul’ [citation] final court judgments. The controlling separation of powers principle was stated as follows: ‘Having achieved finality, ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.’ ” (*Bunn, supra*, 27 Cal.4th at p. 19, 115 Cal.Rptr.2d 192, 37 P.3d 380.) “Moreover, notwithstanding the constitutional protection afforded final judgments on an individual basis, [the statute at issue in *Plaut*] did not somehow escape separation of powers scrutiny merely because the reopening provision affected ‘a whole class of cases.’ [Citation.] The court reiterated that a separation of powers violation occurs when postjudgment legislation deprives court decisions ‘of the conclusive effect that they had when they were announced.’ [Citation.] Thus, whether a statute targets particular suits or parties, or whether it purports to apply more generally ..., the critical factor for separation of powers purposes is whether such impermissible legislative interference with final judgments has occurred.” (*Id.* at pp. 20–21, 115 Cal.Rptr.2d 192, 37 P.3d 380.)

*20 Despite the arguably broad language in *Plaut*, its federal constitutional separation of powers analysis is not binding.¹² Furthermore, “[i]t is ... ‘axiomatic that a decision does not stand for a proposition not considered by the court[]’ ” (*Wishnev, supra*, 8 Cal.5th at p. 217, 254 Cal.Rptr.3d 638, 451 P.3d 777) and, in *Bunn*, the California

Supreme Court's specifically held as follows: “[A] *refiling* provision like section 803(g) cannot be retroactively applied to subvert judgments that became final before the provision took effect, and before the law of finality changed. This ban applies even where lawmakers have acted for ‘the very best of reasons’ [citation], and whether or not legislative disagreement with the ‘legal rule’ underlying the judgment has been expressed” (*Bunn, supra*, 27 Cal.4th at pp. 24–25, 115 Cal.Rptr.2d 192, 37 P.3d 380, italics added).

12 “[T]he doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States” (*Whalen v. United States* (1980) 445 U.S. 684, 689, fn. 4, 100 S.Ct. 1432, 63 L.Ed.2d 715), and federal separation of powers decisions are not binding, although they may have persuasive value (*Marine Forests Society v. California Coastal Com.*, *supra*, 36 Cal.4th at pp. 29–30, 30 Cal.Rptr.3d 30, 113 P.3d 1062).

Both *Plaut* and *Bunn* confronted legislative amendment to statutes of limitation that resulted in the revival of time-barred actions where judgment was final, and both courts concluded that in cases where judgment was final, such legislation violated the separation of powers doctrine by reopening final judgments. (*Plaut, supra*, 514 U.S. at p. 240, 115 S.Ct. 1447; *Bunn, supra*, 27 Cal.4th at p. 24, 115 Cal.Rptr.2d 192, 37 P.3d 380.) While *Plaut*, in interpreting the separation of powers doctrine under the federal constitution, found it “irrelevant ... that the final judgments reopened by [the statute at issue] rested on the bar of a statute of limitations” (*Plaut, supra*, at p. 228, 115 S.Ct. 1447), we decline to divorce the decision in *Bunn* from its context given that “[t]he purpose of separation of powers is to protect individual liberty by preventing concentration of powers in the hands of any one individual or body.” (*O'Brien v. Jones* (2000) 23 Cal.4th 40, 65, 96 Cal.Rptr.2d 205, 999 P.2d 95.)

Relevant to our discussion, post-*Plaut* and *Bunn*, the United States Supreme Court reversed a California Supreme Court decision holding that former section 803 did not, in reviving time-barred criminal cases, violate the ex post facto clause. (*Stogner, supra*, 539 U.S. at p. 609, 123 S.Ct. 2446.) The court addressed four categories of ex post facto laws and although it found the statute unconstitutional because it fell within the category of laws that “‘inflicted punishments, where the party was not, by law, liable to any punishment’ ” (*id.* at p. 612, 123 S.Ct. 2446, italics omitted), the court also recognized that the statute potentially violated the ex post facto clause under another category by violating the rules of evidence (*id.* at p.

615, 123 S.Ct. 2446). Within this context, the court explained, “Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. [Citation.] And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. [Citation.] Indeed, this Court once described statutes of limitations as creating ‘a presumption which renders proof unnecessary.’ [Citation.] [¶] Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.” (*Id.* at pp. 615–616, 123 S.Ct. 2446.)

It is well established that “[o]nce the statute of limitations for an offense expires without the commencement of prosecution, prosecution for that offense is forever time-barred.” (*People v. Robinson* (2010) 47 Cal.4th 1104, 1112, 104 Cal.Rptr.3d 727, 224 P.3d 55, citing *Stogner, supra*, 539 U.S. at pp. 615–616, 123 S.Ct. 2446; see *People v. Williams* (1999) 21 Cal.4th 335, 341, 87 Cal.Rptr.2d 412, 981 P.2d 42; *People v. Gerold* (2009) 174 Cal.App.4th 781, 787, 94 Cal.Rptr.3d 649.) Given both that the specific statute at issue in *Bunn* reached into a final judgment to revive a time-barred criminal action, directly undermining individual liberty interests, and the specific legislative concerns underlying statutes of limitation, as discussed in the preceding paragraph, we reject an expansive view of *Bunn*, and *King*, as standing for the proposition that under no circumstance may a final judgment be disturbed. (*Lamoureux, supra*, 42 Cal.App.5th at p. 260, 255 Cal.Rptr.3d 253.) Such a broad reach would be at odds with the proposition that there is no separation of powers violation where the legislation at issue advances “a legitimate public purpose to which the finality of the judgment must yield.” (*Chavez, supra*, 114 Cal.App.4th at p. 1000, 8 Cal.Rptr.3d 395.)

3. Effect on Final Judgments Incidental to Broader Penal Reform

*21 In sum, the Legislature enjoys plenary power “to define crimes and establish penalties therefor[]” (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1400, 70 Cal.Rptr.2d 20; accord, *People v. Chun, supra*, 45 Cal.4th at p. 1183, 91 Cal.Rptr.3d 106, 203 P.3d 425), and a duly

enacted statute is presumed constitutional (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086, 17 Cal.Rptr.3d 225, 95 P.3d 459; accord, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, 53 Cal.Rptr.2d 789, 917 P.2d 628). The central focus of Senate Bill No. 1437 is equity: ensuring that criminal liability for murder aligns with individual culpability. This is not a novel concept and our high court has stated, “[I]t is now firmly established that ‘[t]he concept of proportionality is central to the Eighth Amendment,’ and that ‘[e]mbodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” [Citation.]’ ” (*In re Coley* (2012) 55 Cal.4th 524, 538, 146 Cal.Rptr.3d 382, 283 P.3d 1252.)

In *Enmund v. Florida*, the United States Supreme Court concluded that in imposing the death penalty, the Constitution requires individualized consideration of the defendant’s culpability. (*Enmund v. Florida* (1982) 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (*Enmund*)). Subsequently, in *Tison v. Arizona*, the United States Supreme Court held that the *Enmund* standard of culpability that must be met to impose the death penalty is “major participation in the felony committed, combined with reckless indifference to human life[.]” (*Tison v. Arizona* (1987) 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (*Tison*)). The court stated, “A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.” (*Id.* at p. 156, 107 S.Ct. 1676.) The *Tison* standard was thereafter codified in section 190.2, subdivision (d), which was amended by Proposition 115. (Voter Information Guide, *supra*, text of Prop. 115, § 10, p. 66; *People v. Banks, supra*, 61 Cal.4th at p. 794, 189 Cal.Rptr.3d 208, 351 P.3d 330.)

More recently, there has been a sea change in the law, procedurally and substantively, with respect to juvenile offenders (*Montgomery v. Louisiana* (2016) — U.S. — [136 S.Ct. 718, 734–735, 193 L.Ed.2d 599]), grounded in the recognition that children differ from adults because of their “ ‘diminished culpability and greater prospects for reform’ ” (*id.* at p. 733).

Given the legislative intent underlying Senate Bill No. 1437 and viewed in the context of broader changes in the law

tightening the connection between criminal liability and individual culpability, we conclude that Senate Bill No. 1437, rather than impermissibly targeting a specific case or class of cases, is directed at broader penal reform. Viewed through that lens, that some final judgments will necessarily be reopened pursuant to the change in the law is purely incidental to the broader reformation of the law. As such, the change to the crime of murder is analogous to the change to the sentencing law effected by the Determinate Sentencing Act.

More recently, as detailed by the Court of Appeal in *Lamoureux*, the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)), which reduced punishment for certain offenders, and the Safe Neighborhoods and Schools Act (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014)), which reduced certain theft- and drug-related felonies to misdemeanors, are both well-known ameliorative measures that provide for postfinal judgment relief. (*Lamoureux, supra*, 42 Cal.App.5th at pp. 262–263, 255 Cal.Rptr.3d 253.) The court also cited several other less well-known examples (*id.* at p. 263, 255 Cal.Rptr.3d 253, citing Health & Saf. Code, § 11361.8, subd. (a), Pen. Code, §§ 1170.22, 1170.91), and commented, “The prevalence of such legislation is not a sufficient reason on its own to affirm the constitutionality of section 1170.95 on separation of powers grounds. However, in our view, it confirms there is nothing especially unique about section 1170.95, which appears to us to constitute a legitimate and ordinary exercise of legislative authority. Further, it demonstrates the sweeping breadth and potentially drastic implications of the People’s separation of powers argument. Extending the holdings of the *Bunn* and *King* decisions to prohibit the retroactive reopening of final judgments of conviction would call into question the constitutionality of all the statutory provisions described *ante*, and potentially others. Because we conclude such an extension is unwarranted, we need not grapple with those potentially far-reaching consequences any further today” (*Lamoureux, supra*, at p. 264, 255 Cal.Rptr.3d 253).

C. Clemency Power

*22 Respondent also argues Senate Bill No. 1437 violates the separation of powers doctrine by impermissibly infringing upon the governor’s pardon power, a core function of the executive branch. We find this argument similarly unpersuasive.

The power to grant clemency is vested in the executive branch (*Lamoureux, supra*, 42 Cal.App.5th at p. 254, 255

Cal.Rptr.3d 253; *Way, supra*, 74 Cal.App.3d at p. 175, 141 Cal.Rptr. 383), and is an act of mercy or grace (*Lamoureux, supra*, at p. 254, 255 Cal.Rptr.3d 253; *People v. Shepard* (2015) 239 Cal.App.4th 786, 796, 191 Cal.Rptr.3d 429; *Santos v. Brown, supra*, 238 Cal.App.4th at p. 419, 189 Cal.Rptr.3d 234). In *Way*, discussed in the preceding section, the Court of Appeal concluded that in enacting section 1170.2 under the Determinate Sentencing Act, the Legislature's motivation was "to restructure punishments for criminal conduct and to make them uniform to the extent reasonably possible[]" and "[i]t undertook no act of mercy, grace, or forgiveness toward past offenders, such as characterizes true commutations." (*Way, supra*, at p. 177, 141 Cal.Rptr. 383.) The court concluded that "the shortening of existing prison terms by section 1170.2 is purely incidental to the main legislative purpose" (*id.* at p. 177, 141 Cal.Rptr. 383), and is "valid as incidental to a comprehensive reformation of California's penal system[]" (*id.* at p. 178, 141 Cal.Rptr. 383).

Subsequently, the California Supreme Court relied on the reasoning in *Way* and upheld a statute authorizing the destruction of marijuana arrest and conviction records. (*Younger, supra*, 21 Cal.3d at pp. 117–118, 145 Cal.Rptr. 674, 577 P.2d 1014.) The court held the statute "does not authorize destruction of records of a conviction for marijuana possession as an act of grace, but as a means of implementing the Legislature's principal objective of reducing the adverse social and personal effects of that conviction which linger long after the prescribed punishment has been completed. Any infringement on the power of executive clemency is thus purely incidental to the main purpose of the statute—which is well within the province of the Legislature—and hence does not violate the separation of powers." (*Id.* at p. 118, 145 Cal.Rptr. 674, 577 P.2d 1014.)

We agree with the court in *Lamoureux* that the rationale of *Way* and *Younger* applies here. (*Lamoureux, supra*, 42 Cal.App.5th at p. 255, 255 Cal.Rptr.3d 253.) As explained in *Lamoureux*, "in cases where a petitioner makes a prima facie showing of entitlement to relief (§ 1170.95, subd. (c)), and the prosecution fails to carry its burden of proving the petitioner is ineligible for resentencing (*id.*, subd. (d)(3)), murder sentences may be vacated and sentences recalled (*id.*, subd. (d)(1)). Although section 1170.95 requires resentencing on remaining counts, such that a given prisoner's overall sentence may not actually be shortened (*id.*, subd. (d)(1)), it is apparent and undisputed that at least some successful petitioners will obtain shorter sentences or even release from prison. [¶] However, the objective of the Legislature

in approving section 1170.95—like the legislative aims underpinning the challenged laws in the *Way* and *Younger* cases—was not to extend 'an act of grace' to petitioners. [Citations.] Rather, the Legislature's statement of findings and declarations confirms it approved Senate Bill 1437 as part of a broad penal reform effort. The purpose of that undertaking was to ensure our state's murder laws 'fairly address[] the culpability of the individual and assist[] in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.' [Citations.]

*23 "The outcome of a successful petition under section 1170.95 further underscores the fact that section 1170.95 is not merely an act of grace akin to an exercise of executive clemency. As noted *ante*, '[a] successful Senate Bill 1437 petitioner's criminal culpability does not simply evaporate; a meritorious section 1170.95 petition is not a get-out-of-jail free card. Instead, the petitioner is resentenced on the remaining convictions. If the murder was charged "generically" and the target offense was not charged, the murder conviction must be redesignated as the target offense or underlying felony for resentencing purposes.' [Citation.] Thus, while some qualifying petitioners certainly may obtain reduced prison sentences under section 1170.95, there is no guarantee of such an outcome. [¶] In accordance with the *Younger* and *Way* decisions, it is clear ... that section 1170.95's interference with the executive's clemency authority, if any, is merely incidental to the main legislative purpose of Senate Bill 1437." (*Lamoureux, supra*, 42 Cal.App.5th at pp. 255–256, 255 Cal.Rptr.3d 253.) As such, "section 1170.95 does not impermissibly encroach upon the core functions of the executive." (*Id.* at p. 256, 255 Cal.Rptr.3d 253.)

III. Remaining Claims Seek Advisory Opinion

Finally, although respondent concedes these issues are not presented by this appeal, she argues that the evidentiary hearing provided for under section 1170.95, subdivision (d)(3), potentially violates the double jeopardy clause; the remedies provided for under section 1170.95, subdivision (e), in cases not involving an underlying offense are susceptible to challenge based on the rights to due process and a jury trial; and that in some cases, the statute of limitations, which cannot be revived, will have lapsed for the target offense. These claims, however, are not ripe for adjudication and, therefore, any opinion on these issues would be premature and advisory. (*People v. Miracle* (2018) 6 Cal.5th 318, 337, 240 Cal.Rptr.3d 381, 430 P.3d 847 [“ ‘We will not ... adjudicate hypothetical claims or render purely advisory opinions.’ ”]; *People v. Buza*

(2018) 4 Cal.5th 658, 693, 230 Cal.Rptr.3d 681, 413 P.3d 1132 [“We ... abide by ... a ‘ ‘cardinal principle of judicial restraint —if it is not necessary to decide more, it is necessary not to decide more.’ ’ ”]; *People v. Mosley* (2015) 60 Cal.4th 1044, 1054–1055, fn. 7, 185 Cal.Rptr.3d 251, 344 P.3d 788 [“[T]rue adherence to judicial restraint and economy counsels against an unnecessary detour into an analysis of ... statutory meaning [on an issue not before the court].”].)

Furthermore, as the court stated in *Lamoureux*, “[t]he People are the individuals on whose behalf violations of criminal laws are prosecuted.” (*Lamoureux, supra*, 42 Cal.App.5th at p. 267, 255 Cal.Rptr.3d 253.) “[T]hey do not represent the particularized interests of persons who have been accused of criminal offenses or petitioners seeking relief from convictions[]” and therefore, they “lack standing to challenge the hearing and remedy provisions of section 1170.95 based on any alleged infringement on petitioners’ constitutional rights.” (*Lamoureux, supra*, at p. 267, 255 Cal.Rptr.3d 253, citing *In re Cregler* (1961) 56 Cal.2d 308, 313, 14 Cal.Rptr. 289, 363 P.2d 305 [“ ‘[O]ne will not be heard to attack a statute on grounds that are not shown to be applicable to himself’ ”]; accord, *Teal v. Superior Court* (2014) 60 Cal.4th 595, 599, 179 Cal.Rptr.3d 365, 336 P.3d 686, italics omitted [“ ‘As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.’ ”].) Accordingly, we do not reach these claims.

DISPOSITION

The judgment is reversed and this matter is remanded to the trial court for further proceedings under section 1170.95.

I CONCUR:

SMITH, J.

POOCHIGIAN, Acting P.J., concurring and dissenting.

Several appellate decisions in California have held that Senate Bill No. 1437 (2017–2018 Reg. Sess.) (S.B. 1437) did not amend Proposition 7. Those cases have relied on the premise

that S.B. 1437 dealt with the punishment for murder as a related “but distinct” subject from the substantive elements of murder. (See, e.g., *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282, 255 Cal.Rptr.3d 239.) I do not view the two subjects as distinct and would hold that S.B. 1437 improperly amended Proposition 7. I respectfully dissent from the majority's contrary holding on that issue, but otherwise concur as to the other issues presented.

Courts have a Duty to Jealously Guard the Initiative Power

*24 As noted by the majority, Proposition 7 “ ‘did not authorize the Legislature to amend its provisions without voter approval,’ ” and the amendment of Proposition 7 through legislative action is precluded by the California Constitution (Cal. Const., art. II, § 10, subd. (c)). (Maj. opn., ante, at p. —.)

The majority opinion and other decisions opining on the constitutionality of S.B. 1437 all acknowledge that “[u]nder our constitutional system the Legislature is not the exclusive source of legislative power.” (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042, 56 Cal.Rptr.3d 814, 155 P.3d 226; *People v. Hannon* (2016) 5 Cal.App.5th 94, 100, 209 Cal.Rptr.3d 408.) “The legislative power of this State is vested in the California Legislature which consists of the Senate and the Assembly, but the people reserve to themselves the powers of initiative and referendum.” (Cal. Const., art. IV, § 1.) “The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” (Cal. Const., art. II, § 8, subd. (a).)

“It has long been recognized that ‘the initiative is in essence a legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end.’ [Citation.]” (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 357, 276 Cal.Rptr. 326, 801 P.2d 1077.) “[I]t is our solemn duty ‘ ‘to jealously guard’ ’ the initiative power, it being ‘ ‘one of the most precious rights of our democratic process.’ ’ [Citation.]” (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248, 149 Cal.Rptr. 239, 583 P.2d 1281; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250, 279 Cal.Rptr. 325, 806 P.2d 1360; *Rossi v. Brown* (1995) 9 Cal.4th 688, 695, 38 Cal.Rptr.2d 363, 889 P.2d 557; *Legislature v. Eu* (1991) 54 Cal.3d 492, 500–501, 286 Cal.Rptr. 283, 816 P.2d 1309.)

As part of their initiative system, the voters also have “ ‘the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.* [Citation.]’ [Citation.]” (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251, 48 Cal.Rptr.2d 12, 906 P.2d 1112; *Professional Engineers in California Government v. Kempton, supra*, 40 Cal.4th at p. 1046, fn. 10, 56 Cal.Rptr.3d 814, 155 P.3d 226.) “The people’s reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures [citation], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves. [Citations.]” (*Rossi v. Brown, supra*, 9 Cal.4th at pp. 715–716, 38 Cal.Rptr.2d 363, 889 P.2d 557.)

“There is a presumption, though not conclusive, that voters are aware of existing laws at the time a voter initiative is adopted. [Citations.]” (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 410, 189 Cal.Rptr.3d 234; *People v. Hannon, supra*, 5 Cal.App.5th at p. 101, 209 Cal.Rptr.3d 408.) “ ‘The purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to “protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.” [Citations.]’ [Citation.] In this vein, decisions frequently have asserted that courts have a duty to “ ‘jealously guard’ ” the people’s initiative power, and hence to “ ‘apply a liberal construction to this power wherever it is challenged in order that the right’ ” to resort to the initiative process “ ‘be not improperly annulled’ ” by a legislative body. [Citations.]” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025, 103 Cal.Rptr.3d 733, 222 P.3d 186.)

Defining Criminal Conduct and Setting the Punishment that Attaches to Criminal Conduct May not be Entirely Distinct

*25 Despite these protections, the Legislature may legislate on “a subject related to, but distinct from, an area addressed by an initiative.” (See *Gooden, supra*, 42 Cal.App.5th at p. 282, 255 Cal.Rptr.3d 239; *Kelly, supra*, 47 Cal.4th at pp. 1025–1026, 103 Cal.Rptr.3d 733, 222 P.3d 186.) Cases addressing whether S.B. 1437 amends Proposition 7 have insisted that punishments and the elements of the crime to which they

apply are related, but “distinct” subjects. (See, e.g., *Gooden, supra*, at pp. 281–282, 255 Cal.Rptr.3d 239.) I disagree.

It is true that the elements of an offense and the punishment for it are not literally synonymous, but neither are they “distinct.” Punishment is the set of consequences the law attaches to certain human conduct classified as a crime. As a result, when the *substantive scope of a crime* is reduced, the direct effect is that at least some real-world conduct is no longer *punishable* as that particular crime.

For example, imagine a jurisdiction where the only crime relating to driving under the influence was defined as “operating a motor vehicle with a blood-alcohol content of over 0.08 percent” and carried a punishment of 6 months in jail. And suppose that statute is subsequently amended to raise the threshold blood-alcohol content to 0.10 percent. One could say such an amendment “merely” redefines the crime and does not expressly speak to punishment. But this formalistic distinction is illusory, because the amendment to the substantive crime had the direct effect of eliminating punishment for certain conduct – e.g., operating a motor vehicle with a blood-alcohol content of 0.09 percent.

Through Proposition 7, the voters said they wanted particular punishments to apply to particular conduct. Under S.B. 1437, some conduct that would previously have constituted murder is no longer punishable as such. In this way, S.B. 1437 *directly* alters the punishment Proposition 7 set for certain conduct.¹

¹ *Gooden* says voters did not intend to “freeze” the substantive offense of murder as it was understood in 1978. (*Gooden, supra*, 42 Cal.App.5th at p. 283, 255 Cal.Rptr.3d 239; see also maj. opn., *ante*, at p. —.)

However, I do not see how to reconcile that conclusion with the fact that, in enacting Proposition 7, the voters were “calling for harsher punishment for those convicted of murder.” (Maj. opn., *ante*, at p. —.) What does “murder” mean in this context if not the real-world conduct legally classified as murder in 1978? What else could they have meant? It is not as if the voters did not care what actual conduct was subject to the harsher penalties in the future so long as that conduct was formally labeled “murder.”

There is simply no limiting principle to the purported distinction between punishment and the elements of the offense being punished.

Imagine the Legislature passed a statute adding an element to murder requiring that the killing be accomplished with a firearm. Would our courts conclude that such a legislative change, which arguably does not directly relate to the breadth of culpability, amends Proposition 7?

Put in slightly different terms, S.B. 1437 “prohibits” something Proposition 7 “authorized.” Specifically, Proposition 7 authorized harsher penalties for murder, *including* the subcategory of conduct that S.B. 1437 subsequently removed from the definition of murder. In contrast, S.B. 1437 effectively *prohibits* punishment of that subcategory of conduct under the harsher penalties *authorized* by Proposition 7.

Conclusion

***26** It is important that criminal punishment is commensurate with the level of culpability involved. S.B.

1437 admirably seeks a better fit between punishment and culpability in the context of felony murder. But the issue before us is not whether S.B. 1437 is wise policy. The issue is whether it amended Proposition 7. If so, S.B. 1437 must yield, even if it better reflects modern views of penology. The reform it seeks must come from the electorate, not the Legislature or the courts.

Whether or not the various opinions upholding the constitutionality of S.B. 1437 ultimately prevail, it is my hope that our commitment to the principle that the people's constitutional initiative power must be jealously guarded and cannot be legislatively nullified remains strong and steadfast.

For these reasons, I respectfully dissent.

All Citations

--- Cal.Rptr.3d ----, 2020 WL 4461245, 20 Cal. Daily Op. Serv. 7930

EXHIBIT C

45 Cal.4th 1172
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
SARUN CHUN, Defendant and Appellant.

No. S157601.

|
March 30, 2009.

|
Rehearing Denied April 29, 2009.

Synopsis

Background: Defendant was convicted following jury trial in the Superior Court, San Joaquin County, No. SF090168C, [Bernard J. Garber](#), J., of second degree murder. Defendant appealed. The Court of Appeal, [Morrison](#), J., reversed murder conviction and otherwise affirmed the judgment.

Holdings: The Supreme Court granted review, superseding the opinion of the Court of Appeal, and, in an opinion by [Chin](#), J., held that:

although derived from common law, the second degree felony murder rule is based on statute and is therefore constitutionally valid;

when underlying felony is assaultive in nature, felony merges with homicide and cannot be the basis of a second degree felony-murder instruction; overruling [People v. Hansen](#), 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022; [People v. Robertson](#), *supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872; [People v. Randle](#), 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987; disapproving [People v. Tabios](#), 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753;

shooting at an occupied vehicle is assaultive in nature and hence cannot serve as underlying felony for second degree felony murder; and

by itself, error in instructing jury on second-degree felony murder was harmless beyond a reasonable doubt, but matter would be remanded for determination of whether that error, in combination with another found by Court of Appeal, was prejudicial.

Judgment of Court of Appeal reversed and matter remanded.

[Baxter](#) and [Moreno](#), JJ., filed concurring and dissenting opinions.

Opinion, [65 Cal.Rptr.3d 738](#), superseded.

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Opinion

[CHIN](#), J.

*[1178](#) **[427](#) In this murder case, the trial court instructed the jury on second degree felony murder with shooting at an occupied vehicle under [Penal Code section 246](#) the ***[109](#) underlying felony.¹ We granted review to consider various issues concerning the validity and scope of the second degree felony-murder rule.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

We first discuss the rule's constitutional basis. Although the rule has long been part of our law, some members of this court have questioned its constitutional validity. We conclude that the rule is based on statute, specifically [section 188](#)'s definition of implied malice, and hence is constitutionally valid.

Next we reconsider the contours of the so-called merger doctrine this court adopted in [People v. Ireland](#) (1969) 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580 (*Ireland*). After reviewing recent developments, primarily some of our own decisions, we conclude the current state of the law in this

regard is untenable. We will overrule some of our decisions and hold that all assaultive-type crimes, such as a violation of [section 246](#), merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction. Accordingly, the trial court erred in instructing on felony murder in this case. We also conclude, however, that this error, alone, was not prejudicial.

We reverse the judgment of the Court of Appeal, which had found the same error prejudicial. However, the Court of Appeal also found a second error, a finding not before us on review. We remand the matter to the Court of Appeal to decide whether the two errors, in combination, were prejudicial.

I. FACTS AND PROCEDURAL HISTORY

We take our facts primarily from the Court of Appeal's opinion.

****428** Judy Onesavanh and Sophal Ouch were planning a party for their son's birthday. Around 9:00 p.m. on September 13, 2003, they and a friend, Bounthavy Onethavong, were driving to the store in Stockton in a blue Mitsubishi that Onesavanh's father owned. Onesavanh's brother, George, also drives the car. The police consider George to be highly ranked in the Asian Boys street gang (Asian Boys).

***1179** That evening Ouch was driving, with Onesavanh in the front passenger seat and Onethavong behind Ouch. While they were stopped in the left turn lane at a traffic light, a blue Honda with tinted windows pulled up beside them. When the light changed, gunfire erupted from the Honda, hitting all three occupants of the Mitsubishi. Onethavong was killed, having received two bullet [wounds](#) in the head. Onesavanh was hit in the back and seriously [wounded](#). Ouch was shot in the cheek and suffered a [fractured jaw](#).

Ouch and Onesavanh identified the Honda's driver as "T-Bird," known to the police to be Rathana Chan, a member of the Tiny Rascals Gangsters (Tiny Rascals), a criminal street gang. The Tiny Rascals do not get along with the Asian Boys. Chan was never found. The forensic evidence showed that three different guns were used in the shooting, a .22, a .38, and a .44, and at least six bullets were fired. Both the .38 and the .44 struck Onethavong; both shots were lethal. Only the .44 was recovered. It was found at the residence of Sokha and Mao Bun, brothers believed to be members of a gang.

Two months after the shooting, the police stopped a van while investigating another suspected gang shooting. Defendant was a passenger in the van. He was arrested and subsequently made two statements regarding the shooting in this case. He admitted he was in the backseat of the Honda at the time; T-Bird was the driver and there were two other passengers. Later, *****110** he also admitted he fired a .38-caliber firearm. He said he did not point the gun at anyone; he just wanted to scare them.

Defendant, who was 16 years old at the time of the shooting, was tried as an adult for his role in the shooting. He was charged with murder, with driveby and gang special circumstances, and with two counts of attempted murder, discharging a firearm from a vehicle, and shooting into an occupied vehicle, all with gang and firearm-use allegations, and with street terrorism. At trial, the prosecution presented evidence that defendant was a member of the Tiny Rascals, and that the shooting was for the benefit of a gang. Defendant testified, denying being a member of the Tiny Rascals or being involved in the shooting.

The prosecution sought a first degree murder conviction. The court also instructed the jury on second degree felony murder based on shooting at an occupied motor vehicle ([§ 246](#)) either directly or as an aider and abettor. The jury found defendant guilty of second degree murder. It found the personal-firearm-use allegation not true, but found that a principal intentionally used a firearm and the shooting was committed for the benefit of a criminal street ***1180** gang. The jury acquitted defendant of both counts of attempted murder, shooting from a motor vehicle, and shooting at an occupied motor vehicle. It convicted defendant of being an active participant in a criminal street gang.

The Court of Appeal, in an opinion authored by Justice Morrison, reversed the murder conviction and otherwise affirmed the judgment. It found two errors in the case. It held the trial court had properly admitted defendant's first statement that he had been in the car but that the court should have excluded his subsequent statement that he had fired a gun. It concluded that the latter statement was procured by a false promise of leniency. It found this error harmless beyond a reasonable doubt "as a pure evidentiary matter." But, partly due to this error, the Court of Appeal also held the trial court erred in instructing the jury on second degree felony murder. It found this error was prejudicial and reversed the murder conviction. It explained: "Second degree felony murder, the only express theory of second degree murder offered to the

jury, was based on the underlying felony of shooting into an occupied vehicle. The merger doctrine prevents using an assaultive-type crime as the basis for felony murder unless the underlying crime is committed with an ****429** intent collateral to committing an injury that would cause death. Without the evidence of defendant's statements about the shooting, there was no evidence from which a collateral intent or purpose could be found. Accordingly, it was error to instruct on second degree felony murder and the murder conviction must be reversed.”

Justice Nicholson dissented from the reversal of the murder conviction. Relying on *People v. Hansen* (1994) 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022 (*Hansen*), he argued that the underlying felony did not merge with the homicide for purposes of the second degree felony-murder rule and, accordingly, the trial court had properly instructed the jury on second degree felony murder.

We granted review. Later, we issued an order limiting review to the issues concerning whether the trial court prejudicially erred in instructing the jury on second degree felony murder.

II. DISCUSSION

A. The Constitutionality of the Second Degree Felony-murder Rule

Defendant contends California's second degree felony-murder rule is unconstitutional *****111** on separation of power grounds as a judicially created doctrine with no statutory basis. To explain the issue, we first describe how the doctrine fits in with the law of murder. Then we discuss defendant's ***1181** contention. We will ultimately conclude that the doctrine is valid as an interpretation of broad statutory language.

Section 187, subdivision (a), defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” Except for the phrase “or a fetus,” which was added in 1970 in response to this court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (see *People v. Davis* (1994) 7 Cal.4th 797, 803, 30 Cal.Rptr.2d 50, 872 P.2d 591), this definition has been unchanged since section 187 was first enacted as part of the Penal Code of 1872. Murder is divided into first and second degree murder. (§ 189.) “Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and

deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102[, 13 Cal.Rptr.2d 864, 840 P.2d 969].)” (*Hansen, supra*, 9 Cal.4th at p. 307, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

Critical for our purposes is that the crime of murder, as defined in section 187, includes, as an element, malice. Section 188 defines malice. It may be either express or implied. It is express “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” (§ 188.) It is implied “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (*Ibid.*) This definition of implied malice is quite vague. Trial courts do not instruct the jury in the statutory language of an abandoned and malignant heart. Doing so would provide the jury with little guidance. “The statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms.” (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217, 264 Cal.Rptr. 841, 783 P.2d 200.) Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having “both a physical and a mental component. The physical component is satisfied by the performance of ‘an act, the natural consequences of which are dangerous to life.’” (*People v. Watson* (1981) 30 Cal.3d 290, 300[, 179 Cal.Rptr. 43, 637 P.2d 279].) The mental component is the requirement that the defendant ‘knows that his conduct endangers the life of another and ... acts with a conscious disregard for life.’ (*Ibid.*, internal quotation marks omitted.)” (*People v. Patterson* (1989) 49 Cal.3d 615, 626, 262 Cal.Rptr. 195, 778 P.2d 549 (lead opn. of Kennard, J.) (*Patterson*)).²

² For ease of discussion, we will sometimes refer to this form of malice by the shorthand term, “conscious-disregard-for-life malice.” *Patterson, supra*, 49 Cal.3d 615, 262 Cal.Rptr. 195, 778 P.2d 549, had no majority opinion. Unless otherwise indicated, all further citations to that case are to Justice Kennard's lead opinion.

****430 *1182** A defendant may also be found guilty of murder under the felony-murder rule. The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. We have said that first degree felony murder is a “creation of statute” (i.e., §

189) but, because no statute specifically describes it, that second degree felony murder is a “common law doctrine.” ***112 (*People v. Robertson* (2004) 34 Cal.4th 156, 166, 17 Cal.Rptr.3d 604, 95 P.3d 872 (*Robertson*).) First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is “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....” (*Robertson, supra*, 34 Cal.4th at p. 164, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

In *Patterson*, Justice Kennard explained the reasoning behind and the justification for the second degree felony-murder rule: “The second degree felony-murder rule eliminates the need for the prosecution to establish the *mental* component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The *physical* requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed ‘an act, the natural consequences of which are dangerous to life’ ([*People v.*] *Watson, supra*, 30 Cal.3d at p. 300[, 179 Cal.Rptr. 43, 637 P.2d 279]), thus satisfying the physical component of implied malice.” (*Patterson, supra*, 49 Cal.3d at p. 626, 262 Cal.Rptr. 195, 778 P.2d 549.)

The second degree felony-murder rule is venerable. It “has been a part of California's criminal law for many decades. (See *People v. Wright* (1914) 167 Cal. 1, 5[, 138 P. 349]; Pike, *What Is Second Degree Murder in California* (1936) 9 So.Cal.L.Rev. 112, 118–119.)” (*Patterson, supra*, 49 Cal.3d at p. 621, 262 Cal.Rptr. 195, 778 P.2d 549; see also *People v. Doyell* (1874) 48 Cal. 85, 94.) Because of this, we declined to reconsider the rule in *Patterson*. (*Patterson, supra*, at p. 621, 262 Cal.Rptr. 195, 778 P.2d 549.) Even earlier, in 1966, we rejected the argument that we should abandon the doctrine, explaining that “the concept lies imbedded in our law.” (*People v. Phillips* (1966) 64 Cal.2d 574, 582, 51 Cal.Rptr. 225, 414 P.2d 353; see also *People v. Mattison* (1971) 4 Cal.3d 177, 184, 93 Cal.Rptr. 185, 481 P.2d 193 (*Mattison*) [describing the rule as “well-settled”].)

But some former and current members of this court have questioned the rule's validity because no statute specifically

addresses it. Chief Justice Bird argued for its abolition in her concurring opinion in *1183 *People v. Burroughs* (1984) 35 Cal.3d 824, 836–854, 201 Cal.Rptr. 319, 678 P.2d 894. Justice Brown did so in dissent in *Robertson, supra*, 34 Cal.4th at pages 186–192, 17 Cal.Rptr.3d 604, 95 P.3d 872, and again while concurring and dissenting in *People v. Howard* (2005) 34 Cal.4th 1129, 1140–1141, 23 Cal.Rptr.3d 306, 104 P.3d 107. Justices Werdegar and Moreno have viewed the rule as ripe for reconsideration in an appropriate case. (*Robertson, supra*, at pp. 174–177, 17 Cal.Rptr.3d 604, 95 P.3d 872 (conc. opn. of Moreno, J.), 185–186, 17 Cal.Rptr.3d 604, 95 P.3d 872 (dis. opn. of Werdegar, J.)) In *Patterson*, Justice Panelli questioned the rule's constitutional validity. As he pointed out, “There are, or at least should be, no nonstatutory crimes in this state. (*In re Brown* (1973) 9 Cal.3d 612, 624[, 108 Cal.Rptr. 465, 510 P.2d 1017]; see Pen.Code, § 6.)” (*Patterson, supra*, 49 Cal.3d at p. 641, 262 Cal.Rptr. 195, 778 P.2d 549 (conc. & dis. opn. of Panelli, J.)) He was concerned that the second degree felony-murder rule is solely a judicial creation not derived from statute and was thus “not quite convinced” that it “stands on solid constitutional ground.” (*Ibid.*)

***113 In line with these concerns, defendant argues that the second degree felony-murder **431 rule is invalid on separation of powers grounds. As he points out, we have repeatedly said that “ ‘the power to define crimes and fix penalties is vested exclusively in the legislative branch.’ (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631[, 87 Cal.Rptr. 481, 470 P.2d 617]; [citations].)” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516, 53 Cal.Rptr.2d 789, 917 P.2d 628.) Defendant asks rhetorically, “How, then, in light of the statutory abrogation of common law crimes and the constitutional principle of separation of powers, does second degree felony murder continue to exist when this court has repeatedly acknowledged that the crime is a judicial creation?”

This court has never directly addressed these concerns and this argument, or explained the statutory basis of the second degree felony-murder rule. We do so now. We agree with Justice Panelli that there are no nonstatutory crimes in this state. Some statutory or regulatory provision must describe conduct as criminal in order for the courts to treat that conduct as criminal. (§ 6.)³ But, as we explain, the second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188's abandoned and malignant heart language.

3 As relevant today, section 6 provides: “No act or omission ... is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes, which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this Code takes effect.”

Many provisions of the Penal Code were enacted using common law terms that must be interpreted in light of the common law. For example, section 484 defines theft as “feloniously” taking the property of another. The *1184 term “feloniously”—which has little meaning by itself—incorporates the common law requirement that the perpetrator must intend to permanently deprive the owner of possession of the property. Accordingly, we have looked to the common law to determine the exact contours of that requirement. (*People v. Avery* (2002) 27 Cal.4th 49, 55, 115 Cal.Rptr.2d 403, 38 P.3d 1; *People v. Davis* (1998) 19 Cal.4th 301, 304, fn. 1, 79 Cal.Rptr.2d 295, 965 P.2d 1165.) Thus, the intent-to-permanently-deprive requirement, although nonstatutory in the limited sense that no California statute uses those words, is based on statute. The murder statutes are similarly derived from the common law. (*Keeler v. Superior Court*, supra, 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 [looking to the common law to determine the exact meaning of “human being” under section 187].) “It will be presumed ... that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactments in common law language, that its intent was to continue those rules in statutory form.” (*Keeler v. Superior Court*, supra, at p. 625, 87 Cal.Rptr. 481, 470 P.2d 617.)

Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's abandoned and malignant heart language. Similarly, the second degree felony-murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another interpretation of the same “abandoned and malignant heart” language. ***114 We have said that 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.” (*Robertson*, supra, 34 Cal.4th at p. 165, 17 Cal.Rptr.3d 604, 95 P.3d 872.) But analytically, this is not precisely correct. The felony-murder rule renders irrelevant *conscious-disregard-*

for-life malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule “acts as a substitute” for conscious-disregard-for-life malice. (*Patterson*, supra, 49 Cal.3d at p. 626, 262 Cal.Rptr. 195, 778 P.2d 549.) It simply describes a different form of malice under section 188. “The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during **432 the perpetration of a felony inherently dangerous to life.” (*Hansen*, supra, 9 Cal.4th at p. 308, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

A historical review confirms this view. California's first penal law was the Crimes and Punishments Act of 1850 (Act of 1850). (Stats.1850, ch. 99, p. 229.) Section 19 of that act defined murder as “the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.” (Stats.1850, ch. 99, § 19, p. 231.) Sections 20 and 21 of the Act of 1850 defined express and implied malice, respectively. Section 21 stated, “Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and *1185 malignant heart.” (Stats.1850, ch. 99, § 21, p. 231.) It also set the punishment for murder as death. At that time, murder was not divided into degrees. The division of murder into degrees “occurred in 1856, when the Legislature amended section 21 of the Act of 1850 to divide the crime of murder into two degrees: first degree murder was defined as that committed by certain listed means or in the perpetration of certain listed felonies, while all other murders were of the second degree.” (*People v. Dillon* (1983) 34 Cal.3d 441, 466, 194 Cal.Rptr. 390, 668 P.2d 697 (*Dillon*).)

Sections 22 to 25 of the Act of 1850 concerned voluntary and involuntary manslaughter. Section 25 provided, in its entirety, “Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do; *in the commission of an unlawful act*, or a lawful act, which probably might produce such a consequence in an unlawful manner; *Provided*, that *where such involuntary killing* shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or *is committed in the prosecution of a felonious intent*, the offense shall be deemed and adjudged to be murder.” (Stats. 1850, ch. 99, § 25, p. 231, italics of “Provided” in original, all other italics added.)

In 1872, the Legislature adopted the current Penal Code. Section 187 defined murder essentially the same as did the Act of 1850. (*Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 624, 87 Cal.Rptr. 481, 470 P.2d 617.) As can readily be seen, section 188 also defined implied malice essentially the same as did the Act of 1850.

But the 1872 Penal Code did recast the definition of involuntary manslaughter. The new section 192 defined voluntary and involuntary manslaughter, as it still does today. (In the interim, vehicular manslaughter has been added as another form of manslaughter.) Subdivision 2 of that section defined and, now labeled subdivision (b), still defines, involuntary manslaughter as an unlawful killing without ***115 malice “in the commission of an unlawful act, *not amounting to felony*; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (§ 192, subd. (b), italics added.) The proviso portion of section 25 of the Act of 1850 was deleted and essentially replaced with the italicized language “not amounting to [a] felony.”

In *Dillon*, *supra*, 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697, this court considered issues concerning the first degree felony-murder rule. As part of its discussion, *Dillon* stated that the proviso portion of section 25 of the Act of 1850 “codified the common law felony-murder rule in this state,” and that “the Legislature’s decision not to reenact the felony-murder provision of section 25 in the 1872 codification implied an intent to abrogate the common law felony-murder rule that the section had embodied since 1850.” (*Dillon*, *supra*, at pp. 465, 467, 194 Cal.Rptr. 390, 668 P.2d 697.) If these *1186 statements were correct, it would be difficult to conclude that second degree felony murder is based on statute today. But this language in *Dillon* was dicta because *Dillon* involved the first degree, not second degree, felony-murder rule. Now that the point is critical, we examine it further and, viewing the relevant 1850 and 1872 statutes in context, conclude that *Dillon* was not correct in this regard.

A codification of the felony-murder rule would logically be placed in the statutes defining murder, not in a statute defining involuntary **433 manslaughter such as section 25 of the Act of 1850. Moreover, any reasonable felony-murder rule would apply to *any* killing during the course of a felony, not just an “involuntary killing” as stated in that same section 25. As *Dillon* noted, “It would have been absurd, of course, to punish as murder those killings [i.e., involuntary killings] but not ‘voluntary’ killings during a

felony....” (*Dillon*, *supra*, 34 Cal.3d at p. 465, fn. 12, 194 Cal.Rptr. 390, 668 P.2d 697.) *Dillon* ascribed section 25’s apparent limitation of the felony-murder rule to involuntary killings to a “quirk of draftsmanship.” (*Dillon*, *supra*, at p. 465, fn. 12, 194 Cal.Rptr. 390, 668 P.2d 697.) If that section’s proviso is viewed as a codification of the common law of felony murder, the draftsmanship would, indeed, be quirky. It would be doubly quirky: It would be unusual to codify a common law rule concerning murder in a statute defining involuntary manslaughter, and it would be quirky to include in the felony-murder rule only involuntary killings to the apparent exclusion of voluntary killings. But viewed instead as what it no doubt was—a proviso merely limiting the scope of *involuntary manslaughter*—the draftsmanship makes sense.

Without the proviso, section 25 of the Act of 1850 would have meant, or at least would have been susceptible to the interpretation, that *any* killing “in the commission of an unlawful act”—i.e., *any* unlawful act, whether misdemeanor or felony—is involuntary manslaughter. The proviso simply makes clear that involuntary manslaughter does not include killings in the course of a felony, which remain murder. As this court explained in a case in which the crime was committed before, but the opinion filed after, adoption of the 1872 Penal Code, “Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder.” (*People v. Doyell*, *supra*, 48 Cal. at p. 94 [citing section 25 of the Act of 1850].) The new section 192 merely simplified the definition of involuntary manslaughter by replacing the earlier proviso with the new language, “not amounting to felony.” In this way, the Legislature avoided the awkwardness of having a ***116 broad definition of involuntary manslaughter followed by a proviso limiting that definition. So viewed, the language of section 25 of the Act of 1850 and 1872’s new section 192 all make sense; no need exists to ascribe any language to quirky draftsmanship or to view section 192’s simplified definition of *involuntary manslaughter* as abrogating a common law rule concerning *murder*.

*1187 The notes of the California Code Commissioners accompanying the 1872 adoption of the Penal Code, which are entitled to substantial weight (*Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 630, 87 Cal.Rptr. 481, 470 P.2d 617), provide no hint of an intent to abrogate the felony-murder rule. The note accompanying section 187, although not discussing this precise point, shows that the statutory term “malice aforethought” incorporated the term’s common law

meaning. (Cal.Code commrs. note foll. [Ann. Pen.Code, § 187](#) (1st ed. 1872, Haymond & Burch, commrs.-annotators), pp. 80–81 (1872 Code commissioners note) [citing various common law sources in discussing the meaning of malice aforethought].) Similarly, nothing in the adoption of [Penal Code sections 188 and 189](#) suggests an intent to change the then-existing law of murder, including, as relevant here, the definition of implied malice and its common law antecedents. The Code commissioners note accompanying the 1872 adoption of section 192 states that “[t]his section embodies the material portions of Sections 22, 23, 24, and 25 of the Crimes and Punishment Act of 1850.” (1872 Code commrs. note, p. 85, italics added.) This latter note strongly indicates that the language change from section 25 of the Act of 1850 to section 192 was not intended to change the law of manslaughter, much less to change the law of murder by abrogating the common law felony-murder rule. Any statute that “embodies the material portions” of predecessor statutes would not change the law in such a substantial manner.

We are unaware of any California case even remotely contemporaneous with the adoption of the 1872 Penal Code (i.e., any case before [Dillon, supra, 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697](#)) suggesting that the language change from section 25 of the Act of 1852 to section 192 abrogated the ****434** felony-murder rule or otherwise changed the law of murder. Indeed, cases postdating [People v. Doyell, supra, 48 Cal. 85](#), and the adoption of the 1872 Penal Code, but still ancient from today's perspective, cited [Doyell](#) in applying the second degree felony-murder rule without any hint that [Doyell](#) was obsolete because it had cited section 25 of the Act of 1850. (See [People v. Olsen](#) (1889) 80 Cal. 122, 126–127, 22 P. 125; [People v. Ferugia](#) (1928) 95 Cal.App. 711, 718, 273 P. 99; [People v. Hubbard](#) (1923) 64 Cal.App. 27, 33, 220 P. 315.)

For these reasons, we conclude that the Legislature's replacement of the proviso language of section 25 of the Act of 1850 with the shorthand language “not amounting to felony” in section 192 did not imply an abrogation of the common law felony-murder rule. The “abandoned and malignant heart” language of both the original 1850 law and today's [section 188](#) contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a ***1188** circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.⁴

4 For policy reasons, Justice Moreno would abolish the second degree felony-murder doctrine entirely. As we have explained, this court has long refused to abolish it because it is so firmly established in our law. We continue to abide by this long-established doctrine, especially now that we have shown that it is based on statute, while at the same time attempting to make it more workable.

*****117 B. The Merger Rule and Second Degree Felony Murder**

Although today we reaffirm the constitutional validity of the long-standing second degree felony-murder rule, we also recognize that the rule has often been criticized and, indeed, described as disfavored. (E.g., [Patterson, supra, 49 Cal.3d at p. 621, 262 Cal.Rptr. 195, 778 P.2d 549](#).) We have repeatedly stated, as recently as 2005, that the rule “ ‘ ‘deserves no extension beyond its required application.’ ” ’ ” ([People v. Howard, supra, 34 Cal.4th at p. 1135, 23 Cal.Rptr.3d 306, 104 P.3d 107](#).) For these reasons, although the second degree felony-murder rule originally applied to all felonies ([People v. Doyell, supra, 48 Cal. at pp. 94–95](#); Pike, *What Is Second Degree Murder in California, supra*, 9 So.Cal.L.Rev. at pp. 118–119), this court has subsequently restricted its scope in at least two respects to ameliorate its perceived harshness.

First, “[i]n [People v. Ford](#) (1964) 60 Cal.2d 772, 795[, 36 Cal.Rptr. 620, 388 P.2d 892], the court restricted the felonies that could support a conviction of second degree murder, based upon a felony-murder theory, to those felonies that are ‘inherently dangerous to human life.’ ” ([Hansen, supra, 9 Cal.4th at p. 308, 36 Cal.Rptr.2d 609, 885 P.2d 1022](#).) Whether a felony is inherently dangerous is determined from the elements of the felony in the abstract, not the particular facts. ([Patterson, supra, 49 Cal.3d at p. 621, 262 Cal.Rptr. 195, 778 P.2d 549](#).) This restriction is not at issue here. [Section 246](#) makes it a felony to “maliciously and willfully discharge a firearm at an ... occupied motor vehicle...”⁵ In [Hansen, supra, at pages 309–311, 36 Cal.Rptr.2d 609, 885 P.2d 1022](#), we held that shooting at an “inhabited dwelling house” under [section 246](#) is inherently dangerous even though the inhabited dwelling house does not have to be actually occupied at the time of the shooting. That being the case, shooting at a vehicle that is actually occupied clearly is inherently dangerous.

5 In its entirety, [section 246](#) provides: “Any person who shall maliciously and willfully

discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in [Section 362 of the Vehicle Code](#), or inhabited camper, as defined in [Section 243 of the Vehicle Code](#), is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year.

“As used in this section, ‘inhabited’ means currently being used for dwelling purposes, whether occupied or not.”

1189** But the second restriction—the “merger doctrine”—is very much at issue. The merger doctrine developed due to the understanding that the underlying felony must be an independent crime and not merely the killing *435** itself. Thus, certain underlying felonies “merge” with the homicide and cannot be used for purposes of felony murder. The specific question before us is how to apply the merger doctrine. The Court of Appeal divided on the question and on how to apply our precedents. But the majority and dissent agreed on one thing—that the current state of the law regarding merger is “muddled.” We agree that the scope and application of the merger doctrine as applied to second degree murder needs to be reconsidered. To explain this, we will first review the doctrine's historical development. Then we will discuss what to do with the merger doctrine and, ultimately, will conclude *****118** that the trial court should not have instructed on felony murder.

1. Historical Review

The merger doctrine arose in the seminal case of [Ireland, supra, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580](#), and hence sometimes is called the “[Ireland](#) merger doctrine.” In [Ireland](#), the defendant shot and killed his wife, and was convicted of second degree murder. The trial court instructed the jury on second degree felony murder with assault with a deadly weapon the underlying felony. We held the instruction improper, adopting the “so-called ‘merger’ doctrine” that had previously been developed in other jurisdictions. ([Id. at p. 540, 75 Cal.Rptr. 188, 450 P.2d 580.](#)) We explained our reasons: “[T]he utilization of the felony-murder rule in

circumstances such as those before us extends the operation of that rule ‘beyond any rational function that it is designed to serve.’ ([People v. Washington \(1965\) 62 Cal.2d 777, 783\[, 44 Cal.Rptr. 442, 402 P.2d 130\].](#)) 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. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.” ([Id. at p. 539, 75 Cal.Rptr. 188, 450 P.2d 580.](#))⁶

⁶ [Ireland, supra, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580](#), was a second degree murder case. The merger doctrine also has a first degree felony-murder counterpart. (See [People v. Wilson \(1969\) 1 Cal.3d 431, 82 Cal.Rptr. 494, 462 P.2d 22.](#)) Because first degree felony murder is specifically prescribed by statute ([§ 189](#)), what we say about the second degree felony-murder rule does not necessarily apply to the first degree felony-murder rule.

We next confronted the merger doctrine in a second degree felony-murder case in [Mattison, supra, 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193](#). As we later described [Mattison's](#) facts, ***1190** “[i]n that case, the defendant and the victim both were inmates of a correctional institution. The defendant worked as a technician in the medical laboratory. He previously had offered to sell alcohol to inmates, leading the victim, an alcoholic, to seek alcohol from him. The defendant supplied the victim with methyl alcohol, resulting in the victim's death by [methyl alcohol poisoning](#). [¶] At trial, the court instructed on felony murder base upon the felony of mixing poison with a beverage, an offense proscribed by the then current version of section 347 (‘ “Every person who wilfully mingles any poison with any food, drink or medicine, with intent that the same shall be taken by any human being to his injury, is guilty of a felony.” ’) ([4 Cal.3d at p. 184\[, 93 Cal.Rptr. 185, 481 P.2d 193\].](#)) The defendant was convicted of second degree murder.” ([Hansen, supra, 9 Cal.4th at p. 313, 36 Cal.Rptr.2d 609, 885 P.2d 1022.](#))

The [Mattison](#) defendant argued “that the offense of administering poison with the intent to injure is an ‘integral

part of’ and ‘included in fact within the offense’ of murder by poison” within the meaning of *Ireland*, *supra*, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580. (*Mattison*, *supra*, 4 Cal.3d at p. 185, 93 Cal.Rptr. 185, 481 P.2d 193.) We disagreed. “The instant case ... presents an entirely different situation from the one that confronted us in *Ireland*. The facts before us are very similar ***119 to *People v. Taylor* (1970) 11 Cal.App.3d 57[, 89 Cal.Rptr. 697], in which the victim died as a result of an overdose **436 of heroin which had been furnished to her by the defendant. The defendant was convicted of second degree murder and the question presented was whether application of the felony-murder rule constituted error under *Ireland*. ... [T]he *Taylor* court concluded that application of the felony-murder rule was proper because the underlying felony was committed with a ‘collateral and independent felonious design.’ (*People v. Taylor*, *supra*, 11 Cal.App.3d 57, 63[, 89 Cal.Rptr. 697].) In other words the felony was not done with the intent to commit injury which would cause death. Giving a felony-murder instruction in such a situation serves rather than subverts the purpose of the rule. ‘While the felony-murder rule can hardly be much of a deterrent to a defendant who has decided to assault his victim with a deadly weapon, it seems obvious that in the situation presented in the case at bar, it does serve a rational purpose: knowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant’s readiness to do the furnishing.’ (*People v. Taylor*, *supra*, 11 Cal.App.3d 57, 63[, 89 Cal.Rptr. 697].) The instant case is virtually indistinguishable from *Taylor*; and we hold that it was proper to instruct the jury on second degree felony murder.” (*Mattison*, *supra*, 4 Cal.3d at pp. 185–186, 93 Cal.Rptr. 185, 481 P.2d 193.)

In *People v. Smith* (1984) 35 Cal.3d 798, 201 Cal.Rptr. 311, 678 P.2d 886, the defendant was convicted of the second degree murder of her two-year-old daughter. We had to decide whether the trial court correctly instructed the jury on second degree felony murder with felony child abuse (now § 273a, subd. (a) the underlying felony. We reviewed some of the felonies that do not merge but found them distinguishable. (*People v. Smith*, *supra*, at p. 805, 201 Cal.Rptr. 311, 678 P.2d 886.) *1191 We explained that the crime at issue was “child abuse of the assaultive variety” for which we could “conceive of no independent purpose.” (*Id.* at p. 806, 201 Cal.Rptr. 311, 678 P.2d 886.) Accordingly, we concluded that the offense merged with the resulting homicide, and that the trial court erred in instructing on felony murder.

Our merger jurisprudence took a different turn in *Hansen*, *supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022. In that case, the defendant was convicted of second degree murder for shooting at a house, killing one person. The trial court instructed the jury on second degree felony murder, with discharging a firearm at an inhabited dwelling house (§ 246) the underlying felony. The majority concluded that the crime of discharging a firearm at an inhabited dwelling house “does not ‘merge’ with a resulting homicide so as to preclude application of the felony-murder doctrine.” (*Hansen*, *supra*, at p. 304, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) We noted that this court “has not extended the *Ireland* doctrine beyond the context of assault, even under circumstances in which the underlying felony plausibly could be characterized as ‘an integral part of’ and ‘included in fact within’ the resulting homicide.” (*Id.* at p. 312, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

We discussed in detail *Mattison*, *supra*, 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193, and *People v. Taylor*, *supra*, 11 Cal.App.3d 57, 89 Cal.Rptr. 697, the case *Mattison* relied on. We agreed with *Taylor*’s “rejection of the premise that *Ireland*’s ‘integral part of the homicide’ language constitutes the crucial test in determining the existence of merger. Such a test would be inconsistent with the underlying rule that only felonies ‘inherently dangerous to human life’ are sufficiently indicative ***120 of a defendant’s culpable mens rea to warrant application of the felony-murder rule. [Citation.] The more dangerous the felony, the more likely it is that a death may result directly from the commission of the felony, but resort to the ‘integral part of the homicide’ language would preclude application of the felony-murder rule for those felonies that are most likely to result in death and that are, consequently, the felonies as to which the felony-murder doctrine is most likely to act as a deterrent (because the perpetrator could foresee the great likelihood that death may result, negligently or accidentally).” (*Hansen*, *supra*, 9 Cal.4th at p. 314, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

But the *Hansen* majority also disagreed with **437 *People v. Taylor*, *supra*, 11 Cal.App.3d 57, 89 Cal.Rptr. 697, in an important respect. We declined “to adopt as the critical test determinative of merger in all cases” language in *Taylor* indicating “that the rationale for the merger doctrine does not encompass a felony ‘committed with a collateral and independent felonious design.’” (*People v. Taylor*, *supra*, 11 Cal.App.3d at p. 63[, 89 Cal.Rptr. 697]; see also *People v. Burton* (1971) 6 Cal.3d 375, 387[, 99 Cal.Rptr. 1, 491 P.2d 793].) Under such a test, a felon who acts with a purpose other than specifically to inflict injury upon someone—for

example, with the intent to sell narcotics for financial gain, or to discharge a firearm at a building solely to intimidate the occupants—is subject to greater *1192 criminal liability for an act resulting in death than a person who actually intends to injure the person of the victim. Rather than rely upon a somewhat artificial test that may lead to an anomalous result, we focus upon the principles and rationale underlying the foregoing language in *Taylor*, namely, that with respect to certain inherently dangerous felonies, their use as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent.” (*Hansen, supra*, 9 Cal.4th at p. 315, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

Hansen went on to explain that “application of the second degree felony-murder rule would not result in the subversion of legislative intent. Most homicides do not result from violations of section 246, and thus, unlike the situation in *People v. Ireland, supra*, 70 Cal.2d 522[, 75 Cal.Rptr. 188, 450 P.2d 580], application of the felony-murder doctrine in the present context will not have the effect of ‘preclud[ing] the jury from considering the issue of malice aforethought ... [in] the great majority of all homicides.’ (*Id.*, at p. 539[, 75 Cal.Rptr. 188, 450 P.2d 580].) Similarly, application of the felony-murder doctrine in the case before us would not frustrate the Legislature’s deliberate calibration of punishment for assaultive conduct resulting in death, based upon the presence or absence of malice aforethought.... [T]his is not a situation in which the Legislature has demanded a showing of actual malice (apart from the statutory requirement that the firearm be discharged ‘maliciously and willfully’) in order to support a second degree murder conviction. Indeed, as discussed above, application of the felony-murder rule, when a violation of section 246 results in the death of a person, clearly is consistent with the traditionally recognized purpose of the second degree felony-murder doctrine—namely the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies.” (*Hansen, supra*, 9 Cal.4th at p. 315, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

Hansen generated three separate opinions in addition to the majority opinion. Justice Werdegar authored a concurring opinion arguing that the operative test for the merger doctrine is “whether the underlying ***121 felony was committed with a ‘collateral and independent felonious design.’ ” (*Hansen, supra*, 9 Cal.4th at p. 318, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) She concurred in the judgment because “[t]he evidence in this case supports the conclusion defendant

entertained a collateral and independent felonious design under *Mattison* and *Taylor*; namely to intimidate Echaves by firing shots into his house.” (*Ibid.*)

Justices Mosk and Kennard each authored separate concurring and dissenting opinions. They would have concluded that the underlying felony merged with the resulting homicide, thus precluding use of the felony-murder rule. Justice Kennard argued that “the prosecution’s evidence did not show that defendant had any independent felonious purpose for discharging the firearm at the Echaves residence. That conduct satisfies this court’s definition of an assault.” (*Hansen, supra*, 9 Cal.4th at p. 330, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

*1193 *People v. Tabios* (1998) 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753 involved the same issue as this case—whether shooting at an occupied vehicle under section 246 merges with the underlying homicide. Relying on *Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, the Court of Appeal found no merger. (*People v. Tabios, supra*, at p. 11, 78 Cal.Rptr.2d 753.)

**438 In *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, the issue was whether the trial court properly instructed the jury on felony murder based on discharging a firearm in a grossly negligent manner. (§ 246.3.) As we later summarized, “[t]he defendant in *Robertson* claimed he fired into the air, in order to frighten away several men who were burglarizing his car.” (*People v. Randle* (2005) 35 Cal.4th 987, 1005, 28 Cal.Rptr.3d 725, 111 P.3d 987 (*Randle*).) *Robertson* concluded that the merger doctrine did not bar a felony-murder instruction. (*Robertson, supra*, at p. 160, 17 Cal.Rptr.3d 604, 95 P.3d 872.) Its reasons, however, were quite different than *Hansen*’s reasons.

The *Robertson* majority reviewed some of the cases discussed above, then focused on *Mattison, supra*, 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193. We said that the *Mattison* court believed that finding no merger under its facts “was consistent with the deterrent purpose of the felony-murder rule, because we envisioned that application of the felony-murder rule would deter commission of the underlying inherently dangerous crime. (*Id.* at pp. 185–186[, 93 Cal.Rptr. 185, 481 P.2d 193].) Although a person who has decided to assault another would not be deterred by the felony-murder rule, we declared, a defendant with some collateral purpose may be deterred. The knowledge that a murder conviction may follow if an offense such as furnishing a controlled

substance or tainted alcohol causes death “should have some effect on the defendant's readiness to do the furnishing.”’ (*Id.* at p. 185[, 93 Cal.Rptr. 185, 481 P.2d 193].)” (*Robertson, supra*, 34 Cal.4th at pp. 170–171, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

We noted that *Mattison, supra*, 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193, focused on the fact that the underlying felony's purpose “was independent of or collateral to an intent to cause injury that would result in death.” (*Robertson, supra*, 34 Cal.4th at p. 171, 17 Cal.Rptr.3d 604, 95 P.3d 872.) Then we explained, “Although the collateral purpose rationale may have its drawbacks in some situations (*Hansen, supra*, 9 Cal.4th at p. 315[, 36 Cal.Rptr.2d 609, 885 P.2d 1022]), we believe it provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury. The ***122 defendant's asserted underlying purpose was to frighten away the young men who were burglarizing his automobile. According to defendant's own statements, the discharge of the firearm was undertaken with a purpose collateral to the resulting homicide, rendering the challenged instruction permissible. As Justice Werdegar pointed out in her concurring opinion in *Hansen*, a defendant who discharges a firearm at an inhabited dwelling house, for example, has a purpose independent from the commission of a resulting *1194 homicide if the defendant claims he or she shot to intimidate, rather than to injure or kill the occupants. (*Hansen, supra*, 9 Cal.4th at p. 318[, 36 Cal.Rptr.2d 609, 885 P.2d 1022] (conc. opn. of Werdegar, J.).)” (*Ibid.*)

In *Robertson*, the Court of Appeal had said “that application of the merger doctrine was necessary in order to avoid the absurd consequence that ‘[d]efendants who admit an intent to kill, but claim to have acted with provocation or in honest but unreasonable self-defense, would likely have a stronger chance [than defendants who claimed “I didn't mean to do it”] of being convicted of the lesser offense of voluntary manslaughter.’ ” (*Robertson, supra*, 34 Cal.4th at pp. 172–173, 17 Cal.Rptr.3d 604, 95 P.3d 872.) We responded: “The asserted anomaly identified by the Court of Appeal is characteristic of the second degree felony-murder in general and is inherent in the doctrine's premise that it is reasonable to impute malice—or, more precisely, to eliminate consideration of the presence or absence of actual malice—because of the defendant's commission of an underlying felony that is inherently and foreseeably dangerous. [Citations.] Reliance on section 246.3 as the predicate offense presents no greater anomaly in this regard than such reliance on any other

inherently dangerous felony.” (*Id.* at p. 173, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

Thus, the *Robertson* majority abandoned the rationale of *Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, and resurrected the collateral purpose rationale **439 of *Mattison, supra*, 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193, at least when the underlying felony is a violation of section 246.3.

Robertson generated four separate opinions in addition to the majority opinion. Justice Moreno's concurring opinion agreed that the refusal to apply the merger doctrine was correct under the current state of the law, but he was concerned whether the court should continue to adhere to the second degree felony-murder doctrine at all. (*Robertson, supra*, at pp. 174–177, 17 Cal.Rptr.3d 604, 95 P.3d 872.) Justice Brown argued in dissent that the second degree felony-murder rule should be abandoned entirely. (*Robertson, supra*, 34 Cal.4th at pp. 186–192, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

In a separate dissent, Justice Kennard disagreed that “defendant's claimed objective to scare the victim” was “a felonious purpose that was *independent of the killing.*” (*Robertson, supra*, 34 Cal.4th at p. 178, 17 Cal.Rptr.3d 604, 95 P.3d 872.) She noted with approval that “the majority, without explanation, abandon[ed] the rationale of the *Hansen* majority, and it return[ed] to the independent felonious purpose standard, which it had criticized in *Hansen, supra*, 9 Cal.4th 300[, 36 Cal.Rptr.2d 609, 885 P.2d 1022].” (*Id.* at p. 180, 17 Cal.Rptr.3d 604, 95 P.3d 872.) That was the test she had advocated in *Hansen*. (*Ibid.*) But she believed that the majority misapplied that test. “An intent to scare a person by shooting at the person is *not independent* of the homicide because it is, in essence, nothing more than the intent required for an assault, which is not considered an independent felonious purpose. ***123 [Citation.] Two examples of *1195 independent felonious purpose come to mind: (1) When the felony underlying the homicide is manufacturing methamphetamine, the intent to manufacture this illegal drug is a felonious intent that is independent of the homicide, thus allowing the manufacturer to be convicted of murder if the methamphetamine laboratory explodes and kills an innocent bystander. (2) When the underlying felony is possession of a destructive device, the intent to possess that device is an independent felonious intent, allowing the possessor to be convicted of murder if the device accidentally explodes, killing an unintended victim. But when, as here, a defendant fires a gun to scare the victim, the intended

harm—that of scaring the victim—is not independent of the greater harm that occurs when a shot fired with the intent to scare instead results in the victim's death.” (*Id.* at p. 183, 17 Cal.Rptr.3d 604, 95 P.3d 872.) “In sum, it makes no sense legally to treat defendant's alleged intent to scare as ‘felonious’ when such an intent is legally irrelevant [to guilt of the underlying felony] and when the jury never decided whether he had that intent.” (*Ibid.*)

Justice Werdegar also dissented, arguing that the underlying felony merged with the resulting homicide. She said she “would like to join in the majority reasoning, which is consistent with my *Hansen* concurrence. But sometimes consistency must yield to a better understanding of the developing law. The anomalies created when assaultive conduct is used as the predicate for a second degree felony-murder theory (see dis. opn. of Kennard, J., *ante*, [34 Cal.4th] at pp. 180–182[, 17 Cal.Rptr.3d 604, 95 P.3d 872]) are too stark and potentially too productive of injustice to be written off as ‘characteristic of the second degree felony-murder rule in general’ (maj. opn., *ante*, at p. 173[, 17 Cal.Rptr.3d 604, 95 P.3d 872]). It simply cannot be the law that a defendant who shot the victim with the intent to kill or injure, but can show he or she acted in unreasonable self-defense, may be convicted of only voluntary manslaughter, whereas a defendant who shot only to scare the victim is precluded from raising that partial defense and is strictly liable as a murderer. The independent and collateral purposes referred to in *Mattison* must be understood as limited to nonassaultive conduct. In circumstances like the present, the merger doctrine should preclude presentation of a second degree felony-murder theory to the jury.” (*Robertson, supra*, 34 Cal.4th at p. 185, 17 Cal.Rptr.3d 604, 95 P.3d 872 (dis. opn. of Werdegar, J.).)

In *Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, the trial court, as in *Robertson*, instructed the jury on second degree felony murder, with discharging a firearm in a grossly negligent manner the **440 underlying felony. (*Randle, supra*, at p. 1004, 28 Cal.Rptr.3d 725, 111 P.3d 987.) We found the instruction erroneous under the facts. “Here, unlike *Robertson*, defendant admitted, in his pretrial statements to the police and to a deputy district attorney, he shot at Robinson [the homicide victim].... [¶] The fact that defendant admitted shooting at Robinson distinguishes *Robertson* and supports application of the merger rule here. Defendant's claim that he shot Robinson in order to rescue [another person] simply provided a *motive* for the shooting;

it was not a purpose independent of the shooting.” (*Id.* at p. 1005, 28 Cal.Rptr.3d 725, 111 P.3d 987.)

*1196 In *People v. Bejarano* (2007) 149 Cal.App.4th 975, 57 Cal.Rptr.3d 486, as in *People v. Tabios, supra*, 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753, and this case, the trial court instructed the jury on second degree felony murder, with shooting at an occupied vehicle under section 246 the underlying felony. The court concluded that the ***124 collateral purpose requirement of *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and *Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, applied. “The facts of this case show that appellant discharged the firearm once, intending to shoot the motor vehicle's occupants, rival gang members, and not intending merely to frighten them. The bullet, however, struck and killed an unintended victim, the driver of another vehicle.” (*People v. Bejarano, supra*, at p. 978, 57 Cal.Rptr.3d 486.) Relying primarily on *Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, the Court of Appeal concluded that the trial court erred in instructing on felony murder. “Thus, *Randle* controls this case, the predicate felony merged with the homicide, and the trial court erred in instructing the jury on second degree felony murder based on discharging a firearm at an occupied motor vehicle in violation of section 246.” (*People v. Bejarano, supra*, at p. 990, 57 Cal.Rptr.3d 486.)

The most recent significant development is the Court of Appeal's opinion in this case. The majority noted that *People v. Tabios, supra*, 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753, had relied on *Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, in finding no merger, but then it also noted that this court “returned to the *Mattison* collateral purpose rationale in” *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872. After reviewing other recent cases, it stated, “From this muddled state of the law, we discern the rule to be that second degree felony murder is applicable to an assaultive-type crime, such as when shooting at a person is involved, provided that the crime was committed with a purpose independent of and collateral to causing injury. Since the Supreme Court could have upheld instruction on felony murder in *Randle* on the basis that most homicides are not committed by negligently discharging a gun and did not, we conclude the collateral purpose rule is the proper test of merger in these type of cases.”

Regarding whether a collateral purpose exists in this case, the Court of Appeal majority noted that it had held defendant's statement that he had fired the gun “ ‘to scare them’ ”

should have been excluded. “Without defendant's statements about firing the gun,” the majority concluded, “there was no admissible evidence of a collateral purpose by defendant or any of his companions. Indeed, the reasonable inference is that one who shoots another at close range intends to harm, if not to kill.” Thus it found the court erred, prejudicially, in instructing on second degree felony murder.

In dissent, Justice Nicholson agreed with the majority that the present state of the law is muddled. But he concluded that this court has not overruled *Hansen*, *supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, and found that case, rather than *Robertson*, *supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, or *Randle*, *supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, to be on point. He *1197 believed that “the only rule that can be gleaned from *Robertson* and *Randle* is that the collateral purpose rationale applies to cases involving a violation of section 246.3, which this case does not.” Accordingly, he would have held “that merger is inappropriate when the underlying offense is a violation of section 246.”

2. Analysis

The current state of the law regarding the *Ireland* merger doctrine is problematic in at least two respects.

441 First, two different approaches currently exist in determining whether a felony merges. *125 *Hansen*, *supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, which we have never expressly overruled, held that a violation of section 246, at least when predicated on shooting at an inhabited dwelling house, *never* merges. *Robertson*, *supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and *Randle*, *supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, held that a violation of section 246.3 *does* merge unless it is done with a purpose collateral to the resulting homicide. If *Hansen*, on the one hand, and *Robertson* and *Randle* on the other hand, are all still valid authority, the question arises which approach applies here. *People v. Tabios*, *supra*, 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753, relied on *Hansen* to conclude that shooting at an occupied vehicle under section 246 never merges. *People v. Bejarano*, *supra*, 149 Cal.App.4th 975, 57 Cal.Rptr.3d 486, relied on the more recent *Robertson* and *Randle* opinions to conclude that the same felony *does* merge unless accompanied by a collateral purpose. The Court of Appeal here, rather understandably, divided on the question. This court has never explained whether *Hansen* retains any viability after *Robertson* and *Randle* and, if so, how a court is

to go about determining which approach to apply to a given underlying felony.

Second, *Randle*, when juxtaposed with *Robertson*, brings into sharp focus the anomaly that we noted in *Robertson* and accepted as inherent in the second degree felony-murder rule, and that we noted in *Hansen* and avoided by concluding that the merger rule never applies to shooting at an inhabited dwelling house. In combination, *Robertson* and *Randle* hold that, when the *Hansen* test does not apply (i.e., at least when the underlying felony is a violation of 246.3), the underlying felony merges, and the felony-murder rule does *not* apply, if the defendant intended to shoot *at* the victim (*Randle*), but the underlying felony does not merge, and the felony-murder rule *does* apply, if the defendant merely intended to frighten, perhaps because he believed the victim was burglarizing his car (*Robertson*). This result is questionable for the reasons discussed in the separate opinions in *Robertson*. Moreover, as we discuss further below, the *Robertson* and *Randle* approach injected a factual component into the merger question that did not previously exist.

*1198 In light of these problems, we conclude we need to reconsider our merger doctrine jurisprudence. As Justice Werdegar observed in her dissenting opinion in *Robertson*, “sometimes consistency must yield to a better understanding of the developing law.” (*Robertson*, *supra*, 34 Cal.4th at p. 185, 17 Cal.Rptr.3d 604, 95 P.3d 872.) In considering this question, we must also keep in mind the purposes of the second degree felony-murder rule. We have identified two. The purpose we have most often identified “is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” (*People v. Washington*, *supra*, 62 Cal.2d at p. 781, 44 Cal.Rptr. 442, 402 P.2d 130.) Another purpose is to deter commission of the inherently dangerous felony itself. (*Robertson*, *supra*, 34 Cal.4th at p. 171, 17 Cal.Rptr.3d 604, 95 P.3d 872 [“the second degree felony-murder rule is intended to deter both carelessness in the commission of a crime and the commission of the inherently dangerous crime itself”]; *Hansen*, *supra*, 9 Cal.4th at pp. 310–311, 314, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

We first consider whether *Hansen*, *supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, has any continuing vitality after *Robertson*, *supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and *Randle*, *supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987. In *Robertson* and *Randle*, ***126 we unanimously rejected the *Hansen* test, at least when the

underlying felony is a violation of section 246.3. Although *Hansen* avoided the problems inherent in the *Robertson* approach by simply stating the felony at issue will never merge, we see no basis today to resurrect the *Hansen* approach for a violation of section 246.3. Indeed, doing so would arguably be inconsistent with *Hansen*'s reasoning. *Hansen* explained that most homicides do not involve violations of section 246, and thus holding that such homicides do not merge would not “subvert the legislative intent.” (*Hansen, supra*, at p. 315, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) But most fatal shootings, **442 and certainly those charged as murder, do involve discharging a firearm in at least a grossly negligent manner. Fatal shootings, in turn, are a high percentage of all homicides. Thus, holding that a violation of section 246.3 never merges would greatly expand the range of homicides subject to the second degree felony-murder rule. We adhere to *Robertson* and *Randle* to the extent they declined to extend the *Hansen* approach to a violation of section 246.3.

But if, as we conclude, the *Hansen* test does not apply to a violation of section 246.3, we must decide whether it still applies to *any* underlying felonies. The tests stated in *Hansen* and in *Robertson* and *Randle* cannot both apply at the same time. If *Hansen* governs, the underlying felony will *never* merge. If *Robertson* and *Randle* governs, the underlying felony will *always* merge unless the court can discern some independent felonious purpose. But we see no principled basis by which to hold that a violation of section 246 never merges, but a violation of section 246.3 does merge unless done with an independent purpose. We also see no principled test that another court could use to determine which approach applies to other possible underlying felonies. The court in *People v. Bejarano, supra*, 149 Cal.App.4th 975, 57 Cal.Rptr.3d 486, implicitly concluded that *Robertson* and *Randle* now govern to the exclusion *1199 of the *Hansen* test. We agree. The *Robertson* and *Randle* test and the *Hansen* test cannot coexist. Our analysis in *Robertson* and *Randle* implicitly overruled the *Hansen* test. We now expressly overrule *People v. Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, to the extent it stated a test different than the one of *Robertson* and *Randle*. Doing so also requires us to disapprove of *People v. Tabios, supra*, 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753.

But the test of *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and *Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987, has its own problems that were avoided in *Hansen* but resurfaced when we abandoned the *Hansen* test. Our holding in *Randle* made stark

the anomalies that Justices Kennard and Werdegar identified in *Robertson*. On reflection, we do not believe that a person who claims he merely wanted to frighten the victim should be subject to the felony-murder rule (*Robertson*), but a person who says he intended to shoot at the victim is not subject to that rule (*Randle*). Additionally, *Robertson* said that the intent to frighten is a collateral *purpose*, but *Randle* said the intent to rescue another person is not an independent purpose but merely a *motive*. (*Robertson, supra*, at p. 171, 17 Cal.Rptr.3d 604, 95 P.3d 872; *Randle, supra*, at p. 1005, 28 Cal.Rptr.3d 725, 111 P.3d 987.) It is not clear how a future court should decide whether a given intent is a purpose or merely a motive.

The *Robertson* and *Randle* test presents yet another problem. In the past, we have treated the merger doctrine as a legal question with little or no factual content. Generally, we have held that an underlying felony either never or always merges (e.g., ***127 *People v. Smith, supra*, 35 Cal.3d at p. 805, 201 Cal.Rptr. 311, 678 P.2d 886 [identifying certain underlying felonies that do not merge]), not that the question turns on the specific facts. Viewed as a legal question, the trial court properly decides whether to instruct the jury on the felony-murder rule, but if it does so instruct, it does not also instruct the jury on the merger doctrine. The *Robertson* and *Randle* test, however, turns on potentially disputed facts specific to the case. In *Robertson*, the defendant claimed he merely intended to frighten the victim, which caused this court to conclude the underlying felony did not merge. But the jury would not necessarily have to believe the defendant. Whether a defendant shot *at* someone intending to injure, or merely tried to frighten that someone, may often be a disputed factual question.

Defendant argues that the factual question whether the defendant had a collateral felonious purpose—and thus whether the felony-murder rule applies—involves an element of the crime and, accordingly, that the *jury* must decide that factual question. When the merger issue turns on potentially disputed factual questions, there is no obvious answer to this argument. Justice Kennard alluded to the problem in her dissent in *Robertson* when she observed that “the jury never decided **443 whether he had that intent [to frighten].” (*Robertson, supra*, 34 Cal.4th at p. 183, 17 Cal.Rptr.3d 604, 95 P.3d 872.) Because this factual *1200 question determines whether the felony-murder rule applies under *Robertson* and *Randle*, and thus whether the prosecution would have to prove some other form of malice, it is not clear why the jury should not have to decide the factual question.

To avoid the anomaly of putting a person who merely intends to frighten the victim in a worse legal position than the person who actually intended to shoot at the victim, and the difficult question of whether and how the jury should decide questions of merger, we need to reconsider our holdings in *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and *Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987. When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An “assaultive” felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal.4th 1164, 1167–1168, 81 Cal.Rptr.3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive. For example, in *People v. Smith, supra*, 35 Cal.3d at page 806, 201 Cal.Rptr. 311, 678 P.2d 886, the court noted that child abuse under section 273a “includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.” Looking to the facts before it, the court decided the offense was “of the assaultive variety,” and therefore merged. (*Smith, supra*, 35 Cal.3d at pp. 806–807, 201 Cal.Rptr. 311, 678 P.2d 886.) It reserved the question whether the nonassaultive variety would merge. (*Id.* at p. 808, fn. 7, 201 Cal.Rptr. 311, 678 P.2d 886.) Under the approach we now adopt, both varieties would merge. This approach both avoids the necessity of consulting facts that might be disputed and extends the protection of the merger doctrine to the potentially less culpable defendant whose conduct is not assaultive.

This conclusion is also consistent with our repeatedly stated view that the ***128 felony-murder rule should not be extended beyond its required application. (*People v. Howard, supra*, 34 Cal.4th at p. 1135, 23 Cal.Rptr.3d 306, 104 P.3d 107.) We do not have to decide at this point exactly what felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge. But shooting at an occupied vehicle under section 246 is assaultive in nature and hence cannot serve as the underlying felony for purposes of the felony-murder rule.⁷

⁷ Justice Baxter makes some provocative arguments in favor of abolishing the *Ireland* merger doctrine entirely. However, just as we have refused to

abolish the second degree felony-murder doctrine because it is firmly established, so too we think it a bit late to abolish the four-decades-old merger doctrine. Instead, we think it best to attempt to make it and the second degree felony-murder doctrine more workable.

*1201 We overrule *People v. Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, and the reasoning, although not the result, of *People v. Randle, supra*, 35 Cal.4th 987, 28 Cal.Rptr.3d 725, 111 P.3d 987. This conclusion means the trial court erred in instructing the jury on the second degree felony-murder rule.⁸ We now turn to a consideration of whether this error was prejudicial.

⁸ When we say the trial court erred, we mean, of course, only in light of our reconsideration of past precedents. As of the time of trial, after *Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, and *People v. Tabios, supra*, 67 Cal.App.4th 1, 78 Cal.Rptr.2d 753, and before *People v. Bejarano, supra*, 149 Cal.App.4th 975, 57 Cal.Rptr.3d 486, ample authority supported the trial court's decision to instruct on felony murder.

C. Prejudice

California Constitution, article VI, section 13, prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial. Accordingly, we must decide whether the error in **444 instructing on felony murder prejudiced defendant.

Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Cross* (2008) 45 Cal.4th 58, 69–71, 82 Cal.Rptr.3d 373, 190 P.3d 706 (conc. opn. of Baxter, J.); *People v. Swain* (1996) 12 Cal.4th 593, 607, 49 Cal.Rptr.2d 390, 909 P.2d 994; *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306–1307, 29 Cal.Rptr.3d 277 [erroneous instruction on the second degree felony-murder rule]; see *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 [reiterating that error of this nature is subject to harmless error analysis]; *Neder v. United States* (1999) 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 [stating the reasonable doubt test].)

In finding prejudice, the Court of Appeal noted that the trial court “did not give CALJIC No. 8.30 on second degree

express malice murder or CALJIC No. 8.31 on second degree implied malice murder.” It also stated, “While it is possible the jury selected second degree murder on another theory after finding no premeditation and deliberation, we cannot determine which theory the jury relied on, so if the second degree felony-murder instruction was legally flawed, the verdict must be reversed. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129[, 17 Cal.Rptr.2d 365, 847 P.2d 45].)” Later, after it did find error, the court reiterated that the error was prejudicial: “Since ... the record does not show the murder conviction was based on a valid ground, we reverse the conviction for second degree murder. (*People v. Guiton*, ***129 *supra*, 4 Cal.4th 1116, 1129[, 17 Cal.Rptr.2d 365, 847 P.2d 45].)”

*1202 Defendant argues that the trial court did not adequately instruct the jury on conscious-disregard-for-life malice as a theory of second degree murder, and therefore the jury could not have based its verdict on that theory. We disagree. Although the trial court did not give CALJIC Nos. 8.30 and 8.31, and hence did not instruct on implied (or express) malice murder precisely the way the authors of CALJIC intended, it did give CALJIC No. 8.11, which contains everything necessary to fully instruct the jury on this form of malice as a possible theory of second degree murder.

Specifically, the court instructed the jury that to prove murder, the prosecution had to prove an unlawful killing that “was done with malice aforethought *or* occurred during the commission or attempted commission of shooting at an occupied motor vehicle....” (Italics added.) It also defined malice: “Malice may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being.

“Malice is implied when:

- “1. The killing resulted from an intentional act;
- “2. The natural consequences of the act are dangerous to human life; and
- “3. The act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.

“When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.”

As the Attorney General notes, the only language from CALJIC No. 8.30 or No. 8.31 not included in CALJIC No. 8.11, which the court gave, is the last sentence of CALJIC No. 8.31: “When the killing is the direct result of such an act [an act committed with implied malice], it is not necessary to prove that the defendant intended that the act would result in the death of a human being.” But omission of this sentence, favorable to the prosecution, could neither have prejudiced defendant nor prevented the jury from finding implied malice.

Later, the court instructed the jury that a killing during the commission of shooting at an occupied motor vehicle is second degree murder “when the perpetrator had the specific intent to commit that crime.” The trial court did not reiterate at this point the conscious-disregard-for-life theory of second degree murder, but doing so was not necessary to adequately instruct the jury on that theory. The instructions permitted the jury to **445 base a second degree *1203 murder verdict on either malice *or* the felony-murder rule. Accordingly, the court *did* instruct the jury on conscious-disregard-for-life malice as a possible basis of murder.

Moreover, the prosecutor explained the applicable law to the jury. He explained that murder was an unlawful killing committed with malice *or* during the commission of a dangerous felony. He discussed what implied malice is and included examples. Defendant correctly notes that the prosecutor did not argue that defendant acted with implied malice. He argued for first degree, not second degree, murder. But the instructions, especially in light of the prosecutor’s explanation, permitted the jury to base a second degree murder verdict on a finding of malice separate from the felony-murder rule.

In this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory, ***130 i.e., either express or conscious-disregard-for-life malice. Citing *People v. Guiton*, *supra*, 4 Cal.4th 1116, 17 Cal.Rptr.2d 365, 847 P.2d 45, the Court of Appeal believed it could not do so. But *Guiton* does not dispose of this issue. In his concurring opinion in *People v. Cross*, *supra*, 45 Cal.4th at page 70, 82 Cal.Rptr.3d 373, 190 P.3d 706, Justice Baxter discussed *Guiton*’s significance in this context: “Although *Guiton* observed that reliance on other portions of the verdict is ‘[o]ne way’ of finding an instructional error harmless (*Guiton*, at p. 1130 [, 17 Cal.Rptr.2d 365, 847 P.2d 45]), we have never intimated that this was the *only* way to do

so. Indeed, *Guiton* noted that we were not then presented with the situation of a jury having been instructed with a legally adequate and a legally inadequate theory and that we therefore ‘need not decide the exact standard of review’ in such circumstances—although we acknowledged that ‘[t]here may be additional ways by which a court can determine that error in [this] situation is harmless. We leave the question to future cases.’ (*Id.* at pp. 1130, 1131[, 17 Cal.Rptr.2d 365, 847 P.2d 45].) Because this case only now presents that issue, *Guiton* does not provide a dispositive answer to the question.” (See also *People v. Harris* (1994) 9 Cal.4th 407, 419, fn. 7, 37 Cal.Rptr.2d 200, 886 P.2d 1193.)

The Attorney General argues that the actual verdict *does* show that the jury did not base its murder verdict on the felony-murder rule but necessarily based it on a valid theory. He notes that the jury *acquitted* defendant of the separately charged underlying crime of shooting at an occupied vehicle. A jury that based a murder verdict solely on felony murder, the Attorney General argues, would not acquit a defendant of the underlying felony. Defendant counters with the argument that the verdict as a whole—finding defendant guilty of murder but *not* guilty of either shooting at or from a motor vehicle—is internally inconsistent. On these facts, it is hard to reconcile this verdict. If defendant did not commit *this* murder by firing at or from a vehicle, how *did* he commit it? There was no evidence the victims *1204 were killed or injured by any method other than shooting from *and* at an occupied vehicle. The overall verdict had to have been either a compromise or an act of leniency.

Defendant recognizes that he may not argue that the murder conviction must be reversed due to this inconsistency. He may not argue that the acquittals imply that defendant could not have committed murder, and therefore the jury found he did not commit murder. Instead, courts necessarily tolerate, and give effect to all parts of, inconsistent verdicts. (See generally *People v. Palmer* (2001) 24 Cal.4th 856, 103 Cal.Rptr.2d 13, 15 P.3d 234.) But, defendant argues, this being the case, a reviewing court should not read more than is warranted into one part of an inconsistent verdict. Defendant posits the possibility that one or more jurors found him guilty of second degree murder on a felony-murder theory but then agreed to acquit him of the underlying felony either out of leniency or as a compromise, or perhaps simply out of confusion. In that event, defendant suggests, those jurors may simply have believed defendant was guilty of murder on the invalid felony-murder theory without ever considering a valid theory of malice.

Defendant's argument has some force. The acquittal of the underlying felony **446 strongly suggests the jury based its murder conviction on a valid theory of malice but, under the circumstances, we do not believe that it alone does so beyond a reasonable doubt. But for other reasons we find the error harmless. In his concurring ***131 opinion in *California v. Roy* (1996) 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266, Justice Scalia stated a test that fits the error of this case well. In *Roy*, the error was permitting a defendant to be convicted of a crime as an aider and abettor solely due to the defendant's *knowledge* of the perpetrator's intent without requiring a finding the aider and abettor shared that intent. That error is similar to the error of this case, which permitted defendant to be convicted of murder on a felony-murder theory without requiring a finding of a valid theory of malice. The high court held that the error was subject to harmless error analysis and remanded for the lower court to engage in that analysis.

California v. Roy, supra, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266, involved collateral review of a state court judgment in a federal habeas corpus matter, a procedural posture in which the standard of review for prejudice is more deferential than the harmless-beyond-a-reasonable-doubt standard applicable to direct review. (*Id.* at pp. 4–5, 117 S.Ct. 337.) But Justice Scalia, in a concurring opinion, stated a test that is adaptable to the reasonable doubt standard of direct review: “The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.” (*Id.* at p. 7, 117 S.Ct. 337.) Without holding that this is the only way to find error harmless, we *1205 think this test works well here, and we will use it. If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless.

For felony murder, the court's instructions required the jury to find that defendant had the *specific intent* to commit the underlying felony of shooting at an occupied vehicle. Later, it instructed that to find defendant committed that crime, the jury had to find these elements:

“1. A person discharged a firearm at an occupied motor vehicle; and

“2. The discharge of the firearm was willful and malicious.”

Thus any juror who relied on the felony-murder rule necessarily found that defendant willfully shot at an occupied vehicle. The undisputed evidence showed that the vehicle shot at was occupied by not one but three persons. The three were hit by multiple gunshots fired at close range from three different firearms. No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice. The error in instructing the jury on felony murder was, by itself, harmless beyond a reasonable doubt.

However, this instructional error is not the only error in the case. The Court of Appeal held that the jury should not have heard evidence that defendant admitted firing the gun, but said he did not point it at anyone and just wanted to scare them, and that this error was harmless “as a pure evidentiary matter.” Neither of these holdings is before us on review. The Court of Appeal also held that the error in instructing on felony murder was, by itself, prejudicial, a holding we are reversing. But the Court of Appeal never considered whether the two errors, *in combination*, were prejudicial. The parties have, understandably, not focused on this precise ***132 question. Under the circumstances, we think it prudent to remand the matter for the Court of Appeal to consider and decide whether the two errors, in combination, were prejudicial.

III. CONCLUSION

Although we agree with the Court of Appeal that the trial court erred in instructing the jury on second degree felony murder, we **447 also conclude that *1206 the error, alone, was harmless. Accordingly, we reverse the judgment of the Court of Appeal and remand the matter to that court for further proceedings consistent with this opinion.

WE CONCUR: [GEORGE, C.J.](#), [KENNARD](#), [WERDEGAR](#) and [CORRIGAN, JJ.](#)

Concurring and Dissenting Opinion by [BAXTER, J.](#)

I concur in the majority's decision to reaffirm the constitutional validity of the long-standing second degree felony-murder rule. (Maj. opn., [ante](#), 91 Cal.Rptr.3d at p. 117, 203 P.3d at p. 434.) Ever since the Penal Code¹ was enacted in 1872, and going back even before that, to California's first penal law, the Crimes and Punishments Act of 1850 (Stats.1850, ch. 99, p. 229), the second degree felony-murder rule has been recognized as a rule for imputing malice under the statutory definition of implied malice (§ 188)² where the charge is second degree murder. (Maj. opn., [ante](#), 91 Cal.Rptr.3d at pp. 113–117, 203 P.3d at pp. 431–434.) As the majority explains, “The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.” (Maj. opn., [ante](#), 91 Cal.Rptr.3d at p. 116, 203 P.3d at p. 434.)

¹ All further statutory references are to the Penal Code.

² Section 188 provides that malice is implied “when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.” (§ 188.) We have, however, recognized that “[t]he statutory definition of implied malice has never proved of much assistance in defining the concept in concrete terms.” (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1217, 264 Cal.Rptr. 841, 783 P.2d 200 (*Dellinger*)). Under the modern understanding of the “abandoned and malignant heart” definition of implied malice, malice is presumed when “ ‘the killing proximately resulted from an 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.’ ” (*Dellinger, supra*, 49 Cal.3d at p. 1218, 264 Cal.Rptr. 841, 783 P.2d 200; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 719, 112 Cal.Rptr. 1, 518 P.2d 913; *People v. Phillips* (1966) 64 Cal.2d 574, 587, 51 Cal.Rptr. 225, 414 P.2d 353.)

Although the majority reaffirms the constitutional validity of the second degree felony-murder rule, it goes on to render the rule useless in this and future cases out of strict adherence to the so-called “merger rule” announced in *People v. Ireland*

(1969) 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580 (*Ireland*). Under the merger rule, no assaultive-type felony can be used as a basis for a second degree felony-murder conviction. The single rationale given in *Ireland* for the merger rule was that to allow assaultive-type felonies to serve as a basis for a second degree felony-murder conviction “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 ***133 finds support neither in logic nor in law.” (*Id.* at p. 539, 75 Cal.Rptr. 188, 450 P.2d 580.)

*1207 In the 40 years since the *Ireland* court announced its sweeping “merger rule,” this court has struggled mightily with its fallout in an attempt to redefine the contours of the venerable second degree felony-murder rule. The history of our “‘muddled’ ” (maj. opn., *ante*, 91 Cal.Rptr.3d at p. 117, 203 P.3d at p. 435) case law on the subject is accurately recounted in painstaking detail in the majority opinion. (*Id.*, 91 Cal.Rptr.3d at pp. 117–128, 203 P.3d at pp. 434–444.) Two decisions in particular are noteworthy here.

In *People v. Hansen* (1994) 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022 (*Hansen*), we concluded that maliciously and willfully shooting at an inhabited dwelling in violation of section 246, “involves a high probability that death will result and therefore is an inherently dangerous felony ... for purposes of the second degree felony-murder doctrine.” (*Hansen*, at p. 309, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) *Hansen* explained that, “application of the second degree felony-murder rule to a homicide resulting from a violation **448 of section 246 directly would serve the fundamental rationale of the felony-murder rule—the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies. The tragic death of innocent and often random victims, both young and old, as the result of the discharge of firearms, has become an alarmingly common occurrence in our society—a phenomenon of enormous concern to the public. By providing notice to persons inclined to willfully discharge a firearm at an inhabited dwelling—even to those individuals who would do so merely to frighten or intimidate the occupants, or to ‘leave their calling card’—that such persons will be guilty of murder should their conduct result in the all-too-likely fatal injury of another, the felony-murder rule may serve to deter this type of reprehensible conduct, which has created a climate of fear for significant numbers of Californians even in the privacy of

their own homes.” (*Hansen*, at pp. 310–311, 36 Cal.Rptr.2d 609, 885 P.2d 1022.)

I signed the majority opinion in *Hansen*, and continue to find that decision well-reasoned and most directly on point in the matter now before us.³ I would follow *Hansen* and conclude the jury below was properly instructed on second degree felony murder based on defendant's commission of the inherently dangerous felony of shooting at an occupied vehicle in violation of section 246 and the inference of malice that follows therefrom. The majority, *1208 in contrast, rejects the analysis and holding in *Hansen* and expressly overrules it. (Maj. opn., *ante*, 91 Cal.Rptr.3d at pp. 126–127, 203 P.3d at p. 442.)

3 The case before us involves a homicide resulting from defendant shooting at an occupied vehicle in violation of section 246. In *Hansen*, we held that shooting at an “inhabited dwelling house” in violation of that same section (§ 246) is an act inherently dangerous to human life even though the house is not actually occupied at the time of the shooting. (*Hansen*, *supra*, 9 Cal.4th at pp. 309–311, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) We then explained that “[t]he nature of the other acts proscribed by section 246 reinforces the conclusion that the Legislature viewed the offense of discharging a firearm at an *inhabited dwelling* as posing a risk of death comparable to that involved in shooting at an *occupied* building or motor vehicle.” (*Id.* at p. 310, 36 Cal.Rptr.2d 609, 885 P.2d 1022.) The majority agrees that shooting at an occupied vehicle, as occurred here, is an inherently dangerous felony. (Maj. opn., *ante*, 91 Cal.Rptr.3d at p. 117, 203 P.3d at p. 434–435.) So do I.

In *People v. Robertson* (2004) 34 Cal.4th 156, 166, 17 Cal.Rptr.3d 604, 95 P.3d 872 (*Robertson*), we again considered whether the trial court had properly instructed the ***134 jury on second degree felony murder, this time based on the felony of discharging a firearm in a grossly negligent manner. (§ 246.3.) The defendant in *Robertson* claimed he fired his gun “upwards into the air” merely intending to “scare people away.” (*Robertson*, *supra*, 34 Cal.4th at p. 162, 17 Cal.Rptr.3d 604, 95 P.3d 872.) The *Robertson* majority rejected (although did not overrule) the rationale of *Hansen*, *supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, and went on to resurrect and apply the so-called “collateral purpose” rule derived from two earlier decisions: *People v.*

Mattison (1971) 4 Cal.3d 177, 93 Cal.Rptr. 185, 481 P.2d 193 (*Mattison*) and *People v. Taylor* (1970) 11 Cal.App.3d 57, 89 Cal.Rptr. 697. Briefly, *Robertson* concluded that, under the collateral purpose rule, the merger doctrine did not bar a second degree felony-murder instruction based on the violation of section 246.3. (*Robertson*, at p. 160, 17 Cal.Rptr.3d 604, 95 P.3d 872.) The “collateral purpose” rule can be summarized as a test that reaches a compromise on the all-or-nothing approach taken in *Ireland* regarding assaultive-type felonies and their nonavailability as a basis for second degree felony-murder treatment. Under the collateral purpose rule or test, application of the second degree felony-murder rule is proper only where the underlying felony, although assaultive in nature, is nonetheless committed with a “ ‘collateral and independent felonious design.’ ” (*Mattison*, *supra*, 4 Cal.3d at p. 186, 93 Cal.Rptr. 185, 481 P.2d 193; *Taylor*, *supra*, 11 Cal.App.3d at p. 63, 89 Cal.Rptr. 697.)

I signed the majority opinion in *Robertson* as well, but I have since come to appreciate that the collateral purpose rule on which it relied is unduly deferential to *Ireland*'s flawed merger doctrine. The majority itself points to several serious concerns raised in the wake of *Robertson*'s reliance on the collateral **449 purpose rule in its effort to mitigate the harsh effects of *Ireland*'s all-or-nothing merger rule. (Maj. opn., *ante*, 91 Cal.Rptr.3d at pp. 126–127, 203 P.3d at pp. 442–443.) Nonetheless, it can fairly be observed that the decision in *Robertson*, right or wrong, did represent a compromise, for under its holding inherently dangerous felonies, though they be of the assaultive type, could still *1209 be used as a basis for second degree felony-murder rule treatment as long as a “collateral purpose” for the commission of such a felony could be demonstrated. (*Robertson*, *supra*, 34 Cal.4th at p. 160, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

The majority, in contrast, rejects the analysis and holding of *Robertson* and expressly overrules it along with our earlier decision in *Hansen*. (Maj. opn., *ante*, 91 Cal.Rptr.3d at p. 127–128, 203 P.3d at p. 443.) The majority, to put it bluntly, is unwilling to ameliorate the harsh effects of *Ireland*'s merger doctrine. The majority instead broadly holds that all felonies that are “assaultive in nature” (maj. opn., 91 Cal.Rptr.3d at p. 127, 203 P.3d at p. 443) henceforth may not be used as a basis for a second degree felony-murder prosecution. In short, this court's various attempts over the course of several decades to salvage the second degree felony-murder rule in the wake of *Ireland*'s merger doctrine, and to ameliorate the harsh effects of that all-or-nothing rule, have been wiped clean from the slate. The majority has effectively returned the law to

where it stood 40 years ago, just after *Ireland* was decided. I cannot join in the majority's wholesale capitulation to such a seriously flawed decision.

In the end, this case presented us with a clear opportunity to finally get this complex and difficult issue right. The majority's recognition and unequivocal pronouncement, in part II.A of its opinion—that the second degree felony-murder rule ***135 is simply a rule for imputing malice under section 188—furnishes the missing piece to this complex and confusing legal jigsaw puzzle. With that clear pronouncement of the second degree felony-murder rule's true nature and function firmly in hand, I would go on to reach the following logical conclusions with regard to the long-standing tension between that rule and *Ireland*'s merger doctrine.

First, when a homicide has occurred during the perpetration of a felony inherently dangerous to human life, a jury's finding that the perpetrator satisfied all the elements necessary for conviction of that offense, without legal justification or defense, *is* a finding that he or she acted with an “abandoned and malignant heart” (i.e., acted with malice) within the meaning of section 188. Put in terms of the modern definition of implied malice, where one commits a felony inherently dangerous to human life without legal justification or defense, then under operation of the second degree felony-murder rule, a homicide resulting therefrom *is* a killing “ ‘ ‘proximately result[ing] from an 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.’ ” ’ ” (*Dellinger*, *supra*, 49 Cal.3d at p. 1218, 264 Cal.Rptr. 841, 783 P.2d 200.)

Once it is understood and accepted that the second degree felony-murder rule is simply *a rule for imputing malice* from the circumstances attending the commission of an inherently dangerous felony during which a homicide occurs, no grounds remain to support the sole rationale offered by the *Ireland* court for the merger doctrine—that use of an assaultive-type felony as the basis for a second degree felony-murder instruction “effectively preclude[s] the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault.” (*Ireland*, *supra*, 70 Cal.2d at p. 539, 75 Cal.Rptr. 188, 450 P.2d 580.) The majority's holding in part II.A of its opinion makes clear it understands and accepts that the second degree felony-murder rule is but a means by which juries impute malice under the *1210 Legislature's statutory definition of

second degree implied malice murder. The majority's holding in part II.B of its opinion nonetheless fails to follow through and reach the logical conclusions to be drawn from the first premise, and instead simply rubberstamps the *Ireland* court's misguided belief ****450** that the second degree felony-murder rule improperly removes consideration of malice from the jury's purview.

Second, when a jury convicts of second degree murder under the second degree felony-murder rule, it *has* found the statutory element of malice necessary for conviction of murder. (§§ 187, 188.) Hence, there are no constitutional concerns with regard to whether the jury is finding all the elements of the charged murder, or is not finding all the “facts” that can increase punishment where the defendant is convicted of second degree murder in addition to being convicted of the underlying inherently dangerous felony. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435.)

Third, our recognition today that the second degree felony-murder rule is simply a rule under which the jury may impute malice from the defendant's commission of inherently dangerous criminal acts, thereby undercutting the very rationale given by the *Ireland* court for the merger rule, should logically *eliminate* any impediment to the use of inherently dangerous felonies—such as the violation of [section 246](#) (maliciously and willfully shooting at an occupied vehicle) at issue in this case— *****136** as the basis for an instruction on second degree felony murder.

The majority's holding, in contrast, works just the opposite result. Prior to this court's decision in *Ireland*, this court had already restricted the felonies that could support a second degree felony-murder conviction to those “inherently dangerous to human life.” (*People v. Ford* (1964) 60 Cal.2d 772, 795, 36 Cal.Rptr. 620, 388 P.2d 892.) The justification for the imputation of implied malice under these circumstances is that, “when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life.” (*People v. Patterson* (1989) 49 Cal.3d 615, 626, 262 Cal.Rptr. 195, 778 P.2d 549 (*Patterson*).) Hence, whatever felonies may remain available for use in connection with the second degree felony-murder rule after today's holding will both have to qualify as inherently dangerous felonies (*Ford*, at p. 795, 36 Cal.Rptr. 620, 388 P.2d 892), and not be “assaultive in nature” or contain any elements that have “an assaultive aspect.” (Maj. opn., *ante*, 91 Cal.Rptr.3d at pp. 127, 128, 203

P.3d at pp. 442, 443.) I fail to see how the second degree felony-murder rule, thus emasculated, will continue to serve its intended purposes of “ ‘deter[ring] felons from killing negligently or accidentally’ ” while “deter[ring] commission of the inherently dangerous felony itself.” (Maj. opn., *ante*, 91 Cal.Rptr.3d at p. 125, 203 P.3d at p. 441.)

***1211** In sum, the majority has turned the second degree felony-murder rule on its head by excluding *all felonies* that are “assaultive in nature” (maj. opn., *ante*, 91 Cal.Rptr.3d at p. 127, 203 P.3d at p. 442–443), including a violation of [section 246](#), in whatever form, from future use as a basis for second degree felony-murder treatment. In reaching its holding, the majority has rejected decades of sound felony-murder jurisprudence in deference to *Ireland*'s merger rule, a doctrine grounded on a single false premise, that use of the second degree felony-murder rule improperly insulates juries from the requirement of finding malice and thereby constitutes unfair “bootstrapping.” (*Ireland, supra*, 70 Cal.2d at p. 539, 75 Cal.Rptr. 188, 450 P.2d 580.)

In concluding that *Ireland*'s merger doctrine trumps the second degree felony-murder rule in this and all future cases involving “assaultive-type” felonies (maj. opn., *ante*, 91 Cal.Rptr.3d at p. 109, 203 P.3d at pp. 427–428), the majority professes to heed the concerns raised by some members of this court in past decisions that have addressed the tension between the second degree felony-murder rule and the merger doctrine. (*Id.*, 91 Cal.Rptr.3d at pp. 122–124, 203 P.3d at pp. 438–440.) I do not believe those concerns justify the result reached by the majority in this case.

For example, in *Robertson, supra*, 34 Cal.4th 156, 17 Cal.Rptr.3d 604, 95 P.3d 872, the issue was whether the trial court properly instructed the jury on second degree felony murder based on discharging a firearm in a grossly negligent manner. (§ 246.3.) In that case the defendant claimed he had heard a sound resembling “either a car backfire or ****451** the discharge of a firearm,” and merely “fired two warning shots” “upwards into the air” in order to “ ‘scare people away from my domain.’ ” (*Robertson*, at p. 162, 17 Cal.Rptr.3d 604, 95 P.3d 872.) The physical evidence was otherwise; the defendant had fired at least three shots, two of which hit a car parked across the street “two feet above ground level.” (*Ibid.*) The homicide victim, found 50 yards from where defendant was standing when he fired his weapon, died from a *****137** bullet wound to the back of his head. (*Ibid.*) The majority in *Robertson* concluded *Ireland*'s merger rule did not bar a

second degree felony-murder instruction. (*Robertson*, at p. 160, 17 Cal.Rptr.3d 604, 95 P.3d 872.)

As the majority observes, Justice Werdegar dissented in *Robertson*, arguing that the underlying felony merged with the resulting homicide. She wrote: “The anomalies created when assaultive conduct is used as the predicate for a second degree felony-murder theory [citation] are too stark and potentially too productive of injustice to be written off as ‘characteristic of the second degree felony-murder rule in general’ ([*Robertson*] at p. 173[, 17 Cal.Rptr.3d 604, 95 P.3d 872]). It simply cannot be the law that a defendant who shot the victim with the intent to kill or injure, but can show he or she acted in unreasonable self-defense, may be convicted of only voluntary manslaughter, whereas a defendant who shot only to scare the victim is precluded from raising that partial defense and is strictly liable as a murderer. The independent and *1212 collateral purposes referred to in *Mattison* must be understood as limited to nonassaultive conduct. In circumstances like the present, the merger doctrine should preclude presentation of a second degree felony-murder theory to the jury.” (*Robertson*, *supra*, 34 Cal.4th at p. 185, 17 Cal.Rptr.3d 604, 95 P.3d 872 (dis. opn. of Werdegar, J.).)

I appreciate and share the concerns voiced by Justice Werdegar in her dissent in *Robertson*. At the threshold, I fail to see why a bald claim by the defendant that he fired his gun “upwards into the air” intending merely to “ ‘scare people away’ ” (*Robertson*, *supra*, 34 Cal.4th at p. 162, 17 Cal.Rptr.3d 604, 95 P.3d 872), a claim that was flatly contradicted by all the physical evidence in the case, including the dead victim who was found 50 yards away felled by a single shot to the back of his head, should be found controlling on the matter of what theory or theories of murder were rightfully available to the prosecution in trying the case. (*In re Christian S.* (1994) 7 Cal.4th 768, 783, 30 Cal.Rptr.2d 33, 872 P.2d 574 (*Christian S.*) [trial courts need only instruct on defenses supported by substantial evidence].)

The particular facts of *Robertson* aside, I agree with Justice Werdegar that defendants are entitled to present all viable defenses supported by substantial evidence, like imperfect self defense, in a second degree murder prosecution, whether it be tried on a theory of straight implied malice second degree murder or under the second degree felony-murder rule. But as we recognize today, the second degree felony-murder rule is simply a common law rule for imputing malice, a required element of murder under [sections 187](#)

and 188. Understood in that way, there is nothing in the rule, or in relevant murder statutes, to prevent a defendant from establishing that, even where the circumstances show he satisfied all the elements of an alleged inherently dangerous felony during which a homicide occurred, his *actual state of mind* nonetheless precludes drawing an inference of malice from those attending circumstances.

Under the modern construction of the statutory definition of implied malice (§ 188), “malice is presumed when ‘the killing proximately resulted from an 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.*’ ” (*Dellinger*, *supra*, 49 Cal.3d at p. 1218, 264 Cal.Rptr. 841, 783 P.2d 200, italics added; see also *People v. Sedeno*, *supra*, 10 Cal.3d at p. 719, 112 Cal.Rptr. 1, 518 P.2d 913.) Notwithstanding a charge ***138 that a homicide occurred during the commission of an underlying inherently dangerous felony, a finding of second degree felony murder could still be negated by substantial evidence establishing unreasonable or imperfect self defense, **452 thereby reducing the murder to voluntary manslaughter (see *Christian S.*, *supra*, 7 Cal.4th at p. 783, 30 Cal.Rptr.2d 33, 872 P.2d 574), where the defendant, given his conduct and state of mind under the circumstances surrounding the crimes, is shown not to have actually harbored *1213 a “ ‘conscious disregard for life.’ ” (*Dellinger*, at p. 1218, 264 Cal.Rptr. 841, 783 P.2d 200.) Even a defendant who claims he “shot into the air” to scare away the homicide victim in an unreasonable or mistaken belief he had to do so in order to defend himself might successfully avoid an imputed inference of malice, and conviction under the second degree felony-murder rule, if substantial evidence bears out his claim and establishes he did not act with a conscious disregard for life.

One might reasonably speculate that if the *Ireland* court had had the benefit of our modern jurisprudence on second degree implied malice murder, including decisions like *Christian S.*, *supra*, 7 Cal.4th 768, 30 Cal.Rptr.2d 33, 872 P.2d 574, and *People v. Flannel* (1979) 25 Cal.3d 668, 160 Cal.Rptr. 84, 603 P.2d 1, which only firmly established the defense of unreasonable or imperfect self defense years after *Ireland* was decided (see *Flannel*, at p. 683, 160 Cal.Rptr. 84, 603 P.2d 1), the concerns that led the *Ireland* court to fashion its sweeping merger rule could have been alleviated.

In conclusion, I concur in the majority's holding that the second degree felony-murder rule is a rule for imputing malice, and as such, withstands constitutional scrutiny. (Maj. opn., part II.A, *ante*, 91 Cal.Rptr.3d at pp. 110–117, 203 P.3d at pp. 429–434.) I respectfully dissent from the analysis and conclusions reached by the majority with regard to *Ireland*'s merger rule. (Maj. opn., part II.B, *ante*, 91 Cal.Rptr.3d at pp. 117–128, 203 P.3d at pp. 434–444.) I would follow the well-reasoned decision in *Hansen, supra*, 9 Cal.4th 300, 36 Cal.Rptr.2d 609, 885 P.2d 1022, and conclude that the jury below was properly instructed on second degree felony murder based on defendant's commission of the inherently dangerous felony of shooting at an occupied vehicle in violation of [section 246](#).

Concurring and Dissenting Opinion by MORENO, J.

The second degree felony-murder rule is deeply flawed. The majority attempts once more to patch this judicially created rule and improves the state of the law considerably, but several years ago I expressed my willingness to “reassess [] the rule in an appropriate case.” (*People v. Robertson* (2004) 34 Cal.4th 156, 176, 17 Cal.Rptr.3d 604, 95 P.3d 872 (conc. opn. of Moreno, J.); see *People v. Burroughs* (1984) 35 Cal.3d at p. 829, fn. 3, 201 Cal.Rptr. 319, 678 P.2d 894 [“the time may be ripe to reconsider [the] continued validity” of the second degree felony-murder rule].) This is that case. The time has come to abandon the second degree felony-murder rule.

“The felony-murder rule has been roundly criticized both by commentators and this court. As one commentator put it, ‘[t]he felony murder rule has an extensive history of thoughtful condemnation.’ [Citation.]” (*People v. Robertson, supra*, 34 Cal.4th 156, 174, 17 Cal.Rptr.3d 604, 95 P.3d 872 (conc. opn. of Moreno, J.)) As the majority notes, “[t]he felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the *1214 defendant's mental state.” (Maj. opn., ***139 *ante*, 91 Cal.Rptr.3d at p. 111, 203 P.3d at p. 430.) Regardless of this court's view of the wisdom of doing so, it is within the Legislature's prerogative to remove the necessity to prove malice when a death result from the commission of certain felonies, and the Legislature has done so by codifying the first degree felony-murder rule in [Penal Code section 189](#). (*People v. Dillon* (1983) 34 Cal.3d 441, 472, 194 Cal.Rptr. 390, 668 P.2d 697.) Thus, we cannot abrogate the first degree felony-murder rule because it “is a creature of statute.... [T]his court does not sit as a super-legislature with the power to judicially abrogate a statute merely because it is unwise or outdated. [Citations.]” (*Id.* at p. 463, 194 Cal.Rptr. 390, 668 P.2d 697.)

We do, however, possess the authority to abrogate the second degree felony-murder doctrine because “ ‘the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express **453 basis in the Penal Code.’ ” (*People v. Robertson, supra*, 34 Cal.4th at p. 174, 17 Cal.Rptr.3d 604, 95 P.3d 872 (conc. opn. of Moreno, J.))

My concerns about the felony murder rule are neither new nor original. Nearly 45 years ago, this court acknowledged that “[t]he felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability. [Citations.] Although it is the law in this state [citation], it should not be extended beyond any rational function that it is designed to serve.” (*People v. Washington* (1965) 62 Cal.2d 777, 783, 44 Cal.Rptr. 442, 402 P.2d 130, fn. omitted.) We have described the felony-murder rule as “a ‘ ‘highly artificial concept’ ’ ” that this court long has held “in disfavor” (*People v. Burroughs, supra*, 35 Cal.3d 824, 829, 201 Cal.Rptr. 319, 678 P.2d 894) “because it relieves the prosecution of the burden of proving one element of murder, malice aforethought” (*People v. Henderson* (1977) 19 Cal.3d 86, 92, 137 Cal.Rptr. 1, 560 P.2d 1180). “The felony-murder doctrine has been censured not only because it artificially imposes malice as to one crime because of defendant's commission of another but because it anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin.” (*People v. Phillips* (1966) 64 Cal.2d 574, 583, fn. 6, 51 Cal.Rptr. 225, 414 P.2d 353, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12, 76 Cal.Rptr.2d 180, 957 P.2d 869.)

The second degree felony-murder doctrine suffers from all the same infirmities as its first degree counterpart, and more. In *People v. Satchell* (1971) 6 Cal.3d 28, 33, footnote 11, 98 Cal.Rptr. 33, 489 P.2d 1361 (overruled on other grounds in *People v. Flood, supra*, 18 Cal.4th 470, 490, fn. 12, 76 Cal.Rptr.2d 180, 957 P.2d 869) we observed that the second degree felony-murder rule is largely unnecessary and, in those unusual cases in which it would mandate a different result, may be unfair: “ ‘It may be that the rule is unnecessary in almost all cases in which it is applied, that is to say, that conviction in those cases can be predicated on the normal rules as to murder and as to accomplice liability. In the small residuum of cases, there may be a substantial question whether *1215 the rule reaches a rational result or does not at least distract attention from more relevant

criteria.’ ” (Fn. omitted.) [Citation.] [¶] “If the defendant commits the felony in a highly reckless manner, he can be convicted of second degree murder independently of the shortcut of the felony-murder rule. Under California’s interpretation of the implied malice provision of the [Penal Code \[§ 188\]](#), proof of conduct evidencing extreme or wanton recklessness establishes the element of malice aforethought required *****140** for a second degree murder conviction. [Citation.] ... The jury would decide whether the evidence, including the defendant’s conduct and inferences rising from it, established the requisite malice aforethought; they would not be bound by the conclusive presumption of malice which the felony murder rule compels.’ ”

The majority acknowledges the criticism heaped on the second degree felony-murder rule and describes this court’s halting and sometimes inconsistent attempts to circumscribe the scope of the rule, most notably by creating the [Ireland merger doctrine](#). The majority’s reformulation of the merger doctrine is an improvement, but it does not correct the basic flaw in the felony-murder rule; that it is largely unnecessary and, in those unusual instances in which it would produce a different result, may be unfair. “In most cases involving a felony-murder theory, prosecutors should have little difficulty proving second degree murder with implied malice. ‘[M]alice 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” [citation].’ [Citation.] Eliminating second degree felony murder from the prosecution’s arsenal would not have a detrimental effect on the prosecution’s ability to secure second

degree murder convictions, but it would go a long way to restoring the proper balance between culpability and punishment.” ****454** (*People v. Robertson, supra*, 34 Cal.4th 156, 177, 17 Cal.Rptr.3d 604, 95 P.3d 872 (conc. opn. of Moreno, J.))

The lack of necessity for the second degree felony-murder rule is demonstrated by the majority’s conclusion that the error in instructing the jury on second degree felony-murder in this case was harmless because no reasonable juror could have found that defendant participated in this shooting without also concluding that he harbored at least implied malice. I agree. This will be the rule, rather than the exception. In most instances, a juror who finds that the defendant killed the victim while committing a felony that is inherently dangerous to human life necessarily also will conclude that the defendant harbored either express or implied malice and thus committed second degree murder without relying upon the second degree felony-murder rule. Only in those rare cases in which it is not clear that the defendant acted in conscious disregard of life will the second degree felony-murder rule make a difference, ***1216** but those are precisely the rare cases in which the rule might result in injustice. I would eliminate the second degree felony-murder rule and rely instead upon the wisdom of juries to recognize those situations in which a defendant commits second degree murder by killing the victim during the commission of a felony that is inherently dangerous to life.

All Citations

45 Cal.4th 1172, 203 P.3d 425, 91 Cal.Rptr.3d 106, 09 Cal. Daily Op. Serv. 3977, 2009 Daily Journal D.A.R. 4745

EXHIBIT D

59 Cal.4th 155
Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Bobby CHIU, Defendant and Appellant.

No. S202724.

|
June 2, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, Sacramento County, No. 03F08566, [Lloyd G. Connelly, J.](#), of first degree murder. Defendant appealed. The Court of Appeal reversed. The People petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, [Chin, J.](#), held that:

an aider and abettor may not be convicted of first degree premeditated murder under natural and probable consequences doctrine, and

trial court's erroneous instruction on natural and probable consequences doctrine was not harmless beyond a reasonable doubt.

Affirmed.

[Kennard, J.](#), filed concurring and dissenting opinion, in which [Cantil-Sakauye, C.J.](#), [And Liu, J.](#), joined.

Opinion, [2012 WL 1383596](#), superseded.

Attorneys and Law Firms

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[Kamala D. Harris](#), Attorney General, [Dane R. Gillette](#), Chief Assistant Attorney General, [Michael P. Farrell](#), Assistant Attorney General, [Donald E. de Nicola](#), Deputy State Solicitor General, [Carlos A. Martinez](#), Eric L. Christoffersen

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Opinion

[CHIN, J.](#)

***158 **974** There are two distinct forms of culpability for aiders and abettors. “First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also ‘for any other offense that was a “natural and probable consequence” of the crime aided and abetted.’ ” ([People v. McCoy \(2001\) 25 Cal.4th 1111, 1117, 108 Cal.Rptr.2d 188, 24 P.3d 1210 \(McCoy\)](#).) This case involves the second form of aider and abettor culpability.

In this case, a jury found defendant, Bobby Chiu, guilty of first degree willful, deliberate and premeditated murder (premeditated murder), on the theory that either he directly aided and abetted the murder or he aided and abetted the “target offense” of assault or of disturbing the peace, the natural and probable consequence of which was murder. On the natural and probable consequences theory, the trial court instructed that the jury could find defendant guilty of first degree murder if it determined that *murder* was a natural and probable consequence of either target offense aided and abetted, and if in committing murder, the perpetrator acted willfully, deliberately, and with premeditation.

The Court of Appeal held that the trial court erred in failing to instruct that the jury must find first degree *premeditated* murder was the natural and probable consequence of either target offense. If the jury relied on the natural and probable consequences theory to return the first degree murder conviction, it “necessarily convicted defendant of first degree murder simply because that was the degree of murder the jury found the perpetrator committed.” Being unable to find the error *****441** harmless, it reversed defendant's first degree murder conviction.

Like the Court of Appeal, we find instructional error, but for a different reason. We now hold that an aider and abettor may not be convicted of first ***159** degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. (See [McCoy, supra, 25 Cal.4th at pp. 1117–1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.](#)) Because the error here was prejudicial, we affirm the Court of

Appeal's judgment reversing defendant's first degree murder conviction.

I. FACTS AND PROCEDURAL HISTORY

On September 29, 2003, McClatchy High School students Sarn Saetern and Mackison Sihabouth argued over two girls in an instant message exchange. Saetern challenged Sihabouth to an after-school fight outside a pizzeria, Famous Pizza, the next day. Saetern told Sihabouth that he was going to bring his "homies" with him, and threatened to shoot Sihabouth's father if his father tried to stop the fight. Sihabouth called Simon Nim, a member of the Hop Sing gang, for **975 help. Defendant Bobby Chiu also learned about the fight.

The next day, defendant told American Legion High School student Toang Tran about the fight. Defendant asked Tran if he "want[ed to] see someone get shot," told Tran that there was going to be a fight over a girl, and said his "friend" would shoot if his "friend feels pressured." Sihabouth showed up for the fight but left after he saw a crowd. Saetern did not show up for the fight because he learned that Hop Sing members planned to be there and he believed they " 'are crazy and they kill people.' " Defendant and his friends, Tony Hoong and Rickie Che, went to Famous Pizza that day.

McClatchy High School student Teresa Nguyen met her boyfriend, American Legion student Antonio Gonzales, outside Famous Pizza the day of the fight. Defendant said something to Nguyen which she did not hear. Defendant snickered when Nguyen asked if he was mocking her. Nguyen told defendant to "shut up," and Gonzales left a conversation he was having with another friend to see what was the matter. Gonzales and defendant exchanged fighting words, and Gonzales walked toward defendant, who got off the trunk of the car on which he had been sitting with Hoong and Che. As Gonzales walked toward defendant, Gonzales's friend, Roberto Treadway, told Gonzales, "I got your back." Che and Hoong stood alongside defendant. After the groups exchanged more words and glared at one another, Che punched Treadway. Defendant swung at Gonzales, and Gonzales swung back. Defendant then tackled Gonzales and started hitting him while he lay on the ground. Soon, a full-scale brawl was underway, with as many as 25 people fighting. Gonzales's cousin, Angelina Hernandez, struck defendant eight or nine times in the head with her fists, allowing Gonzales to get off the ground and resume fighting

defendant. Treadway's cousin, Joshua Bartholomew, also hit defendant hard in the back of the head soon after.

*160 Bartholomew testified that after he struck defendant, he heard defendant tell Che to "[g]rab the gun." However, Gonzales, who had been fighting in close contact with defendant, did not hear defendant mention a gun. Soon, Bartholomew and Treadway attempted to leave the scene because they feared the police officer assigned to McClatchy High School could appear at any moment. Hoong pulled out a pocket knife and stabbed ***442 Treadway in the arm. Che appeared with a gun he had retrieved from a car trunk and pointed it at Gonzales's face and said, "Run now, bitch, run." Gonzales ran. Che then pointed the gun at Bartholomew and Treadway. When he hesitated rather than shoot, defendant and Hoong yelled "shoot him, shoot him." Che shot Treadway dead. Che, defendant, and Hoong then fled together in a car.

Defendant testified that he heard about the fight the night before the incident. He claimed that he did not know that Che had a gun. He said he mocked Nguyen in an attempt to "hit on her." Defendant testified that during the fight with Gonzales, he felt continuous punches into the back of his head, received a blow to the face, and bled from his nose. Defendant denied calling for anyone to get a gun, and claimed that he did not want or expect Che to shoot Treadway.

The prosecution charged defendant with murder ([Pen.Code, § 187, subd. \(a\)](#)), with gang enhancement and firearm use allegations. At trial, the prosecution set forth two alternate theories of liability. First, defendant was guilty of murder because he directly aided and abetted Che in the shooting death of Treadway. Second, defendant was guilty of murder because he aided and abetted Che in the target offense of assault or of disturbing the peace, the natural and probable consequence of which was murder.

Regarding the natural and probable consequences theory, the trial court instructed that before it determined whether defendant was guilty of murder, the jury had to decide (1) whether he was guilty of the target offense (either assault or disturbing the peace); (2) whether a coparticipant committed a murder during the commission of the target offense; and (3) whether a reasonable person in defendant's position would have known that the commission of the *murder* was a natural and probable consequence of the commission of either target offense. ([CALCRIM No. 403.](#))

****976** The trial court instructed that to find defendant guilty of murder, the People had to prove that the perpetrator committed an act that caused the death of another person, that the perpetrator acted with malice aforethought, and that he killed without lawful justification. (CALCRIM No. 520.)

The trial court further instructed that if the jury found defendant guilty of murder as an aider and abettor, it had to determine whether the murder was in ***161** the first or second degree. It then instructed that to find defendant guilty of first degree murder, the People had to prove that the perpetrator acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree. (CALCRIM No. 521.)

The jury found defendant guilty of first degree murder and the gang and firearm use allegations true.

As noted, the Court of Appeal reversed the first degree murder conviction. It held that the trial court erred in failing to instruct sua sponte that the jury must determine not only that the murder was a natural and probable consequence of the target crime, but also that the perpetrator's willfulness, deliberation, and premeditation were natural and probable consequences.

We granted the People's petition for review.

II. DISCUSSION

Penal Code section 31,¹ which governs aider and abettor liability, provides in *****443** relevant part, “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed.” An aider and abettor is one who acts “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” (*People v. Beeman* (1984) 35 Cal.3d 547, 560, 199 Cal.Rptr. 60, 674 P.2d 1318.)

¹ All statutory references are to the Penal Code.

“ ‘A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime.’ ” (*People v. Medina* (2009) 46 Cal.4th 913,

920, 95 Cal.Rptr.3d 202, 209 P.3d 105 (*Medina*), citing *People v. Prettyman* (1996) 14 Cal.4th 248, 260–262, 58 Cal.Rptr.2d 827, 926 P.2d 1013 (*Prettyman*).) “Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.” (*McCoy, supra*, 25 Cal.4th at p. 1117, 108 Cal.Rptr.2d 188, 24 P.3d 1210.)

A nontarget offense is a “natural and probable consequence” of the target offense if, judged objectively, the additional offense was reasonably foreseeable. (*Medina, supra*, 46 Cal.4th at p. 920, 95 Cal.Rptr.3d 202, 209 P.3d 105.) The inquiry does not ***162** depend on whether the aider and abettor actually foresaw the nontarget offense. (*Ibid.*) Rather, liability “ ‘is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’ ” (*Ibid.*) Reasonable foreseeability “is a factual issue to be resolved by the jury.” (*Id.* at p. 920, 95 Cal.Rptr.3d 202, 209 P.3d 105.)

We have not previously considered how to instruct the jury on aider and abettor liability for first degree premeditated murder under the natural and probable consequences doctrine. In *People v. Favor* (2012) 54 Cal.4th 868, 143 Cal.Rptr.3d 659, 279 P.3d 1131 (*Favor*), we held that under the natural and probable consequences doctrine as applied to the premeditation allegation under section 664, subdivision (a) (section 664(a)), a trial court need only instruct that the jury find that attempted murder, not attempted *premeditated* murder, was a foreseeable consequence of the target offense. (*Id.* at p. 872, 143 Cal.Rptr.3d 659, 279 P.3d 1131.) The premeditation finding—based on the direct ****977** perpetrator's mens rea—is determined after the jury decides that the nontarget offense of attempted murder was foreseeable. (*Id.* at pp. 879–880, 143 Cal.Rptr.3d 659, 279 P.3d 1131.)

Relying on *People v. Bright* (1996) 12 Cal.4th 652, 665–667, 49 Cal.Rptr.2d 732, 909 P.2d 1354, we reasoned that section 664(a), which imposes an increased punishment for an attempt to commit a murder that is willful, deliberate, and premeditated, was a penalty provision and did not create a greater offense or degree of attempted murder. (*Favor, supra*, 54 Cal.4th at pp. 877, 879, 143 Cal.Rptr.3d 659, 279 P.3d 1131.) Relying on *People v. Lee* (2003) 31 Cal.4th 613, 616, 3 Cal.Rptr.3d 402, 74 P.3d 176 (*Lee*), we held

that the direct perpetrator's heightened state of mind would be a sufficient basis upon which to apply section 664(a)'s penalty provision to an aider and abettor under the natural and probable consequences ***444 doctrine. (*Favor, supra*, 54 Cal.4th at p. 879, 143 Cal.Rptr.3d 659, 279 P.3d 1131.)

In *Lee*, we applied section 664(a)'s penalty provision to direct aiders and abettors. Relying on its statutory language, we noted that section 664(a) “makes no distinction between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor” and does not require personal willfulness, deliberation, and premeditation of an attempted murderer. (*Lee, supra*, 31 Cal.4th at p. 623, 3 Cal.Rptr.3d 402, 74 P.3d 176.) We observed that although the Legislature would have been justified in refusing to extend section 664(a)'s penalty provision to an aider and abettor who fails to personally act with premeditation, it did not. Although *Lee* did not involve the natural and probable consequences doctrine, we commented in dictum that “where the natural-and-probable consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers *163 who personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so.” (*Lee, at pp.* 624–625, 3 Cal.Rptr.3d 402, 74 P.3d 176.) Thus, we indicated in *Lee* that section 664(a) applies to all aiders and abettors. (*Favor, supra*, 54 Cal.4th at p. 878, 143 Cal.Rptr.3d 659, 279 P.3d 1131.)

Relying on *Favor*, the People urge us to reach the same result here. However, we find that case distinguishable in several respects. Unlike *Favor*, the issue in the present case does not involve the determination of legislative intent as to whom a statute applies. Also, unlike *Favor*, which involved the determination of premeditation as a requirement for a statutory penalty provision, premeditation and deliberation as it relates to murder is an element of first degree murder. In reaching our result in *Favor*, we expressly distinguished the penalty provision at issue there from the substantive crime of first degree premeditated murder on the ground that the latter statute involved a different *degree* of the offense. (*Favor, supra*, 54 Cal.4th at pp. 876–877, 143 Cal.Rptr.3d 659, 279 P.3d 1131.) Finally, the consequence of imposing liability for the penalty provision in *Favor* is considerably less severe than in imposing liability for first degree murder under the natural and probable consequences doctrine. Section 664(a) provides that a defendant convicted of attempted murder is subject to a

determinate term of five, seven, or nine years. If the jury finds the premeditation allegation true, the defendant is subject to a sentence of life with the possibility of parole. (*Ibid.*) With that life sentence, a defendant is eligible for parole after serving a term of at least seven years. (§ 3046, subd. (a)(1).) On the other hand, a defendant convicted of first degree murder must serve a sentence of 25 years to life. (§ 190, subd. (a).) He or she must serve a minimum term of 25 years before parole eligibility. (§ 3046, subd. (a)(2).) A defendant convicted of second degree murder must serve a sentence of 15 years to life, with a minimum term of 15 years before parole eligibility. (§§ 190, subd. (a), 3046, subd. (a)(2).)

Finding *Favor* not dispositive, we turn to the statutory and doctrinal bases of the natural and probable consequence doctrine to determine its application. The natural and probable consequences doctrine was recognized **978 at common law and is firmly entrenched in California law as a theory of criminal liability. (*Prettyman, supra*, 14 Cal.4th at pp. 260–261, 58 Cal.Rptr.2d 827, 926 P.2d 1013; *People v. Durham* (1969) 70 Cal.2d 171, 181–185 & fn. 11, 74 Cal.Rptr. 262, 449 P.2d 198; cf. *People v. ***445 Kauffman* (1907) 152 Cal. 331, 334, 92 P. 861 [conspiracy liability]; see *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625, 87 Cal.Rptr. 481, 470 P.2d 617 [“It will be presumed ... that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactments in common law language, that its intent was to continue those rules in statutory form”], superseded by statute on other grounds as stated in *People v. Taylor* (2004) 32 Cal.4th 863, 870, 11 Cal.Rptr.3d 510, 86 P.3d 881.)

*164 As noted, section 31 provides in relevant part that “[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed.” It does not expressly mention the natural and probable consequences doctrine. Where the statutory language is vague, “the statutory definition permits, even requires, judicial interpretation.” (*People v. Chun* (2009) 45 Cal.4th 1172, 1181, 91 Cal.Rptr.3d 106, 203 P.3d 425.) We may, as a court, determine the extent of aiding and abetting liability for a particular offense, keeping in mind the rational function that the doctrine is designed to serve and with the goal of avoiding any unfairness which might redound from too broad an application. (See *Chun, at pp.* 1188–1189, 91 Cal.Rptr.3d 106, 203 P.3d 425; *People v. Patterson* (1989) 49

Cal.3d 615, 622, 627, 262 Cal.Rptr. 195, 778 P.2d 549 (lead opinion of Kennard, J.).²

² “[A]iding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense.” (*People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190, 27 Cal.Rptr.2d 695; accord, *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1049, fn. 8, 265 Cal.Rptr. 486.)

Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. (*People v. Garrison* (1989) 47 Cal.3d 746, 778, 254 Cal.Rptr. 257, 765 P.2d 419 [accomplice liability is vicarious]; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, 221 Cal.Rptr. 592, 710 P.2d 392 [“The requirement that the jury determine the intent with which a person tried as an aider and abettor has acted is not designed to ensure that his conduct constitutes the offense with which he is charged. His liability is vicarious.”]; *People v. Brigham, supra*, 216 Cal.App.3d at p. 1054, 265 Cal.Rptr. 486 [aider and abettor is derivatively liable for reasonably foreseeable consequence of principal's criminal act knowingly aided and abetted].) “By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852, 128 Cal.Rptr.3d 565, italics added.)

The natural and probable consequences doctrine is based on the principle that liability extends to reach “the actual, rather than the planned or ‘intended’ crime, committed on the *policy* [that] ... aiders and abettors should be responsible for the criminal *harms* they have naturally, probably, and foreseeably put in motion.” ***446 *165 *People v. Luparello* (1986) 187 Cal.App.3d 410, 439, 231 Cal.Rptr. 832, italics added; see *Prettyman, supra*, 14 Cal.4th at p. 260, 58 Cal.Rptr.2d 827, 926 P.2d 1013, quoting *Luparello*.) We have never held that the application of the natural and probable consequences doctrine depends on the foreseeability of every element of

the nontarget offense.³ Rather, in the context of **979 murder under the natural and probable consequences doctrine, cases have focused on the reasonable foreseeability of the actual resulting harm or the criminal act that caused that harm. (See, e.g., *Medina, supra*, 46 Cal.4th at pp. 922, 928, 95 Cal.Rptr.3d 202, 209 P.3d 105 [“shooting” or “escalation of the confrontation to a deadly level” was a foreseeable consequence of simple assault]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450, 105 Cal.Rptr.3d 575 [“fatal shooting” was a natural and probable consequence of aiding and abetting an assault with a deadly weapon during a gang confrontation]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10, 104 Cal.Rptr.2d 247 [“fatal shooting” was a natural and probable consequence of a gang fight]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376, 37 Cal.Rptr.2d 596 [“shooting” was a natural and probable consequence of assault and “escalation of this confrontation to a deadly level was much closer to inevitable than it was to unforeseeable”]; *People v. Rogers* (1985) 172 Cal.App.3d 502, 515, 217 Cal.Rptr. 809 [“ ‘the natural and probable consequences of any armed robbery are that someone may be hurt, someone may be shot, [an] innocent bystander may be hurt’ ”].)

³ Although our cases have referred generally to the foreseeability of the nontarget “crime” or “offense” (see, e.g., *Medina, supra*, 46 Cal.4th at p. 920, 95 Cal.Rptr.3d 202, 209 P.3d 105; *Prettyman, supra*, 14 Cal.4th at pp. 261, 267, 269, 271, 58 Cal.Rptr.2d 827, 926 P.2d 1013), we were not called on in those cases to decide whether all of the elements of the nontarget offense must be foreseeable.

In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 143, 151–152, 59 Cal.Rptr.3d 157, 158 P.3d 731 [second degree murder is the intentional killing without premeditation and deliberation or an unlawful killing proximately caused by an intentional act, the natural consequences of which are dangerous to life, performed with knowledge of the danger and with conscious disregard for human life].) It

is also consistent with reasonable concepts of culpability. Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator's state of mind in committing it. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531, 26 Cal.Rptr.2d 323 *166 [inquiry is strictly objective and does not depend on defendant's subjective state of mind].) It only requires that under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. (*Ibid.*)

However, this same public policy concern loses its force in the context of ***447 a defendant's liability as an aider and abettor of a first degree premeditated murder. First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty. (*People v. Knoller, supra*, 41 Cal.4th at p. 151, 59 Cal.Rptr.3d 157, 158 P.3d 731.) That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080, 119 Cal.Rptr.2d 859, 46 P.3d 335; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27, 73 Cal.Rptr. 550, 447 P.2d 942.) Additionally, whether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm. The victim has been killed regardless of the perpetrator's premeditative mental state. Although we have stated that an aider and **980 abettor's “punishment need not be finely calibrated to the criminal's mens rea” (*Favor, supra*, 54 Cal.4th at p. 878, 143 Cal.Rptr.3d 659, 279 P.3d 1131), the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated public policy concern of deterrence.

Accordingly, we hold that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the

natural and probable consequences doctrine. We further hold that where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine. An aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule. (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322, 92 Cal.Rptr.2d 789.) Our holding in this case does not affect or limit an aider and abettor's liability for first degree felony murder under section 189.

Aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. *167 *McCoy, supra*, 25 Cal.4th 1111, 1117–1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.) Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. (*Id.* at p. 1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.) Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder. (*McCoy, supra*, 25 Cal.4th at p. 1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210 [“an aider and abettor's mental state must be at least that required of the direct perpetrator”]; cf. *Rosemond v. United States* (2014) 572 U.S. —, —, 134 S.Ct. 1240, 1248, 188 L.Ed.2d 248.) An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with ***448 premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.

Because we now hold that a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine, we must determine whether giving the instructions here allowing the jury to so convict defendant was harmless error. When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129, 17 Cal.Rptr.2d 365, 847 P.2d 45; *People v. Green* (1980) 27

Cal.3d 1, 69–71, 164 Cal.Rptr. 1, 609 P.2d 468.) Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. (*People v. Chun, supra*, 45 Cal.4th at pp. 1201, 1203–1205, 91 Cal.Rptr.3d 106, 203 P.3d 425.) We cannot so conclude.

The record shows that the jury may have based its verdict of first degree premeditated murder on the natural and probable consequences theory. During deliberations, the jury sent the trial court a note asking, “We are stuck on Murder I or Murder II due to personal views. What do we do?” While the court and counsel were discussing the note, the jury sent another note, stating, “We are at a stalemate.”

The trial court then questioned several jurors. Some of the jurors stated that one juror was unable to follow or objected to the law relating to aiding and abetting. The **981 foreman explained, “Well, she could not see [defendant] stepping in. Basically, the way we explained it was [defendant] stepping into Rickie Che's position as the murder happened, and she could not understand how he could be put into that position at that time with those circumstances that it happened after we had deliberated through what we thought was *168 murder one or murder two which she went along with.” Another juror also stated that the holdout juror said “something along the lines of not being able to put [defendant] in [Che's] shoes as the shooter.”

The court then asked the holdout juror if she ever expressed the view that she could not put defendant in the perpetrator's shoes because she “object[ed] to the law that the Judge has given.” She responded that she was bothered by the principle of aiding and abetting and putting an aider and abettor in the shoes of a perpetrator. The trial court removed the juror and replaced her with an alternate juror. The jury continued deliberating and found defendant guilty of first degree premeditated murder.

From the trial court's discussion with the jurors, it appears that the jury was deadlocked on whether defendant should be held guilty of first degree murder or of second degree murder. Also, it appears that the holdout juror could not find defendant guilty of first degree murder, being unable to place defendant in the “shoes of” Che, and thus could not attribute Che's premeditated murder to defendant. These events indicate that the jury may have been focusing on the natural and probable consequence theory of aiding and

abetting and that the holdout juror prevented a unanimous verdict on first degree premeditated murder based on that theory. Thus, we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a different theory, i.e., the legally valid theory that ***449 defendant directly aided and abetted the murder.

The Court of Appeal found the trial court's instructions on murder relating to the natural and probable consequences doctrine to be error for reasons different than in our decision. However, the effect of the instructional error was the same, affecting only the degree of the crime of which defendant was convicted. Moreover, like us, the Court of Appeal determined there was no basis in the record to conclude that the verdict was based on the legally valid theory that defendant directly aided and abetted the murder. Regarding the remedy, the Court of Appeal reversed the first degree murder conviction, allowing the People to accept a reduction of the conviction to second degree murder or to retry the greater offense. That disposition is also appropriate under our decision. If the People choose to retry the case, they may seek a first degree murder conviction under a direct aiding and abetting theory.

III. CONCLUSION

Accordingly, we affirm the judgment of the Court of Appeal.

WE CONCUR: [BAXTER](#), [WERDEGAR](#), and [CORRIGAN](#), JJ.

Concurring and Dissenting Opinion by [KENNARD](#), J.*

* Retired Associate Justice of the Supreme Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*169 I agree with the majority's affirmance of the Court of Appeal's decision, which reverses the judgment convicting defendant of first degree murder. I disagree, however, with the majority's reasons for the affirmance.

As pertinent here, first degree murder requires that the killing be willful, deliberate, and premeditated, whereas second degree murder does not.¹ Defendant was convicted of first degree murder, not as the perpetrator but as an accomplice. An accomplice to a crime is guilty not only of the intended, or target, crime, but also of “any other offense **982 that was

a ‘natural and probable consequence’ of the crime aided and abetted.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 260, 58 Cal.Rptr.2d 827, 926 P.2d 1013 (*Prettyman*).)

1 For convenience, I refer to willful, deliberate, and premeditated first degree murder, at issue here, as “premeditated murder” or “premeditated first degree murder.” An unlawful killing is also first degree murder when it is committed with certain specified weapons; by poison, lying in wait, or torture; or when it occurs in the commission of certain specified felonies. (§ 189.) Here, however, there was no evidence that any of these circumstances applied.

An offense is the natural and probable consequence of a target crime if the perpetrator's commission of that nontarget offense was foreseeable by a reasonable person in the defendant accomplice's position. This court granted review on the following question: Did the trial court here correctly instruct the jury that it could convict defendant of *first degree murder* under the natural and probable consequences rule if the jury found that some form of *murder*, irrespective of degree, was a natural and probable consequence of the target crime of either assault or disturbing the peace? I would hold, as did the Court of Appeal, that the trial court committed prejudicial error by instructing the jury that it could convict defendant as an accomplice to *first degree murder* under the natural and probable consequences rule without any need to determine whether the particular circumstances that elevated the murder to first degree were reasonably foreseeable.

***450 The majority, however, sidesteps that question. Instead, the majority establishes a new exception to the scope of accomplice liability under the natural and probable consequences rule, holding that the rule does not apply to first degree murder (maj. opn., *ante*, 172 Cal.Rptr.3d at pp. 440, 447, 325 P.3d at pp. 974, 979). As I explain, this court lacks the authority to create exceptions to rules governing criminal liability.

I

Defendant, a Sacramento high school student, was a member of Hop Sing, a local Asian street gang. He heard that two youths planned to have a fight on *170 September 29, 2009, in front of a local pizza place. Defendant told a classmate about the upcoming fight and asked if the classmate “want[ed

to] see someone get shot,” adding that an unspecified friend of defendant's would use a gun if “pressured.”

On September 29, a crowd of high school students gathered in front of the pizza place. Among them were defendant and two friends (Tony Hoong and Rickie Che) who, like defendant, were Hop Sing members. Also present were members of the Norteños, a Hispanic street gang. Defendant began arguing with Antonio Gonzales, a Norteño, and their friends gathered around them. When defendant's friend Che punched Gonzales's friend Roberto Treadway, a Norteño, a fight broke out between Asian and Hispanic youths.

Treadway's cousin, Joshua Bartholomew, hit defendant and then heard defendant tell Che to “[g]rab the gun.” Gonzales (who was fighting defendant at the time) did not hear this. When Treadway and Bartholomew tried to leave, defendant's friend Hoong stabbed Treadway in the arm. Che retrieved a gun from the trunk of a car, pointed it in Gonzales's face, and told him to run. Gonzales did so. Che then pointed the gun at Bartholomew and Treadway. When defendant and Hoong yelled “shoot him,” Che shot and killed Treadway.

Defendant was charged with murder. At trial, he denied being a Hop Sing member, denied knowing that Che had a gun at the fight, denied telling Che to grab the gun, and denied telling Che to shoot. Defendant claimed he did not want or expect Che to shoot Treadway.

In closing argument to the jury, the prosecutor said that defendant was guilty of premeditated first degree murder based on two theories. First, the prosecutor argued that Che's killing of Treadway was premeditated first degree murder and that defendant, by telling Che to “grab the gun” and to shoot, was guilty of the same offense because he had encouraged Che to commit it. Second, the prosecutor argued that under the natural and probable consequences rule defendant was guilty of premeditated first degree murder because he had aided and abetted Che in committing the target crimes of assault and disturbing the peace; because some form of murder, irrespective of degree, was a natural and probable consequence of those target crimes; and because Che, the actual killer, committed premeditated first degree murder.

**983 The trial court gave the jury this instruction on the natural and probable consequences rule: “Before you may decide whether the defendant is guilty of murder under a theory of natural and probable consequences, you must decide whether he is guilty of the crime of assault or disturbing the

peace. To prove the defendant is guilty of murder, the People must prove that: [¶] 1. *171 The defendant is guilty of assault or disturbing the peace; [¶] 2. During the commission of assault or disturbing the peace, a co-participant in that assault or disturbing the peace committed the crime of murder, and [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the *commission of the murder* was a natural and probable consequence of the commission of the assault or disturbing the peace.” (Italics added.) The court also instructed the jury that to prove defendant guilty of first degree murder the prosecution had to prove that the *perpetrator* acted willfully, deliberately, and with premeditation, but it did not tell the jury that it must find that a willful, deliberate, and premeditated act of murder was a natural and probable consequence of assault or disturbing the peace.

The jury convicted defendant of *first degree* murder. The Court of Appeal reversed the judgment of conviction. The court explained that the trial court committed prejudicial error by failing to instruct the jury that to convict defendant of *first degree murder* under the natural and probable consequences rule it must decide “whether a reasonable person in defendant's position would have known that premeditated murder (i.e., first degree murder) was likely to happen ... as a consequence of either target offense.” The Court of Appeal gave the prosecution a choice between retrying defendant for first degree murder and accepting a reduction of the conviction to second degree murder. This court granted the Attorney General's petition for review.

II

Penal Code section 31 (all later citations are to the Penal Code) states: “All persons concerned in the commission of a crime, ... whether they directly commit the act constituting the offense, or *aid and abet* in its commission, ... are principals in any crime so committed.” (Italics added.) Section 31 does not expressly define the term “aid and abet,” but this court has described two types of accomplices who fall within the statutory definition: those who directly encourage or assist in the commission of the charged offense and those who are liable under the natural and probable consequences rule.

A defendant is a *direct* aider and abettor if “ ‘he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice,

aids, promotes, encourages or instigates the commission of the crime.’ ” (*People v. Delgado* (2013) 56 Cal.4th 480, 486, 154 Cal.Rptr.3d 621, 297 P.3d 859, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164, 282 Cal.Rptr. 450, 811 P.2d 742.) *Indirect* liability of the aider and abettor, under the natural and probable consequences rule, is more complex, requiring a five-step process. The jury must find that “the defendant (1) with knowledge of the confederate's unlawful purpose; and (2) with the intent of committing, *172 encouraging, or facilitating the commission of any target crime(s); (3) aided, promoted, encouraged, or instigated the commission of the target crimes.” (*Prettyman, supra*, 14 Cal.4th at p. 271, 58 Cal.Rptr.2d 827, 926 P.2d 1013.) The jury must also find that “(4) the defendant's confederate committed an offense other than the target crime(s); and ... (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated.” (*Ibid.*, italics omitted.) Requirements (4) and (5) are at issue here.

Under the natural and probable consequences rule, liability “is ‘derivative,’ that is, it results from an act by the perpetrator to which the accomplice contributed.” (***452 *Prettyman, supra*, 14 Cal.4th at p. 259, 58 Cal.Rptr.2d 827, 926 P.2d 1013.) A crime is the natural and probable consequence of an intended or target crime if its commission by the perpetrator was reasonably foreseeable. “The ... question is not whether the aider **984 and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.” (*People v. Medina* (2009) 46 Cal.4th 913, 920, 95 Cal.Rptr.3d 202, 209 P.3d 105.) “A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case ... and is a factual issue to be resolved by the jury.” (*Ibid.*)

The Court of Appeal here agreed with defendant accomplice, as I do, that the trial court erred in its instructions to the jury. The jury was instructed that it could convict him of *first degree* murder under the natural and probable consequences rule simply by finding that some form of *murder* (irrespective of degree) was a natural and probable consequence of the target crimes of either assault or disturbing the peace that defendant had aided and abetted. Under the instructions, the jury was not required to decide whether *first degree murder* was a natural and probable consequence of the target crime.

As mentioned earlier (see 172 Cal.Rptr.3d at p. 440, 325 P.3d at p. 974, *ante*), to convict an accomplice defendant under the natural and probable consequences rule, the jury

must find that “the *offense* ” committed by the perpetrator was “a natural and probable consequence of the target crime that the defendant aided and abetted.” (*Prettyman, supra*, 14 Cal.4th at p. 262, 58 Cal.Rptr.2d 827, 926 P.2d 1013, italics added.) Every offense is made up of factual elements, each of which must be proven by the prosecution to establish the commission of the offense. (*Richardson v. U.S.* (1999) 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985.) Thus, under the natural and probable consequences rule, *every element* of the offense must be foreseeable to a reasonable person in the accomplice defendant's position. If *any* element is not reasonably foreseeable, the commission of the offense is not reasonably foreseeable.

Here, the jury convicted defendant of *first degree murder*, which, as pertinent here, is statutorily defined as a willful, deliberate, and premeditated *173 killing with malice aforethought. (See fn. 1, *ante*.) But the trial court did not instruct the jury that to convict defendant accomplice of first degree murder the jury must find that it was reasonably foreseeable that the actual perpetrator, Che, would commit a *premeditated* murder. Instead, the court essentially instructed the jury that it could convict defendant of *first degree* murder if *any* murder was reasonably foreseeable. Murder includes not only premeditated (first degree) murder, but also unpremeditated (second degree) murder. Thus, the trial court's instructions here permitted the jury, applying the natural and probable consequences rule, to convict defendant of premeditated first degree murder based on a conclusion that only second degree murder was a reasonably foreseeable consequence of the target crimes of either assault or disturbing the peace.

Insisting that the jury instructions were proper, the Attorney General contends that to convict an accomplice of first degree murder under the natural and probable consequences rule, the prosecution need not prove that the actual killer's *mental state* of premeditation (a requirement for first degree murder) was reasonably foreseeable; the prosecution, the Attorney General argues, need prove only that the perpetrator's *homicidal act* was foreseeable. Although the majority does not expressly say so, it appears to embrace the Attorney General's view. (See maj. ***453 *opn.*, *ante*, 172 Cal.Rptr.3d at p. 446, 325 P.3d at p. 979 [“cases have focused on the reasonable foreseeability of the actual resulting harm or the criminal act that caused that harm”].) I do not share that view. As this court has repeatedly held, the natural and probable consequences rule does not apply unless the perpetrator's *crime*, not just the perpetrator's *act*, is reasonably foreseeable. (See, e.g., *People*

v. Favor (2012) 54 Cal.4th 868, 874, 143 Cal.Rptr.3d 659, 279 P.3d 1131; *People v. Pearson* (2012) 53 Cal.4th 306, 321, 135 Cal.Rptr.3d 262, 266 P.3d 966; *People v. Medina* (2009) 46 Cal.4th 913, 920, 95 Cal.Rptr.3d 202, 209 P.3d 105; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1133, 77 Cal.Rptr.2d 428, 959 P.2d 735; *Prettyman, supra*, 14 Cal.4th at pp. 254, 259, 261, 267, 269, 271, 58 Cal.Rptr.2d 827, 926 P.2d 1013; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, 221 Cal.Rptr. 592, 710 P.2d 392.) Because the **985 mental state of premeditation is an element of first degree murder, an accomplice may be convicted of first degree murder under the natural and probable consequences rule only if the killer's premeditation of the homicide was foreseeable by a reasonable person in the accomplice's position.

III

The majority sidesteps the question I discussed in the preceding section—that is, whether under the natural and probable consequences rule the jury here had to find that *each element* of premeditated first degree murder was reasonably foreseeable, or whether, as the Attorney General argues, only the actual perpetrator's homicidal *act* was reasonably foreseeable. Instead, the *174 majority creates an exception to the natural and probable consequences rule, declaring that it can *never* be the basis for a first degree murder conviction. (Maj. *opn.*, *ante*, 172 Cal.Rptr.3d at pp. 440, 447, 325 P.3d at pp. 974, 979.) That exception was not sought by defendant, and thus it could not have been anticipated by the Attorney General. The majority's justifications for its newly created exception are unpersuasive, as explained below.

The majority says that imposing liability for *first degree* murder under the natural and probable consequences rule does not serve the purpose of that rule, which, according to the majority, is to “deter[] aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing.” (Maj. *opn.*, *ante*, 172 Cal.Rptr.3d at p. 446, 325 P.3d at p. 979.) Noting that an unlawful killing is first degree murder only if it is premeditated, the majority observes: “That mental state is *uniquely subjective* and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. [Citations.] Additionally, whether a direct perpetrator commits a nontarget offense with or without premeditation and deliberation has *no effect on the resultant harm*.” (Maj.

opn., *ante*, at p. 447, 325 P.3d at p. 979, italics added.) Thus, the majority concludes, “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine.” (Maj. opn., *ante*, at p. 447, 325 P.3d at p. 980.)

The essence of the majority’s reasoning is that premeditation is “uniquely subjective” and does not affect the “resultant harm.” (Maj. opn., *ante*, 172 Cal.Rptr.3d at p. 447, 325 P.3d at p. 979.) But the majority does not explain why malice is ***454 any less subjective, or has any greater effect on the resultant harm. Therefore, the majority’s reasoning proves too much. It precludes not only a first degree murder conviction based on the natural and probable consequences rule, but also a second degree murder conviction based on that rule.

Yet the majority insists that holding defendants liable for second degree murder under the natural and probable consequences rule “serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing.” (Maj. opn., *ante*, 172 Cal.Rptr.3d at p. 446, 325 P.3d at p. 979.) Why is the mental state of malice foreseeable, but not the mental state of premeditation? The majority does not say. And why are the deterrent purposes of the natural and probable consequences rule served by applying it to second degree murder, but not to first degree murder? Again, the majority does not say.

*175 When the California Legislature enacted the Penal Code in 1872, it said in section 31 that persons who “aid and abet” the commission of a crime are punishable as principals, but it left undefined the words “aid and abet.” Because the natural and probable consequences rule has long been “an ‘established rule’ of American jurisprudence” (*Prettyman, supra*, 14 Cal.4th at p. 260, 58 Cal.Rptr.2d 827, 926 P.2d 1013) and was part of English common law (*ibid*), it is reasonable to infer that the 1872 Legislature intended to include that rule within the meaning of “aid and abet” as that phrase is used in section 31. But it is *not* reasonable to infer, as the majority impliedly does here, **986 that the 1872 Legislature intended to apply the rule to every crime *except* first degree murder. The majority makes no effort to tether that inference to anything in the common law, in this court’s decisions preceding the Legislature’s enactment of the Penal Code in 1872, or in the legislative history of section 31 to

show a legislative intent to create a “ first degree murder exception” to the applicability of the natural and probable consequences rule. What research *does* reveal is that for more than 40 years this court has upheld *first degree* murder convictions by juries instructed on the natural and probable consequences rule, without any hint that this might be legally problematic. (See, e.g., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 297–300, 128 Cal.Rptr.3d 417, 256 P.3d 543; *People v. Richardson* (2008) 43 Cal.4th 959, 1021–1022, 77 Cal.Rptr.3d 163, 183 P.3d 1146; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106–108, 17 Cal.Rptr.3d 710, 96 P.3d 30; *People v. Williams* (1997) 16 Cal.4th 635, 691, 66 Cal.Rptr.2d 573, 941 P.2d 752; *Prettyman, supra*, 14 Cal.4th 248, 58 Cal.Rptr.2d 827, 926 P.2d 1013; *People v. Garrison* (1989) 47 Cal.3d 746, 777–778, 254 Cal.Rptr. 257, 765 P.2d 419; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1231–1232, 249 Cal.Rptr. 71, 756 P.2d 795; *People v. Durham* (1969) 70 Cal.2d 171, 181–185, 74 Cal.Rptr. 262, 449 P.2d 198.)

In the majority’s view here, the punishment for second degree murder (imprisonment for 15 years to life) is “commensurate with a defendant’s culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder.” (Maj. opn., *ante*, 172 Cal.Rptr.3d at p. 447, 325 P.3d at p. 980; see *id.* at p. 444, 325 P.3d at p. 977.) But as this court has repeatedly stated, “in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and ... such questions are in the first instance for the judgment of the Legislature alone,” not the judiciary. (***455 *In re Lynch* (1972) 8 Cal.3d 410, 414, 105 Cal.Rptr. 217, 503 P.2d 921; see *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516, 53 Cal.Rptr.2d 789, 917 P.2d 628 [“ ‘the power to define crimes and fix penalties is vested exclusively in the legislative branch’ ”].) It is thus for the Legislature, not this court, to determine whether a defendant who aids a target crime that naturally and probably results in first degree murder deserves a prison sentence of 25 years to life (the punishment for first degree murder) or 15 years to life (the punishment for second degree murder).

*176 IV

The trial court’s instructional error here requires reversal of defendant’s first degree murder conviction. In the words of the Court of Appeal, with which I agree: “[T]he instructions were deficient because they failed to inform the jury it needed to decide whether first degree murder, rather than just ‘murder,’

was a natural and probable consequence of the target offense. The absence of such an instruction means that if the jury used the natural and probable consequences theory to return the first degree murder conviction, the jury necessarily convicted defendant of first degree murder simply because that was the degree of murder the jury found the perpetrator committed, and the jury never determined whether a reasonable person in defendant's position would have known that premeditated murder (i.e., first degree murder) was likely to happen ... as a consequence of either target offense. Because this possibility exists, we must reverse defendant's first degree murder conviction. When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was actually based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126–1129,

17 Cal.Rptr.2d 365, 847 P.2d 45.) There is no such basis here, as it is impossible for us to determine from the instructions given, the verdict returned, or other circumstances of the case on which theory the jury based its first degree murder conviction.”

I would affirm the Court of Appeal's judgment.

WE CONCUR: CANTIL-SAKAUYE, C.J., and LIU, J.

All Citations

59 Cal.4th 155, 325 P.3d 972, 172 Cal.Rptr.3d 438, 14 Cal. Daily Op. Serv. 6064, 2014 Daily Journal D.A.R. 6979

EXHIBIT E

215 Cal.App.4th 65
Court of Appeal, Second
District, Division 6, California.

The PEOPLE, Plaintiff and Respondent,

v.

Raul Becerra QUIROZ, Defendant and Appellant.

2d Crim. No. B229432

Filed April 3, 2013

Review Denied July 10, 2013

Synopsis

Background: Defendant was convicted in the Superior Court, Ventura County, No. 2006036885, Kevin DeNoce, J., of first-degree murder and being a felon in possession. Defendant appealed.

Holdings: The Court of Appeal, Hoffstadt, J., held that:

defendant received adequate notice of aiding and abetting theory;

jury unanimity was not required on whether defendant was guilty of murder as killer or aider and abettor;

no additional instruction that post-shooting conduct was insufficient for murder liability was required;

witness's statement that defendant was present during murder was not coerced; and

defendant's confession to jailhouse informant was not coerced.

Affirmed.

****203 Kevin DeNoce**, Judge. Superior Court County of Ventura. (Super. Ct. No. 2006036885)

Attorneys and Law Firms

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Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

Opinion

HOFFSTADT, J.*

* (Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to art. 6, § 6 of the Cal. Const.)

***68** A jury unanimously agrees that a defendant is guilty of murder. Must all jurors either unanimously agree defendant is the killer, or unanimously agree that he aided and abetted the killer? Appellant Raul Becerra Quiroz (Quiroz) argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (*Apprendi*) requires all jurors to agree on the same theory of legal liability. We disagree. We also reject Quiroz's arguments that the People's request for an aiding and abetting instruction deprived him of his right to counsel and that such an instruction may be given only if the People name the killer. We further conclude that Quiroz's remaining arguments lack merit. We affirm his conviction for first-degree murder.

FACTS AND PROCEDURAL HISTORY

The Crime

Early in the morning of August 27, 2005, Brian Szostek (Szostek) was shot four times while sitting in the rear passenger's seat of a gold Pontiac. He was dumped in an alley in Oxnard and died soon thereafter.

Quiroz and Szostek were childhood friends. Several months prior to his death, Szostek had called Quiroz for the telephone numbers of two drug dealers. Unbeknownst to Quiroz, Szostek was cooperating with law enforcement. Both dealers were subsequently arrested after drug buys Szostek arranged. One of those dealers, Hector Flores, later asked Quiroz about Szostek's connection to undercover officers. Flores closed their discussion by asking, "Are we on?" Quiroz replied, "Right on, dude."

The night before the shooting, Quiroz borrowed the gold Pontiac, picked up Szostek, and dropped him off at a house in Oxnard. Later that evening, Szostek and three other men drove around in the Pontiac for hours. Quiroz's presence in the car was disputed. Quiroz admitted to two fellow inmates that he had been present (and had shot Szostek), and Quiroz's account was corroborated by one of the car's passengers and by two other witnesses who had seen Quiroz or someone who looked "very familiar" to Quiroz in the car that night. At trial, however, the passenger **204 recanted his prior statement and said Quiroz was not present.

Just hours after the shooting, Quiroz was driving around in the Pontiac with the same passenger who initially said Quiroz was present when Szostek *69 was shot that morning. Quiroz showed up uninvited at the home of one of the two people who had picked up Szostek's body at the scene and transported it to the coroner's office. Quiroz also vacuumed up the glass of the Pontiac's window shattered by the gunshots. Quiroz then returned the car to its owner, and told him to "lay low."

Prosecution

The People charged Quiroz with the first-degree murder of Szostek (Pen.Code, § 187, subd. (a))¹, and being a felon in possession (former § 12021, subd. (a)(1), repealed by Stats. 2010, ch. 711, § 4). The People also alleged Quiroz personally used a firearm in committing the murder (former § 12022.5, subd. (a)(1)).

¹ Unless otherwise indicated, all references are to the Penal Code.

In the midst of voir dire, the People submitted proposed jury instructions, including an aiding and abetting instruction. After the People rested their case-in-chief and after Quiroz had called two of his witnesses, the trial court held its initial jury instruction conference. At that conference, the People again requested that the jury be instructed on the theories of aiding and abetting liability and direct liability. Over Quiroz's objection, the court tentatively ruled that substantial evidence supported Quiroz's liability as an aider and abettor. Quiroz then called another six witnesses.

At the final conference on jury instructions, Quiroz renewed his objection to any aiding and abetting instruction. He did not request an instruction requiring juror unanimity in selecting between aiding-and-abetting liability and direct liability. The

trial court instructed the jury on direct and aiding and abetting liability. During his closing argument, Quiroz criticized the People for shifting its story from Quiroz as the shooter, to Quiroz as an aider and abettor.

The jury found Quiroz guilty of murder and being a felon-in-possession, but split 11 to 1 on whether Quiroz personally used a firearm. The court declared a mistrial on the firearm allegation, and sentenced Quiroz to 28 years to life in prison.

DISCUSSION

Quiroz argues that the trial court erred in instructing the jury on aiding and abetting liability because (1) the People requested the instruction so late in the trial as to deny him the effective assistance of his counsel; and (2) the People never identified the shooter. Quiroz further contends that any aiding *70 and abetting instruction, even if properly given, should have been accompanied by an instruction requiring the jurors to agree unanimously that Quiroz was either the principal or an aider and abettor.

I. Timeliness of Request for Instruction

Quiroz asserts that the People unconstitutionally interfered with his right to counsel by proposing its alternative, aiding-and-abetting theory too late in the trial proceedings. Quiroz contends that his counsel had no ability to respond to this new theory due to this late notice. Drawing on *Sheppard v. Rees* (9th Cir.1989) 909 F.2d 1234 (*Sheppard*) and cases addressing state interference with the right to counsel, Quiroz argues that this error is structural and automatically reversible. Because this involves questions of constitutional law and mixed questions that are **205 predominantly legal, we review Quiroz's contentions de novo. (See *Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74, 89 Cal.Rptr.2d 10; *People v. Waidla* (2000) 22 Cal.4th 690, 730–731, 94 Cal.Rptr.2d 396, 996 P.2d 46.) We conclude that Quiroz had ample notice, and that his deprivation of counsel claim accordingly lacks merit.

Under California's practice of short-form pleading, an instrument charging a defendant as a principal is deemed to charge him as an aider and abettor as well. (§ 971.) This "notice as a principal is sufficient to support a conviction as an aider and abettor ... without the accusatory pleading reciting the aiding and abetting theory...." (*People v. Garrison*

(1989) 47 Cal.3d 746, 776, fn.12, 254 Cal.Rptr. 257, 765 P.2d 419; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 131, 130 Cal.Rptr.3d 1 (*Ardoin*).) Because Quiroz was charged with murder as a principal, he received adequate notice under California law.

A criminal defendant also has a federal constitutional right to “ ‘be informed of the nature and cause of the accusation.’ ” (*Gray v. Raines* (9th Cir.1981) 662 F.2d 569, 571.) It is unsettled whether California's short-form pleading practice, without more, confers constitutionally adequate notice of the People's decision to proceed on an implicitly charged alternative legal theory. (Compare *People v. Scott* (1991) 229 Cal.App.3d 707, 716–717, 280 Cal.Rptr. 274 [holding it does] with *People v. Lucas* (1997) 55 Cal.App.4th 721, 737–738, 64 Cal.Rptr.2d 282 (*Lucas*) [holding it may not].) Nevertheless, we have deemed notice of a new theory to be constitutionally sufficient when the defendant is further alerted to the theory by the evidence presented at the preliminary hearing (*Scott, supra*, at p. 717, 280 Cal.Rptr. 274; *People v. Jenkins* (2000) 22 Cal.4th 900, 1024, 95 Cal.Rptr.2d 377, 997 P.2d 1044 (*Jenkins*)), or by the People's express mention of that theory before or during trial sufficiently in advance of closing argument (*71 *People v. Crawford* (1990) 224 Cal.App.3d 1, 8–9, 273 Cal.Rptr. 472 [initial, pretrial instructional conference]; *Lucas, supra*, at p. 738, 64 Cal.Rptr.2d 282 [same]; *Stephens v. Borg* (9th Cir.1995) 59 F.3d 932, 936 [five days prior to closing argument]). What due process will not tolerate is the People affirmatively misleading or ambushing the defense with its theory. (See *Sheppard, supra*, 909 F.2d at p. 1238; *United States v. Gaskins* (9th Cir.1988) 849 F.2d 454, 458 (*Gaskins*); *Suniga v. Bunnell* (9th Cir.1993) 998 F.2d 664, 667, overruled by *Hedgpeth v. Pulido* (2008) 555 U.S. 57, 129 S.Ct. 530, 532, 172 L.Ed.2d 388; *Ardoin, supra*, 196 Cal.App.4th at p. 134, 130 Cal.Rptr.3d 1.)

The People submitted an aiding and abetting instruction as part of its proposed jury instructions early on—during voir dire. The prosecutor explicitly renewed his request for that instruction at the initial charging conference five days before closing argument, and while Quiroz was still presenting his case. Indeed, the defense called six more witnesses *after* that charging conference. Quiroz had more than sufficient notice of the People's intention to proceed on an aiding and abetting theory. Furthermore, because the People in no way ambushed Quiroz with its aiding and abetting theory, *Sheppard* is distinguishable. (See *Lucas, supra*, 55 Cal.App.4th at p. 738, 64 Cal.Rptr.2d 282 [confining *Sheppard* to its facts].)

Any late notice is harmless in any event. *Sheppard* adopted a rule of automatic reversal because the State's “ambush” had effectively denied Sheppard the assistance of counsel. (*Sheppard, supra*, 909 F.2d at pp. 1237–1238.) By contrast, **206 in cases where a new theory is introduced late in the game for reasons other than prosecutorial gamesmanship, courts have employed a harmless error test. That test looks to whether the late notice “unfairly prevented [defense counsel] from arguing his or her defense to the jury or ... substantially mislead [counsel] in formulating and presenting arguments.” (*Gaskins, supra*, 849 F.2d at p. 458; *People v. Bishop* (1996) 44 Cal.App.4th 220, 234, 51 Cal.Rptr.2d 629.) *Gaskins* and *Bishop* applied this test to evaluate whether supplemental instructions responding to jury notes prejudiced the defendant. However, we find their approach appropriate here as well. Otherwise, we would be left with the illogical result that reversal of a conviction would be automatic when a new theory is added *before* closing argument, but not *after*.

Quiroz had ample time to call witnesses and tailor his closing argument after the People reaffirmed its request for an aiding and abetting instruction. Indeed, Quiroz capitalized on the People's midtrial shift in emphasis during his closing argument. Any late notice was therefore also harmless.

II. Identification of the Principal

Quiroz also argues that an aiding and abetting instruction may not be given unless and until the People produce sufficient evidence of the identity of the *72 principal. Quiroz reasons that the jury cannot assess whether the aider and abettor shares the principal's intent unless it names the principal. We independently review the legal requirements of aiding and abetting liability. (*People v. Rolon* (2008) 160 Cal.App.4th 1206, 1212, 73 Cal.Rptr.3d 358.)

On occasion, courts have observed that an aider and abettor must act with the same “specific intent” as the principal. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210; *People v. Beeman* (1984) 35 Cal.3d 547, 560, 199 Cal.Rptr. 60, 674 P.2d 1318; *People v. Prettyman* (1996) 14 Cal.4th 248, 259, 58 Cal.Rptr.2d 827, 926 P.2d 1013.) However, these cases are always careful to note that they are referring to the requirement of aiding and abetting liability that the aider and abettor know the principal's purpose and intend to encourage or aid that purpose.

No court has required a specific perpetrator to be identified. Quiroz directs us to *People v. Singleton* (1987) 196 Cal.App.3d 488, 241 Cal.Rptr. 842. In *Singleton*, the court overturned a conviction for aiding and abetting a drug offense because there was a “total absence of any proof of a perpetrator.” (*Id.*, at p. 493, 241 Cal.Rptr. 842.) *Singleton* stands for the unremarkable proposition that there can be no aider and abettor without a principal; it says nothing about whether a specific person must be identified as the principal.

Nor will we create such a requirement now. If we did so, we would effectively preclude aiding and abetting liability in those cases in which it is unclear which of several persons involved in a crime was the perpetrator, but equally clear that those persons acted together in committing the crime.

This case illustrates why Quiroz's novel proposal is unnecessary and unwise. No one disputes that someone shot Szostek. Moreover, the People presented sufficient evidence that this perpetrator—whoever he was—acted with premeditation. The evidence showed that one or more people who drove with Szostek in the Pontiac knew he was an informant, shot Szostek four times while he was still in the back seat, dumped him in an alley, and subsequently concealed the damage to the car. Quiroz hypothesizes that Szostek could ****207** have been shot impulsively, but this speculation does not undermine the substantial evidence that the shooter acted with premeditation. More to the point, we are able to make this assessment regarding the principal's intent without knowing which of the Pontiac's three other occupants pulled the trigger. Requiring the People to name a principal is accordingly unnecessary. It is also unwise because Quiroz's proposal would compel us to conclude that no one could be held liable for Szostek's murder, despite the evidence that his murder was premeditated.

*73 III. Unanimity

Quiroz further argues that the trial court was obligated to give a unanimity instruction. This instruction would have required all 12 jurors to agree on whether Quiroz was the shooter or a person who aided and abetted the shooter. Quiroz argues that the United States Supreme Court's decisions in *Apprendi, supra*, 530 U.S. 466, 120 S.Ct. 2348, and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (*Ring*) refused to defer to legislative labels. Quiroz reasons that, because our Legislature chose to classify aiding and abetting as an alternative theory of liability rather than a

separate crime, *Apprendi* requires us to reject the Legislature's classification and to insist upon unanimity. Quiroz did not request a unanimity instruction, but we may overlook this forfeiture because he is now arguing that the trial court is under a sua sponte duty to instruct. (*People v. Valdez* (2012) 55 Cal.4th 82, 151, 144 Cal.Rptr.3d 865, 281 P.3d 924.) We consider this issue de novo. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850, 128 Cal.Rptr.3d 565.)

For decades now, California law has conditioned the duty to give a unanimity instruction on whether the evidence at trial indicates that the defendant committed more than one “discrete criminal event.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1134–1135, 108 Cal.Rptr.2d 436, 25 P.3d 641 (*Russo*)). Where the evidence suggests that the defendant might have committed more than one crime, the court must instruct the jury that it must agree on *which* of the acts—and, hence, which of the *crimes*—the defendant committed. (See *People v. Diedrich* (1982) 31 Cal.3d 263, 281, 182 Cal.Rptr. 354, 643 P.2d 971; *People v. Napoles* (2002) 104 Cal.App.4th 108, 118–119, 127 Cal.Rptr.2d 777.) Otherwise, a guilty verdict might not reflect that all 12 jurors agreed that the defendant committed the same crime. (*People v. Beardslee* (1991) 53 Cal.3d 68, 92, 279 Cal.Rptr. 276, 806 P.2d 1311 (*Beardslee*)) [“A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses”].)

Where, however, the evidence suggests that a defendant committed only one discrete criminal event—but may have done so in one of several different ways—no unanimity instruction is required. (*Russo, supra*, 25 Cal.4th at p. 1135, 108 Cal.Rptr.2d 436, 25 P.3d 641; *People v. Millwee* (1998) 18 Cal.4th 96, 160, 74 Cal.Rptr.2d 418, 954 P.2d 990 [“It is settled ... that unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law”].) Unanimity is not required in this situation even if the jurors might conclude that the defendant is guilty based on different facts, or on different findings about the acts the defendant committed or his mental state. (*Jenkins, supra*, 22 Cal.4th at pp. 1025–1026, 95 Cal.Rptr.2d 377, 997 P.2d 1044; *People v. Pride* (1992) 3 Cal.4th 195, 249–250, 10 Cal.Rptr.2d 636, 833 P.2d 643 (*Pride*); *People v. Davis* (1992) 8 Cal.App.4th 28, 45, 10 Cal.Rptr.2d 381.) That is because, in this situation, ***74** the jury's ****208** guilty verdict will still reflect unanimous agreement that the defendant committed a single crime.

On the basis of this authority, we have held that a unanimity instruction is not required as to which overt act was

committed in furtherance of a conspiracy (*Russo, supra*, 25 Cal.4th at pp. 1135–1136, 108 Cal.Rptr.2d 436, 25 P.3d 641); which felony the defendant intended to commit when burglarizing a house (*People v. Failla* (1966) 64 Cal.2d 560, 567–569, 51 Cal.Rptr. 103, 414 P.2d 39); which acts constitute lying in wait for a murder conviction (*People v. Edwards* (1991) 54 Cal.3d 787, 824, 1 Cal.Rptr.2d 696, 819 P.2d 436); or which aggravating factors render the defendant eligible for the death penalty (*People v. Cook* (2006) 39 Cal.4th 566, 618–619, 47 Cal.Rptr.3d 22, 139 P.3d 492.)

For the same reasons, we have also held that a jury need not agree on the legal theory underlying a single murder charge. This rule applies whether the choice is between premeditated murder and felony-murder theories (*Beardslee, supra*, 53 Cal.3d at pp. 92–93, 279 Cal.Rptr. 276, 806 P.2d 1311; *Ardoin, supra*, 196 Cal.App.4th at pp. 126–127, 130 Cal.Rptr.3d 1; *Pride, supra*, 3 Cal.4th at pp. 249–250, 10 Cal.Rptr.2d 636, 833 P.2d 643), or between direct liability and aiding and abetting liability theories (*People v. Wilson* (2008) 44 Cal.4th 758, 801–802, 80 Cal.Rptr.3d 211, 187 P.3d 1041; *Jenkins, supra*, 22 Cal.4th at pp. 1025–1026, 95 Cal.Rptr.2d 377, 997 P.2d 1044; *People v. Majors* (1998) 18 Cal.4th 385, 408, 75 Cal.Rptr.2d 684, 956 P.2d 1137 (*Majors*); *People v. Santamaria* (1994) 8 Cal.4th 903, 918–919, 35 Cal.Rptr.2d 624, 884 P.2d 81; *People v. Forbes* (1985) 175 Cal.App.3d 807, 816–817, 221 Cal.Rptr. 275; *People v. Perez* (1993) 21 Cal.App.4th 214, 220–222, 26 Cal.Rptr.2d 691.)

The United States Supreme Court has declared our approach to defining when unanimity instructions are required to be consistent with the requirements of due process. In *Schad v. Arizona* (1991) 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, the Court upheld an Arizona law which, like California law, treated premeditation and felony murder as alternative theories upon which a person could be convicted of murder. Arizona accordingly did not require juror unanimity. The Court explained that due process placed some limits “on a State’s capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense....” (*Id.* at p. 632, 111 S.Ct. 2491.) However, the Court held that Arizona’s decision to treat premeditated murder and felony murder as different theories rather than different offenses did not exceed those limits. The Court therefore upheld Arizona’s decision not to require unanimity as to which theory the jurors adopted. (*Id.* at pp. 636–638, 111 S.Ct. 2491) Because these rules did not violate due process, “judicial restraint” counseled against gainsaying Arizona’s approach. (*Ibid.*)

Do *Apprendi* and *Ring* undermine *Schad* and thereby compel a change in our approach to jury unanimity? The specific holdings of *Apprendi* and *Ring* *75 do not. In each case, the Court held that due process required any facts triggering a higher maximum penalty for a crime to be found by the jury beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at pp. 490, 494, 120 S.Ct. 2348 [longer jail term]; *Ring, supra*, 536 U.S. at pp. 589, 603–604, 122 S.Ct. 2428 [imposition of death penalty].) The Court further held that States could not sidestep this constitutional requirement by labeling such facts “sentencing factors” rather than elements. (*Ibid.*) Because the choice between alternative theories does not in any sense trigger a higher **209 maximum penalty, these cases do not themselves abrogate *Schad* or require us to modify our approach to juror unanimity.

Nor do the rationales of *Apprendi* or *Ring* dictate or counsel any change. Contrary to what Quiroz asserts, *Apprendi* and *Ring* did not decree a wholesale abandonment of deference to how states define their crimes. To the contrary, these two cases reaffirmed *Schad’s* deference to the authority of states to delineate crimes. They also embraced *Schad’s* reluctance to discard state-law labels except when compelled by constitutional necessity. As we note above, the rights at issue in *Apprendi* and its progeny do not create such necessity in this case. Moreover, Quiroz has not identified any other constitutional right at issue here that would justify overriding California’s longstanding authority to treat direct liability and aiding and abetting liability as alternative legal theories rather than as two separate crimes. Absent a superseding constitutional right, we would be disregarding deference to state law just for the sake of doing so. *Apprendi, Ring* and *Schad* speak in a uniform voice in decrying such judicial activism.

Given this dynamic, it is no surprise that courts have not read *Apprendi* as vitiating California’s authority to distinguish between alternative theories and separate crimes, and to insist upon unanimity only for separate crimes. Following *Apprendi*, numerous cases have reaffirmed the rule that a jury need not unanimously agree whether the defendant committed premeditated murder or felony murder. (*People v. Moore* (2011) 51 Cal.4th 386, 413, 121 Cal.Rptr.3d 280, 247 P.3d 515; *People v. Taylor* (2010) 48 Cal.4th 574, 626, 108 Cal.Rptr.3d 87, 229 P.3d 12; *People v. Nakahara* (2003) 30 Cal.4th 705, 712–713, 134 Cal.Rptr.2d 223, 68 P.3d 1190.)

This is the first case to squarely confront *Apprendi's* application to the alternative theories of direct and aiding and abetting liability. Quiroz argues that these alternative theories are different from the alternative theories of premeditation and felony murder because a jury choosing between the theories of felony murder or premeditation will still have to unanimously agree on what the defendant did. But this is not always true. In *Perez*, for example, the defendant was alternatively charged with felony murder and premeditation on theories entailing two entirely different factual scenarios. *76 (*Perez*, *supra*, 21 Cal.App.4th at pp. 217–222, 26 Cal.Rptr.2d 691.) He could have been the get-away driver or the shooter inside the store, yet unanimity was not required. (*Ibid.*) We therefore see no principled basis upon which to require unanimity for direct liability versus aiding-and-abetting liability, but not for premeditated versus felony-murder liability.

Reading *Apprendi* to require unanimity for alternative theories would jettison decades of precedent and, at the same time, abrogate deference to state legislators' definitions of crimes without any constitutional imperative. It would also lead to absurd results: As our Supreme Court has noted, “if 12 jurors must agree on the role played by the defendant, the defendant may go free, even if the jurors all agree [he] committed the crime.” (*Russo*, *supra*, 25 Cal.4th at p. 1136, 108 Cal.Rptr.2d 436, 25 P.3d 641.) We therefore conclude that *Apprendi* and *Ring* have not altered existing law, and the trial court ruled properly in not giving a unanimity instruction in this case.

IV. Remaining Instructional Challenges

A. Substantial Evidence to Support Aiding and Abetting Instruction

Quiroz argues that the trial court should have refused to give the aiding and ****210** abetting instruction because substantial evidence did not support a finding that he knew of the shooter's intent to kill or that Quiroz intended to aid the shooting. (*People v. Beeman*, *supra*, 35 Cal.3d at p. 560, 199 Cal.Rptr. 60, 674 P.2d 1318; *People v. Perez* (2005) 35 Cal.4th 1219, 1225, 29 Cal.Rptr.3d 423, 113 P.3d 100.) A trial court may instruct on a theory only if it is supported by “substantial evidence.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200–1201, 24 Cal.Rptr.3d 112, 105 P.3d 487.) We review the trial court's assessment de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206, 17 Cal.Rptr.3d 532, 95 P.3d 811.)

Substantial evidence supports the trial court's decision to instruct on aiding and abetting liability. The evidence adequately demonstrated Quiroz's awareness and complicity in Szostek's killing. Quiroz spoke with Flores about Szostek's role in bringing down Flores's drug organization; Quiroz borrowed the Pontiac and picked up Szostek on the night of his death; Quiroz may have been present in the car at the time Szostek was shot; Quiroz showed up unbidden at the home of the woman who picked up Szostek's body just hours after the shooting; also just hours after the shooting, Quiroz was driving around in the Pontiac with one of the witnesses to the shooting; Quiroz cleaned up the Pontiac, returned it to its owner, and advised the owner to “lay low”; and Quiroz admitted to the shooting and knowing many of its details to two fellow inmates.

*77 B. Accessory instruction

Quiroz also asserts that the trial court erred in not instructing the jury that his post-shooting conduct was insufficient, by itself, to convict him of aiding and abetting. Quiroz never requested such an instruction prior to closing argument. To the extent Quiroz argues that the trial court was obligated to instruct the jury on the crime of being an accessory after the fact, he is incorrect because doing so would have been error in light of the People's objection. (*Majors*, *supra*, 18 Cal.4th at p. 408, 75 Cal.Rptr.2d 684, 956 P.2d 1137 [accessory after the fact is a lesser-related offense to murder]; *People v. Birks* (1998) 19 Cal.4th 108, 137, 77 Cal.Rptr.2d 848, 960 P.2d 1073 [court may not instruct on lesser-related offenses unless all parties agree].) To the extent Quiroz is arguing that the court should have given a pinpoint instruction clarifying the differences between an aider and abettor and an accessory after the fact, any such instruction would have been duplicative and unwarranted. (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 99, 17 Cal.Rptr.3d 710, 96 P.3d 30.) The aiding and abetting instruction already informed the jury that Quiroz had to have the intent to aid and abet the killing “before or during the commission of the offense”; as long as Quiroz satisfied this intent requirement, even his post-killing acts would render him an aider and abettor. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, 282 Cal.Rptr. 450, 811 P.2d 742.)

V. Evidentiary Challenges

A. Statement of Ruben Gonzales (Gonzales)

1. Pertinent facts

Gonzales was a defense witness. He testified that Quiroz was not in the Pontiac when Szostek was shot. Quiroz's counsel asked Gonzales about a prior statement Gonzales made to police. In response to counsel's specific questions about the circumstances under which Gonzales made that statement, Gonzales indicated that the police had told him that he could cooperate or face 50 years-to-life in prison and that they knew all the answers, including that ****211** Quiroz was in the Pontiac at the time of the shooting.

In rebuttal, the People called one of the detectives who had interviewed Gonzales. The detective relayed the substance of Gonzalez's statement—namely, that Quiroz had been in the Pontiac, and had told Gonzales to keep quiet about the shooting. The detective also described the circumstances of Gonzales's two-hour interview. Gonzales had not been under arrest. The detective and other officer gave Gonzales the information they believed to be true, told Gonzales that they knew he was not the shooter, and told him he ***78** was still potentially liable for the murder. They explained that Gonzales faced 50 or more years in prison, but could provide them accurate information that the district attorney might view favorably. The officers also told Gonzales that Quiroz and others were talking to the police, which was untrue.

2. Analysis

Quiroz argues that the trial court should have excluded Gonzales's statement as coerced. Because he is seeking to suppress Gonzales's statement (and not his own), Quiroz bears the burden of proving the statement was coerced. (*People v. Badgett* (1995) 10 Cal.4th 330, 348, 41 Cal.Rptr.2d 635, 895 P.2d 877.) We review this question de novo. (*People v. Richardson* (2008) 43 Cal.4th 959, 992–993, 77 Cal.Rptr.3d 163, 183 P.3d 1146 (*Richardson*)).²

² We would evaluate the trial court's resolution of any evidentiary disputes for substantial evidence (*ibid.*), except that we have no such findings because Quiroz never asked the court to make them.

Quiroz has forfeited this claim by failing to object below. (*People v. Kennedy* (2005) 36 Cal.4th 595, 611–612, 31 Cal.Rptr.3d 160, 115 P.3d 472 [failure to object to admission of involuntary statement forfeits issue on appeal], overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 111 Cal.Rptr.3d 589, 233 P.3d 1000; *People v. Kelly* (1992) 1 Cal.4th 495, 519 & fn 5, 3 Cal.Rptr.2d 677, 822 P.2d 385 [casting significant doubt on *In re Cameron* (1968) 68 Cal.2d

487, 67 Cal.Rptr. 529, 439 P.2d 633, which heard a challenge to a confession as involuntary despite its forfeiture].) Because the question of coercion turns on the intensely factual inquiry into the totality of the circumstances (*People v. Dykes* (2009) 46 Cal.4th 731, 752, 95 Cal.Rptr.3d 78, 209 P.3d 1), it is an especially poor candidate for first-time consideration on appeal. (*Accord In re Ana C.* (2012) 204 Cal.App.4th 1317, 1325, 139 Cal.Rptr.3d 686.)

Quiroz argues we should nevertheless consider his claim because his trial counsel was constitutionally ineffective for not objecting and there is “no satisfactory explanation” for counsel's lapse. (*People v. Huggins* (2006) 38 Cal.4th 175, 206, 41 Cal.Rptr.3d 593, 131 P.3d 995.) We disagree. Quiroz's trial counsel did more than not object—he called Gonzales as a witness and, during his direct examination, elicited facts about the alleged coerciveness of the earlier police interrogation. What is more, counsel then used those facts in his closing argument to make the point that the police were coercing statements from Gonzales and others to fit their theory that Quiroz was the shooter. Counsel's decision to call Gonzales and elicit these facts in the service of his closing argument is a classic tactical decision. It defeats any contention that counsel was asleep at the switch or otherwise ineffective. (See *Strickland v. Washington* (1984) 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

****212 *79** In any event, Gonzales's interrogation did not transgress the guidelines that govern police interrogations. It is well settled that law enforcement may confront a witness with what they know. (*People v. Holloway* (2004) 33 Cal.4th 96, 115, 14 Cal.Rptr.3d 212, 91 P.3d 164.) They may also discuss any advantages that “‘naturally accrue’” from making a truthful statement. (*People v. Ray* (1996) 13 Cal.4th 313, 340, 52 Cal.Rptr.2d 296, 914 P.2d 846; *People v. Jones* (1998) 17 Cal.4th 279, 297–298, 70 Cal.Rptr.2d 793, 949 P.2d 890.) They may explain the possible consequences of the failure to cooperate as long as their explanation does not amount to a threat contingent upon the witness changing her story. (*People v. McClary* (1977) 20 Cal.3d 218, 228–229, 142 Cal.Rptr. 163, 571 P.2d 620, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17, 20 Cal.Rptr.2d 582, 853 P.2d 1037.) They may even engage in deception as long as it is not of a type “‘reasonably likely to produce an untrue statement.’” (*People v. Scott* (2011) 52 Cal.4th 452, 481, 129 Cal.Rptr.3d 91, 257 P.3d 703 (*Scott*)).

Quiroz points out that Gonzales may have been unlawfully “seized” in violation of the Fourth Amendment or in

“custody” for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. These observations are irrelevant. Seizure and “custody” hinge on *objective* inquiries. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400, 58 Cal.Rptr.3d 368, 157 P.3d 973; *People v. Hughes* (2002) 27 Cal.4th 287, 328, 116 Cal.Rptr.2d 401, 39 P.3d 432.) They add nothing to the *subjective* inquiry that defines coercion under due process. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1133, 124 Cal.Rptr.2d 373, 52 P.3d 572.)

Nor does Gonzales's interrogation suffer from the same flaws as the interrogation in *People v. Lee* (2002) 95 Cal.App.4th 772, 115 Cal.Rptr.2d 828. In *Lee*, the police falsely told the witness that the lie detector test he took indicated he was guilty with 97 percent accuracy and threatened him with a murder charge unless he named the defendant. The vice in *Lee* was that the interrogation “was not designed to produce the truth as [the witness] knew it but to produce evidence to support a version of events the police had already decided upon.” (*Id.* at p. 786, 115 Cal.Rptr.2d 828.) Quiroz did not establish the same or any similar dynamic here.

B. *Quiroz's jailhouse statement to Ismael Cano*

1. *Pertinent facts*

In January 2006, jail officials moved Quiroz into a cell beside Ismael Cano (Cano). They told Quiroz the move was for security reasons—namely, that the Mexican Mafia had ordered a “hit” on Quiroz. In truth, they moved him to be near Cano, a jailhouse informant. Cano told Quiroz that he was part of *80 Flores's drug organization (which was true) and was Flores's cousin (which was untrue). Cano explained that Flores's drug operation had been dismantled by the Drug Enforcement Administration, due in large part to a few snitches. At that point, Quiroz indicated that he shot “Brian.” An officer listening in on their conversation also heard Quiroz admit to the shooting, but did not hear Quiroz use the same words as Cano heard to describe.

2. *Analysis*

Quiroz contests the admission of his incriminating statements to Cano. Because Quiroz raises this objection for the first time on appeal, it is forfeited. It is also without merit.

**213 Quiroz argues that three aspects of his statement render it involuntary: (1) Quiroz faced a credible threat of physical violence because he was told he was moved to

a different cell for safety reasons; (2) the prison officials lied about why he was moved and Cano lied about being Flores's cousin; and (3) Cano made an indirect offer to call off Flores's organization if Quiroz confessed to killing Szostek. This situation, Quiroz claims, is indistinguishable from the confession held to be involuntary in *Arizona v. Fulminante* (1991) 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (*Fulminante*).

To begin with, the factors Quiroz cites do not amount to coercion on the record we have before us. Although the jail officials moved Quiroz because of an alleged “threat” of a hit, there is no evidence that Quiroz had any reason to believe those threats originated with Flores. Moreover, the two deceptions involved—(1) that the prison officials did not honestly tell Quiroz he was being moved so Cano could try to surreptitiously befriend him and elicit incriminating statements and (2) that Cano exaggerated his connection to Flores (as a cousin rather than business associate)—are not of the type “reasonably likely to produce an untrue statement.” (*People v. Scott, supra*, 52 Cal.4th at p. 481, 129 Cal.Rptr.3d 91, 257 P.3d 703.) Additionally, the evidence does not support Quiroz's contention on appeal that Cano suggested he would call off the Mexican Mafia hit on Quiroz if Quiroz admitted killing Szostek. To the contrary, the thrust of Cano's ploy was that Flores would be grateful to whoever had eliminated Szostek. Consequently, the undercover conversations in this case are unlike those in *Fulminante*, where the informant promised to protect the defendant from ongoing jailhouse violence against him only if he confessed to murder. (*Fulminante, supra*, 499 U.S. at pp. 287–288, 111 S.Ct. 1246.)

*81 DISPOSITION

The judgment is affirmed.

We concur:

GILBERT, P.J.

PERREN, J.

All Citations

215 Cal.App.4th 65, 155 Cal.Rptr.3d 200, 13 Cal. Daily Op. Serv. 3683, 2013 Daily Journal D.A.R. 4353

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EXHIBIT F

22 Cal.4th 900, 997 P.2d 1044, 95 Cal.Rptr.2d 377,
00 Cal. Daily Op. Serv. 3495, 2000 Daily Journal
D.A.R. 4725, 2000 Daily Journal D.A.R. 7030
Supreme Court of California

THE PEOPLE, Plaintiff and Respondent,

v.

DANIEL STEVEN JENKINS,

Defendant and Appellant.

No. S007522.

May 4, 2000.

SUMMARY

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Xgpgw"E'54//Etlo kpcn'Ecugu//Ej cpi g"qh'Xgpgw//I tqwpf u// Hcevqtu'Eqpukf gtgf 0

Rgp0Eqf g. 'E'3255."uwdf 0*c+."tgs wktgu'c'tkcn'eqwtv'v'q'i tcpv'c o qvqp'hqt'ej cpi g'qh'xgpgw'kh'vj gtg'ku'c'tgcuqpcdrng'hknrgj qqf vj cv'c'hck'cpf "lo r ctvkn'tkcn'ecppqv'dg'j cf "lp'vj g"eqwpv'0 Vj g'rj tcug'otgcuqpcdrng'rnknrgj qqf o'lp'vj ku'eqpvz'v' o gcpu uqo gvj kpi "rguu'vj cp'o qtg'r tqdcdng'vj cp'pqv.cpf "uqo gvj kpi o qtg'vj cp'o gtgn' r quukdrng'0'k'p'twkp' qp'uwej "c'o qvqp."cu vq'y j lej "vj g'f ghgpf cpv'dgctv'vj g'dwtf gp'qh'r tqqh'vj g'tkcn eqwtv'eqpukf gtu'cu'hevqtu'vj g'i tckxk'cpf 'pcwtg'qh'vj g'etlo g. vj g'gzv'p'cpf 'pcwtg'qh'vj g'r wdrlek'f. 'vj g'uk' g'cpf 'pcwtg'qh vj g'eqo o wplk'f. 'vj g'ucwu'qh'vj g'xlevo . 'cpf 'vj g'ucwu'qh'vj g ceewugf 0

*5+

Xgpgw"E' 57//Etlo kpcn'Ecugu//Ej cpi g"qh'Xgpgw//Cr r gcn// Ueqr g'qh'T gxly // "Dwtf gp'qh'Rtqqh//Hcevqtu'Eqpukf gtgf 0

Qp"cr r gcn'htqo "f gpkcn'qh'c" f ghgpf cpv'u' o qvqp'hqt'ej cpi g qh'xgpgw'lp'c'etlo kpcn'r tqugewkqp."vj g'f ghgpf cpv'o wuv'uj qy dqv' vj cv'vj g'tkcn'eqwtv'gtt'gf 'lp'f gp' kpi "vj g'ej cpi g'qh'xgpgw o qvqp."k'0'vj cv'v'vj g'v'ko g'qh'vj g'o qvqp'k'y cu'tgcuqpcdrng' rknrg' 'vj cv'c'hck'tkcn'eqwt'p'qv'dg'j cf. 'cpf 'vj cv'vj g'gtt'qt'y cu r tglwf lekcn'k'0'vj cv'k'y cu'tgcuqpcdrng' rknrg' 'vj cv'c'hck'tkcn

*904 "y cu'pqv'lp'hcev'j cf 0'Qp'cr r gcn'vj g'tgxly kpi "eqwtv wpf gtv'cngu'c" f g'pqxq'tgxly "qh'hkx"eqpvtqm'kpi "hevqtu."cu f go qpwtcv'gf 'd' { 'vj g'g'xkf gpeg'dghqt'g'vj g'tkcn'eqwtv'v'vj g'v'ko g qh'vj g'o qvqp."lp'qt'f gt'vq'tgu'k'g'vj g'htu'v's wgu'k'p'y j gvj gt vj g'tkcn'eqwtv'gtt'gf 0'Vj qug'hkx'g'hevqtu'ctg'vj g'i tckxk' "cpf pcwtg'qh'vj g'etlo g. 'vj g'gzv'p'cpf 'pcwtg'qh'vj g'r wdrlek'f. 'vj g uk' g'cpf 'pcwtg'qh'vj g'eqo o wplk'f. 'vj g'ucwu'qh'vj g'xlevo . 'cpf vj g'ucwu'qh'vj g'ceewugf 0'Hwt'vj gt."y kj "tgi ctf "vq'vj g'ugeqpf uj qy kpi . "lp'qt'f gt'vq' f gyto lpg"y j gvj gt" r tglw'kcn'r wdrlek'f j cf "c'r tglwf lekcn'gh'hev'qp'vj g'lw' { . 'vj g'tgxly kpi "eqwtv'cuq g'zco kpgu'vj g'xqk'f'ktg'qh'vj g'lw'qtu0

*6+

Etlo kpcn' Ncy " E' 77; //Cr r gnc'v'g" Tgxly //Rtgugpv'kpi cpf" Tgugtxkpi " Qdlgev'kpu//Eqpf wev' qh' Rtqugewqt// K' r gto kuukdrng'Rwtr qug'lp'O qxkpi 'hqt'Ugxgtcpeg0

K'c'ecr kcn'r tqugewkqp'hqt' b wtf gt'cpf 'eqpur k'ce'f. 'f ghgpf cpv y ckgf. 'd' { 'hck'kpi "vq'qdlgev'qp'vj cv'i tqwpf "cv'tkcn"j ku'tki j v vq'eqo r r'k'p'qh'vj g'r tqugewqt'u'cmgi gf "lo r gto kuukdrng.'tcekn r wtr qug'lp'o qxkpi "hqt'ugxgtcpeg'qh'f ghgpf cpv'u'tkcn'htqo

vj cv'qh'j ku'eqepur k'cvqtu'0'k'p'cp' { 'gxgpv.'vj g'tgeqtf 'f luenqugf vj cv'vj g'r tqugewqt'y cu'o qv'x'cv'gf 'd' { "c'f gult'g'vq'ugxgt'vj g f gc'vj "r gpcn'f "ecug"ci clpu'v'f ghgpf cpv'htqo "vj g'ecug"ci clpuv j ku'eqf ghgpf cpv'lp'y j lej "vj g'f gc'vj "r gpcn'f "y cu'pqv'dgk'p' uqwi j v'vq'cxqk'f'cp'wpo cpci gedng'tkcn'lp'xq'k'k'p' "vq'q" o cp' { f ghgpf cpv'u."vj cv'vj g'r tqugewqt'y cpv'gf "vq't' { "dq'vj "ecugu'lp vj g'rqecv'k'p'lp'y j lej "vj g'etlo g'y cu'eqo o k'wgf. "cpf "vj cv'vj g f k'cxqy gf "cp' { 'wngt'k'qt'r wtr qug0

*7c.'7d+

Etlo kpcn'Ncy "E'424//Vtkcn//F gpkcn'qh'O qvqp'hqt'Ugr ctcvg Vtkcn' qp" F k'htgt'gpv' Eqwpw//Tgrg'xcpv' Hcevqtu//Etqu/ cf o kuukdrng' { 'qh'G'xkf gpeg//Rt'glwf leg0

K'c'ecr kcn'r tqugewkqp'hqt' o wtf gt'cpf 'eqpur k'ce' { 'cu'vq'qpg xlevo 'cpf 'c'vwo r v'gf 'b wtf gt'qh'c'ugeqpf 'xlevo . 'vj g'tkcn'eqwtv f k'p'qv'gtt'lp'f gp' kpi "f ghgpf cpv'u' o qvqp'vq'ugxgt'vj g'tkcn'qh vj g'q'ht'pugu'ci clpu'v'vj g'v'q'xlevo u'0'Vj g'q'ht'pugu'dgm'pi gf vq'vj g'uco g'ercu'qh'etlo gu."uq'vj cv'lq'k'p'f gt'y cu'cr r tq'rl'c'vg wpf gt "Rgp0Eqf g. 'E'; 76."wprgu'c'engt'uj qy kpi "qh'r qv'p'v'kcn r tglwf leg'y cu'o cf g'0'G'xkf gpeg'qh'vj g'ugr ctcvg'ej cti gu'y qw'f j cxg'dggp'cf o kuukdrng'c'v'ugr ctcvg'tkcn.'uk'peg'g'x'kf gpeg'lp'g'cej ecug'lw'r r qt'v'gf 'vj g'k'p'ht'g'peg'vj cv'f ghgpf cpv'v'cv'gf hqt'vj g'uco g o qv'x'g'cpf "y kj "vj g'uco g'k'p'v'p'v'cu'lp'vj g'q'v'gt'ecug."k'0'vq nkn'y kpgu'gu'lp'q'f gt'vq'r' t'gxgp'v'vj go 'htqo 'v'gu'k'h'k'p' "ci clpuv j lo 'cv'j ku'q'pi q'kpi 't'qddgt' { 'tkcn'0'Hwt'vj gt."vj g'tg'y cu'p'q'lw'r r qt'v k'p'vj g'tgeqtf 'hqt'f ghgpf cpv'u'erclo "vj cv'vj g'c'vwo r v'gf 'b wtf gt ej cti g'y cu'pqv'dt'q'wi j v'lp' "i q'qf "hck'j . "dw'v' cu'h'k'gf "o gtgn' vq'lw'r r qt'v'vj g'ecr kcn'ej cti gu'0'k'p'cf f k'k'q'p. "f ghgpf cpv'v'f k'p'qv f go qpwtcv'g'vj cv'vj g'g'x'kf gpeg'w'p'f gtn' kpi "q'p'g'qh'vj g'q'ht'pugu y cu'uki p'h'k'ecp'w'f "o qtg'k'p'hc'o o cv'qt' { "qt' "ut'q'pi gt" vj cp'vj g g'x'kf gpeg'lp'vj g'q'v'gt'0'H'k'p'cm'f. "f ghgpf cpv'v' c'k'x'gf "j ku'erclo vj cv'vj g'y cu'f gr t'k'x'gf 'qh'f k'ue'q'x'gt' { 'p'gegu'ct' { "vq'j ku'ugx'gt'c'peg o qv'k'p'0' *905

*8+

Etlo kpcn'Ncy "E'424//Vtkcn//F gpkcn'qh'O qvqp'hqt'Ugr ctcvg Vtkcn'qp" F k'htgt'gpv'Eqwpw//Cr r gnc'v'g" Tgxly 0

Qp"cr r gcn'qh'c'v'kcn'eqwtv'u'f gpkcn'qh'c'etlo kpcn'f ghgpf cpv'u o qvqp'hqt'ugxgt'c'peg'qh'vj g'v'kcn'qh'ugr ctcvg'eqwpw."vj g t'gxly kpi "eqwtv'g'zco kpgu'vj g'tkcn'eqwtv'u'tw'kpi "hqt'cdwug qh'f k'uet'g'k'p'."y j lej "y kn' dg" h'q'w'p'f "y j gp" vj g'tkcn'eqwtv'u tw'kpi 'h'cm'u'q'w'uk'f g'vj g'd'q'w'p'f u'q'ht'g'cu'q'p'0'f gr gp'f kpi "w'qp'vj g r ct'v'k'w'ct'ek'ewo u'c'p'egu'qh'g'cej "ecug."c't'gh'w'uc'n'v'q'ugxgt' "o c' { dg'cp'cdwug'qh'f k'uet'g'k'p' "y j gp"<3+g'x'kf gpeg'qp"vj g'etlo gu vq'dg'l'q'k'p'v'f "t'k'gf "y qw'f "p'qv'dg'et'qu'cf o kuukdrng'lp'ugr ctcvg v'kcn'4+eg't'v'k'p'qh'vj g'ej cti gu'ct'g'v'p'w'w'cm'f 'h'knrg' 'vq'k'p'hc'o g vj g'lw' { 'ci clpu'v'vj g'f ghgpf cpv'5+6'v' g'cm'k'ecug'j cu'd'ggp'l'q'k'p'gf y kj 'c'lw'q'pi "ecug."qt'y kj 'c'p'q'v'gt'y g'cm'k'ecug."uq'vj cv'vj g'gh'hev

qh'ci i tgi cvg'gxf ppeg'qp'ugxgtcn'ej cti gu'o ki j v'y gmi'cngt'vj g qweqo g'qh'uqo g'qt'cm'qh'vj g'ej cti gu=cpf '*6+'cp' { "ppg'qh vj g'ej cti gu'ectt'kgu'vj g'f gc'vj 'r gpcn' { "qt'lqkpf gt'qh'vj go 'wtpu vj g'o cwtg'lp'vq'c'ecr kcn'ecug'OP qv'cm'qh'vj gug'eqpuk' gtc'v'kpu ctg'qh'gs wcn'y gki j v'Vj g'hktuv'wgr "lp'cuugukpi "y j gvj gt" c eqo d'kpg'f'v'kcn'y qwf "j cxg'dggp'r tglwf lekcn'ku"vq'f gvgto kpg y j gvj gt" gxf ppeg'qp'gcej "qh'vj g'lqkpf'ej cti gu'y qwf "j cxg dggp'cf o kuukdr. 'w'pf gt "Gxf 0E qf g. 'E'3323. 'lp'ugr ctcvg'v'kcn' qp'vj g'qv'j gtu'K'uq. "cp' { "kphgt'ppeg'qh'r tglwf leg'ku'f kur gmgf 0 Etquu'cf o kuukdr' { "uw'hlegu'vq'p'gi cvg'r tglwf leg. 'dw'k'ku'p'qv guugp'v'kcn'ht'vj cv'r wtr qug0

*9+

Etlo kpcn'Ncy "E'364//Rtgrko kpc' { "Rtqeggf kpi u//F kueqxt { // H'kntg' vq' F kuenug' Rtqugewkqp' Y kpguugu' Rtkqt' vq Rtgrko kpc' { "J gctkpi //Rtgrlwf leg0

K'c' ecr kcn' o wtf gt" r tqugewkqp. "vj g' v'kcn' eqwt'v' f k' "pqv gtt' k' tghwukpi "vq' ucpev'kqp' vj g' r tqugewkqp' hqt' hckkpi "vq f kuenug'vq'vj g'f ghgpug'dghqtg'vj g'r tgrko kpc' { "j gctkpi "vj cv vj g'r tqugewkqp'r quuguug' gxf ppeg'vj cv'f ghgp'cpv'j cf "o cf g k'pewr cvqt { "ucvgo gpw'vq'c'lckj qwug'kphqto cp'OC' rko kcvkqp qp'c'f ghgp'cpv'u'cdk'k' { "vq'f kueqxt' gxf ppeg'cp'f "vq'f g'xgr c'f ghgpug'cv'vj g'r tgrko kpc' { "j gctkpi "ku'pqv'tgxgtukdr' qp cr r gcn'lp'vj g'cdugpeg'qh'c'uj qy kpi "qh'r tglwf leg'cv'v'kcn'K'ku'c'f ghgp'cpv'u'dwtf gp'vq'uj qy "vj cv'vj g'hkntg'vq'vko gnl eqo r n' "y k'j "cp' { "f kueqxt { "qtf gt'ku' r tglwf lekcn' cp'f "vj cv c'eqp'v'kpcpeg'y qwf "pqv'j cxg'ewt'g'vj g'j cto 0F ghgp'cpv hck'g'vq'f go qpwt'cvg'r tglwf leg'OC'v'v'kcn'f ghgp'cpv'y cu'cdrg vq'eqp'ht'qp'v' cp'f "etquu'gzco kpg'vj g'kphqto cpv."j cxkpi "j cf co r ng'qr r qtwp'k'vq'lp'xguk' cvg'vj g'dcuku'ht'vj g'y kpgu'u'v'guko qp' { "cp'f "cp' { "ch'kto cvk'g'f ghgpug'uw' i guug'f d' { "k'OVj g f gr' { "lp'f kuenug'f k' "pqv'ko r nek'v'f ghgp'cpv'u'f w'r tqe'guu tki j v'v'q'dg'kphqto gf "qh'c' cvgt'kcn'gxf ppeg'hcxqtcdr'vq'vj g f ghgp'cpv'j g'y cu'kphqto gf "qh'vj g'gxf ppeg'cp'f "j cf "co r ng vko g'vq'lp'xguk' cvg'dghqtg'v'kcn'00 qtgxgt. 'vj g'gxf ppeg'lp'vj g r tqugewkqp'u'r quuguuk'p'y cu'pqv'hcxqtcdr'vq'vj g'ceewugf 0

* +

Etlo kpcn' Ncy " E' 799//Crr gnc'v'g' Tgxkgy //Tgeqtf//Tgxkgy Nko k'g'f "vq'Cr r gnc'v'g'Tgeqtf 0

K'c' ecr kcn' o wtf gt" r tqugewkqp. "vj g' r tqugewkqp' f k' "pqv xk'q'v'g'f ghgp'cpv'u'tki j v'v'q'f w'r tqe'guu'qh'rcy "d' { "hckkpi "vq *906 "f kuenug'kphqto cvk'p'tgi ctf kpi "cp'cmgi gf "kphqto cpv u'f uvg' "lp'vj g'eqw'v'f "lck'vj cv'f ghgp'cpv'cuug'v'g'g'p'eqwt'ci gf k'po cv'gu'vq'ugg'ni'qt' hcd'k'ec'v'g'eqp'huuk'p'u'ht'qo "f ghgp'cpv'u'lp' p'q'v'k'q'w'ecug'u'uw'ej "cu'j ku'OF w'r tqe'guu'qh'rcy 'tgs wkt'gu'vj cv vj g'r tqugewkqp'f kuenug'o cvgt'kcn'gzewr cvqt { "gxf ppeg'vq'cp ceewugf. 'k'p'nm' kpi 'hcxqtcdr'gxf ppeg'hp'qy p'v'q'v'j gtu'cv'kpi

qp'vj g' i qxgtpo gpv'u' dgj c'ht'J qy g'xgt. "cmj qwi j "c" j cdgeu eqtr w'lt' tqeggf kpi 'b c { 'f g'xgr' c't'geqtf'dg' { qp'f 'vj g'cr r gnc'v'g tgeqtf. "tgxkgy "qp'f k'ge'v'cr r gcn'ku' rko k'g'f "vq'vj g'cr r gnc'v'g tgeqtf 0F ghgp'cpv'u'tgs w'gu'v'j cv'vj g'eqw'v'cng'lw'f lekcn'p'q'v'leg qh'c'eqw'v'f "i t'cp'f "lw' { "tgr q'v'lp'uw'r q'v'qh'j ku'eqp'v'p'k'p'u qp'cr r gcn'y cu't'gl'ge'v'f'd'ge'cw'g'k'v'y cu'lp'eqp'v'c'x'g'p'v'k'p'qh'vj g i gp'gt'c'nt'w'g'vj cv'cp'cr r gnc'v'g'eqw'v'i gp'gt'cm' { 'ku'p'q'v'vj g'ht'wo k'p'y j k'ej "vq'f g'xgr' "cp'cf f k'k'p'cn'f'c'ew'cn't'geqtf 0

* , c. ; d+

Etlo kpcn'Ncy "E'368//Rtgrko kpc' { "Rtqeggf kpi u//F kueqxt { // K'phqto cvk'p' " Cxck'cdrg' " Qpn' " vq' Rtqugewkqp//F kueqxt { Tgr'v'g'vq'Rqr'leg'Ce'v'k'k'g'u0

K'c' ecr kcn' o wtf gt" r tqugewkqp. "vj g' v'kcn' eqwt'v' f k' "pqv' gtt' k' tghwukpi "vq' i t'cp'v'f ghgp'cp'v'f kueqxt { "tgr'v'g'vq' r r'leg' ce'v'k'k'g'u. 'y j k'ej 'k'p'nm' gf 'r j q'v'i t'cr j u'q'h'r q'rt'eg'q'h'legu'j y q y g'tg'lp'x'q'k'g'f "lp'uw'x'g'k'k'p'i "j ko "r t'k'q' "vq'vj g'o wtf gt'qh'c' r r'leg' q'h'leg. "cp'f "qh'vj g'x'g'j k'ergu'vj g' { "w'ug'f. "o go q'c'p'f c y t'k'w'p' d' { "vj g' r r'leg' e'j k'gh' t'gi c'tf kpi "cp' k'p'v'g't'pcn' ch'cku k'p'x'g'uk' cvk'p. 't'geqtf u'eq'p'eg't'p'kpi "vj g'q'r g't'cv'k'p'q'h'f ghgp'cpv'u' eqw'v'f "lck'no qf w'g. "cp'f "cm'ecug'u'y q'tng'f "qp'd' { "vj g'x'k'v'ko "qh vj g'b wtf gt'f w'k'p'i "vj g'r t'ge'g'f kpi " { gct'0F ghgp'cpv'j cf "p'q'p'gg'f q'h'r j q'v'i t'cr j u'q'h'vj g'uw'x'g'k'k'p'eg'q'h'legu. 'uk'peg'vj g'q'h'legu vj go u'g'k'gu'y g't'g'o cf g'c'x'k'c'drg'vq'vj cv'y k'p'gu'gu'eqw'f "x'kgy vj go 'lp't' gtu'p. 'j g'f k'f 'p'q'v'ij qy 'uw'h'k'eg'p'v'ec'w'g'ht'f kueqxt { qh'r j q'v'i t'cr j u'q'h'vj g'x'g'j k'ergu. "gxf ppeg'qh'vj g'r j q'v'i t'cr j u y cu'pq'v'o cvgt'kcn'cp'f "vj g't'g'y cu'pq'v' t'g'cu'p'cdrg'r t'q'd'cd'k'k'f c'f k'h'gt'gp'v' t'gu'w' y qwf "j cxg' q'ee'w't'g'f "j cf "vj g' gxf ppeg dggp'f kuenug'f 0Cnuq. 'p'q'v' kpi "eq'p'v'k'p'g'f "lp'vj g'r r'leg' e'j k'gh'u o go q'c'p'f c'y qwf "j cxg'dggp'o cvgt'kcn'vq'vj g'f ghgpug'0Hw'vj g't. gxf ppeg'qh'vj g'q'r g't'cv'k'p'q'h'vj g'lck'no qf w'g'y cu't'g'g'x'cp'v'q'p'nf vq'c'f g'rc' { "lp'f kueqxt { "y j k'ej "f k'f "pqv'r tglwf leg'f ghgp'cpv'0 H'k'p'cm'. 'f ghgp'cpv'u'tgs w'gu'v'ht'j ku'x'k'v'ko 'u'c'tt'g'u'v't'geqtf u'y cu vq'q'dw'f g'pu'qo g. 'uk'peg'j g'f k'f "p'q'v'q'ew'u'q'p'gxf ppeg'qh'vj t'g'cu d' { "q'v' g't'c'tt'g'ug'gu'ci c'k'p'v'vj g'q'h'leg'0Cnuq' qwi j 'r w'k'le'r r'k'le { o c' { 'hcxqt' i t'cp'v'kpi 'h'd'g't'cn'f kueqxt { "vq'et'ko k'p'cn'f ghgp'cpv. eqw'v'o c' { 't'gh'w'g'vq'i t'cp'v'f kueqxt { 'k'i'vj g'dw'f g'pu'r r'eg'f "qp i qxgtpo gpv'cp'f "qp'vj k'f "r c't'v'gu'uw'v'c'p'v'k'cm' "qwy g'ki j "vj g f go qpwt'cv'g'f 'p'gg'f "ht'f kueqxt { 0Cnuq. 'vj g't'g'ku'c'uki p'h'k'ec'p'v k'p'v'g't'g'u'v'k'p'f t'g'ug't'k'p'i 'vj g'eq'p'h'k' g'p'v'k'cn'f 'q'h'k'p'f k'k'f w'cn'ek'k' g'p'u c'tt'g'u'v't'geqtf u0

*32+

Etlo kpcn'Ncy "E'362//Rtgrko kpc' { "Rtqeggf kpi u//F kueqxt { 0 C'et'ko kpcn'f ghgp'cpv'i gp'gt'cm' { "ku'g'p'v'k'g'f "vq'f kueqxt { "qh k'phqto cvk'p' vj cv' *907 "y km'cuuk'v'lp'j ku'qt" j g't'f ghgpug qt" dg' w'gh'w'f hqt" ko r gcej o gpv' qt' etquu'gzco k'p'cv'k'p' qh cf x'gt'ug' y k'p'gu'gu'0 C" o q'v'k'p' hqt'f kueqxt { "o w'v'f g'uet'k'dg

vj g"lphqto cvkqp"uqwi j v'y kj "uqo g"ur gekhlekyl "cpf "r tqxkf g"c r rncwldng"lwukhlecckqp"lqt "f kuenuwtg0Vj g"eqwtvutwtkpi "qp"c f lueqxtg { "o qvkkp"ku"uwldgevlq"tgxkgy "lqt"cdwug"qhf kuetgkqp0 Wpf gt"vj g"v w'r tqeguuewug"qh"vj g"lhf gtrnEqpukswkqp."vj g i qxgtpo gpv"j cu"vj g"qdrki cvkqp"vq"v f kuenuqg"vq"vj g"v f ghgpf cpv gxlk gpeg"lp"ku"r quuguukqp"vj cv"ku"lhxqtcdrng"vq"vj g"ceewugf cpf "o cvgtkcn"vq"vj g"kuuwgu"qhf i wkn"qt"r wpluj o gpv0Gxkf gpeg ku"o cvgtkcn"kh"o"tgcuaqpcdrng"r tqdcdkrlkyl "gzkuu"vj cv"o"v f khgt gpv tguwmy qwv"j cxg"qeewtgf "lp"vj g"t tqeggf kpi "j cf "vj g"v gxlk gpeg dggp"v f kuenuqg"vq"vj g"v f ghgpug0C"tgcuaqpcdrng"r tqdcdkrlkyl "ku"o r tqdcdkrlkyl "lwukhlekcpv"vq"wpf gto kpg"eqphk gpeg"lp"vj g"v qweqo g qh"vj g"r tqeggf kpi u0

*33+

Etlo kpcnNcy "E":358//Rtgrko kpcet { "Rtqeggf kpi u//Rtgrko kpcet { J gctkpi // " Hcknw" vq" I tcvp" F ghgpug" Tgs wguv" lqt Eqpvkpwcepg//Rtglw leg0 Kp"o"ecr kcn"o wtf gt"r tqugewkkqp."vj g"v tkcn"eqwtv"v f kf "pqv"gtt kp"v f gp { kpi "v f ghgpf cpv"u" tgs wguv" lqt "c" eqpvkpwcepg" qh" vj g r tgrko kpcet { "j gctkpi . "y j lej "y cu'tej gf wrgf "r r tqzko cvng" hxxg o qpj u"chgt"j ku"cttguv0Vj g"v hcknw"vq"i tcvp"o"eqpvkpwcepg qh"o"r tgrko kpcet { "j gctkpi "ku"pqv"gttqt"vprguu"vj g"v f ghgpf cpv ecp"v go qpwtcvg"vj cv"v hcknw"tguwngf "lp"vj g"v f gplcn"qhf"o"v hck v tkcn"qt"qj gty kug"clhgevgf "vj g"v wko cvg"lwf i o gpv0F ghgpf cpv hckngf "vq"v go qpwtcvg"vj cv"vj g"v f gplcn"qhf"o"eqpvkpwcepg"dgqhtg vj g"r tgrko kpcet { "j gctkpi "j cf "cp { "ghge"v"cv"uwdugs wgpv"v tkcn r tqeggf kpi u0qj" ku"tki j v"vq"eqwpugn"vq"eqphtqp"vj g"v kpguugu ci clpuv"j ko . "qt"vq"r tguvpc"v f ghgpug."qt"qp"vj g"lwf i o gpv0

*34c. 34d+

Etlo kpcnNcy "E": 904//Ckf "qh"Eqwpugn/Ugrh"tgr tguvpcvkkp// VtkcnEqwtvF kuetgkqp//Vko kpi "qh"O qvkkp0 Kp"o"ecr kcn"o wtf gt"r tqugewkkqp." vj g"v tkcn" eqwtv"v f kf "pqv gtt"kp"v f gp { kpi "v f ghgpf cpv"u"o qvkkpu"vq"tgr tguvpcv"j ko ugrh"cv vj g"i wkn"r j cu0Vj g"v tkcn"eqwtv"v f kf "pqv"eqgteg"v f ghgpf cpv kpq"v y kj f tcy kpi "j ku"htuv"o qvkkp." o cf g"v y gm"lp"cf xcpvg qh"v tkcn"dw"tcv"j gt"r tqg trn"cf xkugf "j ko "qh"vj g"v f cpi gtu"qh ugrh"tgr tguvpcvkkp0 Cnj qwi j "v f ghgpf cpv"u"htuv"o qvkkp"v cu dcugf "lp"r ctv"v wqp"o" c" eqpgetp" vj cv"v f ghgpug"eqwpugn"j cf hckngf "vq"v kpxguki cvg"egt vclp"r tqg qugf "v gpcn"v"j cu"v gxlk gpeg. vj g"v tgeqt"v guncdrkuj gf "vj cv"v f ghgpf cpv"v cu"v ucukhgf "vj cv"o eqpvkpwcepg"dgqhtg"lwt { "vgrgevlq"eqo o gpegf "y qwv"r tqxkf g cf gs wcv"v ko g"lqt" kpxguki cvkqp0 Cnuq. "k"v y cu"v f ghgpf cpv"u eqpuwvckqp"v y kj "v f ghgpug"eqwpugn"v cv"j gt"v j cp"v j g"v eqwtv"u eqo o gpv"v j cv"v r gtuwcf gf "v f ghgpf cpv"vq"v y kj f tcy "j ku"htuv o qvkkp0 Y kj "v tgr ge"v vq"v f ghgpf cpv"u" ugeqpf "o qvkkp" vq tgr tguvpcv"j ko ugrh"v j g"o cvgt"v y cu"v rgh"v vq"v j g"v tkcn"eqwtv"u uqwpf "v f kuetgkqp."dgecwug"v j g"o qvkkp"v y cu"o cf g"v chgt"v j g

lwt { "j cf "dggp"vgrgevgf "cpf "vj g"r tqugewkkqp"j cf "v grkxgtgf "ku qr gplki "v cvgo gpv0I kxgp"v f ghgpf cpv"u"v tghwucn"vq"r ct vclv cvg"lp r tqeggf kpi u" *908 "y j gp"v f kucr r qkpv"v y kj "vj g"v tkcn"eqwtv"u twnkpi u."vj g"v tkcn"eqwtv"tgcuaqpcdrng"eqwv"j cxg"eqpenw"gf "vj cv vj g"i tcvkpi "qh"vj g"o qvkkp"v qwv"v f kutv v"vj g"v qtf gtrn"eqpf vev qh"vj g"v tkcn"O Cnuq."vj g"v eqwtv"tgcuaqpcdrng"eqwv"j cxg"eqpenw"gf vj cv"v f ghgpf cpv"v y cu"v gm"tgr tguvpcv"v d { "eqwpugn"cpf "vj cv"j g j cf "uqo g"r tqenxkyl "vq"v xcelv"v y kj "v tgr ge"v vq"v tgr tguvpcvkkp d { "eqwpugn

*35+

Etlo kpcnNcy "E": 9//Ckf "qh"Eqwpugn/Ugrh"tgr tguvpcvkkp"Vtkcn EqwtvF vgt o kpcvkkp//Vko kpi "qh"O qvkkp0 C"etlo kpcn"v f ghgpf cpv"v j q"hpqy kpi n"v cpf "kpvgnki gpw"v y cxxgu vj g"v tki j v"vq" eqwpugn"r quuguu"o"v tki j v"v wpf gt" WLU0Eqpu0 8y "Co gpv0"vq"eqpf vev"v ku"v"j gt"qy p"v f ghgpug0Y j gp"vj g f ghgpf cpv"o qvkkp"v f ku"ku"eqwpugn"vcpf "wpf gtrng"j ku"v"j gt qy p"v f ghgpug."j g"v q"v"v y qwv"v dg"o cf g"v cy ctg"qh"vj g"v f cpi gtu cpf "v f kucf xcpvci gu"qh"vgrh"tgr tguvpcvkkp0 Hwt vj gt."cnj qwi j kp"o"etlo kpcn"v tkcn"o"v f ghgpf cpv"v y cu"v cp"v wpeqpf kskpcn"lhf gtrcn eqpukswkpcn"v tki j v"v qh"vgrh"tgr tguvpcvkkp."kp"v qtf gt"vq"v kpxqng vj cv"v tki j v"v"j g"v q"v"v y g"o wuv"o"v cng"cp"v wgs vlxqecn"cuugt vkkp"qh vj cv"v tki j v"v y kj kp"v tgcuaqpcdrng"vko g"v tkt"vq"v j g"v eqo o gpego gpv qh"v tkcn"Y j gp"o"o qvkkp"lqt "vgrh"tgr tguvpcvkkp"ku"pqv"o cf g"v kp c"vko gm"v hcu"v kq"v r tkt"vq"v tkcn"vgrh"tgr tguvpcvkkp"pq"v rpi gt"ku c"o"cvgt"qh"v tki j v"v dw"ku"uwldgevlq"v j g"v tkcn"eqwtv"u"v f kuetgkqp0 Kp"v gztelkupi "vj ku"v f kuetgkqp."vj g"v tkcn"eqwtv"v y qwv"v eqpukf gt hcvqtu"uwej "cu"v j g"v s wcrkyl "qh"v eqwpugn"v tgr tguvpcvkkp"v qh vj g"v f ghgpf cpv"v y j g"v f ghgpf cpv"u"r tkt"v r tqenxkyl "vq"v uduvkwg eqwpugn"v j g"v tgcuaqpu"lqt"v j g"v tgs wguv"v j g"v tpi vj "v cpf "vuci g"v qh"vj g r tqeggf kpi u"v cpf "v j g"v f kutv vkkp"v q"v gtr"v j cv"o ki j v"v tgcuaqpcdrng"dg"gzr gevgf "vq"v hqmy "vj g"v i tcvkpi "qh"v uwej "c"o qvkkp0

*36+

Etlo kpcnNcy "E":5: 6//Gxkf gpeg//Cf o kuukdrkyl//Cf o kuukpu cpf "F gerctvkkpu/Xqnpvct { "Ej ctcevg//Eqgteg"Vguko qp { qh"Vj kf "Rctv//Ueqr g"qh"Zzenulqpcet { "T wrg0 Kp"o"ecr kcn"o wtf gt"r tqugewkkqp."vj g"v tkcn"eqwtv"v f kf "pqv"gtt kp"v f gp { kpi "v f ghgpf cpv"u"r tgvtkcn"o qvkkp"vq"v uwr r tguv"v gxlk gpeg qdvcxkpg"v d { "v j g"v r qrlvg"cu"v j g"v tguwv"qh"v ucvg o gpv"o cf g d { "c"v eqf ghgpf cpv"v y j lej "v j g"v tkcn"eqwtv"v f vgt o kpgf "v y g"v kpxqnpvct { "cpf "kpcf o kuukdrng"cu"v j g"v r tqf vev"v qh"v r qlvg"qh"v gtu qh"v rplgpe { 0Vj g"v gxlk gpeg"cv"kuwv"v y cu"v j g"o wtf gt"v y gcr qp. vj g"v xgj lerg"v eqppgevgf "v y kj "v j g"o wtf gt."cpf "v guko qp { "qh vj g"v r gtuqpu"kp"v y j qug"v j quwv"v j g"v eqf ghgpf cpv"v j cf "v uqgtf "v j g o wtf gt"v y gcr qp0F ghgpf cpv"v vengf "vcpf kpi "vq"v eqo r rckp"qh"v cp cngi gf "v r qlvg"v kqrcvkkp"qh"v ku"v eqf ghgpf cpv"u"v r tkxkgi g"v ci clpuv ugrh"lpetko kpcvkkp"v WLU0Eqpu0"7y "Co gpv00F ghgpf cpv"v f kf

j c x g'w e p f l p i "v q'c u u g t v'j c v'j k u'q y p'f w g'r t q e g u u't k i j v'v q'c'f h c k t
v t k e r i y c u'x k q m v g f "c u'c'e q p u g s w p e g'q h'j g'c u u g t v g f "x k l r v k q p
q h'j k u'e q f g h g p f c p v'u'f h k i j "C o g p f o g p v't k i j w'j q y g x g t." y j g
g z e n w u k p c t { "t w g'k u'q p n { "c r r n k g f "l p"j k u'k w c v k q p"y j g p"j y g
f g h g p f c p v'e c p"u j q y "j c v'j g'v t k e n'v g u k o q p { "k u'e q g t e g f." c p f
j y c v'k u'c f o k u k q p"y k m'f g r t k g"j k o "q t"j g t"q h'c'f h c k t" v t k e n
*909 "V j g'r w r q u g"q h'g z e n w u k p"q h'g x k f g p e g'r w t u w c p v'v q"c
f w g'r t q e g u u'e n k o "k u'c f g s w e g n { "u g t x g f "d { "h q e w u k p i "q p"j y g
g x k f g p e g"v q" d g'r t g u g p v g f "c v'v t k e n'c p f" c u n k p i "y j g v j g t"j y c v
g x k f g p e g"k u'o c f g'w p t g r k e d n g"d { "q p i q l p i "e q g t e k a p'0' D g e c w u g
f g h g p f c p v'f h c k r g f "v q" u j q y "j y c v'j g'g x k f g p e g"j g"u q w i j v'v q
g z e n w'g y c u'w p t g r k e d n g." q t"j y c v'k u't g r k e d k i k f { "y c u'k p"u q o g
y c { "c h g e v g f" d { "c p { "r q r k e g"e q g t e k a p"q h'j k u'e q f g h g p f c p v'j g
h c k r g f "v q" e c t t { "j k u'd w t f g p'q h'f g o q p u t c v k p i "c p { "h w p f c o g p v c n
w p h c k t p g u u'c v'v t k e n'0' V j g'v t k e n'e q w t v'f g v g t o k p g f "j y c v'j g'r q r k e g
f k f "p q v' e q g t e g" f g h g p f c p v'u' e q f g h g p f c p v'r j { u k e c m f ." c p f "j k u
u c v g o g p v." q d v c l p g f" d { "c" r t q o k u g" q h' r q r k e g" r g l e g e { ." p q v
e q g t e k a p." y c u'p q v'c f o k w g f "c v'c m 0

J U g g " 3 " Y k n k p . " E c r 0 G x k f g p e g * 5 f " g f 0 3 ; : 8 + E " 8 3 2 C 0

*37c."37d."37e."37f."37g."37h+

U g t e j g u " c p f " U g k w t g u " E " 5 4 / " E q p u k w k a p c n i " c p f
U c w w q t { " R t q x k u k a p u / " Y c k x g t " q h' R t q v g e v k a p u / E q p u g p v / Q h
V j k f " R g t u a p " l p " E a p v t q n i " q h' R t g o k u g u / F g h g p f c p v'u' R g t u a p c n
R t q r g t v 0
k p " c " e c r k e n i o w t f g t " r t q u e w k a p . " j y g'v t k e n i e q w t v'f k f " p q v' g t t
k p " f g p { l p i " f g h g p f c p v'u' r t g t k e n i o q v k a p . " r w t u w c p v' v q " R g p 0
E q f g . " E " 3 7 5 : 0 . " v q " u w r t g u u " g x k f g p e g" q d v c l p g f" d { " j y g
r q r k e g" c u' j y g" t g u a n' q h' j y g" u g k w t g" q h' j k u' d t k g h e c u g" c p f
k u' e q p v g p u' h t q o " j k u' u k n g t u' j q o g . " l p " c m g i g f " x k l r v k q p" q h
j k u' W U " E q p u 0 " 6 y " C o g p f 0' t k i j w 0' F g h g p f c p v' e c t t k g f " j k u
d w t f g p" q h' u j q y l p i " c " r g i k k o c v g" g z r g e v v k a p" q h' r t k x c e { " l p
j k u' d t k g h e c u g' 0' P q p g y g r g u u . " j y g' u g t e j " q h' j y g' d t k g h e c u g" y c u
t g c u a p c d r g" d { " x k t w g" q h' j y g' u k n g t u' x q n a p v c t { " e q p u g p v' v q
j y g' u g t e j 0' V j g" g x k f g p e g" y c u' u j c t r n { " l p " e q p h i e v" q p" j y g
k u u w g" q h' j y g' x q n a p v c t k p u u' q h' j y g' u k n g t u' e q p u g p v' 0' V j g' v t k e n
e q w t v' u' t g u q n w k a p" q h' j y k u' f k u r w g' l p' f c x q t " q h' j y g' r t q u e w k a p
y c u' u w r r q t v g f" d { " u w d u c p v k n i g x k f g p e g" c p f " j y w u . " g p v k r g f " v q
f g h g t g p e g' 0' H w v j g t . " j y g' r q r k e g" q h' h e g t u' j c f " c p" q d l g e v k g n f
t g c u a p c d r g" d c u k u' v q" e q p e n f g" j y c v' j y g' u e q r g" q h' j y g' u k n g t u
e q p u g p v' l p e n f g f " j y g' d t k g h e c u g . " u l p e g' u j g' j c f " d g g p' l p h q t o g f
d { " j y g o " j y c v' j y g { " y g t g' u g n k p i " g x k f g p e g" e q p e g t p k p i " j g t
d t q v j g t . " c p f " y j g p" c u m g f " y j g v j g t" c p { " q h' j g t" d t q v j g t u
d g m p i l p i u' y g t g' l p " j g t" j q o g . " u j g' j c p f g f " j y g" q h' h e g t u" j g t
d t q v j g t u' d t k g h e c u g' 0' C n u q . " c n j q w i j " j y g' u g t e j l p i " q h' h e g t " j c f
r k w g" t g c u a p " v q " u w r r q u g" j y c v' j y g' u k n g t" j g t u g r i h' y c u' w u k p i
f g h g p f c p v'u' d t k g h e c u g . " j y g' q h' h e g t " j c f " c " t g c u a p c d r g" d c u k u' h q t

d g r k g x l p i " u j g' j c f " c w j q t k f " v q" e q p u g p v' v q" j y g' u g t e j " q h' j y g
d t k g h e c u g . " u l p e g' v g u k o q p { " l p f k e c v g f " j y c v' j y g' j c f " t g o q x g f " j y g
d t k g h e c u g' h t q o " f g h g p f c p v'u' t g u k f g p e g 0

*38+

E t k o l p c n i " N e y " E " 5 7 7 / / G x k f g p e g / 0 q v k a p " v q " U w r r t g u u /
C r r g m v g " T g x k g y 0
k p " t g x k g y l p i " j y g' v t k e n i e q w t v' u' f g p k e n i q h' c " o q v k a p " v q " u w r r t g u u
g x k f g p e g . " j y g' c r r g m v g " e q w t v' x l g y u' j y g' t g e a t f " l p " j y g' r i j v
o q u v' h x q t c d r g" v q" j y g' v t k e n i e q w t v' u' t w k p i . " f g h g t k p i " v q" j y q u g
g z r t g u u" q t " l o r n k g f " h k p f l p i u' q h' h e v' u w r r q t v g f" d { " u w d u c p v k n
g x k f g p e g' 0' V j g' c r r g m v g " e q w t v' l p f g r g p f g p v' t g x k g y u' j y g' v t k e n
e q w t v' u' c r r h e c v k a p" q h' j y g' r e y " v q" j y g' h e w 0 * 9 1 0

*39+

U g t e j g u " c p f " U g k w t g u " E " 4 3 / / E q p u k w k a p c n i " c p f " U c w w q t {
R t q x k u k a p u / " Y c k x g t " q h' R t q v g e v k a p u / E q p u g p v 0
W U 0 E q p u 0 " 6 y " C o g p f 0' r t q v g e w' c p " l p f k x k w e n u' t g c u a p c d r g
g z r g e v v k a p" q h' r t k x c e { " c i c l p u v' w p t g c u a p c d r g" l p v w k a p" q p
j y g' r c t v' q h' j y g' i q x g t p o g p v' 0' C " y c t t c p v' k u' t g s w k t g f " w p r g u u
e g t v c l p" g z e g r v k a p u" c r r n f . " l p e n f l p i " j y g" g z e g r v k a p" j y c v
r g t o k u' e q p u g p u w c n' u g t e j g u' 0' V j g' v q w e j u q p g" q h' j y g' H q w v j
C o g p f o g p v' k u' t g c u a p c d r g p g u u' 0' V j g' H q w v j " C o g p f o g p v' f q u
p q v' r t q u e t k d g" c n i' u c v g' l p k l c v g f " u g t e j g u" c p f " u g k w t g u = k v
o g t n f " r t q u e t k d g u' j y q u g' j y c v' c t g' w p t g c u a p c d r g' 0' C " y c t t c p v g u u
u g t e j " o c { " d g' t g c u a p c d r g" p q v' q p n { " h i' j y g' f g h g p f c p v' e q p u g p u
v q' j y g' u g t e j . " d w b c n u q' h i' c' t g t u a p' q v j g t' j y c p' j y g' f g h g p f c p v' y k j
c w j q t k f " q x g t' j y g' r t g o k u g u' x q n a p v c t k f " e q p u g p u' v q' j y g' u g t e j 0
k p " q t f g t " v q" e r e k o " j y g' r t q v g e v k a p" q h' j y g' H q w v j " C o g p f o g p v
c' f g h g p f c p v' o w a v' f g o q p u t c v g' j y c v' j g' q t " u j g' r t g u a p c m f " j c u
c p" g z r g e v v k a p" q h' r t k x c e { " l p " j y g' r c t v e w r c t' c t g e" u g t e j g f " q t
j y l p i " u g k f g f . " c p f " j y c v' j y k u' g z r g e v v k a p" k u' t g c u a p c d r g = k p 0' q p g
y j k e j " j c u' c' u q w t e g' q w u k f g' q h' j y g' H q w v j " C o g p f o g p v . " g k j g t
d { " t g h g t g p e g' v q' e q p e g r u' q h' t g c n i q t' r g t u a p c n i' t q r g t v' h e y " q t' v q
w p f g t u c p f l p i u' j y c v' c t g' t e q i p k f g f " c p f " r g t o k w g f" d { " u e l e g v 0
C " f g h g p f c p v' j c u' j y g' d w t f g p' c v' v t k e n i q h' i g u c d r k u j l p i " c' h e i k k o c v g
g z r g e v v k a p" q h' r t k x c e { " l p " j y g' r m e g" u g t e j g f " q t" j y g' j y l p i
u g k f g f' 0' V j g' u c v g' o c { " e c t t { " k u' d w t f g p' q h' f g o q p u t c v k p i " j y g
t g c u a p c d r g p g u u' q h' c' u g t e j " d { " f g o q p u t c v k p i " j y c v' j y g' q h' h e g t
e q p f w e v k p i " j y g' u g t e j " j c f " c' t g c u a p c d r g" d g r k g h' j y c v' j y g' r t g u a p
e q p u g p v' k p i " v q" j y g' u g t e j " j c f " c w j q t k f " v q" f q" u q = k' k u' p q v
t g s w k t g f " j y c v' j y g' u c v g' u g u c d r k u j " j y c v' j y g' r t g u a p' e q p u g p v' k p i " v q
j y g' u g t e j " j c f " c e w c n i c w j q t k f " v q' e q p u g p v 0

*3: +

U g t e j g u " c p f " U g k w t g u " E " 5 4 / / E q p u k w k a p c n i " c p f " U c w w q t {
R t q x k u k a p u / " Y c k x g t " q h' R t q v g e v k a p u / E q p u g p v / U e q r g" q h
U g t e j " D c u g f " q p' E q p u g p v 0

Kp"uqo g"ektewo ucpegu"vj g"eqpugpv"vq" c"ugctej "i kxgp" d{ "c rgtuqp" y kj "cwj qtkv" "vq"eqpugpv"vq" c"ugctej "qh"vj g"r tgo kugu f qgu" pqv" pgeguactkv" uwr r n{ " eqpugpv" vq" ugctej " rgtuqpcn r tqr gtv{ "hqwpf" y kj kp"vj g"r tgo kugu0C" r tkxce{ "kpvtgub"kp" c j qo g"kuhnp"ggf "pqv"dg"eqgzv"pukxg"y kj "c"r tkxce{ "kpvtgub"kp vj g"eqpugpv"vq"gh"gt { vj kpi "ukwcvf" "kpkf g"vj g"j qo g0E"eqpugpv vq" ugctej " c" eqpvc"lpgt" qt" c" r rceg" ku" ghgevkxg" qpn{ " y j gp i kxgp" d{ "qpg"y kj "eqo o qp"cwj qtkv{ "qxgt"qt"qvj gt "uwhh"lekpvt g"rvc"lpuj kr "vq"vj g"r tgo kugu"qt"gh"gevu"uqwi j v"vq"dg"kpur gev"gf 0 Eqo o qp"cwj qtkv{ "tguu"qp"o wwn"vug"qh"vj g"r tqr gtv{ "d{ rgtuqpu"i gpgtcm{ "j c"lxpi "lqkp"ceegu"qt"eqpvtqn"ht" "o quv r wtr qugu0 Vj g" ucv"v" o c{ "ectt{ "ku" dwtf gp" qh" r tqxkpi " vj g tgcupcdng"p"u" qh"vj g"ugctej "d{ "f go qpvt"cvkpi "vj cv"kv"y cu qdlgevkxgn" "tgcupcdng"ht" vj g"ugctej kpi "qh"legt"vq" dngkxg vj cv"vj g"rgtuqp"i kxkpi "eqpugpv"j cf "cwj qtkv{ "vq" f q"uq" c"pf "vq dngkxg"vj cv"vj g"ueqr g"qh"vj g"eqpugpv"i kxgp" gpeqo r cuugf "vj g kgo "ugctej gf 0Vj g"ueqr g"qh"lekpugpv"vuvcm{ "ku" f gh"kp" d{ "vj g g"zr tguugf "qdlge"v"qh"vj g"ugctej 0Vj g"ucpf ctf "ht" "o gcuvtkpi vj g"ueqr g"qh"lekpugpv"ku"vq"cum"y j cv" *911 "y qwf "vj g"v" r lecn tgcupcdng"rgtuqp"j cxg"wpf gtuqqf "d{ "vj g"z"ej cpi g"dgvy ggp vj g"qh"legt" c"pf "vj g"u"ur gev"0C"nj qwi j "c"u"ur gev"o c{ "tko kv"vj g ueqr g"qh"lekpugpv"kh"lekpugpv"tgcupcdng" y qwf "dg"wpf gtuqqf vq"gz"v"pf "vq" c"eqpvc"lpgt. "pq"ht"vj gt "cwj qtkv{ cvkpi"ku"tgs vktgf 0

*3; c. 3; d+

Ugctej gu" cpf " Ugk wtu" E" 54//Eqpukwkwkqpcn" cpf " Uvcwwqt { Rtqxkukqpu/Y ckg" qh" Rtqvevqpu/Eqpugpv/Qh" Rgtuqp" kp lqkp"vEqpvtqn"qh"Rtgo kugu"qt"Rtqr gtv{0 Vj g" eqpugpv" qh" qpg" y j q" r quugu" eqo o qp" cwj qtkv{ qxgt" r tgo kugu" qt" gh"gevu" ku" xcrlf " cu" ci clpuv" vj g" cdugpv. papeqpugpvkpi " rgtuqp"y kj "y j qo "vj cv"cwj qtkv{ "ku"lj ctgf 0Vj g eqpugpv"qh" c"vj kf " r ctv{ "o c{ "dg"xcrlf "kh"vj cv"r ctv{ "r quugu" eqo o qp"cwj qtkv{ "qxgt"qt"qvj gt "uwhh"lekpvtg"rvc"lpuj kr "vq"vj g r tgo kugu"qt" gh"gevu"uqwi j v"vq"dg"kpur gev"gf 0Eqo o qp"cwj qtkv{ ku"pqv"vq"dg"ko r n"gf "ht"qo "vj g"o g"t"r tqr gtv{ "kpvtgub" c"vj kf r ctv{ "j cu"kp"vj g"r tqr gtv{0Vj g"cwj qtkv{ "vj cv"l"uwhh"gu"vj g"vj kf r ctv{ "eqpugpv" f qgu"pqv"tguv"wr qp"vj g"r"cy "qh"r tqr gtv{ "y kj "ku cwgpf cp"vj kuvtlecn"cpf "rgi cn"tgh"pgo g"p"u. "dwt"guu"tcv"j gt"qp o wwn"vug"qh"vj g"r tqr gtv{ "d{ " rgtuqpu"i gpgtcm{ "j c"lxpi "lqkp ceegu"qt"eqpvtqn"ht" "o quv"r wtr qugu. "uq"vj cvk"ku"tgcupcdng"vq tgeqi pk" g"vj cv"cp{ "qh"vj g"eqj cdkcpu"j cu"vj g"tki j v"vq"r gto kv vj g"kpur gev"vq"kp"j ku"qt"j g"t"qy p"tki j v"cpf "vj cv"vj g"qvj gtu"j cxg cuuwo gf "vj g"tkum"vj cv"ppg"qh"vj gk"pwo dgt" "o ki j v"r gto kv"vj g eqo o qp"ctgc"vq"dg"ugctej gf 0Hw"vj gt. "qdlgevu"rgh"v"kp"cp"ctgc qh"eqo o qp"vug"qt"eqpvtqn"o c{ "dg"y kj kp"vj g"ueqr g"qh"vj g eqpugpv"i kxgp" d{ "c"vj kf " r ctv{ "ht" c"ugctej "qh"vj g"eqo o qp ctgc0Y j gp" vj g" rgtuqp"y j q"eqpugpv"vq"vj g"ugctej " gplq{ u c"r quugu"qt{ "kpvtgub"vj cv"vj g"u"ur gev" f qgu"pqv"uj ctg"kp"vj g r tgo kugu"ugctej gf "cpf "c"uq" gplq{ u"cr r ctg"pv"lqpv"qt" gzenwukxg

ceegu"vq"cpf "eqpvtqn"lxgt"vj g"rgtuqpcn"r tqr gtv{ "ugctej gf. "vj g r tkxce{ "kpvtgub"vq"vj g"qy pgt"qh"vj g"emugf "eqpvc"lpgt"qt"qvj gt rgtuqpcn"r tqr gtv{ "ku"ht"t"gf wegf "cpf "vj g"cwj qtkv{ "qh" c"vj kf r ctv{ "vq"eqpugpv"vq" c"ugctej "o c{ "dg"guvcdkuj gf 0

*42c. 42d+

Lwt { "E"520//Ugrgevkqp"cpf "Hqto cvkqp"qh"lwt { //Gzenwukqp"qh Egtvc"lpgt"Rgtuqpu"cpf "Erucugu//Guvcdrkuj kpi "Rtko c" Hcekg"Ecug0 Kp" c"ecr kcn"o wtf gt "r tqugevkwq. "vj g"v"tkcn"eqwtv" f kf "pqv"gtt"kp f gp{ kpi "f gh"epf cp"vu"o qv"vq"vq" s wcu" "vj g"lwt { "xgpk" g"o cf g"qp vj g"i tqwpf "vj cv"vj g" xgpk" g" f kf "pqv"eqpukw" c"tgr tgu"pvc"v"kg etquu"ugev"vq" qh" vj g"eqo o wpk{ 0Gxgp" vj qwi j " vj g" eqwv" lwt { "eqo o ku"v"vq"gt"y cu"pqv"cdng. "ht" "w"q" qh"vj g"vj tgg" f c{ u qh"lwt { "ugrgevkqp. "vq"eqo r n{ "y kj "vj g"v"tkcn"eqwtv"u" qtf gt"vq ugrgev"lwtqtu"ht"qo "y kj kp" c"42/o krg"tcf ku"qh"vj g"eqwtv" qwug y j gtg"vj g"v"tkcn"y cu"j gf. "f gh"epf cp"v"hc"ngf "vq"guvcdkuj "c"r tko c hcekg"ecug"qh"u{ ugo cvke"wpf gttgr tgu"pvc"v"kg"qh" c"eqi pk" cdng encu. "dgecv"ug"j g"hc"ngf "vq"tgh"t"vq"vj g"cr r tqr tkcv"eqo o wpk{ kp" cwgo r vki "vq" r tqxg"vj g" f gpken"qh" c"tgr tgu"pvc"v"kg" lwt { xgpk" g"0 F gh"epf cp"v" f go qpvt"cvf" c" f kur ctkv{ " dgvy ggp" vj g r gtegpvc"i g"qh"Ch"lecp/Co gtlecp" rgtuqpu"kp"vj g" xgpk" g"cpf vj g" r gtegpvc"i g"qh"Ch"lecp/Co gtlecp" *912 " rgtuqpu"grki kdrq ht"lwt { "ugt"xl"eg"y j q"r"kgf "y kj kp"42"o krgu"qh"vj g"eqwtv" qwug Vj g"cr r tqr tkcv"eqo o wpk{ "y kj "y j lej "vq"guvcdkuj "uwej "c eqo r ctku"p"y cu"vj g"lwf lecn" f ku"lev"kp"y j lej "vj g"eqwtv" qwug y cu"kwcv" 0Kp"cp{ "gxgp"v"vj g"t"y cu"kp"uwhh"lekpvt"ij qy kpi "vj cv cp{ "wpf gttgr tgu"pvc"v"kg"y cu" f w"vq" c"u{ ugo cvke" gzenwukp0

*43+

Lwt { "E"52//Ugrgevkqp" cpf "Hqto cvkqp"qh"lwt { //Gzenwukqp" qh Egtvc"lpgt"Rgtuqpu"cpf "Erucugu0 Vj g" hgf gtcn" eqpukwkwkqpcn" tki j v" vq" c" lwt { " f tcy p" ht"qo " c tgr tgu"pvc"v"kg"etquu"ugev"vq"qh"vj g"eqo o wpk{ "WU0E"qpu0 8y "Co gpf 0H" wctcp"v"gu"vj cv"vj g"r qqu"ht"qo "y j lej "lwt"gu"ctg f tcy p"o wuv"pqv"u{ ugo cvkecm{ "gzen"v" g" f ku"pvc"v"kg"i tqwr u"kp vj g"eqo o wpk{ 0Kp" qtf gt "vq"guvcdkuj "c"r tko c" hcekg"xl"qrc"v"kg qh"vj g"vj ku"tgs vktgo g"p"v. "c" f gh"epf cp"v"o wuv"uj qy "3+"vj cv"vj g i tqwr "cmgi gf "vq" dg" gzen"v" gf "ku" c" f ku"pvc"v"kg"i tqwr "kp"vj g eqo o wpk{ "4+"vj cv"vj g"tgr tgu"pvc"v"kg"qh"vj ku"i tqwr "kp" xgpk" gu ht"qo "y j lej "lwt"gu"ctg"ugrgevkqp" ku"pqv"hc"l"cpf "tgcupcdng"kp tgrvc"lpgt"vq"vj g"pwo dgt"qh"uwej " rgtuqpu"kp"vj g"eqo o wpk{ = cpf "5+"vj cv"vj g"ku"wpf gttgr tgu"pvc"v"kg"ku" f w"vq" u{ ugo cvke gzenwukqp" qh"vj g"i tqwr "kp"vj g" lwt { "ugrgevkqp" r tgegu0 Vj g tgrgxc"p"v"eqo o wpk{ "ht"etquu"ugev"vq" r wtr qugu"ku"vj g"lwf lecn f ku"lev"kp"y j lej "vj g"ecug"ku"v"tkgf 0

*44c. 44d+

Etlo kpcn'Ney "È"459//Vtkcn/Eqpf wev'qh'lw { //Cf gs wec { "qh VtkcnEqwtv'kps wkt { "Y j gp'lwqt' O kueqpf wev'cmgi gf 0 kpc'c'ecr kcn'o wtf gt "r tqugewkqp. "y j g'vtkcn'eqwtv'f kf "pqv'cdwug ku'f kuetgkqp'kp'f gp { kpi 'f ghgpf cpv'u'b qvkqp'htq'b kntkcn'dcugf qp'j ku'enclo 'qhlwqt'èqpvco kpcvkqp'OC'r tqur gev'xg'lwqt'wcv'gf vq'y j g'eqwtv'y cv'cpqj gt. "gzewugf. "r tqur gev'xg'lwqt'j cf "vqr' j gt "y j cv'y j g'lw'f i g'cpf "y kpguugy' y gt g'lp'hgct "qhf ghgpf cpv'0 C'vtkcn'eqwtv'o wuv'eqpf wev'c'uw'hlk'egp'v'kps wkt { "vq'f gvgto kpg hcew'cmgi gf "cu'lwqt'b kueqpf wev'y j gpgxgt "y j g'eqwtv'ku'f w'qp pqv'leg'y cv'f qqf 'ècwug'v'f k'æg cti g'c'lwqt'b c { "gzkn'0Vj g'vtkcn eqwtv'lp'y ku'ècug'èqpf wev'f 'cp'kps wkt { "uw'hlk'egp'v'v'f gvgto kpg y j cv'y j g'lwqt' "y j q' tckugf "y j g'kuwg" j cf "vq' dg" gzewugf "ht ecwug'cpf "vq'lc'kuh'f "ku'gri'h'y cv'y j g'tgo clpf gt 'qhf'y g't tqur gev'xg lwqtu'j cf "pqv'dggp' "zr qugf "vq' r tglw' k'ekcn'two qtu'qt' j gctf eqo o gpw'cdqww'y tgcw'ci clpuv'y j g'vtkcn'eqwtv'0'kpc'cf f k'kqp. y j g'vtkcn'eqwtv'ècvgf "y kj kp'ku'f kuetgkqp'lp'f gvgto k'kpi "y cv o qtg'r qlp'v'f "s wgu'kpu'tgi ctf kpi "cmgi gf "y j tgcw'ci clpuv'y j g eqwtv'y qwf "ugtxg'v'c'mcto "y j g'r tqur gev'xg'lwqtu'tcvy gt "y j cp vq'wpeqxtg'r tglw'leg'qt'cmr { "hgctu'0'Vj g'r tqur gev'xg'lwqtu f ktgew'f "lo r r'k'ecv'f 'lp'y j g'two qtu'tgi ctf kpi "y j tgcw'ci clpuv'y j g eqwtv'f kf "pqv'ugtxg'qp'f ghgpf cpv'u'lw { "cpf "y j g'tgo cl'kpi lwqtu. "y j gp' s wgu'kppgf. "i cxg'pq'kpf k'ecv'kqp' y j cv'y j g' j cf j gctf "y j g'two qtu'qt' y j cv'y j g'k' "lo r ctv'k'k'v'f "y cu' "lo r ckt gf 0 Vj wu. "y j g'tgeqtf "f go qpwtcv'gf "y j g'cdugpeg'qh'cp'f { "k'pew'cdng r tglw'leg' y j cv'y qwf "tgs wktg' y j g' i t'ep'kpi "qh'c" o q'vkqp' hqt o kntkcn'0' *913

*45+

Etlo kpcn'Ney "È"43: //Vtkcn/Eqwtug'cpf "Eqpf wev'qh'Vtkcn/ O kntkcn//VtkcnEqwtv'F kuetgkqp0 C"o q'vkqp'htq'o kntkcn'ku'f ktgew'f "vq'y j g'uqwpf "f kuetgkqp'qh y j g'vtkcn'eqwtv'0'C" o kntkcn'uj qwf "dg" i t'ep'v'f "kh'y j g'eqwtv'ku cr r t'kugf "qh'r tglw'leg'y j cv'k'lw'f i gu'k'pew'cdng'd { "cf o qp'k'kqp qt' "k'pwtv'ekqp'0' Y j g'y j gt "c" r ctv'k'w'rt "k'p'k'f gp'v' ku' k'pew'cdn'f r tglw' k'ekcn' ku' d { "ku' pcw'g'c" ur gew'v'xg'g" o cwgt. "cpf " y j g vtkcn'eqwtv'ku'x'gungf "y kj "eqpuk'f g'cdng'f kuetgkqp'lp'tw'kpi "qp o kntkcn'o q'vkp'u0

*46c. 46d+

Lw { "È"65//Ej cmgpi gu/Hqt "Ecwug//Xqkt "F ktg//kps wkt { "cu'vq Xlgy "qp'Ecr kcn'Rwpluj o gpv'/Gxgpj cpf gf pgu0 kpc'c'ecr kcn'o wtf gt "r tqugewkqp. "y j g'vtkcn'eqwtv'r tqur gtn'f "cpf g'xgpj cpf gf n' "cr r n'g'f "y j g'w'cpf ctf u'htq'f gvgto k'kpi "y j g'y j gt c'r tqur gev'xg'lwqt'uj qwf "dg"gzewugf "qp'y j g'dcuku'qh'x'kgy u qh'ecr kcn'r wpluj o gpv'y j cv'y qwf "r t'g'x'gpv'qt' "u'w'uc'p'k'cm'f ko r ckt' y j g'lwqt'u' cdk'k'v'f "vq' r g'htqto " j ku' qt' j gt' f w'kgu0 Vj g' vtkcn'eqwtv'f kf "pqv'gtt "lp' u'w'uc'k'p'kpi "y j g'r tqugewkqp'u ej cmgpi g'v'c'r tqur gev'xg'lwqt' y j qo "y j g'vtkcn'eqwtv'd'g'k'g'x'g'f

y cu' o gp'v'cm'f "ko r ckt'gf "cpf "y j q'w'cv'gf "y j cv'y j g'tg'y g'tg'pq ekewo u'c'p'egu'w'p'f gt 'y j k'ej 'j g'y qwf "x'q'v'v'q'ko r qu'g'y j g'f g'cv j r gpcn'f'OC'p'q'y j g'r tqur gev'xg'lwqt' y cu'r tqur gtn'f "gzewugf "htq ecwug'dcugf "qp'y j g'vtkcn'eqwtv'u'eqpenwukqp'j g'y cu' o gp'v'cm'f k'p'eqo r g'v'p'v'v'q' r g'htqto "c"lwqt'u'f w'kgu. "cp'cu'gu'uo gpv'y cv y cu'f'f gs w'cv'gn'f "w'r r qt'v'f 'd { "y j g't'geqtf. "cpf 'd'cugf "p'q'v'q'p'cp { r tglw'leg'ci clpuv'y ku'o { w'k'ecn't'g'k'i k'q'w'u'd'g'k'g'h'u. "dw'w'cvy gt "qp y j g'vtkcn'eqwtv'u' t'g'cu'q'p'cdng'è'q'p'eg'tp' y j cv'y ku'o { w'k'ec'k'uo "y qwf ko r ckt' j ku'cdk'k'v'f "vq'f g'k'gd'g't'cv'g't'cv'k'p'cm'f'0'Vj g't'geqtf "lw'y j g't f go qpwtcv'gf "y j cv'y g'r tqur gev'xg'lwqtu'y j qo "y j g'vtkcn'eqwtv t'g'hwugf "vq'gzewug'eng'ctn'f "k'p'f k'ec'v'gf "y j g'k' cdk'k'v'f "vq'eqpuk'f gt ekewo u'c'p'egu'lp'o k'ki cv'kqp. "vq'y kj j q'f "lw'f i o gpv'w'qp' y j g s w'gu'k'qp'qh'r gpcn'f "w'p'k'i'y j g'g'x'k'f g'peg'y cu'd'gh'g't'g'y go. "cpf ugt'k'q'w'w'v' "vq'g'p'v'g't'cv'k'p' y j g'q'r w'k'p'q'h'ko r qu'kpi 'c'ug'p'v'g'peg'q'h'k'k'g y kj q'w'r qu'k'k'k'v'f "qh'r ct'q'ng'0

*47+

Lw { "È"65//Ej cmgpi gu/Hqt "Ecwug//Xqkt "F ktg//kps wkt { "cu'vq Xlgy "qp'Ecr kcn'Rwpluj o gpv'/Cr r gcn'/U'cpf ctf "qh'T'g'x'k'gy 0 kpc'c'ecr kcn'ecug. "c" r tqur gev'xg'lwqt' o c { "dg" g'z'ew'f gf "kh j ku'qt' j gt "x'k'gy u'qp'ecr kcn'r wpluj o gpv'y qwf "r t'g'x'gpv'qt u'w'uc'p'k'cm'f "lo r ckt' y j g'r g'htqto c'peg'qh'y j g'lwqt'u'f w'kgu'0C r tqur gev'xg'lwqt'ku'r tqur gtn'f "g'z'ew'f gf "kh'y j g'qt'uj g'ku'w'p'cdng vq'è'q'p'ue'k'p'v'k'w'w'v' "eqpuk'f gt 'cm'q'h'y j g'ug'p'v'g'p'k'p'i "cm'g't'p'cv'k'x'gu. k'p'ew'f k'p'i "y j g'f g'cv'y 'r gpcn'f "y j gp'cr r tqur t'k'ev'g'0'Q'p'cr r gcn'y j g t'g'x'k'gy k'p'i "eqwtv'y k'w'w'v' j q'f "y j g'vtkcn'eqwtv'u'tw'k'p'i "k'h'k'ku h'ctn'f "w'r r qt'v'f "d { "y j g't'geqtf. "c'ee'g'v'k'p'i "cu'd'k'p'f k'p'i "y j g'vtkcn eqwtv'u'f gvgto k'p'cv'kqp'cu'v'q'y j g'r tqur gev'xg'lwqt'u'w'v'g'w'cv'g'qh o k'p'f "y j gp'y j g'r tqur gev'xg'lwqt' j cu'b cf g'w'cv'go gpw'y cv'è'tg eq'p'h'è'v'k'p'i "qt'co d'k'i w'q'w'u0

*48+

Lw { "È"65//Ej cmgpi gu/Hqt "Ecwug//Xqkt "F ktg//kps wkt { "cu'vq Xlgy "qp'Ecr kcn'Rwpluj o gpv'/Vtkcn'Eqwtv'F kuetgkqp0 kpc'c'ecr kcn' *914 "o wtf gt "r tqugewkqp. "y j g'vtkcn'eqwtv'f kf pqv'gtt "lp't'g'w't'v'k'p'i "f ghgpf cpv'u'f g'cv'y /s w'k'k'k'ec'v'k'qp'x'qkt'f kt g qh' y j g' r tqur gev'xg'lwqtu'0'C" vtkcn'eqwtv' j cu' eqpuk'f g'cdng f kuetgkqp'vq'è'q'p'v'k'p'x'qkt'f kt g'y kj kp' t'g'cu'q'p'cdng'iko ku. "cpf y j ku'f kuetgkqp'gz'v'p'f u'v'q'y j g'r t'q'eg'uu'qh'f g'cv'y /s w'k'k'k'ec'v'k'qp x'qkt'f kt g'0'N'ko k'cv'k'p'u'qp'x'qkt'f kt g'ct'g'uw'd'g'ev'v'q't'g'x'k'gy "htq cdwug'qh'f kuetgkqp'0'kpc' y ku'ecug. "y j g'vtkcn'eqwtv'f kf "pqv'cdwug ku'f kuetgkqp. "u'k'peg'y j g'tg'y cu'pq' k'p'f k'ec'v'k'qp'qp' y j g't'geqtf y j cv'f gh'g'p'ug'è'q'w'p'ug'n'y cu'r t'g'x'g'p'v'f "ht'qo "o cm'kpi "t'g'cu'q'p'cdng kps wkt { "k'p'v'y j g'h'k'p'g'uu'qh'cp'f "x'g'p'k'g'r g'tu'qp'v'q'ug't'x'g'qp' y j g lw' {0'G'cej 'lwqt'y cu'è'ung'f. "k'p'x'ct'k'q'w'u'y c { u. 'y j g'y j gt'j g'qt'uj g' d'g'k'g'x'g'f "y j g'f g'cv'y 'r gpcn'f "uj qwf "dg'ko r qu'gf "cw'qo cv'k'ecm'f w'qp'è'q'p'x'k'v'k'qp'qh'c'ecr kcn'q'h'g'p'ug'0'Vj g'tg'y cu'pq'gtt'qt'k'p tw'k'p'i "y j cv's w'gu'k'p'u't'g'r'v'f "vq'y j g'lwqtu'v'k'w'w'f gu'v'q'y ctf

gxf ppeg'vj cv'y cu'vq'dg'kptqf wegf "lp'vj ku'vtkn'eqwrf "pqv'dg cunfg =pqt "y cu'k'gttqt "vq'r tgenmf g'eqwpugn'ltqo "uggnkpi "vq eqo r gnc'r tcur gevkg'lwqt "vq'r tqo kug'vq'xqg'lp'c'r ctvewrct y c'."qt'vq'r tgenmf g'eqwpugn'ltqo "kpf qestkpcvki "vj g'lw { "cu'vq c'r ctvewrct'xlgy "qh'vj g'hcew0Hwt vj gt. "dgecwug'cp { "s wgunkqp eqpegtplki "c'r tcur gevkg'lwqt u'cwkwf g'vqy ctf "vj g'eqpegr v qh'ltgg'y kn'y cu'j ki j n' "rj knuqr j lecn "k'y cu'y kj kp'vj g'vtkn eqwt v'u' f kuetgvkp" vq" eqpenmf g' uwej " c"s wgunkqp" y qwrf " pqv dg'ht wkhwl'ht " vj g'r wtr qug'qh'f gc'v /s wvthk'ecvqp"xqk "f k g0 Cnuq. "vj g'vtkn'eqwt v'r gto kwgf "vj g"s wgunkqp" y j gvj gt "lwqtu y qwrf "j qrf "k'ci c'kup'f ghgpf cpv'uj qwrf "j g'hck'vq'v'gwh'."cpf f ghgpug'eqwpugn'y cu'r gto kwgf "vq" cuni's wgunkqp'u'tgi ctf kpi vj g'r tcur gevkg'lwqtu'cwkwf g'vqy ctf "vj g'gzgtekug'qh' vj g r tkxk'gi g'ci c'kup'ugh'kpetko kpcvqp0

*49c. '49d+

Lwt { " È'690//Ej cngpi gu/Rgtgo r vqt { //I tqwr " Dku/Rtko c Hcekg'Ecug0 Kp'c'ecr kcn'0 wtf gt'r tqugewkp. "vj g'vtkn'eqwt v'f k' "pqv'gtt "lp ku'f gvgt0 kpcvqp" vj cv'f ghgpf cpv'hck'g'f "vq" guvdrkuj "c'r tko c hcekg'ecug'vj cv'vj g'r tqugewqt "gzewug' "cp'Ch'lecp/Co gtecp r tcur gevkg'lwqt "dgecwug' qh' tcekn' dku' Vj ku' r tcur gevkg lwqt "cpv'ek cvgf "uqo g' f k'hw'w' "lp" vj g' eqwtug' qh' vtkn' kp uj k'gf kpi "j ko ugr'htqo "qwuk' g'kphqto cvkp" eqpegtplki "vj g ecug'dgecwug'qh'j ku'go r m { o gpv'cu'c' tgr qtvt "y kj "c" nqecn pgy ur cr gto'k'cf f k'kp. "j g'pqv'f "vj cv'j g'j cf "tgegk'g'c'r qqt r gthqto cpeg' t'g'k'gy "cv'y qtn'dgecwug'qh'j ku' r ctv'ek cvkp "lp xqk "f k'g" r tqeggf kpi u. "cpf " vj cv' lwt { " ugtx'eg" y qwrf " ecwug cp" go qv'k'p'n'j ctf uj kr "dgecwug'qh'vj g'wt guu'kpxq'k'g'f "y kj j ku' lqd'0'k'cr r gctgf "vj g'r tcur gevkg'lwqt "tkung'f "nukpi "j ku go r m { o gpv'qt "uwh'gtkpi "f g'vko gpv'vq'j ku'ectg'g'k'h'j g'y g'g tgs wkt'g' "vq" ugtx'g'qp" c' n'p'ij vj { "vtkn'0'Vj g'r tqugewqt "t'gh'gt'g'f vq'vj g'ug'ektewo ucpegu'lp'lwuk'h' kpi "j ku' r gto r vqt { "ej cngpi g cpf "g'zr'k'k'p'g'f "vj cv'j g' h'gctgf "vj g'lwqt "y qwrf "dg'vq" vqtp d { "eqph'ek'vki "m { c'k'gu'vq'j ku'go r m { o gpv'cpf "vq" vj g'eqwt v' vq'hw'ht'k'j ku'hw'p'ek'vq'0'ht'v'j gt. "vj g'r tqugewqt u'ej cngpi g'vq cpq'j gt "r tcur gevkg'lwqt "f k' "pqv'uw r qt'v'cp'k'p'ht'g'p'g'vj cv vj g'r tqugewqt "y cu'o q'v'x'cv'g' "d { "i tqwr "dku. "uk'p'eg'vj cv'lwqt d'ct'gn' "lwtx'k'g'f "c'ej cngpi g'ht'ecwug'dgecwug'qh'j ku'lng'r v'ecn xlgy u't'gi ctf kpi "vj g'f gc'v' "r gpcn'f. "cpf "j g'j cf "dggp'ung'g' kpi kp'vj g'lw { "dqz'f wtkpi "i g'p'g't'cn'x'qk'f "k'g'0' *915

*4: +

Lwt { "È'690//Ej cngpi gu/Rgtgo r vqt { //I tqwr "Dku0 Rgtgo r vqt { " ej cngpi gu" o c { " pqv" dg" wugf" vq" tgo qxg r tcur gevkg'lwqt u'k'p'gn' { "qp'vj g'dcuku'qh'f tguwo gf "i tqwr "dku0 I tqwr "dku'ku'c" r tguwo r v'kp" vj cv'egt'v'k'p'lwqtu'ct'g' dkcugf o g'gn' "dgecwug" vj g { "ctg" o go dgtu'qh'cp'k'f g'p'v'k'cd'g' "i tqwr

f k'v'k'pi w'kuj gf "qp't'cekn't'g'ki k'qwu. "gvj ple. "qt'uko k'ct' "i tqwpf u0 C' r ctv' "y j q'uwur gew'ko r tqr gt'wug'qh'f g'tgo r vqt { "ej cngpi gu o wv't'ck'g'c'v'ko gn' { "q'd'lg'ev'k'p'cp'f "o cng'c'f' tko c'h'cekg'uj qy kpi vj cv'pp'g'qt" o qt'g'lwqtu'j cu'dggp'gz'ew'gf "qp'vj g'dcuku'qh i tqwr "qt" tcekn'k'f g'p'v'k'0'Q'peg" c" r tko c'h'cekg'uj qy kpi "j cu dggp" o cf g. "vj g'r tqugewqt" o wv'ectt { "vj g'dwt'f g'p'qh'uj qy kpi vj cv'j g'qt'uj g'j cf "i g'p'v'k'p'p'q'p'f k'uetko k'p'cv'qt { "t'g'cu'p'u'ht'v'j g ej cngpi gu" cv'ku'w'g'0'Vj g'vtkn'eqwt v'u'f gvgt0 kpcvqp" vj cv'pq r tko c'h'cekg'uj qy kpi "qh'i tqwr "dku'j cu'dggp" o cf g'ku'uw'd'lg'ev vq't'g'x'k'gy "vq" f gvgt0 k'p'g'y j gvj gt "k'ku'uw r qt'v'g'f "d { "uwdu'c'p'k'cn g'x'k'f ppeg'0'Q'p'cr r gcn'vj g't'g'x'k'gy kpi "eqwt'v'g'z'co k'p'gu'vj g't'geq't'f qh'vj g'x'qk "f k'g'c'p'f "c'ee'q't'f u'r ctv'ewrct "f gh'gt'p'peg'vq" vj g'vtkn eqwt v'cu'h'ce'v'k'p'f gt. "dgecwug'qh'ku'qr r qt'w'p'k'f "vq" q'dug't'x'g'vj g r ctv'ek cpw'cv'ht'uv'j cpf 0

*4; c. '4; d+

Etlo kpcn'Ncy "È'66//Tki j u'qh'Ceewugf //Hck'Vtkn/Ugewt'k'f O gcuwt'gu/O gcn' F gvgevt" cv' Gp't'c'peg" vq" Eqwt'v'q'qo // Cf f k'k'p'c'n'c'to gf "Dck'h'hu0 Kp'c'ecr kcn'0 wtf gt'r tqugewkp. f ghgpf cpv'u'f w'g'r t'q'egu'k'j v vq'c'h'ck'vtkn'y cu'pqv'ko r ckt'gf "d { "g'k'j gt'vj g'k'p'uc'v'k'p'qh'c' o g'cn'f gvgevt "ht' "vj g'r wdr'k' "eqo kpi "kp'v'vj g'eqwt'v'q'qo "qt vj g'r t'g'ug'peg'qh'c'f f k'k'p'c'n'c'to gf "dck'h'hu'f wtkpi "q'p'g'y k'p'gu'u' v'g'u'ko qp { 0'Vj g'wug'qh'c'0 g'cn'f gvgevt "q'wuk'f g'vj g'eqwt'v'q'qo . r'k'ng'vj g'wug'qh'c'f f k'k'p'c'n'lgewt'k'f "h'q't'egu'y kj kp'vj g'eqwt'v'q'qo . ku'pqv'c'0 gcuwt'g'vj cv'ku'k'p'j g't'p'p'v' "r t'gl'w'f l'ek'cn'cpf "uq'k'v'p'gg'f pqv'd'g'lwuk'h'g'f "d { "eqo r g'nk'pi "g'x'k'f p'peg'q'h'ko o k'p'gp'v'j t'g'c'w'v'q vj g'ugewt'k'f "qh'vj g'eqwt'v'0'w'p'rk'ng'uj cem'k'pi "cpf "vj g'f k'ur'k' { "qh vj g'f ghgpf cpv'lp'k'c'n' ctd. "vj g'wug'qh'c'0 g'cn'f gvgevt "f q'gu'p'qv k'f g'p'v'k'h' "vj g'f ghgpf cpv'cu'c'r g'tu'p'cr ctv'qt "cu'y qt'v' { "qh'ht'ct cpf "uwur k'ek'p'0'k'cf f k'k'p. "vj g'lw { "lp'vj ku'ecug'f k' "pqv'r cuu vj tqw j "vj g'o g'cn'f gvgevt "cpf "o c { "pqv'j cx'g'dggp'cy ct'g'qh'k'0 G'x'g'p'h'vj g'lw { "y cu'cy ct'g'qh'vj g'o g'cn'f gvgevt. "vj g'lw { "o c { y g'm'j cx'g'eq'p'k'f g'gf "k'v'c't'q'w'k'p'g'ugewt'k'f "f g'x'k'g'0'Vj g'r wdr'k' ku'k'p'wt'gf "vq" vj g'wug'qh'0 g'cn'f gvgevt u'k'p'r wdr'k' "r r'eg'u'uw'ej cu'eqwt'v' q'wugu. "cpf "pq't'gh'ng'ev'k'p'w'qp" c'f ghgpf cpv'u'j w'k'n'qt k'p'p'eg'peg'p'gg'f "dg'k'p'ht'g'f "ht'qo "vj g'k'w'g'0'ht'v'j gt. "vj g'g'y cu pq'k'p'f k'ec'v'k'p'vj cv'f ghgpf cpv'y cu'r t'gl'w'f k'eg'f "d { "vj g'q'ee'cu'k'p'cn r t'g'ug'peg'qh'q'p'g'qt" y q'w'p'k'ht'o gf "dck'h'hu" dg' { "q'p'f "vj g'v'j t'gg qh'ht'g'tu'eq'p'uk'w'k'pi "vj g'dct'g'0 k'p'ko wo "p'ge'gu'ct { "vq" r tq'x'k'f g'ugewt'k'f 0

*52+

Etlo kpcn'Ncy "È'66//Tki j u'qh'Ceewugf //Hck'Vtkn/Ugewt'k'f O gcuwt'gu0 E'g't'v'k'p'ugewt'k'f "o gcuwt'gu" o c { "dwt'f g'p'vj g't'ki j v'q'c'h'ck'vtkn'0 Kp' r ctv'ewrct. "vq't'gs wkt'g'c'etko kpcn'f ghgpf cpv'v'q'cr r gct'd'gh'gt'g vj g' " *916 "lw { "w'p'f g't'r j { u'k'c'n'it'g'ut'c'p'v'0 c { "ko r ckt'vj cv't'ki j v

d{ 'hgcf lpi "vj g'lw{ 'v' lphgt'j g'qt'uj g'ku'c'xlqngpv'r gt uqp'cpf d{ 'vgpf lpi "vq'f kur gn'v'j g'r tguwo r vqp'qh'kppqegpeg0'Xlkudng r j { uekri'tguntckpw'uj qwf "pqv'dg'qt'f gt gf "lp'y'g'cdugpeg'qh gxkf gpv'pgeguuk{ "qt'o cphguv'pggf ."cpf "vj g'ko r quklqp'qh r j { uekri'tguntckpw'lp'y'g'cdugpeg'qh'c'tgeqtf "uj qy lpi "qh xkqngpeg"qt" c" v'j tgcv'qh'xlqngpeg"qt" qy gt "pqpeqphqto lpi eqpf wev'y kn'dg'f ggo gf "v'q'eqpukwwg'cp'cdwug'qh'f kuetgkqp0 Qy'gt "ugewtk{ "o gcuwtgu."j qy gxgt."o c{ "pqv' tgs vkt'g" uwej lwukhlec'vqp."cpf "tgu'f'g'y kj lp'y'g'wqpf "f kuetgkqp'qh'y'g v'kri'eqwt0'Vj g'r tgupeg'qh'cto gf "i wctf u'lp'y'g'eqwt0'qo y qwf "pqv' tgs vkt'g" lwukhlec'vqp" qp" vj g' tgeqtf " wprguu" vj g{ ctg" r tgu'p'v' lp" wptgcuqpcdng" pwo dgtu0' O gcuwt'gu" uwej " cu uj cemkpi "qt'v'j g'cr r gctcepeg'qh'y'g'f ghgpf cpv'lp' lckri' ctd'ctg kpi gt gpv' "r tglwf lckri'cpf " ctg" uwdlgev'v" gzce'vpi " uetwkp{. dw'r tgecw'kpu' uwej "cu'v'j g'wug'qh'cf f kkp'p'c'cto gf "ugewtk{ hqtegu'ctg'p'q'v'dgecwug'qh'y'g'y' kf gt 't'cpi g'qh' lphgt'p'gegu'v'j cv'c lwtqt'o ki j v'tgcuqpcdn{ "f tcy "ht qo "vj g'qh'le'gtu'r tgupeg0'Vj g'r tgupeg'qh'le'gtu'v' wctf u'ku'p'q'v'k'p'j gt gpv' "r tglwf lckri'cpf "v'j g'kt cr r gctcepeg'cv'v'k'ri'v' kn'dg'tgxky gf "qp" c"ecug/d{/ecug'dcuku v'q'f g'v'gt'o k'p'g'y' j g'y' g'v'j g'f ghgpf cpv'cewcm{ "y cu'r tglwf legf 0

*53c. 53d+

Etlo kpcn' Ncy "È" 99//Tki j vu' qh' Ceewugf //Ck{ "qh' Eqwpugn/ F ghgpf cpv'u' Cdkk{ " vq" Cuukv' lp" F ghgug//Ghgev' qh Eqpf kkp'u'qh'Eqphl'pgo gpv0 Kp'c'ècr kcn' b wtf gt' r tqugewkqp."v'j g'èqpf kkp'u'qh'f ghgpf cpv'u eqphl'pgo gpv'dqy' "dghqtg"cpf "f wtkpi "vj g'i wkn'r j cug'qh'y'g v'kri'f'f' "pqv'ewo wv'kxgn{ "ko r ck" j ku'cdkri'v' "v'q'cuukv'lp" j ku f ghgug'cp' "v'q'f ghgpf "j ku ugrh'lp'xlqng'v'p'qh'WLU0Eqpu0'8y' cpf "36y" "Co gpf u0'cpf "Ecri0Eqpu0'ct'0'K'È"370'F ghgpf cpv y cu' pqv' f gr tkxgf "qh' cm' o g'p'u' qh' r tgr ct'kpi " j ku' f ghgug. dw' o g'gn{ " uwhgtgf " ektewo ucpegu" j g' hqwpf " f luci tggcdng cpf "f kutw' v'xg0'Hwt'j gt." "vj g'eqwt'v' y cu' uqre'kqwa'tgi ctf lpi f ghgpf cpv'u'eqo r r'ckpw."htgs wgpv' "eqp'ce'vpi "lckri'cwj qtkl'gu cpf "j q'f lpi "j g'ct'kpi u'v'q' cwgo r v'v'q' tgu'q'ng" r tqdng u."cpf qtf g'kpi "vj cv'pq"ugctej gu'qh'f ghgpf cpv'u'egm'dg"eqpf wev'f gze'gr v'ht' u'gewtk{ 't'gcuqpu'c'p'f "v'j cv'v'j g'èq'p'v'p'v'qh'f ghgpf cpv'u rgi cn'ht'ng"pqv'dg'f kxwi gf "v'q'v'j g'r tqugewkqp0'F ghgpf cpv'j cf htgs wgpv' ceegu" v'q" v'j g' rcy "ndtct{0'O quv'uki pl'k'ecp'v'." vj g' eqo o g'pv' qh'f ghgug'eqwpugn'cpf "qh'f ghgpf cpv'j ko ugrh'q'p v'j g'gxg'qh'v'j g'gxkf g'pv'ct{ " r qt'v'kqp'qh'v'j g'v'kri' guv'c'ri'uj gf ergctn{ "v'j cv'f ghgpf cpv'j cf "dggp'cdng"v'q'v'eng"cf xcp'vci g'qh cf gs wev'qr r qt'w'p'k'gu'v'q'cuukv'lp" j ku'qy p'f ghgug'OC'ng."v'j g' tgeqtf "lpf l'ecv'f "v'j cv'f ghgpf cpv'eq'ph'cto gf "j g'j' cf "eqpu'wngf y kj "eqwpugn'qp'c'f ckn{ 'dcuku'f wtkpi "v'kri'c'p'f "f ghgpf cpv'y cu r tgu'p'v'cv'v'kri'v' tqeggf lpi u'v'j cv'v'v'v'f "h'q't'o cp{ "o q'p'y u'cpf lp'y j lej "j g'ergctn{ "y cu'cdng"v'q'cuukv'eqwpugn'lp" o q'wp'kpi "c xki q'v'w'f ghgug0

*54+

Etlo kpcn' Ncy "È" 778//Crr gmv'g" Tgxky //Rtgug'v'kpi " cpf Rtgug'txkpi "S wgu'k'p'u'lp'v'kri'Eqwt'0 Cp" cr r gmv'g" eqwt'v' y kn' qtf k'p'ct'k' " pqv' *917 " eqpukf g'r r tqegf w'cn'f ghg'ew'qt"gtt'p'q'g'w'u't'w'k'p'i u'lp'eq'p'p'g'v'k'p'y kj t'gr'gh'u'q'w'i j v'q't'f ghg'p'u'g'u'cu'gt'v'f . "y j gt'g'cp'q'dl'g'v'k'p'eq'w'f j cxg'dggp'dw'y cu'pqv'r tgu'p'v'f "v'q'v'j g'ng'y gt "eqwt'v'd{ "u'qo g cr r tq'rt'k'v'g'o g'y qf 0

*55c. 55d+

J qo k'ek'f g" È" 63//Gxkf gpeg//F ghgpf cpv'u' Cfo kuuk'p'u" vq Lckj qwug' l'p'ht'o cpv'/Xlqng'v'k'p'qh'Uk'v'j "Co gpf o gpv'Tki j v'v'q Eqwpugn/Tgri'cdkri'v' //Rq'v'p'v'kri'ht' R'tglw' leg0 Kp' c" ecr kcn' o wtf gt" r tqugewkqp." vj g' v'kri' eqwt'v' f'f' "pqv' cdwug" ku'f'k'uet'g'v'k'p'lp' h'ck'k'pi " v'q" gzen'f' g' v'g'w'ko qp{ " qh'c lckj qwug' l'p'ht'o cpv' v'j cv' f ghgpf cpv' cf o kwgf " v'j g' ej cti gf o wtf gt0' Kp' qtf gt" v'q" r tq'x'g" c" er'ko " v'j cv' cf o kuuk'p' qh gxkf gpeg" qh' c" lckj qwug" cf o kuuk'p' xlqng'v'gu" c" f ghgpf cpv'u tki j v'v'q' eqwpugn' *WLU0Eqpu0'8y "Co gpf 0: "v'j g'f ghgpf cpv j cu'v'j g' dwt'f gp" qh'f go q'p'v'c'v'k'pi " v'j cv'v'j g' r q'rt'eg" cpf "v'j g' l'p'ht'o cpv'v'q'qm'u'qo g'ce'v'k'p."dg{ q'p'f "o g'gn{ "ht'v'p'k'p'i . "v'j cv y cu'f g'uki pgf "f g'ri'kd'g'v'gn{ "v'q" g'ri'k'v'k'p'et'ko k'p'c'v'k'pi "tgo ctm0' F ghgpf cpv' o cf g'pq'cwgo r v'v'q" o g'g'v'j ku'dwt'f gp"lp'y'g'v'kri' eqwt'v'0'Hwt'j gt."f ghgpf cpv'u't'gh'g't'p'gegu'v'q'v'j g'v'c'p'uet'k' v'q'h'y'g i t'cp'f "lwt{ "t'gr'qt'v' t'gi ctf lpi " v'j g' wug' qh' k'p'o cv'gu" v'q" u'gew'g k'p'et'ko k'p'c'v'k'pi 'h'v'go gpv'u'ht'qo "r gtu'q'pu't'g'r tgu'p'v'f 'd{ 'è'q'wp'ugn y g'g'v'p'cx'ck'p'i . "ukpeg"v'j ku't'geqtf "y cu'pqv'dgh'q'tg" v'j g'v'kri' eqwt'v'cpf "pqv'u'wdlgev'v'q'lw' lckri'p'v'q'v'g'0'Hwt'j gt." v'j g't'geqtf d'gh'q'tg" v'j g'v'kri' eqwt'v' f'f' "pqv' f go q'p'v'c'v'g' v'j g' v'g'w'ko qp{ y cu'wpt'g'ri'cdng." cpf "l'p'ht'o cpv' v'g'w'ko qp{ "ku'pqv' k'p'j gt g'p'v'f wpt'g'ri'cdng0'Vj g'r tq'd'c'v'x'g' h'q'teg'qh'y'g'g'xkf g'peg'y cu'q'd'x'k'q'w'u. cpf "v'j g'g'y cu'p'q'f cpi gt'qh'w'p'f w'è'eq'p'u'wo r v'k'p'qh'v'ko g'qt'q'qh eq'p'h'w'k'p'qh'y'g'ku'w'gu'0'0 q't'g'x'g't. "v'j g'g'xkf g'peg'y cu'p'q'v'q'h'c u'q't'v'ht'ngn{ "v'q'g'x'q'ng'cp"go v'q'v'p'c'ri'd'lcu'ci c'k'p'v'f ghgpf cpv'qt'v'q ecw'ug'v'j g'lw{ "v'q'f t'glwf i g'v'j g'ku'w'gu'q'p'v'j g'd'cuku'qh'è'z'v'c'p'g'q'w'u h'v'v'qt'0

*56+

Etlo kpcn' Ncy "È" 4: ; //Gxkf gpeg//Cfo kuuk'kri'v' //Y g'ki j lpi R'tq'd'c'v'x'g'X'cn'w'g'Ci c'k'p'v'F cpi gt'qh'R'tglw' leg0 Y j gp'cp'q'dl'g'v'k'p'v'q'g'xkf g'peg'ku't'ck'g'f 'w'p'f gt'Gxkf 0Eqf g'È 574."v'j g'v'kri'è'q'w'v'ku't'gs v'kt'gf "v'q'y g'ki j "v'j g'r tq'd'c'v'x'g'x'cn'w'g'qh v'j cv'v'g'xkf g'peg'ci c'k'p'v'v'j g'f cpi gtu'q'h'i' tglw' leg. 'è'q'p'h'w'k'p.'c'p'f w'p'f w'è'v'ko g'eq'p'u'wo r v'k'p'0'W'p'ng'u'v'j g'g'f cpi gtu'u'd'v'c'p'v'c'm' q'w'y g'ki j "r tq'd'c'v'x'g'x'cn'w'g."v'j g'q'dl'g'v'k'p'o w'u'v'd'g'q'x'g't'w'g'f 0 Qp'cr r gcn'v'j g't'w'k'p'i "ku't'gx'ky gf "h'q't'cdwug'qh'f k'uet'g'v'k'p'0

*57+

Etlo kpcn' Ncy " È' 654//Gxkf gpeg//Ceeqo r rleg" Vguko qp{// Kó o wplv " Ci tggo gpw" cpf " Rtqo kugu" qh" Ngplgep{//F wg Rtqegu0

Kp" c" ecr kcn' o wtf gt" r tqugewkqp." yj g" vlcni' eqwtv" f gplcn qh' f ghgpf cpv" o qvqp" vq" gzenwf g" yj g" vlcni' qp{ " qh' hqwt ceeqo r rlegu' y j q" vlcni' hq' yj g' r tqugewkqp" f kf "pqv'xkqrcv f ghgpf cpv" tki j v' vq" f wg" r tqugewkqp" qh' rcy O' Gxgp" yj qwi j " yj g y kpguugu" j cf " dggp" ceeqtf gf " lo o wplv " ci tggo gpw" cpf r tqo kugu"qh' hcxqtdcng" tgevo gpv'lp" wptgrcvf" r gpf lpi "ecugu. cpf " r tqdcvqp" xkqrcvqp" o cwggu." yj qug" ekewo ucpegu" f kf pqv' tgpf gt" yj g" vlcni' qp{ " kpj gtgpv" wptgrcvf" Cnj qwi j yj gtg" ku" uqo g" eqo r wukqp" *918 " kpj gtgpv" lp" cp{ " r rnc ci tggo gpv'qt' i tcv'q' h' lo o wplv. 'k'ku'engct' yj cv'cp' ci tggo gpv tgs wtkpi "qpn' "yj cv' yj g' y kpguu' vlcni' hwn' "cpf " v'wj hwn' "ku xcnf O' Wf qp" kpf gr gpf gpv' tglxy "qh' yj g' tgeqtf. "k' y cu' engct yj cv' yj g' g' ci tggo gpw" yj g' g' p' dcugf " w' qp" yj g' eqpf kkp yj cv' yj g' y kpguugu" vlcni' "lp" c" r ct'kwrc" o cpgt" cv' vlcni' qt" yj cv' yj g' " vlcni' " eqpukgpv" y k' j " r tkt" uvcgo gpw" vq yj g' r rleg. " uwe" yj cv' yj g' k' p' q' v' v' qp" qh' yj g' k' vlcni' qp{ eqpukwgf " c" xkqrcvqp" qh' f ghgpf cpv" tki j v' vq" c" h' k' vlcni' Kp" cf f kkp. " yj g" ceeqo r rlegu" vlcni' qp{ " y cu' eqttqdcv d{ " yj g" vlcni' qp{ " qh' qj gt" y kpguugu" cpf " d{ " qj gt" g' xkf gpeg uwe" cu' vgr j ppg" cpf " o qvgn' dwukpguu" tgeqtf u. " f ghgpf cpv r cr gtu" f kur r{ lpi " yj g" ceeqo r rlegu" pco gu" cpf " vgr j ppg pwo dgu. " cpf " yj g" vlcni' qp{ " qh' c" dcnk' u" g' r gt' O' Hw' yj gt. yj g" vlcni' eqwtv" f vgt o k' p' g' yj cv' yj g' v' v' uo u" g' r g' p' f " qp yj g' y kpguu" r tqugewkqp" r tqi tco " y qwf " dg" f k' r' ugf " vq" yj g f ghgpf. " cpf " f ghgpf " eqw' p' ugn' g' h' c' k' p' g' " h' tqo " etquu/ g' zco k' lpi yj g' y kpguugu" qp" yj ku' r q' p' v' vq" cxqk' " r tqugewkqp" g' xkf gpeg g' r r' lpi " yj cv' yj g' " yj g' k' p' v' g' t' tqi tco " vq' r tqugewkqp go " h' tqo f ghgpf cpv" t' g' k' d' w' k' g' x' k' r' p' e' g' O' h' p' c' m' . " yj g' y cu' p' q' " cdwug qh' f k' uet' v' k' p' " l' p' " cf o k' lpi " yj g" vlcni' qp{ " v' p' f " Gxkf O' E' q' f. È' 574. " ukpeg" yj g" vlcni' qp{ " y cu' r t' d' c' v' k' g" cpf " yj g' y cu' p' q' f cpi gt' qh' v' p' f w' " eqpuwo r v' k' p' " qh' v' o g' q' t' " qh' eq' p' h' u' k' p' " qh' yj g kuuwu0

*58+

Etlo kpcn' Ncy " È' 4: 8//Gxkf gpeg//Cf o kuuklrv{//Tgrxcpeg// Rqleg" Kpvtgpcn' Ch' h' k' u' k' p' x' g' u' k' i' v' k' p' //Vj tgcw' Ci k' p' u' R' q' n' e' g' Q' h' l' e' g' " Etlo g' X' l' e' v' o 0

Kp" c' ecr kcn' o wtf gt" r tqugewkqp." yj g" vlcni' eqwtv" f kf "pqv'cdwug" ku f kuet' v' k' p' " l' p' " r t' g' x' p' v' i' " f ghgpf cpv' h' tqo " r t' g' u' p' v' i' " g' x' k' f' g' p' e' g' t' g' r' v' i' " v' q' " c' t' r' q' n' e' g' " k' p' v' t' g' p' c' n' i' c' h' k' u' k' p' x' g' u' k' i' v' k' p' " t' g' r' v' i' " v' q' " yj g' e' k' t' e' w' o' u' c' p' e' g' u' " h' w' t' t' q' w' p' f' l' p' i' " r' q' n' e' g' " t' g' e' g' r' v' c' p' f' " e' q' o' o' w' p' l' e' c' v' k' p' qh' c" yj t' g' e' v' " ci k' p' u' v' " yj g" o wtf gt" x' l' e' v' o . " c" " yj t' g' e' v' " yj cv' y cu' c' w' t' d' w' g' f " v' q' f ghgpf cpv' d{ " c' l' c' k' j' q' w' u' g' " l' p' h' q' t' o' c' p' v' O' G' x' k' f' g' p' e' g' " q' h' yj g' yj t' g' e' v' y cu' p' q' v' r' t' g' u' g' p' v' g' f " ci k' p' u' v' f ghgpf cpv' l' p' " cp{ " h' q' t' o' " cv

yj ku' vlcni' gpeg. 'p' q' p' g' q' h' yj g' g' x' k' f' g' p' e' g' " yj cv' h' q' t' o' g' f " yj g' d' c' u' k' u' " q' h' yj g' " k' p' v' t' g' p' c' n' i' c' h' k' u' k' p' x' g' u' k' i' v' k' p' " y cu' t' g' r' x' c' p' v' " f ghgpf cpv" u vlcni' ukpeg" yj g' r' q' l' p' v' q' h' yj g' " k' p' x' g' u' k' i' v' k' p' " y cu' p' q' v' " f k' u' e' q' x' g' t' c' p' " c' w' g' o' r' v' " v' q' " o' c' p' w' h' c' e' w' t' g' " g' x' k' f' g' p' e' g' " ci k' p' u' v' f ghgpf cpv. " d' w' t' c' v' g' t' " v' q' " f k' u' e' q' x' g' t' " y j g' yj g' t' " yj g' r' q' n' e' g' " j' c' f " h' c' k' r' g' f " v' q' " y c' t' p' " yj g' x' l' e' v' o . " y j q' y cu' c' n' u' q' " c' t' r' q' n' e' g' " q' h' yj g' r' r' c' p' p' g' f " u' j' q' q' v' k' p' i' q' t' " v' q' " r' t' q' g' e' v' j' k' o' " ci k' p' u' v' k' s' O' h' w' yj g' t' . " yj g' vlcni' eqwtv" y cu' y k' j' k' p' k' u' " d' t' q' c' f " f k' u' e' t' v' k' p' " l' p' " f' v' g' t' o' k' l' p' i' " yj cv' v' g' " g' x' k' f' g' p' e' g' " y q' w' f' e' q' p' u' w' o' g' " c' p' " v' p' f' w' g' " c' o' q' w' p' v' q' h' v' o' g' " l' p' " t' g' r' v' k' p' " v' q' " k' u' r' t' q' d' c' v' k' g' x' c' n' v' g' " c' p' f " yj cv' k' v' yj g' t' g' h' q' t' g' " u' j' q' w' f' " d' g' " g' z' e' n' w' f' g' f' o

*59+

Etlo kpcn' Ncy " È' 884//Cr r gncv" Tgxlgy //J cto ngui" cpf Tgxtukdn' Gttq{//Gxkf gpeg//J gctuc{0

Kp" c" ecr kcn' o wtf gt" r tqugewkqp." cp{ " gttq" lp" yj g" vlcni' eqwtv" f gplcn' qh' f ghgpf cpv" u" j' gctuc { " qdlgevqp" cpf " qdlgevqp dcugf " qp" yj g' eqp' h' q' p' v' k' p' " e' r' w' u' g' " *WLU0E' q' p' u' 0' 8' y' " Co g' p' f' O' v' q' " vlcni' qp{ " qh' c" r tqugewkqp" y kpguu" f wtkpi " t' g' f' k' t' e' v' g' z' c' o' k' p' c' v' k' p' " *919 " eqpegt' p' l' p' i' " u' v' c' o' g' p' u' d' { " c' " e' q' f' g' h' g' p' f' c' p' v' y j q' y cu' e' j' c' t' i' g' f " c' p' f " v' l' e' g' f " u' g' r' c' t' c' v' n' g' " yj cv' yj g' vlcni' eqwtv cf o k' w' g' f " cu' u' v' c' o' g' p' u' " ci k' p' u' v' r' g' p' c' n' i' k' p' v' t' g' u' v' " *Gxkf O' E' q' f' g. È' 3452+ " y cu' j' c' t' o' n' g' u' i' " d' g' { " q' p' f " c" " t' g' c' u' q' p' c' d' n' g' " f' q' w' d' O' " Vj g' vlcni' qp{ " eqpegt' p' g' f " c' p' " g' c' t' r' i' g' t' " c' d' q' t' v' k' g' " c' w' g' o' r' v' " q' p' " yj g' k' t' r' c' t' v' c' p' f " yj cv' qh' q' yj g' t' u' " t' g' e' t' v' k' g' f " d' { " f ghgpf cpv. " vq" n' k' n' i' " yj g' x' l' e' v' o " qh' yj g' e' j' c' t' i' g' f " b' w' t' f' g' t' O' Vj g' vlcni' qp{ " c' f' o' k' w' g' f " f' w' t' k' p' i' t' g' f' k' t' e' v' g' z' c' o' k' p' c' v' k' p' " qh' yj k' u' y' k' p' g' u' u' " e' q' p' e' g' t' p' g' f " j' k' u' e' g' t' v' k' p' v' yj cv' yj g' e' q' f' g' h' g' p' f' c' p' v' j' c' f " d' g' g' p' " k' p' x' q' r' k' g' f " l' p' " yj g' g' c' t' r' i' g' t' " o' w' t' f' g' t' c' w' g' o' r' v' d' g' e' c' w' u' g' " qh' u' v' c' o' g' p' u' " yj cv' yj g' " r' e' w' g' t' " o' c' f' g' " vq" yj g' y kpguu" y j g' p' " yj g' { " yj g' t' g' d' q' y " k' p' e' c' t' e' g' t' c' v' g' f . " c' p' f " y cu' f' g' u' k' i' p' g' f " vq" t' g' j' c' d' k' r' k' c' v' g' " yj g' y kpguu" " e' t' g' f' k' d' k' r' k' s' . " ukpeg" j' g' j' c' f " d' g' g' p' v' p' e' g' t' v' k' p' " q' p' " yj k' u' r' q' l' p' v' f' w' t' k' p' i' " f' k' t' e' v' g' z' c' o' k' p' c' v' k' p' O' J' g' p' e' g' . " yj g' u' v' c' o' g' p' u' yj g' t' g' c' f' o' k' w' g' f " b' o' g' t' g' n' i' " v' q' t' g' j' c' d' k' r' k' c' v' g' " yj g' e' t' g' f' k' d' k' r' k' s' { " qh' c' y kpguu' q' p' " c' " c' p' i' g' p' v' c' n' i' f' q' l' p' v' c' p' f' " b' q' yj k' p' i' " l' p' " yj g' u' v' c' o' g' p' u' f' k' t' e' v' n' i' " k' p' e' w' r' c' v' g' f " f ghgpf cpv' q' t' " g' x' g' p' " o' g' p' v' k' p' g' f " j' k' o' O' C' n' u' q' . " yj g' " e' j' c' n' g' p' i' g' f " g' x' k' f' g' p' e' g' " y cu' e' w' o' w' r' e' v' k' g' " vq" q' yj g' t' " vlcni' qp{ yj cv' e' c' o' g' d' g' h' q' t' g' yj g' l' w' t' { " l' p' " h' c' t' " i' t' g' e' v' g' t' " f' g' v' c' k' n' " c' p' f " c' p' { " g' t' t' q' t' " l' p' k' u' " c' f' o' k' u' k' p' " y cu' j' c' t' o' n' g' u' i' " d' g' { " q' p' f " c' " t' g' c' u' q' p' c' d' n' g' " f' q' w' d' O

*5: +

Etlo kpcn' Ncy " È' 788//Cr r gncv" Tgxlgy //Rt' g' u' g' v' l' p' i' " cpf Rt' g' u' g' t' x' l' p' i' " Q' d' l' g' e' v' k' p' u' //Gxkf gpeg' cv' vlcni' /Y kpguugu0

Kp" c' ecr kcn' o wtf gt" r tqugewkqp." f ghgpf cpv' y c' k' g' f " c' e' r' k' o' " qh' g' t' t' q' t' " l' p' " yj g' c' f' o' k' u' k' p' " qh' yj g' vlcni' qp{ " qh' c' e' j' k' f' " y kpguu' yj cv yj g' o' wtf gt" x' l' e' v' o " u' e' j' k' f' . " y j q' y cu' y k' j' " yj g' x' l' e' v' o " y j g' p' j' g' y cu' u' j' q' v' " j' c' f " c' n' u' q' " d' g' g' p' " l' p' l' w' t' g' f . " d' { " h' c' k' l' p' i' " v' q' " q' d' l' g' e' v' c' v' vlcni' y j g' p' " yj g' e' j' k' f' " h' k' u' v' vlcni' h' g' f " v' q' " yj cv' g' h' t' g' e' O' K' p' " c' p' { " g' x' g' p' v' " g' x' g' p' k' i' f' ghgpf cpv" u' q' d' l' g' e' v' k' p' " c' p' f " r' e' w' g' t' " o' q' v' k' p' " h' q' t' " o' k' u' t' k' n' i' d' c' u' g' f " q' p' " c' f' o' k' u' k' p' " qh' yj k' u' " g' x' k' f' g' p' e' g' " r' t' g' u' g' t' x' g' f " yj g' k' u' u' w' g' . " c' p' { " g' t' t' q' t

*65+

J qo kek g" È" : 9//Vtkn/Kpustwekqpu//K gpvk" cpf Rctvlek cvkqp kp"Qthgpeg//P ggf "hqt" Wpcplo kx "Kpustwekqpu0 Kp" c" ecr kcn' o wtf gt" r tqugewkqp" kp" y j lej " y j g" lwt { " y cu kpustwevgf "qp"cee qo r neg' hcdkxkx' cu'y gmi'cu'qp'r tgo gf kcvgf o wtf gt. "y j g' vtkn'eqwtv'y cu'pqv'tgs wktgf "d { "ucv'g"cpf "hgf gten eqpukwvqpcnrl tlpkx rgu'qhf' wgr' t qegu'qhf' r' y "v' kpustwev'y j lwt { "qp" y j g" pggf "hqt" wpcplo kx "cu"v' y j g" hcevu'wr qp" y j lej cp { "eqpxlevkqp" hqt "y j g' etko g' qh' o wtf gt "ku' d'cu'g' 0'Vj g' g' ku' pq tgs wktgo gpv'y cv' lwt { "wpcplo qwan' "ci tgg'wr qp" y j g' y j g' g' qh' y j g' f' ghgpf cpv' u' ewr cdkxkx' .cpf "y j ku' twg' cr r rku' v' y j g' g' q' t' ku' qh' i wkn' r tgo kug' 'wr qp' c'k' kpi "cpf "cdgwkpi "qt" f' k' ge'v' ewr cdkxkx' 0 Cu' h' qpi "cu' g'cej ' lwt q' ku' eqpxkpegf "dg { qpf "c' t' g' cu' q' p' d' r' f' q' w' d' v' y j cv' y j g' f' ghgpf cpv' ku' i wkn' { qh' b' wtf gt "cu' y j cv' q' h' g' p' u' g' h' k' p' g' f' d { "ucw' w' g' . "y j g' lwt { "pggf "pqv' f' gekf g' wpcplo qwan' "d { "y j lej y j g' g' t { "j g' q' t' "uj g' ku' i wkn' 0' O' q' t' g' ur gek' h' e' c' m' . "y j g' lwt { "pggf pqv' f' gekf g' wpcplo qwan' "y j g' y j g' y j g' f' ghgpf cpv' y cu' i wkn' "cu y j g' c'k' g' t' "cpf "cdgwt' "qt" "cu" y j g' f' k' ge'v' r' g' r' g' t' c' v' q' t' 0' P' q' v' q' p' n' k' u' y j g' t' g' p' q' wpcplo kx "tgs wktgo gpv' cu' v' y j g' y j g' g' t { "qh' i' wkn' y j g' k' p' k' k' x' w' c' n' l' w' t' q' u' v' y j g' o' u' g' r' k' u' p' g' g' f' "p' q' v' e' j' q' q' u' g' ' c' o' q' p' i' "y j g' y j g' g' t' k' u' . "u' q' h' q' p' i' "cu' g' c' e' j' "ku' e' q' p' x' k' p' e' g' f' "q' h' i' wkn' 0' H' w' t' y j g' t' . "l' w' q' t' u' p' g' g' f' "p' q' v' w' p' c' plo q' w' a' n' { "c' i' t' g' g' "q' p' "y j g' y j g' g' t' "y j g' f' ghgpf cpv' ku' cp c' k' g' t' "c' p' f' "c' d' g' w' t' "q' t' "c' r' t' l' p' e' k' c' n' i' g' x' g' p' "y j g' p' f' k' h' g' t' g' p' v' g' x' k' f' g' p' e' g' c' p' f' "h' c' e' u' u' w' r' q' t' v' g' c' e' j' "e' q' p' e' n' w' i' k' p' 0

*66+

Etlo kpcn'Ncy "È"45; //Vtkn/Eqwtug"cpf "Eqpf wev' qh' Vtkn'/ Eqpf wev' c' p' f' "F g' r' i' d' g' t' c' v' k' p' u' q' h' l' w' t' { //T g' c' f' k' p' i' "V' g' u' k' o' q' p' { "C' h' g' t' U' w' d' o' k' u' k' q' p' //N' c' e' n' i' q' h' P' q' w' h' e' c' v' k' p' "v' q' "F' g' h' e' p' u' g' //R' t' g' l' w' f' l' e' g' 0 Kp" c' e' c' r' k' c' n' o' w' t' f' g' t' r' t' q' u' e' w' k' q' p' . "c' n' j' q' w' i' j' "y j g' v' t' k' n' e' q' w' t' v' g' t' t' g' f' k' p' r' g' t' o' k' v' k' p' i' "e' g' t' v' c' l' p' "v' g' u' k' o' q' p' { "v' q' "d' g' "t' g' c' f' "v' q' "y j g' l' w' t' { "f' w' t' k' p' i' k' u' f' g' r' i' d' g' t' c' v' k' p' u' y' k' j' q' w' p' q' w' h' k' l' k' p' i' "f' g' h' e' p' u' g' e' q' w' p' u' g' n' "y j g' g' t' t' q' t' y' c' u' j' c' t' o' r' g' u' u' 0' V' t' k' n' e' q' w' p' u' g' n' j' c' f' "p' q' v' y' c' k' x' g' f' "y j g' u' c' w' w' q' t' { t' k' i' j' v' q' "d' g' "p' q' v' h' e' g' f' "q' h' l' w' t' { "t' g' s' w' g' u' u' h' q' t' "y j g' t' g' c' f' k' p' i' " *922 "q' h' v' g' u' k' o' q' p' { " *R' e' p' 0' E' q' f' g' . " È' 335: +0' J' q' y' g' x' g' t' . "c' "e' q' p' x' l' e' v' k' q' p' "y' k' m' p' q' v' d' g' t' g' x' g' t' u' g' f' "h' q' t' "c' "x' k' i' p' c' v' k' p' "q' h' È' 335: "w' p' r' i' g' u' u' r' t' g' l' w' f' l' e' g' "k' u' u' j' q' y' p' 0' E' q' w' p' u' g' n' i' j' q' w' f' "d' g' "p' q' v' h' e' g' f' "k' p' "q' t' f' g' t' "v' q' "g' p' u' w' t' g' "y' c' v' j' g' q' t' "u' j' g' j' c' u' "c' p' "q' r' r' q' t' w' p' k' x' "v' q' "q' d' l' g' e' v' "v' q' "y j g' "e' q' w' u' g' "q' h' "c' e' v' k' q' p' w' p' f' g' t' c' n' g' p' d' { "y j g' e' q' w' t' v' q' t' "u' w' i' i' g' u' v' c' p' "c' n' g' t' p' c' v' x' g' e' q' w' t' u' g' . "d' w' y j g' r' t' k' o' c' t' { "i' q' c' n' i' u' g' t' x' g' f' "d { " È' 335: "k' u' "v' q' "r' t' q' x' k' f' g' "y j g' l' w' t' { y' k' j' "y j g' "g' x' k' f' g' p' e' g' "k' v' p' g' g' f' u' h' q' t' "k' u' f' g' r' i' d' g' t' c' v' k' p' u' 0' Kp" r' i' k' i' j' v' q' h' y j g' v' t' k' n' e' q' w' t' v' i' u' r' g' e' k' h' e' "k' p' s' w' k' t' { "y j g' y j g' t' "y j g' l' w' t' { "y j k' u' j' g' f' "v' q' j' g' c' t' "c' f' f' k' k' q' p' c' n' i' r' q' t' v' k' p' u' "q' h' y j g' t' g' s' w' g' u' v' f' "v' g' u' k' o' q' p' { "c' p' f' "y j g' l' w' t' { "u' t' g' u' r' q' p' u' g' . "c' p' f' "y j g' e' k' t' e' w' o' u' c' p' e' g' "y j c' v' y j g' "v' g' u' k' o' q' p' { "y j c' v' y' c' u' t' g' c' f' "v' q' "y j g' l' w' t' { "e' r' g' e' c' t' n' { "y' c' u' "c' f' o' "k' u' l' d' r' g' "c' p' f' "o' g' v' y' j' g' l' w' t' { "u' r' t' e' k' u' g' t' g' s' w' g' u' v' y j g' v' c' t' f' { "p' q' w' h' e' c' v' k' p' "q' h' e' q' w' p' u' g' n' i' c' p' f' "e' q' w' p' u' g' n' u

cdugpeg' h' t' q' o' "y j g' t' g' c' f' k' p' i' "q' h' 'y j g' "v' g' u' k' o' q' p' { "e' c' p' p' q' v' j' c' x' g' j' c' f' c' p' { "g' h' g' e' v' w' r' q' p' "y j g' x' g' t' f' l' e' v' 0

*67+

Etlo kpcn' Ncy " È" 74306//Rwpkuj o gpv/RgpcnM " Vtkn' qh Ecr kcn' Rtqugewkqp//Gxkf gpeg" kp" Ci i txcxvkqp//P qvleg" vq F ghgpf cpv/Cf gs wce {0 Kp" c' e' c' r' k' c' n' o' w' t' f' g' t' r' t' q' u' e' w' k' q' p' . "f' g' h' g' p' f' c' p' v' t' g' e' g' k' x' g' f' "c' f' g' s' w' e' v' p' q' v' l' e' g' "q' h' "g' x' k' f' g' p' e' g' "q' h' "c' p' "c' u' c' w' a' n' "k' p' t' q' f' w' e' g' f' "c' u' "c' i' i' t' c' x' c' v' k' p' i' g' x' k' f' g' p' e' g' "f' w' t' k' p' i' " y j g' " r' g' p' c' n' { " r' j' c' u' g' " *R' e' p' 0' E' q' f' g' . " È' 3; 206+ c' p' f' "y j g' v' t' k' n' e' q' w' t' v' f' k' f' "p' q' v' g' t' t' "k' p' "h' c' k' k' p' i' "v' q' "i' t' c' p' v' f' g' h' g' p' f' c' p' v' c' " e' q' p' v' k' p' w' c' p' e' g' " v' q' " o' g' g' v' " y j k' u' " g' x' k' f' g' p' e' g' 0' D' g' h' q' t' g' " v' t' k' n' " y j g' r' t' q' u' e' w' k' q' p' " i' c' x' g' " p' q' v' l' e' g' " v' q' " f' g' h' g' p' f' c' p' v' " y j c' v' " k' v' k' p' v' g' p' f' g' f' v' q' " r' t' g' u' g' p' v' " g' x' k' f' g' p' e' g' " k' p' " c' i' i' t' c' x' c' v' k' q' p' " q' h' " f' g' h' g' p' f' c' p' v' u' " r' t' k' q' t' e' q' p' x' l' e' v' k' q' p' h' q' t' "c' u' c' w' a' n' y' k' j' "c' f' "g' c' f' n' l' "y' g' r' c' p' 0' C' h' g' t' "g' p' v' { "q' h' i' j' g' i' w' k' n' i' j' c' u' g' x' g' t' f' l' e' v' . "y j g' t' t' q' u' e' w' k' q' p' t' t' q' r' q' u' g' f' "v' q' "e' c' n' i' y' k' p' g' u' u' g' u' y' j' q' y' q' w' f' "v' g' u' k' h' l' "p' q' v' q' p' n' l' "v' q' "y j g' e' k' t' e' w' o' u' c' p' e' g' u' "q' h' "y j g' r' t' k' q' t' e' j' c' t' i' g' f' "c' u' c' w' a' n' "v' q' "y j j' l' e' j' "f' g' h' g' p' f' c' p' v' r' r' g' c' f' g' f' "i' w' k' n' . "d' w' "c' n' u' q' v' q' "y j g' e' k' t' e' w' o' u' c' p' e' g' u' "q' h' "y j g' t' g' r' c' v' g' f' "c' u' c' w' a' n' "q' p' "y j c' v' x' l' e' v' k' o' "u' h' c' v' g' t' "y j g' h' q' m' y' k' p' i' "f' c' { . "y j l' e' j' "t' g' r' c' v' g' f' "e' j' c' t' i' g' y' c' u' f' t' q' r' r' g' f' r' w' t' u' c' p' v' v' q' "c' r' n' e' c' i' t' g' g' o' g' p' 0' P' q' v' l' e' g' r' w' t' u' c' p' v' v' q' È' 3; 206 "y j c' v' y j g' t' t' q' u' e' w' k' q' p' y' k' n' i' r' t' g' u' g' p' v' g' x' k' f' g' p' e' g' t' g' r' c' v' k' p' i' "v' q' "c' r' t' k' q' t' e' t' k' o' g' q' t' "e' q' p' x' l' e' v' k' q' p' "k' u' "u' w' h' l' e' k' p' v' v' q' "c' r' i' g' t' v' v' y' g' f' g' h' e' p' u' g' "y j c' v' g' x' k' f' g' p' e' g' t' g' i' c' t' f' k' p' i' "w' p' e' j' c' t' i' g' f' "e' t' k' o' g' u' "q' t' "q' y j g' t' "o' k' u' e' q' p' f' w' e' v' e' q' o' o' k' w' g' f' c' u' r' c' t' v' q' h' y j g' u' c' o' g' "k' p' e' k' f' g' p' v' q' t' "e' q' w' t' u' g' "q' h' e' q' p' f' w' e' v' c' u' "y j g' r' t' k' q' t' e' t' k' o' g' q' t' "e' q' p' x' l' e' v' k' q' p' "o' c' { "d' g' "q' h' h' g' t' g' f' 0' Kp" c' f' f' k' k' q' p' . "c' e' w' e' n' i' p' q' v' l' e' g' o' c' { "d' g' "r' t' q' x' k' f' g' f' "p' q' v' q' p' n' l' "d { "y j g' u' c' w' w' q' t' { "p' q' v' l' e' g' . "d' w' "d { u' w' r' r' g' o' g' p' v' c' n' i' k' p' h' q' t' o' c' v' k' q' p' u' w' e' j' "c' u' r' q' r' i' e' g' t' g' r' q' t' w' 0' Kp" y j k' u' e' c' u' g' . y j g' y' q' "c' u' c' w' a' n' y' g' t' g' k' p' v' g' t' t' g' r' c' v' g' f' . "c' p' f' "f' g' h' g' p' f' c' p' v' t' g' e' g' k' x' g' f' "y j g' r' q' r' i' e' g' t' g' r' q' t' v' t' g' r' c' v' k' p' i' "v' q' "y j g' u' g' e' q' p' f' "c' u' c' w' a' n' "u' p' i' "d' g' h' q' t' g' "v' t' k' n' 0 Kp" c' p' { "g' x' g' p' v' "y j g' t' g' y' c' u' "p' q' r' t' g' l' w' f' l' e' g' 0

*68+

Etlo kpcn'Ncy È"436//Vtkn/Eqpvkwcpeg//F kuetgwqp'qh'Vtkn Eqwtv//C'r r gmcvg'Tgxkgy 0 Kp" c' e' t' k' o' k' p' c' n' e' c' u' g' . "y j g' v' t' k' n' e' q' w' t' v' j' c' u' "d' t' q' c' f' "f' k' u' e' t' g' w' k' q' p' "v' q' f' g' v' g' t' o' k' p' g' y' j' g' y' j' g' t' i' q' q' f' "e' c' w' u' g' "g' z' k' u' u' "v' i' t' c' p' v' c' "e' q' p' v' k' p' w' c' p' e' g' q' h' "y j g' v' t' k' n' " *R' e' p' 0' E' q' f' g' . " È' 3272. "u' w' d' f' 0' *g' +0' C' "u' j' q' y' k' p' i' "q' h' i' q' q' f' "e' c' w' u' g' "t' g' s' w' k' t' u' "c' "f' g' o' q' p' u' t' c' v' k' q' p' "y j c' v' e' q' w' p' u' g' n' i' c' p' f' "y j g' f' g' h' g' p' f' c' p' v' j' c' x' g' r' t' g' r' c' t' g' f' "h' q' t' "v' t' k' n' i' y' k' j' "f' w' g' f' k' k' i' g' p' e' g' 0' Y' j' g' p' c' "e' q' p' v' k' p' w' c' p' e' g' "k' u' " *923 "u' q' w' i' j' v' v' q' "u' g' e' w' t' g' "y j g' "c' w' g' p' f' c' p' e' g' "q' h' c' y' k' p' g' u' u' . "y j g' f' g' h' g' p' f' c' p' v' o' w' a' v' "g' u' e' d' r' i' k' u' j' "y j c' v' j' g' "q' t' "u' j' g' j' c' f' g' z' g' t' e' k' u' g' f' "f' w' g' f' k' k' i' g' p' e' g' "v' q' "u' g' e' w' t' g' "y j g' y' k' p' g' u' u' "c' w' g' p' f' c' p' e' g' . y j c' v' y j g' y' k' p' g' u' u' "g' z' r' g' e' w' g' f' "v' g' u' k' o' q' p' { "y' c' u' "o' c' v' g' t' k' n' i' c' p' f' "p' q' v' e' w' o' w' r' c' v' x' g' . "y j c' v' y j g' "v' g' u' k' o' q' p' { "e' q' w' f' "d' g' "q' d' v' c' l' o' p' g' f' "y' k' j' k' p' "c' t' g' c' u' q' p' c' d' r' g' "k' o' g' . "c' p' f' "y j c' v' y j g' h' c' e' u' v' q' "y j l' e' j' "y j g' y' k' p' g' u' u' y' q' w' f' v' g' u' k' h' l' "e' q' w' f' "p' q' v' q' v' j' g' t' y' k' u' g' "d' g' "r' t' q' x' g' p' 0' V' j' g' e' q' w' t' v' e' q' p' u' k' g' t' u' p' q' v' q' p' n' l' "y j g' d' g' p' g' h' k' v' y j c' v' y j g' "o' q' x' k' p' i' "r' c' t' v' l' "c' p' v' l' e' k' r' c' v' g' u' "d' w'

cnuq 'vj g' hknrj qqf 'vj cv'j ku'dgpgkh'y kn'tguwv.'j g'dwtf gp"qp
qjy gt 'y kpguugu.'lwtqtu.'cpf 'j g'eqwtv'cpf.'cdqxcg'cm'y j gjy gt
uwxucpvcn'lwnleg'y kn'dg' ceeqo r rkuj gf "qt" f'ghgcvf "d{ "c
i tcvkpi: 'qh'j g'b qvqpv'Vj g'tkcn'eqwtv'f gpkcn'qhc'o qvqpv'ht
eqpvkpcpeg'ku'tgxky gf 'ht'cdwug'qh'f kuetgkvp0

*69c. '69d+

Etlo kpcn' Ncy " È" 742//Rwpkuj o gpv/Rgpcn' Vtkcn' qh
Ecr kcn' Rtqugewkqp//F ghgpf cpv' Tgr tguvpv'pi " J lo ugrh/
Eqpvkpcpeg//Vtkcn'Eqwtv'F kuetgkvp0

F wtkpi "vj g'r gpcn' 'r j cug'qh'c'ecr kcn'o wtf gt "r tqugewkqp.
kp"y j lej "f ghgpf cpv' grgevgf "vq" tgr tguvpv'j lo ugrh "vj g' tkcn
eqwtv' f k' "pqv'cdwug" ku'f kuetgkvp." cpf "f ghgpf cpv' y cu'pqv
f gr tkxgf 'qh'f wgr' t qegu. 'd{ 'j g'eqwtv'f gpkcn'qh'j ku'tgs wguu
ht "eqpvkpcpeg'Vj g'pggf "ht" eqpvkpcpeg" y cu'ecwugf "d{
f ghgpf cpv'u' r gtuuvp'v' hcnw'g'kp"vj g'r gkqf "hgcf kpi "vr "vq"vj g
r gpcn' "r j cug"vq"eqqr gtcvg" y kj "eqwpugn'cpf "j ku'f grkdtcvg
qduwv'w'kp" qh' j ku' qy p' eqwpugn' tgcucpdrng' cwgo r w' vq
f gvgto kpg'vj g'pcwtg'qh'j g'r tqr qugf "y kpguugu"v'guko qp {0k
cf f k'kq. "f ghgpf cpv'j cf "pqv'f go qpwtcvf "vj cv'c'eqpvkpcpeg
y qwf "dg" wughw'kp" r tqf wtkpi "ur gekhe" tgrgxcpv'o kki cvkpi
gxkf gpeg" y kj kp" c "tgcucpdrng" v'ko g'0'ht'v'j gt. "f ghgpf cpv'j cf
ucvgf "vj cv'j g"y cu' r tgr ctgf "ht" vj g'r gpcn' "r j cug" cpf "j cf
eqpuwv'gf " y kj " j ku' r tqur gev'xg" y kpguugu." cpf "f ghgpf cpv
ceegr v'f "ugrh'tgr tguvpv'kqp" qp "vj g" w'f gtucpf kpi "vj cv'pq
cf f k'kqpcn'v'ko g'y qwf "dg" i tcvp'f 0Cnuq. 'vj g'tkcn'eqwtv'eqw'f
tgcucpdrng' "j cxg'eqpen'f gf "vj g'o ku'kpi "y kpguugu. 'kpen'f kpi
r qv'pvcn'r u'ej k'v'le" g'zr gtuw' y j q "o ki j v'dg'cdng"vq" f guetkdg
vj g'b gpvcnkmpgu'qh'f ghgpf cpv'u'b qjy gt. 'y qwf 'j cxg't t'x'kf gf
v'guko qp { 'vj cv'y cu'ht'ci gn' 'ewo w'v'xg'0'ht'kpcn'.'vj g'eqwtv'y cu
y kj kp'ku'f kuetgkvp'kp'f gp { kpi 'vj g'tgs wguv'f 'eqpvkpcpegu'qp
i tqw'f u'vj cv'j g'tgs wguu' y gt'g' d'cugf "vr qp" c "f gu'k'g'vq" f gr {
vj g'r tqeggf kpi u'kp"cp'gh'ht'v'v'q'ch'ge'v'vj g'eqo r qu'k'kq'qh'vj g
lwt { "qt"vq'ecwug'c'o ku'kcn'o

*6: c. '6: d+

Etlo kpcn' Ncy " È": 9//Tki j w'qh'Ceewugf//Ck' "qh'E'qwpugn/
Ugrh'tgr tguvpv'kqp//Eqpvkpcpeg//Vtkcn'Eqwtv'F kuetgkvp0

C" etlo kpcn' f ghgpf cpv' ecppqv' tgcucpdrng' " dg" g'zr gev'f " vq
r tqeggf "vq" tkcn' y kj qw'cp { " v'ko g'ht" r tgr ctcvkqp'0' C" tkcn
eqwtv'v' hcnw'g'vq" r t'x'kf g'cp"cf gs wcv'g'eqpvkpcpeg" y j gp'kv
i tcvu'c'f ghgpf cpv'u'v'ko gn' 'o qvqpv'ht'ugrh'tgr tguvpv'kqp'ku'c'
f gpkcn'qh'f wgr' t qegu'qh'ht'ry 0J qy gxgt. "c'o k'f tkcn'o qvqpv'ht
ugrh'tgr tguvpv'kqp" o c { "dg" f g'p'kf "qp"vj g'i t'qwpf "vj cv'f gr {
qt" c'eqpvkpcpeg" y qwf "dg" t'gs w'k'gf 0C' tkcn'eqwtv' *924 "o c {
eqpf k'kq'vj g'i tcvkpi 'qh'ht'we'j 'c'b qvqpv'ht'ugrh'tgr tguvpv'kqp
qp"vj g'f ghgpf cpv'u' y c'k'gt' qh'c'eqpvkpcpeg'0'k'ku'pqv'gxgt {
f gpkcn'qh'c"tgs wguv'ht"o qtg"v'ko g"vj cv'x'k'q'v'cu'f wgr' t qegu

gxgp'kh'vj g'r ctv' "hcnu"vq"qh'gt"gxkf gpeg"qt"ku'eqo r gm'gf "vq
f ghgpf "y kj qw'eqwpugn'0'k'p'v'gcf. "vj g'cpuy gt "o wu'v'dg" h'w'p'f
kp"vj g'ek'ewo ucpegu'r tguvpv'kp"gc'ej "ecug. "r ctv'ew'ctn' "kp"vj g
tgcucpdrng' r tguvpv'f "vq"vj g'tkcn'lw'f i g'0'Gxgp'kp" c'ecr kcn'ecug. 'kh
vj g" f ghgpf cpv'ecppqv'uj qy "vj cv'j g"qt"uj g'j cu'dggp" f k'ki gpv
kp" ugewtkpi "vj g" cw'p'f cpeg" qh' y kpguugu." qt "vj cv' ur gekhe
y kpguugu"gz'ku'v'y j q'y qwf "r tguvpv'o cv'gtkcn'gxkf gpeg. "i kxgp
vj g" f ghgpf gpeg" p'gegu'ct'k' "f w'g" c' tkcn'lw'f i g'lp"tgi ctf "vq"vj g
f gpkcn'qt' i tcvkpi 'qh'eqpvkpcpegu. 'vj g'eqwtv'u'tw'kpi "f gp { kpi
c'eqpvkpcpeg" f qgu'pqv'uw' r qt'v'c'erc'ko "qh'gttqt" w'f gt "vj g
hg'f g'cn'Eqpvkpcpeg0

*6: c. '6: d+

Etlo kpcn' Ncy " È": 904//Tki j w'qh'Ceewugf//Ck' "qh'E'qwpugn/
Ugrh'tgr tguvpv'kqp//Tguq'w'egu" Cxck'cdng" vq" k'p'ecteg'cv'f
F ghgpf cpv' Ecr kcn'Rtqugewkqp0

F wtkpi "vj g'r gpcn' 'r j cug'qh'c'ecr kcn'o wtf gt "r tqugewkqp."kp
y j lej "f ghgpf cpv'grgevgf "vq" tgr tguvpv'j lo ugrh' y kj "cf x'ku'qt {
eqwpugn' f ghgpf cpv' y cu'pqv'f gr tkxgf "qh"j ku' eqpvkpcpeg'k'p'cn
tki j v' qh' ugrh'tgr tguvpv'kqp" d { " t'g'ut'lev'xg" eqpf k'k'q'pu' qh
eqp'k'p'go gpv' cv' vj g" eqwpv'f " lckl' cpf " t'g'ut'lev'xg" ugewtk'f
o gcuw'gu'kp"vj g'eqwtv'q'qo 0'Vj g'tkcn'eqwtv.'y j gp'k'v'dgeco g
cy ctg" qh' f ghgpf cpv'u' f k'ht'ew'w'ku. " qtf gtgf "vj cv' f ghgpf cpv
dg" i kxgp" w'p'ko k'gf "ceegu" vq" vj g' v'gr'j q'pg" cpf "uko k'ctn'
qtf gtgf "vj cv'j g'eqwpv'f "lckl'o cng"vj g'cv'at'p'g { 'x'ku'k'pi "t'q'qo
cxck'cdng" vq" f ghgpf cpv'qxgt "vj g'y g'ng'p'f "vq" r gto k'ht'v'j gt
eqpuwv'k'k'p" y kj "j ku' cu'ku'v'p'u'0'Vj g'tge'q'tf "eqpvk'p'gf "j ku
eqwpugn'cu'ug'v'k'p"vj cv'f ghgpf cpv'mpgy "vj g'ht'ew'cpf "ku'w'gu
kp"vj g'ecug'dg'v'gt"vj cp"o qu'v'cv'at'p'g { u'y qwf 0'Vj g'cf gs w'ce {
qh' vj g" t'gu'q'w'egu" o cf g" cxck'cdng" vq" f ghgpf cpv' cnuq" y cu
f go qpwtcvf "d { "vj g'ek'ewo ucpeg"vj cv'dgh'q'g" w'f g't'cn'k'pi
ugrh'tgr tguvpv'kqp. "f ghgpf cpv' ucvgf "j g'j cf " eqpv'cv'gf "j ku
r tqur gev'xg" r gpcn' "r j cug" y kpguugu" tgr g'cv'f n' "f wtkpi "vj g
i w'kn'r j cug." cpf "d { "j ku'tgo ct'cdng" r g'ht'qto cpeg" f wtkpi "vj g
r gpcn' "r j cug'0'ht'kpcn'. 'gxgp'kh'vj g'tkcn'eqwtv'u't'gh'w'cn'v'q' t'gto kv
f ghgpf cpv'v'q'k'p'v'x'ky "cp"q'w'q'ht'ucv'g'zr g't'v'y k'p'guu'dgh'q'g
j g'v'ku'ht'gf "y cu'gt'q'p'g'q'w'."vj g't'g'y cu'pq" r t'gl'w'f leg. "d'ge'cw'ug
vj cv'y k'p'guu'v'g'uko qp { 'y cu'gz'ew'f gf "cu'ht'g'ng'x'cp'0

*72+

Etlo kpcn' Ncy " È": 9//Tki j w'qh'Ceewugf//Ck' "qh'E'qwpugn/
Ugrh'tgr tguvpv'kqp//Tguq'w'egu" Cxck'cdng" vq" k'p'ecteg'cv'f
F ghgpf cpv'0

Cnj qwi j "c"etlo kpcn'f ghgpf cpv'y j q"ku'tgr tguvpv'kpi "j lo ugrh
qt"j g'ugrh'o c { "pqv'dg" r r'ceg'f "kp"vj g'r qu'k'k'q'qh' r tguvpv'kpi
c" f ghgpf" y kj qw' ceegu" vq" c" v'gr'j q'pg. " r'cy " r'hd'tct {.
t'w'p'p'g. "k'p'x'g'v'ki cv'qt. "cf x'ku'qt { "eqwpugn"qt"cp { "qjy gt"o g'cpu
qh'f g'x'g'nr kpi "c" f ghgpf. "vj ku' i g'p'g'cn' r t'qr qu'k'k'q'f q'gu'pqv

f levcv'j g'tguqwtegu'j cv'o wu'dg"cxckrdng"v" f ghgpf cpv'0
Kpukwkwqpcn' cpf " ugewtk' eqpegtpu' qh' r tgvtkn' f gvgpvkq
hcekrkkgu'o c { " *925 " dg" eqpuk' gtgf " kp" f gvgto kpkpi " y j cv
o gcpu'y kn'dg'ceeqtf gf 'v'j g'f ghgpf cpv'v' r tgr ctg'j ku'qt'j gt
f ghgpug'Y j gp'v'j g'f ghgpf cpv'j cu'c'rcy { gt'cevki " cu'cf xkuqt {
eqwpugn'j ku'qt'j gt'tki j w'ctg'cf gs wcvgn' r tqvgevgf 0

*73+

Etlo kpcn'Ncy "È": 904//Tki j w'qh'Ceewugf //Ck'qh'Eqwpugn/
Ugrh'tgr tguvpcv'kq//Rgpcn' "Rj" cug'qh'Ecr kcn'Rtqugewkq//
Mpqy kpi 'cpf "kpvgnki gpv'Y cxkg'qh'Tki j v'v'Eqwpugn0
F wtkpi "v'j g'r gpcn' "r j cug'qh'c"ecr kcn'o wtf gt'r tqugewkq. "kp
y j lej "f ghgpf cpv'grgevgf "v'j tgr tguv'v'j ko ugrh'y kj "cf xkuqt {
eqwpugn' f ghgpf cpv'npqy kpi n' "cpf "kpvgnki gpv' "y cxkg' "j ku
tki j v' "v' eqwpugn' Chgt' cp' "gzv'p'gf " r gtlqf " qh' r tgvtkn
kpectegt'kq"kp" y j lej "j g" y cu'ceeqtf gf "cf xkuqt { "eqwpugn
ucwuu."f ghgpf cpv'y qwf "j cxg"npqy p"y j gp"j g"ugewtgf "hwm
ugrh'tgr tguvpcv'kq" y j cv'uatv'qh'ceegu"v'j g"vgrg'j ppg"j g
eqwf "gZR gev'v'j cv'j g'qh'g'v'g'w'p'gf "v'j g'eqwpv' "lckh'v'cv
pki j v'q'p'eqwtv'f c { u'cpf "v'j cv'p'qto cm' "v'j g'cv'q'p'g' { "kpv'g'kgy
tqgo "kp" v'j g'eqwpv' "lckh'y cu'pqv'qr gp"qp"y gng'p' u'V'j g
eqwtv'f k'cf xkg'j ko "v'j cv'j g'y qwf "pqv't'gegk'g'cp' { "cf f k'k'p'cn
r t'k'k'gi gu'0'Cu' m'pi "cu' v'j g' tgeqtf "cu'c" y j qrg'uj qy u' v'j cv
v'j g'f ghgpf cpv'wpf gtuqqf "v'j g'f cpi gtu'qh'ugrh'tgr tguvpcv'kq.
pq" r ctv'ew'et "h'qto "qh'y ctpkpi "ku' tgs w'k'gf 0' H'k'p'cm'." y j gp
f ghgpf cpv' uqwi j v' ugrh'tgr tguvpcv'kq." j g" cu'gt'v'g' "v'j cv' j g
ct'g'cf { "j cf "eqp'cevg' "j ku'y k'p'guuu."mpgy "y j cv'v'j g' { "y qwf
uc { "cpf "y cu'r tgr ctgf "v'j r tguv'v'j ku'ecug0

*74+

Etlo kpcn'Ncy "È": 904//Tki j w'qh'Ceewugf //Ck'qh'Eqwpugn/
Ugrh'tgr tguvpcv'kq//Rgpcn' "Rj" cug'qh'Ecr kcn'Rtqugewkq//
Ugewtk' "O gcuwt'gu'kp'Eqwt'v'qgo 0
F wtkpi "v'j g'r gpcn' "r j cug'qh'c"ecr kcn'o wtf gt'r tqugewkq. "kp
y j lej "f ghgpf cpv'grgevgf "v'j tgr tguv'v'j ko ugrh'y kj "cf xkuqt {
eqwpugn' v'j g'v'k'cn'eqwtv'f k' "pqv'cdwug'ku'f kuet'g'kq"kp'cm'py kpi
v'j g'dck'k'h'v'q"ko r qug'eqwt'v'qgo "ugewtk' "o gcuwt'gu'0'V'j g'eqwtv
y cu'y kj kp'ku'f kuet'g'kq"kp'ceegr v'kpi "v'j g'dck'k'h'u'ucvgo gpv
v'j cv' v'j g'eqwt'v' qwug' f k' "pqv' j cxg' ugewtg' hcekrkkgu." y j lej
y qwf "dg'p'gegu'ct { "h'q'cp'kp'ewu'qf { "f ghgpf cpv'eqpx'k'v'g' "qh
ur gek'cn'ek'ewo ucpeg'o wtf gt. h'q' k'p'v'g'k'gy u'f ghgpf cpv'y kuj gf
v'j w'p'f g'v'cng' y kj "j ku'k'p'x'g'v'ki cv'q' "cpf "r gpcn' "eqpu'w'ncp'0
H'w'v'j gt. "v'j g'v'k'cn'eqwtv'ctt'cpi gf "h'q' v'j g'cv'q'p'g' { "x'k'k'k'pi "tqgo
cv' v'j g' eqwpv' "lckh' v'j dg" o cf g" cxckrdng" v" f ghgpf cpv' h'q'
gzv'p'gf "j qwt'0' h'q' v'j g'uc'o g'ugewtk' "t'g'cu'p'u. "v'j g'eqwt'v'y cu
y kj kp'ku'f kuet'g'kq"kp'ci t'g'g'k'pi "y kj "v'j g'dck'k'h'u'g'cu'p'cd'g'
cf o q'p'k'k'q"v'j cv'f ghgpf cpv'uj qwf "pqv'dg'r gto k'v'g' "v'j o q'x'g'
cdq'w'v'j g'eqwt'v'qgo "f wtkpi "v'j g'r gpcn' "r j cug'qh'v'j g'v'k'cn'0'Cu

h'q' "f ghgpf cpv'u'wug'qh'gz'j kdku'qp"v'j g'd'nc'nd'q'ctf . "v'j g'eqwtv
qdugt'x'gf "v'j cv'cf xkuqt { "eqwpugn'eqwf "r n'ceg'v'j g'gz'j kdku'qp"v'j g'
d'nc'nd'q'ctf "h'f ghgpf cpv'y kuj gf 0

*75+

Etlo kpcn'Ncy "È": 904//Tki j w'qh'Ceewugf //Ck'qh'Eqwpugn/
Ugrh'tgr tguvpcv'kq//Rgpcn' "Rj" cug'qh'Ecr kcn'Rtqugewkq//
F ghgpf cpv'u'k'p'guu0
F wtkpi "v'j g'r gpcn' "r j cug'qh'c"ecr kcn'o wtf gt'r tqugewkq. "kp
y j lej "f ghgpf cpv'grgevgf "v'j tgr tguv'v'j ko ugrh'y kj "cf xkuqt {
*926 "eqwpugn'v'j g'tgeqtf "uj qy gf "v'j cv'f ghgpf cpv'y cu'pqv
h'q'tegf "v'j r tqeggf "cv'v'j g'r gpcn' "r j cug'y kj "c'ug'k'q'w'u'k'p'guu0
Qp'v'j g'eqwt'ct { "v'j g'tgeqtf "uj qy gf "v'j cv'v'j g'v'k'cn'eqwt'v'p'k'egf
v'j cv'f ghgpf cpv'j cf "rct { pi kku' "cpf " qtf gtgf " v'j cv'j g" t'gegk'g
o gf k'cn'c'w'g'p'k'q. "cpf "v'j cv'j g'cr r gctgf "v'j g'h'q'ny kpi "f c { "cpf
eqp'v'p'w'gf "v'j tgr tguv'v'j ko ugrh'y kj qw'cp { "k'p'f k'c'v'k'q"v'j cv'j g
y cu'v'q' "k'k'v'q" r tqeggf 0

*76+

Etlo kpcn' Ncy " È" 74408//Rw'p'k'uj o gpv'/Rgpcn' " Rj" cug' " qh
Ecr kcn' Rtqugewkq//Cti wo gpv'/Ci i t'cx'cv'kpi " Gxk' g'peg//
N'c'cm'q'h'T'go q'tug0
F wtkpi "v'j g'r gpcn' "r j cug'qh'c"ecr kcn'o wtf gt'r tqugewkq.
f ghgpf cpv'y cxkg' "c'enc'ko "qh'r tqugewq'k'cn'o k'ueq'p'f w'v'f wtkpi
en'uk'pi "cti wo gpv' d { "h'ck'k'pi "v'j q'dl'gev'cv'v'j g' "ko g'0'k'p' "cp {
gx'gp'v'j g'tg'y cu'pq"o k'ueq'p'f w'v'0'V'j g'r tqugewq't "uwi i g'ugf
v'j cv'f ghgpf cpv'j cf "f g'ut'q { gf "u'g'g'c'r'h'k'g'gu. "k'p'cn'f kpi "v'j qug'q'h
v'j g'eq'f ghgpf cpv'u. "v'j cv'j g'p'qy "y cv'p'g' "h'q'ti k'x'g'p'guu. "d'w'v'j cv'j g
p'g'x'g'j cf "cf o k'v'g'f "j g'j cf "f q'p'g'cp' v'j kpi "v'g't'k'k'ng. "cpf "v'j cv'j g
j cf "pq'eqo r cu'k'q'p'cpf "pq' u'q'w'0'N'c'cm'q'h'g'x'k'f g'peg'q'h't'go q'tug
ku'c'r t'qr gt "u'w'dl'gev'q't'eq'p'k'f g'v'k'q'p'cv'v'j g'r gpcn' "r j cug'0'V'j g
r tqugewq't'u'eqo o gpv'v'j cv'f ghgpf cpv'j cf "ej k'f t'g'p' "d { "f k'h'gt'gpv
y qo gp. "p'q'p'g'q'h'y j qo "j g'j cf "o c'tt'k'g'f. "y cu'd'cu'g'f "w' q'p'v'j g
g'x'k'f g'peg'cpf "y cu'c'r t'qr gt "t'g'ur q'p'ug'v'q'f ghgpf cpv'u'g'x'k'f g'peg
kp'o k'ki cv'k'q"v'j cv'j g'y cu'c'i q'q'f "h'co k'k' "o cp'cpf "g'zeg'ng'p'v
h'cv' g't'0' H'k'p'cm'." v'j g'r tqugewq't'u'eqo o gpv'v'j cv'j g'j cf "j g'ctf
u'qo g'p'g'v'c'm'k'pi "cd'q'w'v'j g'ecug'cpf "uc { kpi "v'j cv'v'j g' { "w'ug'f "c
o cej k'p'g'i w'p'k'p'v'j g'uj cf qy "q'h'c'et'quu.0'y j k'g'r g'tj cr u'w'p'f w'v'
o g'ru'f t'co cv'k'. "r t'qr g'tn' { "t'g'h'g't'g'f "v'j g'x'k'f g'peg'g'u'v'cd'k'uj kpi "v'j cv
v'j g'o wtf gt "q'ee'w't'g'f "k'p' h'q'p'v'q'h'c'ej w'ej "f c { ect'g'eg'p'v'g't0

*77+

Etlo kpcn'Ncy "È"74404//Rw'p'k'uj o gpv'/Rgpcn' "Rj" cug'qh'Ecr kcn
Rtqugewkq//Cti wo gpv'/Eqo o gpv'q'p'Y k'p'guu'gu0
F wtkpi "v'j g'r gpcn' "r j cug'qh'c"ecr kcn'o wtf gt'r tqugewkq.
v'j g'v'k'cn'eqwt'v'f k' "pqv'ko r t'qr g'tn' "rko k'v'f ghgpf cpv'u'en'uk'pi
cti wo gpv' v'j g'j lwt { " y j gp" k' "u'w'x'k'p'g'f " v'j g" r tqugewq't'u
q'dl'gev'kq"v'j f ghgpf cpv'u'ucvgo gpv'v'j cv'v'j g"r q'r'k'g' "cpf "v'j g

f kntlev'cwqtpg{ 'j cf 'eqphgtt'g' c'p'f 'f g'v'to k'p'g' 'v'j c'v'j g' { 'y g'tg p'q'v'r t'g'c'g'f 'y k'j 'c' 'e'g't'c'k'p'y k'p'g'u'u' 'u'c'v'g'o g'p'u' 'v'j g'r r'q'k'eg'0 k'p' 'u'w'u'c'k'p'k'p'i 'v'j g'q'd'l'g'e'v'k'p'p. 'v'j g' 't'k'n'l'e'q'w'v'c'u'ng'f 'f' g'h'g'p'f' c'p'v'p'q'v' v'q' 'e'j' c't'c'e'v'g't'k' g. "d'w' 'k'p'u'ng'c'f "v'q' 'l'w'u'v' 'u'w'o o' c't'k' g' 'v'j g' 'g'x'k'f' g'p'eg'0 k'p' 'y' c'u' 'r' t'q'r' g't' "v'q' 'u'w'u'c'k'p' 'v'j g' 'r' t'q'u'g'e'w'q't' 'u' 'q'd'l'g'e'v'k'p' "y' j' g'p' f' g'h'g'p'f' c'p'v' 'd'g'i' c'p' "e'q'o o' g'p'v'k'p'i "q'p' "o' c'w'g't'u' "p'q'v' 'y' k'j' k'p' "v'j g' g'x'k'f' g'p'eg. "u'w'ej' "c'u' 'v'j g' "o' q'v'k'c'v'k'p' "q'h' 'v'j g' "r' t'q'u'g'e'w'q't' "c'p'f 'v'j g' "r' q'r'l'eg' "f' w't'k'p'i "k'p'v'g't'x'k'g'y' u' 'y' k'j' "v'j g' "y' k'p'g'u'u' 'C'n'j' q'w'i' j' f' g'h'g'p'f' c'p'v' 'y' c'u' 'g'p'v'k'w'g'f' "v'q' "w't'i' g' "j' k'u' 'k'p'v'g'r' t'g'v'c'v'k'p' "q'h' 'v'j g' g'x'k'f' g'p'eg. "j' g' 'y' c'u' 'p'q'v' 'g'p'v'k'w'g'f' "v'q' "c'u'ng't'v'c'u' 'h'c'e'v'o' c'w'g't'u' 'c'u' 'v'q' y' j' k'ej' "p'q' 'g'x'k'f' g'p'eg' "j' c'f "d'g'g'p' 'r' t'g'u'g'p'v'g'f' '0' k'p' "v'j g' 'e'q'p'v'g'z'v' 'q'h' f' g'h'g'p'f' c'p'v' 'u'c't'i' w'o' g'p'v' 'v'j g' 't'k'n'l'e'q'w'v' 'u' 'c'f' o' q'p'k'k'q'p' 'c'f' g's' w'c'v'g'n'f' e'q'p'x'g' 'g'f' 'v'j' k'u' 'r' q'l'p'v. "c'p'f "k'v'f' k'f' "p'q'v' 'r' t'g'x'g'p'v'f' g'h'g'p'f' c'p'v' 'h'q'o' e'q'p'v'k'p'w'k'p'i "v'q' "w't'i' g' "j' k'u' 'k'p'v'g'r' t'g'v'c'v'k'p' "q'h' 'g'x'g'p'u' 'w'r' q'p' "v'j g' 'l'w't' { 0 *927

*78+

Etlo k'p'c'n'l'N'c'y "E"742//R'w'p'k'uj o' g'p'v'/R'g'p'c'n'l' "R'j' c'u'g' 'q'h' 'E'c'r' k'c'n' R't'q'u'g'e'w'k'q'p'// "H'c'k' "c'p'f "T' g'r'k'c'd'ng' "F' g'v'g't'o' k'p'c'v'k'q'p' "W'p'f' g't' "G'k'i' j' v'j' C'o' g'p'f' o' g'p'v'0 k'p' "c' "e'c'r' k'c'n'l' o' w't'f' g't' "r' t'q'u'g'e'w'k'q'p'p. "f' g'h'g'p'f' c'p'v' 'h'c'k'g'f' "v'q' f' g'o' q'p'u't'c'v'g' 'v'j' c'v'v'j' g' 'e'k't'e'w'o' u'c'p'eg'u' 'w'p'f' g't' "y' j' k'ej' "v'j' g' 'r' g'p'c'n'l' r' j' c'u'g' "y' c'u' 'e'q'p'f' w'e'g'f' "x'k'q'r'v'g'f' "j' k'u' 't'k'i' j' v' 'w'p'f' g't' "W'U'U' 'E'q'p'u'0 : v'j' "C'o' g'p'f' 0' "v'q' "c' "h'c'k' "c'p'f' "t'g'r'k'c'd'ng' "r' g'p'c'n'l' "f' g'v'g't'o' k'p'c'v'k'q'p'0 V'j' g' 't'g's' w'k'g'f' 't'g'r'k'c'd'k'k'v' "k'u' 'c'w'c'k'p'g'f' "y' j' g'p' "v'j' g' 'r' t'q'u'g'e'w'k'q'p' "j' c'u' f' k'ue'j' c't'i' g'f' "k'u' 'd'w't'f' g'p' "q'h'l'r' t'q'q'h'c'v'v'j' g' 'i' w'k'n' 'c'p'f' 'r' g'p'c'n'l' 'r' j' c'u'g'u' r' w't'u'w'c'p'v'v' "v'j' g' 't'w'g'u' 'q'h'i' g'x'k'f' g'p'eg' "c'p'f' "y' k'j' k'p' "v'j' g' "i' w'k'f' g'r'k'p'g'u' q'h'l'c' 'e'q'p'u'k'w'k'q'p'c'n'l'f' g'c'v'j' 'r' g'p'c'n'l' 'u'c'w'w'g'. "v'j' g' 'f' g'c'v'j' "x'g't'f' k'ev'j' c'u' d'g'g'p' 't'g'w't'p'g'f' "w'p'f' g't' "r' t'q'r' g't' "k'p'u't' w'e'v'k'q'p'u' "c'p'f' "r' t'q'eg'f' w't'u'. "c'p'f' v'j' g' 't'k'g't' 'q'h'l'r' g'p'c'n'l' "j' c'u'f' w'k'f' "e'q'p'u'k'f' g't'g'f' "v'j' g' 't'g'r'g'x'c'p'v'0 k'k'i' c'v'k'p'i g'x'k'f' g'p'eg. "k'h'c'p' { . "v'j' c'v'v'j' g' 'f' g'h'g'p'f' c'p'v'j' c'u' 'e'j' q'u'g'p' "v'q' "r' t'g'u'g'p' 0 C' l'w'f' i' o' g'p'v'q'h'l'f' g'c'v'j' "g'p'v't'g'f' "k'p' "e'q'p'h'q't'o' k'v' "y' k'j' "v'j' g'u'g' "t'k'i' q't'q'w'u' u'c'p'f' c't'f' u'f' q'g'u' 'p'q'v'x'k'q'r'v'g' "v'j' g' "G'k'i' j' v'j' "C'o' g'p'f' o' g'p'v't'g'r'k'c'd'k'k'v' t'g's' w'k'g'o' g'p'u'0

*79+

Etlo k'p'c'n'l'N'c'y "E"742//R'w'p'k'uj o' g'p'v'/R'g'p'c'n'l' "R'j' c'u'g' 'q'h' 'E'c'r' k'c'n' R't'q'u'g'e'w'k'q'p'// "L'w't' { "O' k'ue'q'p'f' w'e'v' /T'c'k'ul'p'i' "k'o' 'r' t'q'r' t'k'g'v' { 'q'h'l' w'k'n' X'g't'f' k'ev'0 F' w't'k'p'i' "v'j' g' "r' g'p'c'n'l' "r' j' c'u'g' "q'h' 'c' "e'c'r' k'c'n'l' o' w't'f' g't' "r' t'q'u'g'e'w'k'q'p'p. v'j' g' 't'k'n'l'e'q'w't'v'f' k'f' "p'q'v'g't't' "y' k'j' "t'g'u'r' g'e'v'v' "v'j' g' "i' w'k'n' 'x'g't'f' k'ev'k'p' h'c'k'k'p'i' "v'q' "g'z'c'o' k'p'g' "v'j' g' "h'q't'g'r' g't'u'q'p' "t'g'i' c't'f' k'p'i' "j' k'u' 'q'r' k'p'k'q'p' "v'j' c'v' q'p'g' 'l'w't'q't' "j' c'f' "h'c'k'g'f' "v'q' "f' g'r'k'd'g't'c'v'g'f' w't'k'p'i' "v'j' g' 'i' w'k'n' 'r' j' c'u'g' "u'k'p'eg' v'j' g' 't'k'n'l'e'q'w't'v'f' g'v'g't'o' k'p'g'f' "c'p'f' "e'q'w'p'u'g'n'l'e'q'p'eg'f' g'f' "v'j' c'v'c'p' { "g'h'q't'v' v'q' "k'o' r' g'c'ej' "v'j' g' 'i' w'k'n' 'x'g't'f' k'ev'j' c'u' 'v'q' "d'g' "e'q'p'f' w'e'g'f' "d' { "y' c' { "q'h'l'c' o' q'v'k'q'p' "h'q't' "p'g'y' "t'k'n'l'0

*7: +

Etlo k'p'c'n'l'N'c'y "E"742//R'w'p'k'uj o' g'p'v'/R'g'p'c'n'l' "R'j' c'u'g' 'q'h' 'E'c'r' k'c'n' R't'q'u'g'e'w'k'q'p'// "L'w't' { "O' k'ue'q'p'f' w'e'v' /C'r' r' g'm'c'v'g' "T' g'x'k'g'y' // "Y' c'k'x'g't'0 F' w't'k'p'i' "v'j' g' "r' g'p'c'n'l' "r' j' c'u'g' "q'h' 'c' "e'c'r' k'c'n'l' o' w't'f' g't' "r' t'q'u'g'e'w'k'q'p'p. f' g'h'g'p'f' c'p'v' 'y' c'k'x'g'f' "c'p' { "e'r'c'k'o' "q'p' "c'r' r' g'c'n'l' "v'j' c'v' "v'j' g' "l'w't' { "u' f' g'r'k'd'g't'c'v'k'q'p'u' 'y' g't'g' 'c'k'p'v'g'f' "d' { "q'p'g' 'l'w't'q't' "u' 'k'p'c'd'k'k'v' "v'q' "f' g'r'k'd'g't'c'v'g' d' { "h'c'k'k'p'i' "v'q' "q'd'l'g'e'v'k'p' "v'j' c'v'i' t'q'w'p'f' "c'v'v'j' g' 'v'k'o' g'0k'p' 'h'c'e'v' 'c'h'g't' "v'j' g' v'k'n'l'e'q'w't'v'g'z'c'o' k'p'g'f' "v'j' g' "l'w't' { "h'q't'g'r' g't'u'q'p' "w'p'f' g't' "q'c'v'j' . "f' g'h'g'p'g' e'q'w'p'u'g'n'l'e'q'p'en'w'f' g'f' "h'q'o' "u'q'o' g' "q'h'v'j' g' "h'q't'g'r' g't'u'q'p' "u' 'u'c'v'g'o' g'p'u' v'j' c'v'v'j' g' "l'w't'q't' "y' j' q'f' g'h'g'p'f' c'p'v'v'c'k'o' g'f' "y' c'u' 'w'p'c'd'ng' "v'q' "f' g'r'k'd'g't'c'v'g' k'p' "h'c'e'v'v' 'y' c'u' "c' "j' q'r'f' q'w'w' "l'w't'q't' "y' j' q' "y' c'u' "v'j' g' "u'q'r'g' "u'w'r' r' q't'v'g't' "q'h' c' "u'g'p'v'g'p'eg' "g'u'u' "v'j' c'p' "f' g'c'v'j' 0' V'j' g' "r' t'q'u'g'e'w'q't' "u'q'w'i' j' v' 'h'w't'v'j' g't' g'z'c'o' k'p'c'v'k'q'p' "c'p'f' "c'u'ng't'v'g'f' "v'j' g' "l'w't'q't' "u'j' q'w'f' "d'g' "g'z'ew'g'f' . "d'w' f' g'h'g'p'g' "e'q'w'p'u'g'n'l'x'k'i' q't'q'w'u'w'f' "q'r' r' q'u'g'f' "v'j' g' "r' t'q'u'g'e'w'q't' "u' 't'g's' w'g'u'v' q'p' "v'j' g' "i' t'q'w'p'f' "v'j' c'v'v'j' g't'g' "y' c'u' "p'q' "k'p'f' k'ec'v'k'q'p' "v'j' g' "l'w't'q't' "y' c'u' w'p'c'd'ng' "v'q' "h'q'm'q'y' "v'j' g' "h'c'y' . "c'p'f' "v'j' c'v'v'j' g't' "g'z'c'o' k'p'c'v'k'q'p' "e'q'w'f' e'q'g't'eg' "v'j' g'j' q'r'f' q'w'l'w't'q't' "v'q' "i' q'c'm'p'i' "y' k'j' "v'j' g' 'b'o' c'l'q't'k'v' { "c'p'f' "x'q'g' h'q't' "c' "u'g'p'v'g'p'eg' "q'h'l'f' g'c'v'j' 0

*7: +

Etlo k'p'c'n'l'N'c'y "E"742//R'w'p'k'uj o' g'p'v'/R'g'p'c'n'l' "R'j' c'u'g' 'q'h' 'E'c'r' k'c'n' R't'q'u'g'e'w'k'q'p'// "L'w't' { "O' k'ue'q'p'f' w'e'v' /G'z'r' q'u'w't'g' "v'q' "R'w'd'r'k'k'v' // C'f' g's' w'c'e' { "q'h' "v'k'n'l'e'q'w't'v'k'p's' w'k' { "c'p'f' "T'g'u'r' q'p'ug'0 F' w't'k'p'i' "v'j' g' "r' g'p'c'n'l' "r' j' c'u'g' "q'h' 'c' " *928 "e'c'r' k'c'n'l' o' w't'f' g't' r' t'q'u'g'e'w'k'q'p'p. "y' j' g'p' "v'j' g' "v'k'n'l' e'q'w't'v' "y' c'u' "k'p'h'q't'o' g'f' "q'h' p'g'y' u' "c'ee'q'w'p'u' "t'g'i' c't'f' k'p'i' "c'm'g'i' c'v'k'q'p'u' "v'j' c'v'f' f' g'h'g'p'f' c'p'v'v'j' "y' k'h'g' r' q'u'g'u'g'f' "c' "r'k'u'v'q'h'l'r' g't'u'q'p'u' "y' j' q'o' "f' g'h'g'p'f' c'p'v'v'j' c'p'v'g'f' "n'k'm'g'f' "k'p' t'g'v'c'r'k'c'v'k'q'p' "h'q't' "v'j' g'k' "r' c't'v'k'k'r' c'v'k'q'p' "k'p' "j' k'u' 'r' t'q'u'g'e'w'k'q'p'p. "v'j' g' "t'k'n' e'q'w't'v'f' k'f' "p'q'v'g't't' "k'p' "f' k'ue'j' c't'i' k'p'i' "v'j' q' "l'w't'q't'u' "d'w'p'q'v'c' "v'j' k'f' "y' j' q' j' c'f' "d'g'g'p' "g'z'r' q'u'g'f' "v'q' "v'j' k'u'f' w'd'r'k'k'v' { 0 "H'w't'v'j' g't' "v'j' g' "t'g'u'w'o' r' v'k'p' "q'h' r' t'g'l'w'f' l'eg' "c't'k'ul'p'i' "h'q'o' "v'j' g' "l'w't'q't'u' "k'p'c'f' "x'g't'v'g'p'v'g'z'r' q'u'w't'g' "v'q' "v'j' k'u' r' w'd'r'k'k'v' "y' c'u' "t'g'd'w'w'g'f' 0' k'p' "c'f' f' k'k'q'p'p. "v'j' g' "t'k'n'l'e'q'w't'v'v'j' c'u' "w'p'f' g't' p'q' "q'd'r'k'i' c'v'k'q'p' "v'q' "k'p'h'q't'o' "v'j' g' "t'g'o' c'k'p'f' g't' "q'h'v'j' g' "l'w't'q't'u' "y' j' q' "y' g't'g' w'p'c'y' c't'g' "q'h'v'j' g' "e'q'p'v'g'p'v'q'h'v'j' g' "p'g'y' u' "t'g'r' q't'w'u' "v'j' c'v'v'j' g' "t'g'r' q't'w'u' y' g't'g' "h'c'ng' . "p'q't' "y' q'w'f' "u'w'ej' "c'p' "k'p'u't' w'e'v'k'q'p' "j' c'x'g' "d'ep'g'h'k'g'f' f' g'h'g'p'f' c'p'v'v'j' "x'k'g'y' "q'h'v'j' g' "l'w't'q't'u' "k'i' p'q't'c'p'eg' 0' k'p' "k'u' o' k'ue'q'p'f' w'e'v' h'q't' "c' "l'w't'q't' "v'q' "t'g'c'f' "q't' "r'k'ung'p' "v'q' "p'g'y' u' "c'ee'q'w'p'u' "t'g'r'v'k'p'i' "v'q' "v'j' g' e'c'ug' "k'p' "y' j' k'ej' "j' g' "q't' "u'j' g' "k'u' "u'g't'x'k'p'i' 0'j' q'y' g'x'g't' . "q'p' "c'r' r' g'c'n' "c' "v'k'n' e'q'w't'v'v'j' "e't'g'f' k'k'k'v'v' "f' g'v'g't'o' k'p'c'v'k'q'p'u' "c'p'f' "h'k'p'f' k'p'i' u' "q'p' "s' w'g'u'k'q'p'u' q'h' "j' k'u'q't'k'c'n'l' "h'c'e'v' "c't'g' "c'ee'g'r' v'g'f' "k'h' "u'w'r' r' q't'v'g'f' "d' { "u'w'd'u'c'p'v'k'n' g'x'k'f' g'p'eg' 0' k'p' "v'j' k'u' "e'c'ug' . "v'j' g' "t'k'n'l'e'q'w't'v'f' k'ue'j' c't'i' g'f' "r' g't'u'q'p'u' "y' k'j' f' g'v'c'k'g'f' "n'p'q'y' n'g'f' i' g' "q'h'v'j' g' "e'q'p'v'g'p'u' "q'h'v'j' g' "p'g'y' u' "t'g'r' q't'w'u' "v'j' g' "t'g'o' c'k'p'k'p'i' "l'w't'q't' "n'p'g'y' "x'g't' { "r'k'w'g' . "c'u'ng't'v'g'f' "v'j' c'v'v'j' g' "e'q'w'f' "d'g' h'c'k' "v'q' "f' g'h'g'p'f' c'p'v'c'p'f' "v'j' c'v'v'j' g' "r' w'd'r'k'k'v' { "y' q'w'f' "p'q'v'c'h'g'ev'j' k'o' . u'g'g'o' g'f' "t'g'r'g'x'g'f' "y' j' g'p' "k'p'h'q't'o' g'f' "v'j' c'v'v'j' g' "e'q'p'v'g'p'v'q'h'v'j' g' "p'g'y' u' "t'g'r' q't'w'u' "y' c'u' "h'c'ng' . "c'p'f' "c'r' r' g'c't'g'f' "v'q' "v'j' g' "e'q'w't'v'v'q' "d'g' "r' c't'v'k'w'w'c't'n'l' e'q'p'u'el'g'p'v'k'q'w' 0' "H'w't'v'j' g't' "v'j' g' "t'k'n'l'e'q'w't'v'v'j' c'u' "l'w'k'h'k'g'f' "k'p' "h'c'k'k'p'i' "v'q' e'q'p'f' w'e'v' "h'w't'v'j' g't' "k'p's' w'k' { "q'h'v'j' g' "l'w't'q't'u' "c'd'q'w'c'p' "c'f' f' k'k'q'p'c'n'l'p'g'y' u' "t'g'r' q't'v' "t'g'i' c't'f' k'p'i' "v'j' g' "c'u'ng't'v'g'f' n'l' "u'j' c'f' { "r' c' { o' g'p'v'q'h' "887.222 "v'q' "f' g'h'g'p'f' c'p'v'v'j' "e'q'w'p'u'g'n'l' "C'p' "c'u'w'o' r' v'k'q'p' "v'j' c'v'v'j' g' "l'w't'q't'u' "r' c'k'f'

r ctvewrt "cwgpvkqp" vj "g" tlcni'eqwt v' cf o qpkkqp "v" cxqkf
gxr qwtg "v" r wdrekf "y cu'y cttcpvgf . "dgecwug" vj "lwtqtu" j cf
dggp "f kfej cti gf "hqt' hckkpi "v" qdgd { "vj cv'cf o qpkkqp0

*82+

Etlo kpcni'Ncy "E"742//Rwpluj o gpv/Rgpcn { "Rj cug"qh'Ecr kcn
Rtqugewkqp// "Vtlni'Eqwtv'Dku0
F wtkpi "vj g" r gpcn { "r j cug"qh'c" ecr kcn'o wtf gt" r tqugewkqp.
f ghgpf cpv'y cu'p'v'f gr tkxgf "qhf wgt' t qegu'd { "cp { 'ko r ctvcrk {
qt "dku" qp" vj g" r ctv'qh' vj g" tlcni'eqwt v' Gxgp "vj qwi j "vj g" tlcni
eqwt v' gxr gt lgpgef "uqo g' h'wutcvkqp" cv'y j cv'k' dgrkxgf "v" dg
f ghgpf cpv'u" cwgo r w'v'q" o cplr wcvg "vj g" eqwt v' cpf "v" ecwug" c
tkni'qh' o kwtkn "pqj kpi "lp" vj g' tgeqtf "f go qpwtcvgf "vj cv' vj g
eqwt v' iquv'ku' lo r ctvcrk {0

*83+

J qo kelf g "E"3230//Rwpluj o gpv/F gcvj "Rgpcn { //Xcrkf k { "cpf
Eqpukwkwkpcrk {0
Vj g" ur gekni'ekewo ucpegu" ugv' hqt vj "lp" Rgp0Eqf g. "E"3; 20f.
ctg' p'v' qxgt kpenwukg" d { "vj gkt" pwo dgt "qt" d { "vj gkt" v' gto u. "cpf
vj g { "j cxg' p'v' dggp' eqpwt v' gf "lp" cp' w'p' w'k' "gxr cpukxg" o cpggt0
J gpeg. "vj ku" r qt v' kqp" qh' vj g" f gcvj "r gpcn { "ucwug" f qgu" p'v'
xkqr v' g "WLU0Equn07j . '8j . : . vj . 'qt "36j "Co gpf u0

*84+

J qo kelf g "E"3230//Rwpluj o gpv/F gcvj "Rgpcn { //Ci i txcv'kpi
Hcevqtu// " Ektewo ucpegu" qh' Etlo g//Xcrkf k { " cpf
Eqpukwkwkpcrk {0
Rgp0 Eqf g. "E" 3; 20f. " hcevqt " *c+ " y j lej " r gto ku" vj g" lwt {
f wtkpi "vj g" *929 "r gpcn { "r j cug"qh'c" ecr kcn' r tqugewkqp" vj
eqpukf gt "vj g" ekewo ucpegu" qh' vj g" etlo g" lp" ci i txcv'kqp. "ku
p'v' xkqr v' kxg" qh' "WLU0Equn0": vj "Co gpf 0" qp" vj g" dcuku" qh
xci wgp'gu" qt "qj gt" i tqw'p' u0 Vj g" lwt kur twf gpeg" qp" ecr kcn
r wpluj o gpv' j cu' guv' d' k' j gf "vj cv' vj g' ugv' p' g' e' q' p' k' j
vj g' ekewo ucpegu" qh' vj g' etlo g' lp' f' gekf kpi "y j g' vj g' v' q' lo r qug
vj g' f' gcvj "r gpcn { . "cpf "vj ku' hcevqt' k' p' ut v' w' v' j g' lwt { "v' eqpukf gt
c' t' g' r' x' c' p' v' i' w' d' l' g' e' v' o' c' w' g' t' c' p' f' "f' q' g' u' l' q' k' p' w' p' f' g' t' u' c' p' f' c' d' r' g' v' g' t' o' u' 0
Hwt vj gt. "k' l' u' p' q' v' l' p' c' r' t' q' r' t' k' v' g' v' j' c' v' c' r' c' t' v' e' w' r' t' e' k' e' w' o' u' c' p' e' g'
qh' c' ecr kcn' etlo g" o c { "dg" eqpukf gtgf "ci i txcv'kpi "lp" qpg
ecug. "y j k' g' c" eqp' t' c' u' k' p' i' "ektewo ucpeg" o c { "dg" eqpukf gtgf
ci i txcv'kpi "lp" cp' q' j' g' t' "ecug0 vj g' ugv' p' g' e' t' "ku" v' q' eqpukf gt "vj g
f ghgpf cpv'u" k' p' f' k' k' f' w' e' n' e' w' r' c' d' k' r' k' v' { "v' j' g' t' g' "ku" p' q' "eqpukwkwkpcn
tgs w' k' g' o' g' p' v' " vj cv' " vj g" ugv' p' g' e' t' " eqo r ctg" vj g" f ghgpf cpv'u
ewr cdkr { "y k' j' " vj g" ewr cdkr { "qh' q' j' g' t' "f ghgpf cpv'u0 C " lwt {
uj q' w' f' "eqpukf gt "vj g' ekewo ucpegu" qh' vj g' etlo g' lp' f' g' v' g' t' o' k' l' p' i
r gpcn { . "dw" vj ku" ku" cp" k' p' f' k' k' f' w' e' r' k' f' g' f . " p' q' v' c" eqo r ctv' kxg

hwpevkqp0Vj g' hqewa'ku'wr qp' vj g' k' p' f' k' k' f' w' e' n' e' c' u' g . " c' p' f' " vj g' l' w' t { " u
f k' u' e' t' g' v' k' q' p' " k' u' d' t' q' c' f' 0

*85+

J qo kelf g" E" 3230//Rwpluj o gpv/F gcvj " Rgpcn { //Gs wcn
Rtqugewkqp0
F k' u' k' p' e' v' k' q' p' " l' p' " t' g' c' w' o' g' p' v' d' g' w' g' g' p' " e' c' r' k' c' n' i' f' g' h' g' p' f' c' p' w' " c' p' f' " q' v' j' g' t'
r g' t' u' q' u' p' u' " e' q' p' x' k' e' v' g' f' " q' h' h' g' r' p' l' e' g' u' " k' u' " p' q' v' c' t' d' k' t' c' t { 0

*86+

J qo kelf g" E" 3230//Rwpluj o gpv/F gcvj " Rgpcn { //
Eqpukwkwkpcrk { //Lwt { "u' Dwt f gp" qh' Rtqqh0
Vj g" f' gcvj " r gpcn { " rcy " f qgu" p' q' v' xkqr v' g' "WLU0Equn0": vj
cpf "36j "Co gpf u0 "lp" ku' hckwt g" v' k' p' ut v' w' v' j g' lwt { "cu" v' q' c
dwt f gp' qh' r' t' q' q' h' k' p' u' g' r' e' v' k' p' i " vj g' r' gpcn { "v' dg" ko r qugf 0Wp' r' k' g
vj g' i' w' k' v' f' g' v' g' t' o' k' p' c' v' k' q' p' . " vj g' u' g' p' v' g' p' e' k' p' i " h' w' p' e' v' k' q' p' " k' u' " k' p' j' g' t' g' p' w' f'
o q' t' c' n' i' c' p' f' " p' q' t' o' c' v' k' x' g' . " p' q' v' h' e' w' e' n' i' c' p' f' " j' g' p' e' g' . " p' q' v' u' w' e' g' r' v' d' r' g' v' q'
c' d' w' t' f' g' p' " q' h' r' t' q' q' h' s' w' c' p' v' h' e' c' v' k' q' p' 0 Vj g' k' p' ut v' e' v' k' q' u' " c' u' " c' y' j' q' r' g
c' f' g' s' w' c' v' g' n' " i' w' k' f' g' " vj g' lwt { "lp" e' c' t' t' { k' p' i " q' w' " vj g' k' t' " o' q' t' c' n' i' c' p' f'
p' q' t' o' c' v' k' x' g' h' w' p' e' v' k' q' p' 0

*87+

J qo kelf g "E"3230//Rwpluj o gpv/F gcvj "Rgpcn { //Ci i txcv'kpi
Hcevqtu// " Rtlqt" Ej cti g" F luo kuugf " Rwtuwpv" vj " Rrgc
Ci tgggo gpv/Xcrkf k { "cpf "Eqpukwkwkpcrk {0
F wtkpi "vj g" r gpcn { "r j cug"qh'c" ecr kcn'o wtf gt" r tqugewkqp.
vj g" wug. "lp" ci i txcv'kqp. "qh' g' x' k' f' g' p' e' g' " qh' c' " r' t' k' q' t' " c' u' c' w' n' . " c
ej cti g" vj cv' j' cf "dggp" f' t' q' r' g' f' " r' w' t' u' w' p' v' " v' q' " f' g' h' g' p' f' c' p' v' u' " r' r' g' c'
ci tgggo gpv. "f' k' f' " p' q' v' e' q' p' u' k' w' w' g' c' " d' t' g' e' j' " q' h' v' j' g' r' r' g' c' " ci tgggo gpv0
Vj g' k' p' ut q' f' w' e' v' k' q' p' " q' h' g' x' k' f' g' p' e' g' . " r' w' t' u' w' c' p' v' v' q' " Rgp0Eqf g. "E"3; 20f.
hcevqt "d+ " qh' vj g' h' c' e' u' v' w' p' f' g' t' n' k' p' i " e' j' c' t' i' g' u' f' k' u' o' k' u' u' g' f' " c' u' t' c' t' v' q' h'
c' r' r' g' c' " ci tgggo gpv' f' q' u' " p' q' v' x' k' q' r' v' c' " f' g' h' g' p' f' c' p' v' u' " e' q' p' u' k' w' w' k' p' c' n'
t' k' i' j' u' 0 Hwt vj gt. "f ghgpf cpv' f' k' " p' q' v' f' g' o' q' p' u' t' c' v' g' " vj cv' j' g' y' c' u'
r' t' q' o' k' u' g' f' " vj cv' g' x' k' f' g' p' e' g' " qh' vj g' " c' u' c' w' n' " y' q' w' f' " p' q' v' d' g' " w' u' g' f'
c' i' c' l' p' u' v' j' k' o' " k' p' " h' w' t' v' j' g' t' " r' t' q' e' g' g' f' k' p' i' u' 0

*88+

Etlo kpcni' Ncy " E" 7430//Rwpluj o gpv/Rgpcn { " Vtlni' qh
Ecr kcn' Rtqugewkqp- J qo kelf g "E"3230//O kki cv'kpi " Hcevqtu//
F ghgpf cpv'u" *930 " Wptgcuqpcdrig" Dgrkgh' lp" O qtcn
Lwukh' e' c' v' k' q' p' 0
F wtkpi "vj g" r gpcn { "r j cug"qh'c" ecr kcn'o wtf gt" r tqugewkqp.
Rgp0Eqf g. "E"3; 20f. " hcevqt " h+ " y j g' vj g' t' q' h' h' g' p' u' g' y' c' u' e' q' o' o' k' w' g' f'
w' p' f' g' t' " e' k' e' w' o' u' c' p' e' g' u' " y' j' k' e' j' " f' g' h' g' p' f' c' p' v' t' g' c' u' q' p' c' d' n' " d' g' r' k' x' g' f'
v' q' " d' g' " o' q' t' c' n' i' Lwukh' e' c' v' k' q' p' " q' t' " g' z' v' p' w' c' v' k' q' p' " h' q' t' " f' g' h' g' p' f' c' p' v' u'
e' q' p' f' w' e' v' : " f' k' f' " p' q' v' k' o' r' t' q' r' g' t' n' " h' o' k' e' q' p' u' k' f' g' t' c' v' k' q' p' " q' h' b' k' k' i' c' v' k' p' i'
g' x' k' f' g' p' e' g' " q' h' f' g' h' g' p' f' c' p' v' u' " w' p' t' g' c' u' q' p' c' d' r' i' g' " d' g' r' k' g' h' " vj cv' j' k' u' x' l' e' v' o' .

F gvevkg'Y knkco u'y cu'nknkf "lp" c'ur tc{ "qh'i wphktg"lp"ltqp v
qh'j ku'uqpu'f c{ectg'egpvtg"lp"vj g'gctn{ "gxgpkpi "qh'Qevdgt
53.'3; : 70F ghgpf cpv'cniqi 'y kj 'eqf ghgpf cpw'F wcp'g'O qqf {.
Twdgp"O quu."Xqncktg"Y knkco u."F cxf "Dgpvrg{."cpf "Tgge{
Eqqr gt+y cu'ej cti gf "y kj 'y g'o wtf gt"qh'F gvevkg'Y knkco u
cpf 'y kj 'eqpur ktce{ "v'o wtf gt"Y knkco u⁴

4 Cv' yj g' i wkn' r j cug' qh' yj g' vkn' f ghgpf cpv' y cu
vktgf 'lqkpn{ 'y kj 'eqf ghgpf cpv'O quu'dghqtg'ugr ctcvg
lvtkgu."dw' cv' yj g' r gpcn{ " r j cug." f ghgpf cpv' y cu
vktgf 'ugr ctcvgn{OEqf ghgpf cpw'O qqf {."Eqqr gt."cpf
Y knkco u'y gtg'vktgf 'ugr ctcvgn{ 'htqo "f ghgpf cpvO

Vj g' gxf gpeg" tgi ctf kpi " f ghgpf cpv'u' lpxqkgo gpv' kp" yj g
eqpur ktce{ " cpf " yj g' o wtf gt" qh' F gvevkg' Y knkco u" eco g
r tko ctkn{ 'htqo " yj g'vkuo qp{ 'qh'ko o wpk gf "y kpguug/F cxf
Dgpvrg{."Lghgtg{ "Dt{cpv."Crcf tqp"J wpgt."cpf "V{tqpg"J lemuO
Vj gk' vkuo qp{." kp" cf f kkp" vj " vkuo qp{ " htqo " r gtuqpu
y j q"y kpguugf "yj g'uj qqvpi ."qt"v"y j qo "f ghgpf cpv'o cf g
kpetko kpcvpi " ucvggo gpw." qt" y j q" y gtg" lpxqkxf " kp" yj g
f kur qucn'qh'v' g'o wtf gt'y gcr qp."cu'y gni'cu'dcn'ku'eu'gxf gpeg
cpf "vgrj qpg"tgeqt u." gucdnkj gf " yj cv'f ghgpf cpv' f kgevgf
xctkqu'r rpu'ht"qj gtu'v'kn'Y knkco u."cpf "wko cvgn{ 'yj cv
f ghgpf cpv'j ko ugh'nknkf "Y knkco uO

F ghgpf cpv'vknkkgf Lghgtg{ 'Dt{ cpv'v'o wtf gt"Y knkco u."vknpi
j ko " yj cv'j g'y kuj gf "v"r tggp'Y knkco u'u'vkuo qp{ "cv'yj g
Ectr gpvt'lddgt{ "vkn'F ghgpf cpv'gpi ci gf 'kp'uqo g'r rppkpi
cevknk{ "y kj "Dt{cpv."dw'y j gp"Dt{cpv'hw'p'q"Y knkco u
y cu'pq'c" ugewk{ "i wctf."cu'f ghgpf cpv'j cf "f gcrctgf."dw
kpv'gf "y cu'c'r knkkg'qhtegt."Dt{cpv'cppqpegf "j g'y qwf "p'qv
r ctvkr cvgO

Qp'Qevdgt'46.'3; : 7."eqf ghgpf cpv'Xqncktg"Y knkco u'vknkkgf
Crcf tqp"J wpgt"v"r gthqto " yj g'o wtf gt."ht" yj g'cppqpegf
r wtr qug'qh'r tggp'vpi " yj g'f gvevkg'u'vkuo qp{ "kp"eqw'v'O Qp
Qevdgt'47.'3; : 7."Xqncktg"ftq'g'y kj "J wpgt"v"f ghgpf cpv'u
j qo g'O Xqncktg" gpvtgf " yj g' tgu'f gpeg" cpf "tgwtpgf "y kj "c
y gcr qp'O Xqncktg" i qv' kvq" cp" cwqo qdkrg' kf gpv'ktgf "d{ "c
y kpguu" vj " yj g'uj qqvpi "qh' yj g' f gvevkg'cu' dglpi "uko kct
v" yj g' xgj kerg" htqo " y j lej " yj g'uj qw" y gtg" hktgf O' J wpgt
hmqy gf "Xqncktg"v" c"m'cvkq" c" hgy "dn'emi' r cu'c" uej qqn
cpf "y cu' kputvevgf "d{ "Xqncktg"v" y ckl'ht" cp" qtcpi g/cpf /
y j kg"Vq{ qvc"r kmw "v'wenly kj "c"eco r gt"uj gni'qp" yj g'dcenO
Xqncktg" kputvevgf "J wpgt"v" f tkxg" d{ " yj g'r kmw "v'wenl'cpf
uj qqv' yj g'kv'p'gf "xlvko "kp" yj g'j gcf "chgt" yj g'ncwtg." y j qo
j g' f guetkdgf ." j cf " r lengf " w " j ku' ej kf " htqo " yj g' uej qqnO
Xqncktg" *933 "ucv'gf "j g' pggf gf "v" i gv' kputvevqpu' htqo
f ghgpf cpv'tgi ctf kpi "y j gp" yj g'xlvko "y qwf "cttkxgO Xqncktg

yj gp'tgtkxgf "yj g'y gcr qp'htqo 'j ku'cwqo qdkrg'cpf 'i cxg'kv'q
J wpgtO

J wpgt"hw'p'f "j ko ugh'n'wpcdr'v"uj qqv' yj g'xlvko "y j gp"j g
cttkxgf O'J wpgt"o gv'Xqncktg"ncvtg"lp" yj g'gxgpkpi ."lphqto kpi
j ko " yj cv'j g"j cf "pq'ecttkgf "qw" yj g'uj qqvpi "cpf "qdugtxkpi
yj cv'j g" yj qw' j v' yj g'kv'p'gf "xlvko "y cu'c'r knkkg'qhtegt"cpf
pq'c'ugewk{ 'i wctf O

Vy q'r gtuqpu'y j q'htxgf "pgct" yj g' Hckj "Dcr vkn'Ej wtej "Uej qqn
kp" Ecpqi c" Rctm" y j gtg" yj g'uj qqvpi "qh'F gvevkg'Y knkco u
qewt'gf."vknkkgf "yj cv'qp"Qevdgt'47.'3; : 7." yj g' "qdugtxgf
eqf ghgpf cpw'O qqf { "cpf "O quu'kp"cp'cwqo qdkrg' r ctn'f "pgct
yj g'uej qqnO C" yj kt'f "o cp'ugcv'f "kp" yj g'tgct'qh'v' g'xgj kerg" o c {
j cxg'dggp" f ghgpf cpvO

F ghgpf cpv'cniq'br r tqcej gf "F cxf "Dgpvrg{ "y q'qt" yj tgg'y gmu
dghqtg"J cmqy ggp'kp'3; : 7."ht'cuukcpeg'kp'k'p' kpi "c'eqp'v'cev
nkngtO'Dgpvrg{ "u'vknkkgf "V{tqpg"J lemu."y j q"eqp'ht'gf "y kj
O quu."Dgpvrg{."cpf "f ghgpf cpv'tgi ctf kpi "v'to u'O'F ghgpf cpv
f kgevgf "J lemu"v'eqo g'v'j ku'j qo gO

Vy q'qt" yj tgg'f c{ u'dghqtg"J cmqy ggp'kp'3; : 7."O quu."Eqqr gt.
cpf " Dgpvrg{ " r lengf " w " J lemu." lphqto kpi " j ko " yj g{ " y gtg
i qkpi "v"uj qy "j ko "y j cv'j g'y cu'uw' r qugf "v" f qO'Y j gp" yj g
o gp"cttkxgf "cv'f ghgpf cpv'u"j qo g."J lemu"y cu'k'p'v'qf wegf "v'
f ghgpf cpv'cu'v'j g'f tkxgtO

F ghgpf cpv'y gpv'y kj "Dgpvrg{ "v'c'htq'q'w'v' qk'v'cp'f 'kputvevgf
j ko "v"m'q'ht'c"uo cni'qtcpi g"Vq{ qvc"qt" F cvw'p"v'wenly kj
c"eco r gt"uj gni'qp"kv"ucv'vpi "yj cv'v'j g'o cp"kp" yj g'v'wenly cu
yj g'r gtuq'p"j g'y cpv'f "v"j cxg'nknkf."cpf "yj cv'Dgpvrg{ "y cu'v'
eqp'cev'O quu'y j gp"Dgpvrg{ "ucy "yj g'v'wenl'cp'f 'lphqto "j ko "qh
yj g'f kgev'q'v'j g'v'wenly cu'j gcf gfO

Dgpvrg{ 'y ckgf '42'b kpwgu."f kf "pq'v'ugg' yj g'v'wem'cp'f 'tge'kxgf
pq'tgur qpug'y j gp"j g'cev'x'cv'f "O quu'u'r ci gtO

Kp' yj g'o gcpvko g."O quu'j cf "f tkxgp"J lemu'cpf "Eqqr gt"v" yj g
ej wtej "uej qqn"y j gtg"j g' i cxg' yj go "kputvevqpu'tgi ctf kpi
yj g'o wtf gtO'Y j krg' yj g{ "y ckgf."O quu'ucv'gf "yj cv'r tgg'k'w
cwgo r w'qp" yj g'xlvko u'v'knkkg'j cf "h'knkf."kp"qpg'ecug'dge'cwug
yj g' i wpo cp'j cf "v'uv'j ku'p'gtxgO

J lemu" qdugtxgf " yj g' qtcpi g/cpf /y j kg" v'wenl' cttkxg" cv' yj g
uej qqn"dw'k'f gr ctv'f "dghqtg" yj g' r rcp"eqw'f "dg"gzgewgf O
F ghgpf cpv'ncvtg"dg'cv'gf "O quu."cpf "eqo r r'k'p'gf "yj cv'pqy "yj g
xlvko "y qwf "dg'c'drg'v'v'knkkg' "ci c'k'p'v'j ko "yj g'hmqy kpi "f c{O

O quu'cuwtgf "j ko "vj g{"y qwf "nkn"vj g"xleko "dghqtg"vj gp0 *934

Qp"vj g"y c{"j qo g."Dgpwv{"kphqto gf"J lemu"vj cv'k'y cu ko r tqdcdrng"vj cv'f ghgpf cpv'y qwf "r c{"j ko "o qtg"vj cp"chgy j wptgf "f qmctu"ht"j ku"r ctvkr cvkp"lp"vj g"etko g0J lemu cppqwpgef "j ku'tgnwvpeg"vq'r ctvkr cvg'htvj gt0

Cp"ceswkvpcpeg"qh"J lemu"tgecmgf "vj cv'J lemu"j cf "uckf "vq j ko "vj cv'j g"y cu'r ctv'qhi"r rcp"vq"uj qqv"r gtuqp"pgct" c uej qqn"vj cv'cu"J lemu"j cf "vgu"hgkf +j g'j cf "dggp'r lengf "vr "lp c'iko qwukpg"cpf "j cf "uggp"vj g"xleko "cpf "vj g'ectu"vj cv'y gtg"vq dg"wgf. "dw"vj cv'j g'j cf "i qwgp"uctgf 0Cf f kkpqcm{"J lemu" i krtkpgf "tgecmgf "vj cv'J lemu"j cf "vqr"j gt "vj g'r rcp"y cu"vq"nkn c'r rkeg"qhlegf. "cpf "vj cv'j g'j cf "dggp"uj qy p'y j gtg"vj g'qhlegf r lengf "vr "j ku'up"chgt "uej qqr0J lemu"vqr"j gt"j g'y cu'wv r qugf vq"dg"vj g'f tkxg. "dw"vj cv'y j gp"vj g"xleko "cttkxgf "htqo "cp wgzr gevqf "f kgevq. "vj g' "cdcpf qpgf "vj g'r rcp0

Vgrj j qpg" tgeqtu" f kuenqgf " r tqrlke" vgrj j qpg" eqpcev dgy ggp" vj g" j qo gu. " tgukf gpegu. " cpf " r ci gt" pwo dgtu" qh Dgpwv{. " O quu. "Eqqr gt. " O qqf {." cpf " Xqncktg" Y knko u" lp vj g" y ggm' r tgegf kpi " Qevqdtg" 53." 3; : 70' Y j gp" f ghgpf cpv'u dtkgecug" uwdugs wgvv" y cu'ugk gf "htqo " j ku'ukvgt"j qo g. kv'eqpckpgf "pqv'vqpu"qh"vj g"pco gu"cpf "vgrj j qpg"pwo dgtu qh"J lemu. "O qqf {." cpf "O quu. "cu'y gni"cu"Xqncktg" Y knko u" vgrj j qpg"pwo dgt"cpf "vj g'pco gu"V{tqpg"cpf "Tgge{0

Vj g" r tqugewkqp"u" gxkf gpeg" guvdrkj gf " vj cv' f ghgpf cpv wko cvgn" "vqni"o cvgtu"kvq"j ku"qy p"j cpf u0'Cu"pqvqf. "lp Qevqdtg" 3; : 7." f ghgpf cpv' y cu'qp" vkrn'ht" vj g" tqddgt {" qh Ectr gpvt. "cpf "F gvgevxg" Y knko u. "cu"lpxguki cvkpi "qhlegf. uc'v'evqwpugn'vdrng'f wtkpi "vj g'v'kr0F ghgpf cpv'r ckf "j ku'itkpgf Uxg" Dcmqy "c" pgo kpcn' uwo " vq" vgnk{" "lp" j ku" dgj cih" qp Qevqdtg" 52." 3; : 7." cpf "vq'r tqxkf g'f ghgpf cpv'y kj "c' hcnig'crkdk cv'vj g'v'kr0F ghgpf cpv'zr rckpgf "vq" Dcmqy "vj cv'j g'j cf "pqv eqo o kvgf "vj g" tqddgt {" dw"j cf "ngp"j ku'ect"vq" c" eqwukp" y j q j cf "eqo o kvgf "vj g' qhngpu0J g'y cu'vr ugv'cdqw"vj g'v'krn'cpf uckf "j g'y kj gf "vj g'r rkeg"qhlegf "y gtg'f gcf 0Dcmqy "qdugtxgf vj cv'Eqqr gt. "O qqf {." cpf "O quu" ceeqo r cplgf "f ghgpf cpv'vq cpf "htqo "eqwv. "cpf "O qqf {" cpf "O quu" y gtg'f gvckgf "vq" f tkxg Dcmqy "j qo g0

Grij wgDtqo hgrf. "cp'ceswkvpcpeg"qh'f ghgpf cpv'u"htqo "b cp{ {gctu'dghqtg. "y cu'cv'j g'eqvtv' qwug"qp"Qevqdtg" 53." 3; : 7." cpf j cr r gpgf "vq" qdugtxgf ghgpf cpv'u"v'kr0F ghgpf cpv'r r tqcej gf j ko "cpf "lpxkfg" j ko "vq" i q"j qo g'y kj "j ko "f wtkpi "vj g'npej dtgcn0F ghgpf cpv'vqr "Dtqo hgrf "vj cv'j g'j cf "pqv'eqo o kvgf vj g' tqddgt {" cpf "vj cv'j g'j cf "dggp"ugv'vr "d {" F gvgevxg" Y knko u

cpf "Ectr gpvt. "dw" vj cv'f ghgpf cpv'u"ect" j cf "dggp" wugf "kp vj g" tqddgt {0F ghgpf cpv'ucvqf "j g" y qwf "pqv" vqrctvg" dglpi ugv'vr "d {" c" r rkeg"qhlegf "cpf "y qwf "pqv"kpewt" c" eqpxlekvq y kj qw'ugev'kpi "tgxgpi g0F ghgpf cpv'uckf "j g" y qwf "oi gv0 vj g'qhlegf "cpf "y qwf "j cxg"uqo gqpg"cto gf "y kj "c" y gcr qp oi gv0 *935 "F gvgevxg" Y knko u" vj cv' gxpki 0J g" uckf "j g j cf "j cf "Y knko u" hqmqy gf "cpf "mpgy "j ku'tqwkpg0J g'uj qy gf Dtqo hgrf "c" y gcr qp"vj cv'er r gctgf "vq" dg"cp" W' k'cpf "uckf "kv hkgf "32"vq"42"tqwpf u'r gt "ugeqpf "lp'tcr kf "uueguukp0J g'uckf j g'j cf "b qtg"vj cp'qpg'eqpvtcev'hkngt"vq'f q'vj g'lqd0Dtqo hgrf uwdugs wgvv{" kf gpv'kfgf "vj g'o vtf gt"y gcr qp"cu'uko krt "vq"vj g i wv'vj cv'f ghgpf cpv'uj qy gf "j ko 0

Y j kv" vj g' "y gtg" cv'f ghgpf cpv'u" j qo g. " f ghgpf cpv' o cf g" c vgrj j qpg'ecm "f wtkpi "y j kv "Dtqo hgrf "qxgtj gctf "f ghgpf cpv uc {" vj cv'gxgt {" daf {" j cf "vq" dg"vqi gvj gt "cv'3822" j qwtu"qt "ok0 y qwf "pqv'y qtn0Qxgt "hpej . "f ghgpf cpv'uckf "j g'eqwf "pqv'dgct vq" dg"kp" lckn' y j kv" vj g'o cp" y j q'j cf "ugv"j ko "vr "y qwf "dg cv"r r kple" gplq {" kpi "htg0J g" uckf "j g" y qwf "rko kpcv" j ko 0 W' qp"vj gk "tgv'p"vq"vj g'Ucp "Hgtpcpf q'eqvtv' qwug. "Dtqo hgrf qxgtj gctf "f ghgpf cpv'qp"vj g'r j qpg'eqo r rcklpi "vj cv'uo gqpg eqwf "pqv"dg"nqevqf. "cpf "ucv'kpi "vj cv'j g"cpf "qj gtu"j cf "vq dg"cv'j ku"j qo g'cv'c"egtckp"ko g'cpf "vj cv'ok0"j cf "vq" qeewt cdqw" 6-22" q'emv'0Dtqo hgrf "y gpv'vq" vgnk{" "lp" cpv'j gt ecug" ctqwpf "5-22" qt "5-52" vj cv'chgtppq. "cpf "vj gp" j g'cpf f ghgpf cpv' rgh" vj g' eqvtv' qwug" vqi gvj g0 Vgrj j qpg" tgeqtu eqttqdtcvqf "Dtqo hgrf "u" vgnko qp {" tgi ctf kpi "f ghgpf cpv'u vgrj j qpg'eqpcev0

F gvgevxg" Y knko u"uki pgf "j ku'up"qw"qh"vj g" Hckj "Dcr kvv Ej vtej "Uej qqn'cv'7-62"r 0b 0cpf "y cu'i wppgf "f qy p'cu"j g'cpf j ku'up" cr r tqcej gf "vj gk" r ctngf "xgj keng"cp" qtcp" g' r kmv' vteny kj "c'eco r gt "uj gni" Y knko u" y cu'j kv'd {" gki j v'dwngv. vy q'qh" y j kv "r tqxgf "h'v'v'0J ku'vten'cnq" y cu'tkf f rnf "y kj dwngv. "cu" y gtg" pgtcd {" y cmu" cpf "gxgp" vj g' kv'v'ktq" qh" vj g uej qqn'v'wewt g0

C" y qo cp" y j q" y cu" r tgv'p" r kknpi "vr "j gt" uqp" htqo "vj g uej qqn'uj qtvr {" dghqtg" 8-22" r 0b 0qp" Qevqdtg" 53." 3; : 7." j gctf vj g'i vphk0Vj g'dq {" tgr qtvgf "vj cv'kv'uwv'gf "rkn" c" o cej kpg i w0Vj g'b qv' gt "cpf "ej kf "vq'qn'eqxgt. "dw'gxgpwcm {" go gti gf vq"ugg" F gvgevxg" Y knko u"unwo r gf "ci ckpu"j ku'xgj keng" y kj j ku'up" y ggr kpi "pgctd {" 0Qj gt" y kpguugu" j gctf "vj g" i vphk g cpf "qdugtxgf "vj g'xleko "u'dqf {" unwo r gf "ci ckpu"j g'v'tven0Vj g r rkeg' tgegxgf "vj g'htu'ecm'tgr qt'kpi "vj g'hknkpi "cv'7-66"r 0b 0

Xctkqu'v' kpguugu'ucy "c'i tc {" kuj "cwqo qdkng" i q'vr "cpf "f qy p vj g'lv'ggv'k'p'ht'qv'qh"vj g'uej qqn'v'xgt'cn'ko gu'cv'r r tqzko cvgn {" 7-52" r 0b 0' vj cv' gxpki 0' Qpg" qh" vj g'ug" y kpguugu" j gctf "vj g

i wphkg"cpf "ucy "vj g"uco g"xgj kerg"eqo g"wr "vj g"utggv"cpf tcr kf n"ceegrctcv"q"82"qt"87"o kgu"r gt"j qwt0Vj g"dtqvj gt qh'vj ku'y kpguu"cr r tqcej gf "vj g"xgj kerg"q"cf xkug"vj g"ftkxgt vj cv'j ku'j gcf rki j w'y gtg"pqv'qp0Vj g'y kpguu'y cu'pqv'egtvcip y j gjv gt'vj g'ftkxgt/cr r ctgpnv' 'vj g'luqrg'qeewr cpv'y cu'Chkcep/Co gtlecp."J kur cple."qt"Y j kg. "vj qwi j "j g"tgr qtvgf "q"vj g r qrlkg'vj cv'vj g'ftkxgt'y cu'Y j kg0

C" r gtuqp" qp" vj g" i tqwpf u' qh' vj g" Hckj " Dcr vku' Uej qqn qp" vj g" gxgplpi " qh' vj g" o wfgt " j gctf " y j cv' j g" vj qwi j v y gtg"htgetcengtu"gzr mlf lpi "cpf "ucy "cp" *936 "Qrf uo qdkg. r quukdn " y j kg. "ur ggf lpi " f qy p" vj g" utggv"lp" htqp' qh' vj g r tqr gtv' 'y kj "ku'rki j w'qht0C"j wudcpf "cpf "y klg"ftkxkpi "pgct vj g'uej qqn'chgt"7-52'r 0'0'qp"Qevqdtg"53"ucy "c"rki j v'eqmtgf hwm'uk g" cwqo qdkg."r quukdn "c" E j gxtqrgv"qt" Qrf uo qdkg. ur ggf lpi "cy c{"cv'dgvy ggp"67"cpf "82"o kgu"r gt"j qwt0Y j gp vj g{"cttkxgf "cv'vj g'uej qqn"vj g{"qdugtxgf "F gvevkg"Y knko u unwo r gf "ci ckpu"j ku' vtvm" f gcf 0'Vj g"y qo cp" vj qwi j v'vj g xgj kerg'uj g'j cf "uggp"ur ggf lpi "cy c{"tugoo drgf "c"r j qwi tcr j qh'vj g"cwqo qdkg"lf gpvhtgf "cu"vj g"qpg"fg hgpfp cpv'j cf "dggp wulpi "y kj "Dtqoo hgrf "vj cv'uco g"fc{0'Vj ku'cwqo qdkg"y cu c"y q/f qqt "dmv/cpf /y j kg"Qrf uo qdkg"vj cv'j cf "dggp"uqrgp lp"Ugr wxgf c"qp"Qevqdtg"44."3; : 70'Vj g'cwqo qdkg"j cf "dggp r ctngf "hqt"cp"gzvpgf gf "r gtlkf "dghqtg"Qevqdtg"53."3; : 7."lp"c tgukf gpvckp'gki j dqtj qaf 'lp"Ecpqi c'Retn0C'tgukf gpv'p'qvgf 'vj g rkegpug'pwo dgt"cpf "vguhtgf "vj cv'vj g"cwqo qdkg"y cu'r ctngf qp"vj g"utggv'qp"vj g"o qtpkpi "qh'vj g"o wfgt."dw"vj cv'y j gp uj g'tgwtpgf "htqo "y qtmctqwpf "7-22'r 0'0'ky cu'i qpg0Y j gp vj g"cwqo qdkg"y cu'tgeqxtgf "chgt"c"kr "htqo "eqf ghgpf cpv O qaf {"+qp"P qxgo dgt"9."3; : 7."vj g'hgf i g'qh'vj g'ftkxgt"u'f qqt y cu'eqxgtgf "lp"i wpuj qv'tgukf wg"qh'vj g"v'r g'vj cv'vj g"o wfgt y gcr qp"go kwgf "r tqhwgn(0'Vj g'htqpv'r ctv'qh'vj g"cwqo qdkg cuq"eqpvcpgf "lpkg"gzr gpf gf "uj gm'eculpi u0

Hw'vj gt'g'xkf gpeg'tgeqxtgf 'lp"vj g'r gtlkf "hqm'y lpi "vj g'etko g y cu'qhtgtf "q'r tqxgf ghgpf cpv'u'ewr cdkk{"hqt"vj g'uj qqvpi 0 F ghgpf cpv'cppqwpgef "q" F cxf "Dgpvrg{"qp"vj g" gxgplpi "qh Qevqdtg"53."3; : 7."vj cv'j g'oi qv'f qy p"j ku'gh'cpf "000"vqniectg qh'vj cv'cuu'j ku'gh'j)sic_06"Y j gp"Dgpvrg{"cungf "y j cv'j g'o gcpv. f ghgpf cpv'uckf "Dgpvrg{"y qwf "ugg'kv'qp"vj g'pgy u'vj cv'gxgplpi 0

Cv'f ghgpf cpv'u" tgs wguv" Dgpvrg{"y gpv'q" f ghgpf cpv'u"j qo g cdqw! -22'r 0'0'F ghgpf cpv'r r gctgf "gzekgf "cpf "tgr gcvf "vj cv j g'j cf "ovcngp"ectg"qh'vj cv'cuu'0'o"Y j kg"Dgpvrg{"y qtngf "vq tgr ckt"O qaf {"u'cwqo qdkg."j g'j gctf "f ghgpf cpv'v'gmio qaf {"j g y cu'lwtr tkugf "cv'j qy "o ep{"uj qw'vj g"W k'j cf "htgf "y kj "qpg rki j vt wrlqhv'j g'tki i g0F ghgpf cpv'ucv'gf "j g'j cf "vgu'htgf "vj g W k'lp"j ku'dcentf ctf "gctrlgt"vj cv'f c{0'F ghgpf cpv'tgr gcvf "vj cv j g'oi qv'vj cv'cuu"o {"ugr0Kj cf "q" f q" k0Ko gcp0Kj cf "q" f q"kv

o {"ugr0I w{u'y qp)v'cng'ectg"qh'dwulpguu0Kj cf "q"v'cng'ectg qh'vj ku'00o {"ugr00

Crk'Y qaf uqp'tgegxgf "c'v'grj r qpg'ecmltqo 'j ku'htkpf 'O qaf { dgvy ggp"8-22"r 0'0'cpf " : -22"r 0'0'qp"Qevqdtg"53."3; : 70'C eqwr ng'qh'j qwtu'rcvgt.'O qaf {"cttkxgf "cv'Y qaf uqp'u'cr ctvo gpv0 J g"uggo gf "f kwtgdg"cpf "uckf "j g'y cpvgf "q"ftqr "qht'uqo g unevu0'J g"y cu'ectt{"lpi "c" rcti g"i tggp" f w'ghn'dci ."y j lej Y qaf uqp'f k'gevgf "j ko "q"r'ncg'lp"vj g'emugv0Vj ku'vguko qp{ y cu'eqp'htko gf "d{"O tu0Y qaf uqp0C'hgy "f c{u'rcvgt.'O qaf {"u i k'htkpf "v'grj r qpgf "Crk' Y qaf uqp" cpf "v'rf "j ko "q" v'cng gxgt {"vj lpi "qww'qh'vj g'f w'ghn'dci "gzegr v'vj g"W k'cpf "vj cv'vj g r qrlkg'y gtg"qp"vj g'y c{0'Y qaf uqp"gzco kpgf "vj g'f w'ghn'dci . y j lej "eqpvcpgf "ugxgtcnly gcr qpu 'lpenw' lpi "c'o qf h'kgf "O ce *937 'O/32"cuucwv'r ku'q'ncpf "c'erkr "hqt"vj g'r ku'q'ni0J "g'wtpgf vj g'f w'ghn'dci "cpf "i wp'qxgt "q"vj g'r qrlkg0Dcnk'v'ku'g'xkf gpeg kpf lcv'gf "vj cv'vj g'r ku'q'ni'ly cu'vj g'o wfgt 'y gcr qp0

Ctxkg" Ecttqm" y j q" j cf " dggp" eqpxlevgf " qh' dwi rct {" cpf gucr g."dgeco g"ces wclpvgf "y kj "f ghgpf cpv'y j kg"dq'vj "o gp y gtg'lp'ectegtcv'gf "lp"vj g'Nqu'cpi grgu'Eqwv'p' 'lck0F ghgpf cpv v'rf "j ko "vj cv'j g'j cf "uj qv'F gvevkg"Y knko u'ugxgtcn'ko gu'c'p'f vj gp'ur gf "cy c{"q'c'Mo ctv'lw'gt'c'p'f "cmgf "q'c'bcngur gtuqp'lp qtf gt'q'g'ucv'ckuj "cp"crkd0F ghgpf cpv'v'q'f "Ecttqm'vj cv'j g'vj gp t'gwtpgf "j qo g."y j gtg"j g'i cxg"O qaf {" "vj g"o wfgt "y gcr qp0 F ghgpf cpv'cppqwpgef "vj cv'j g'y cu'i qkpi "q"r'ncg'vj g"drco g hqt"vj g'uj qqvpi "qp"O qaf {0'F ghgpf cpv'gzr r'clp'gf "vj cv'j g'j cf uj qv'F gvevkg"Y knko u'dgecv'w'g"Y knko u'j cf "ctt'g'v'gf "j ko 0 J g'f guetkdgf "vj g'f gv'cku'qh'vj g'uj qqvpi . 'pqv'pi "j qy "vj g'dqf {" j cf "lgtngf "y j kg'j g'htgf . 'cpf "ucv'pi "vj cv'j ku'ect'ucv'ngf "y j kg j g'y cu'v' {"lpi "q"i gv'cy c{"u'q'j g'or wo r gf "u'qo g'o qtg'dw'ng'v' lp'v'j ku'y j kg'cuu.0'hpqy lpi "vj cv'vj g'q'ht'egt'c'rtgcf {"y cu'f gcf 0 J g'cuq'ucv'gf "j g'y qwf "j cxg'h'kn'gf "vj g'q'ht'egt'u'up'k'h'j g'j cf eqo g'lp'v'q'vj g'r'kp'g'qh'htg."dgecv'w'g'vj g'ej kf "r tqdcdn' "y qwf i tqy "wr "q"dg"c"r qrlkg'qh'htg"r'kn'g"j ku'hw'j gt0Ecttqm'ucv'gf vj cv'f ghgpf cpv'uo kgf "cpf "rwi j gf "cu'j g't'g'v'gf "j ku'lw'qt 0

F cxf "Dgpvrg{" "vgu'htgf "vj cv'j g"ur qng"y kj "Tgge{"Eqqr gt cdqw"vj g'etko g"y j kg"vj g{"y gtg'lp'ectegtcv'gf "v'q'j g'j gt."cpf vj cv'Eqqr gt"uckf "vj cv'j g'y cu'lp"vj g'ect"cpf "cv'vj g"j qwug. dgecv'w'g'j g'y cu'lw'r r qugf "q'dg'vj g'uj qqvgt.'dw'vj cv'j g'dgeco g ht ki j v'gpgf "cpf "f kf "pqv'y cpv'v'q" f q'vj g'uj qqvpi 0

Kp" cp'v'ekr cv'k'p" qh' c" r quukdn' crkd' f ghgpg" o gp'v'q'p'gf "d{ ugxgtcnly kpguugu. 'lp'xq'v'k'pi "f ghgpf cpv'u'r t'gugpeg'cv'c'Mo ctv uq'gt' u'q'p' chgt"vj g'uj qqvpi ."c"r qrlkg'qh'ht'egt'vgu'htgf "vj cv j g'j cf "f tkxgp"vj g't'q'w'g'htqo "vj g'Ucp"Hgt'p'cp'f q'eqw'vj qwug. v'q'f ghgpf cpv'u"j qo g"qp"Ecpv'ctc"utggv"v'q"vj g'Hckj "Dcr vku' Ej wtej "Uej qqn'lp"Ecpqi c"Rctm"cpf "h'q'wpf "vj cv'f ghgpf cpv

eqwf "j cxg" eqo o kwgf "vj g" o wfg gt "cpf" uwm'cttkxgf "cv'vj g Mo ctv'cv'vj g'ko g'lpf kcvgf "d{ 'r qvqpv'cn'ckdk'y kpguugu

Vgrgr j ppg'tgeqtf u'eqphko gf 'vj cv'vj g'g'y cu'vgrgr j ppg'eqpvcv dgw ggp'vj g'vgrgr j ppg'pwo dgtu'qhf ghgpf cpv'O quu.'Eqqr gt. Dgpv'g{.'J lenu.'cpf'O qqf { 'f wtkpi 'vj g'chgtppqpp'cpf'gxgplpi qh'Qevdgt"53."3; : 70'Vj g'dt'ghecug'ugk gf "Itqo "f ghgpf cpv'u ukvgt'u" j go g' eqp'w'p'gf "c" r'keg' qh' r'cr gt "dgctkpi " Grlj wg Dtqqo h'grf 'u'vgrgr j ppg'pwo dgt0

2. Defense case

F ghgpf cpv' r tgu'p'v'gf "gxkf gpeg" vj" uwr r qtv' j ku" erlko " vj cv eqf ghgpf cpv'O qqf { 'j cf "nkrng "F gvev'xg"Y krlko u'O qqf { y cu' ko r'kecv'gf "lp" vj g' Ectr gpvgt "tqddgt { " cpf " cnuq" j cf dggp" w'p'gf "lpxguki cvkq" d{ "F gvev'xg"Y krlko u"lp" *938 eqpp'g'v'q"p" y kj " cpq'j gt "etko g'O Rtq'ugewkq" gxkf gpeg" v'gf O qqf { " vj" vj g" o wfg gt" y gcr qp." cpf " f ghg'p'ug" gxkf gpeg uwi i gu'gf "vj cv'r qrl'eg'lp'xguki cvkq" j cf 'h'ew'ug'f'qp'O qqf {OC r'gtu'p"y j q' o gv'O qqf { "lp"Qevdgt"3; : 7'ucv'gf"vj cv'O qqf { j cf "uck' cv'vj g'ko g'vj cv'j g'y cu'cp'ckdk'y kpguu'lp" c'ht'gpf 'u tqddgt { "v'kcn"vj cv'cp'q'ht'eg"y cu'c'ng{ "y kpguu'lp"vj g'ecug. cpf "vj cv'O qqf { "j cf "g'zr t'gu'gf "j ku"qy p" t'gu'k'ng" vj "oi gv' o vj g'q'ht'eg"O'cp'q'j gt "y kpguu'v'g'k'gf "vj cv'O qqf { "j cf "ucv'gf j g'j cf "eqo o kwgf "vj g'Ectr gpvgt "tqddgt {."cpf "vj cv'f ghgpf cpv j cf "pq'v'dggp"lpx'q'k'gf O'Vj g'f ghg'p'ug'cnuq"r t'gu'p'v'gf "gxkf gpeg l'p'f'k'cv'kpi "vj cv'O qqf { "y qwf "j cxg" dggp"cd'ng"v"i gv'v"vj g o wfg gt "uegpg"qp"Qevdgt"53."3; : 7."lp"ko g"v"eqo o k'v'j g o wfg gt0

F ghgpf cpv'cnuq"r t'gu'p'v'gf "gxkf gpeg"uwi i gu'kpi "vj cv'dgecv'ug j g'y cu'cy ctg'q'ht' r'keg'uw'x'g'k'p'eg'f wtkpi "vj g'r' g'k'q'f' h'g'cf'kpi w' "v'q"vj g'j' qo k'ef g."cpf "d'gecv'ug"j' g'y cu't'guki p'gf "v"i q'kpi "v'q r' t'ku'p'ht' "vj g'Ectr gpvgt "tqddgt { "cpf "y cu'cy ctg'vj cv'F gvev'xg Y krlko u" y cu' p'q'v' c" uki p'ht'ecpv' y kpguu' lp" vj g' Ectr gpvgt tqddgt { " v'kcn" j g" y qwf " pq'v' j cxg" w'p'gf'gt'v'ngp" vj" o wfg gt F gvev'xg"Y krlko u'O'q'rl'eg"t'geqtf u'l'p'f'k'cv'gf "f ghgpf cpv'y cu w'p'gf "uw'x'g'k'p'eg"ht'qo "r'v'g" C'wi wuv'3; : 7"wp'kri'Ugr vgo dgt 3; : "3; : 7." cpf " vj cv' uw'x'g'k'p'eg" t'gu'wo gf " qp" Qevdgt" 53. 3; : 7."chgt"vj g'j' qo k'ef g'O'F ghgpf cpv'r t'gu'p'v'gf "gxkf gpeg"vj cv r'q'rl'eg"t'geqtf u'y g't'g'hw'w'f'cpf "vj cv'vj g'uw'x'g'k'p'eg"o c{ 'j' cxg eqp'w'p'gf "dgw ggp"Ugr vgo dgt"3; : "3; : 7."cpf "vj g'ko g'q'ht'vj g j qo k'ef g'O'k'f'cf'f'k'k'q'p."o cp{ 'ht'g'p'f' u.'p'gki j d'qtu.'cpf "t'g'v'x'g'u qh' f ghgpf cpv'u" t'g'v'gf " g'k'j gt " vj cv' vj g{ " q'dugt'x'gf " cr r'ct'gpv uw'x'g'k'p'eg" qh' f ghgpf cpv' q' " vj cv'f ghgpf cpv' j cf " g'zr t'gu'gf cy ct'g'p'gu'q'ht'cpf "i t'g'cv'eq'p'eg't'p'g'i ctf kpi "r' q'rl'eg'uw'x'g'k'p'eg vj cv'eqp'w'p'gf "wp'kri'vj g'ko g'q'ht'vj g'j' qo k'ef g0

Vj g' r'cy {gt" y j q" tgr t'gu'p'v'gf "f ghgpf cpv' lp" vj g' Ectr gpvgt tqddgt { "v'kcn'v'g'k'p'eg" vj cv'j g'f'k'f "pq'v'cp'v'k'v' cv'vj cv'F gvev'xg

Y krlko u" y qwf " v'g'v'k'k' { " ci cl'p'uv' j ku" erl'g'p'v' vj cv' c'nj q'wi j f ghgpf cpv'f g'p'k'gf "t'gur q'p'uk'k'k'v{ "ht" vj g' t'q'ddgt {."j g'uggo gf t'guki p'gf "v" d'g'k'pi "eq'p'x'v'gf "cpf "i q'kpi "v" r' t'ku'p'ht' "k'v'c'p'f vj cv'f ghgpf cpv' cr r' gct'gf "uw'r t'k'ug'f "y j gp" eq'w'p'ug'n' l'p'ht'o gf f ghgpf cpv'vj cv'F gvev'xg"Y krlko u'j cf "d'ggp"ht'ng'f 0

F ghgpf cpv' cnuq" r t'gu'p'v'gf "ckdk' g'x'kf g'peg'O' C'nj q'wi j " F c'x'kf Dgp'v'g{ "y cu'ec'ng'f "cu" c" r' t'q'ugew'k'q" y k'p'g'u'u. j ku'v'g'v'ko q'p{ k'p'ew'f gf "c" t'geq'ng'ev'k'q" vj cv'j g' cpf "f ghgpf cpv' j cf "i q'pg" vj c" i cu'uc'v'k'q" qp" vj g'gx'g'k'pi "qh'Qevdgt"53."3; : 7."v'q" y q'tm qp"O qqf { "u'c'w'qo q'd'k'g'O'J g't'gec'ng'f "vj cv'j g'cpf "i cu'uc'v'k'q go r' m'q { g'gu'co w'ug'f "vj go u'g'r'x'g'u'd { 'o'd'w't'p'kpi 't'w'dd'g't'o'y k'j "v'j g'k' c'w'qo q'd'k'g'u'c'v'vj g't'g'ct'q'h'v'j g'uc'v'k'q'O'F ghgpf cpv'ec'ng'f "v'j g't y k'p'g'u'gu'v'q'eq'p'ht'o "v'j g'x'g'p'v'c'nj q'wi j "v'j g{ 'y g't'g'p'q'v't'g'ek'ug cd'q'w'v'j g'f'c'v'g'k'j cf "q'ee'w't'g'f 0

F ghgpf cpv'cnuq"r t'gu'p'v'gf "gxkf gpeg"lp"uwr r q't'v'q'h'v'j g'v'j g'q't { vj cv'vj g'r'q'rl'eg"j cf "ce'v'gf "f'k'uj p'p'g'u'w'f "lp"r' t'g'r'c't'kpi "vj g'ecug ci cl'p'uv' j ko O' Vj g'tg" y g'tg" f'k'ue't'g'r'c'p'ek'g'u" lp" r' q'rl'eg" t'geqtf u t'gi c't'f'kpi "y j gp"cpf "y j g't'g'v'j g'r' q'rl'eg'uw'x'g'k'p'eg"q'h' *939 f ghgpf cpv'j cf "v'c'ng'p"r' r'eg'O'F ghgpf cpv'p'q'v'gf "vj cv'uc'v'go g'p'w' cpf " f'g'ue't'k' v'k'p'u" q'h'g't'gf " d{ " y k'p'g'u'gu" e'j c'p'i gf " lp" u'qo g t'g'ur'g'ev'u' chgt" eq'p'vc'v' y k'j " r' q'rl'eg" l'p'v'g't'x'g'y g't'u'0' E'c'p'c'ng. "c y k'p'g'u'u" t'g'r'k'gf "w'r qp" d{ " vj g'r' t'q'ugew'k'q" g'c't'n{ "lp" vj g'ecug/ dw'p'q'v' cv'v'kcn'cf'f'gf "l'p'et'ko l'p'cv'kpi "f'g'v'k'u"v"j ku" c'ee'q'w'p'v q'h' l'p'ew'r'cv'q't { " uc'v'go g'p'w" o cf g" d{ " O q'q'f { " chgt" x'c't'k'q'w' eq'p'vc'ev" y k'j "r'cy "g'p'ht'eg'o g'p'v'q'ht'eg't'u'0' E'c'p'c'ng" cnuq" o cf g' l'p'eq'p'uk'v'g'p'v' uc'v'go g'p'w" cd'q'w' y j g'v'j g't" j g' j cf " y c't'p'gf " vj g r'q'rl'eg"cd'q'w'O q'q'f { "u'uc'v'go g'p'w't'g'i c't'f'kpi "vj g'ht'v'j eqo k'pi etko g'd'gh'q't'g'v'j g'et'ko g'q'ee'w't'g'f O'V'g'r' j p'p'g't'geqtf u'l'p'f'k'cv'gf E'c'p'c'ng"j cf "v'gr'gr j p'p'gf "vj g" P'q't'y c'm'i'uj g't'k'h'u"uc'v'k'q" v'y l'eg qp" Qevdgt" 46." t'g'o c'k'p'kpi "qp" vj g' v'gr'gr j p'p'g' h'q't" 34" cpf 43" o l'p'w'g'u." t'g'ur'g'ev'x'g'n{ O' Vj g' q'h'ht'eg't'u" p'co gf " d{ " E'c'p'c'ng f'g'p'k'gf "d'g'k'pi "l'p'ht'o gf "d{ "E'c'p'c'ng'cd'q'w'j ku'eq'p'x'g't'uc'v'k'q" y k'j O q'q'f { O'E'c'p'c'ng"y cu'c't'g'i w'r't' l'p'ht'o cp'v'y j q'y cu' l'p'v'g't'g'ug'f lp" t'g'eg'k'x'kpi "c" t'g'y c't'f "qt" q'j' g't" d'g'p'g'h'k' lp" t'g'w't'p" h'q't" j ku l'p'ht'o cv'k'q'p 0

K'p'cf'f'k'k'q'p."vj t'g'g'q'h'v'j g'y k'p'g'u'gu"y j q'v'g'v'k'k'gf "vj cv'vj g{ 'j cf ug'p'p'cp" c'w'qo q'd'k'g."u'w'ej "cu" vj g' p'p'g" w'ug'f "d{ " vj g'uj q'q'v'g't. p'g'c't" vj g'ue'g'p'g'q'h'v'j g'et'ko g'ko o gf k'c'v'ng'f "d'gh'q't'g'cpf "chgt" vj g' u'j q'q'v'kpi ".q't'k'i l'p'c'm'f "v'q'r'f" vj g'r' q'rl'eg" vj cv'vj g'f' t'k'x'g't' l'p'x'q'k'gf "lp vj g'uj q'q'v'kpi "y cu"Y j k'g"q't" J kur'c'p'le'O'F ghgpf cpv'ku'Ch'ht'ecp/ Co g't'le'cp'O'C" f't'o c'v'q'q'i ku'v'g'v'k'k'gf "vj cv'j g'y cu'w'p'cy ct'g'q'h cp{ "l'k'p'wo g'p'v'q't' u'q'w'k'q'p" vj cv'eq'w'f "d'g'c'r r' r'k'gf "v'q'cp'Ch'ht'ecp/ Co g't'le'cp"r' g'tu'q'p'u' h'c'eg"v'q" o c'ng'k'c'r r' g'c't' h'k'i j v'q't" y j k'g't 0

H'w't'v'j g't'gx'kf g'peg'ec'ng'f "lp'v'q's' v'g'v'k'q'p" vj g't'g'r'ic'd'k'k'v{ "q'h'eg't'v'k'p r' t'q'ugew'k'q" y k'p'g'u'gu'0' U'k' p'g'f { " Y q'q'f u'q'p" v'g'v'k'k'gf " j g" j cf

mpqy p "LghHt{ "Dt { cpv'hqt " { getu. "vj cv'Dt { cpv'y cu" c" eqecklpq f gcrgt. "cpf "vj cv'Y qqf uqp" j cf "uggp'Dt { cpv'wug'eqecklpq'hxg'vq 32'ko gu'b'f c {0Dt { cpv'nuq'y cu'e'j cti gf 'y kj 'ugxgtcrltqddgtlgu kp'3; : 9.'cpf 'j ku'r tqdcv'q'q'hlleg't'y cu'qh'j g'qr kpkq'j' g'lj qwf dg"ugpvgepgf "v"ucv'g'r tkuqp "h'hqwpf "i wkm'0'Vj g'r tqdcv'q'q'hlleg't'gecmgf "vj cv'Dt { cpv'j cf "f gplgf "t'gur qpukdkrk' "hqt"vj g 3; : 9'tqddgtlgu."dw'Dt { cpv'v'gukh'gf "vj cv'j g'dgn'g'x'gf "j g'j cf cf o kwgf "t'gur qpukdkrk' "hqt"qpg'tqddgt {0'Gnj w'g'Dtqqo h'grf u dtqj gt/lp/rcy "v'gukh'gf "vj cv'Dtqqo h'grf "j cf "cp"gzv'tgo gn' r qat't'gr wcv'kqp"ht"j qpguv' "kp"vj g'eqo o wpk'0'Dtqqo h'grf j cf "dggp"qp'r tqdcv'q'q'hlleg't' "h'grf" { "j k'cpf "twp"kp"3; 9; . "cpf j cf "uwducp'v'kcm' "f gnc' { gf 't c { lpi "vj g't'guk'w'k'q'p'q'f'gt'gf'kp'vj cv ecug'0'Rt'q'ugew'k'q'p"y k'pguu"U'g'x'g'p"Dcm'y "o cf g"l'p'eq'p'uk'v'g'p'v' uc'v'go g'p'u'v'q'vj g'r q'rl'eg'eq'peg't'p'k'pi "j ku't'k'f'g'v'q'vj g'eq'w'v'j q'w'ug y kj "f'gh'gp'f'cp'v'q'p"vj g'o q't'p'k'pi "q'h'Q'ev'q'dgt"53."3; : 70'D'g'p'v'g' { cf o kwgf "d'g'k'pi "c"t'f' t'w "f'g'c'rg't'y j q' "u'q'rf "eq'p't'q'm'g'f "uwdu'c'p'egu v'q"J l'emu'0'J l'emu"cf o kwgf "g'z'v'p'uk'x'g"t'w "cd'w'ug"ct'q'w'p'f "vj g v'ko g'q'h'vj g'et'ko gu'0

J w'p'v'g't'cf o kwgf "d'g'k'pi "cp"cre'q'j q'rl'eg'eq'peg't'p'k'pi "v'k'p'pi "eq'eq'ck'p'g'f' w'k'p'pi v'j g't'g'x'c'p'v'r g't'k'q'f'0'J w'p'v'g't."J l'emu."D'g'p'v'g'."cpf "Dt { cpv'cm h'ceg'f' u'g'p'v'g'p'k'pi "hqt"et'ko l'p'c'n'q'hl'g'p'ug'u'y j g'p'vj g' { "v'guk'h'gf "hqt v'j g'r tq'ugew'k'q'p'0

F gh'gp'f'cp'v' r t'g'ug'p'v'g'f " g'x'k'f'g'p'eg" v'j cv' r t'q'ugew'k'q'p" y k'p'g'uu C't'x'lg"E'c't't'q'm'0 c { "j c'x'g'j cf "c"o q'v'x'g"v'q"l'p'l'w'g'f'gh'gp'f'cp'v'0 F gh'gp'f'cp'v'u'dt'q'j g't "v'guk'h'gf "vj cv' *940 "f w'k'p'pi "f gh'gp'f'cp'v'u r t'g'v'k'c'n'k'p'ect'eg't'c'v'k'q'p'k'p'vj g'eq'w'p'v'f "l'c'k'n'v'q'o g'p'g'y'k'j "c'p'c'o g r'k'ng"E'c't't'q'm'v'g'r'r j q'p'g'f "j ko "v'q'uc" { "vj cv'f gh'gp'f'cp'v'y'c'p'v'g'f "vj g dt'q'j g't "v'q"dt'k'pi " &422"v'q"vj g'l'c'k'n'c'p'f "r w'k'p'k'p"E'c't't'q'm'u"l'c'k'n c'ee'q'w'p'0'F gh'gp'f'cp'v'v'q'rf "j ku'dt'q'j g't"j g'j cf "p'g'x't"o cf g'cp' { u'w'ej "t'g's w'g'u'0'C'p'q'j g't"y k'p'g'uu."cp"l'p'o c'v'g'k'p'vj g'eq'w'p'v'f "l'c'k'n v'guk'h'gf "vj cv' C't'x'lg"E'c't't'q'm'v'q'rf "j ko "vj cv'j g'y cu"i q'k'pi "v'q v' { "v'q"i g'v'f gh'gp'f'cp'v'u'dt'q'j g't "v'q"r w'o q'p'g' { "k'p"E'c't't'q'm'u"l'c'k'n c'ee'q'w'p'0'Vj g'y k'p'g'uu"r'c'v'g't"j g'c't'f "f gh'gp'f'cp'v'c'p'f "E'c't't'q'm'k'p" c j g'c'v'g'f "c'ti wo g'p'v't'g'i c't'f'k'pi "E'c't't'q'm'u"gh'q't'u'v'q'i g'v'o q'p'g' { "h'q'o f gh'gp'f'cp'v'u'dt'q'j g't'0

F gh'gp'f'cp'v'r t'g'ug'p'v'g'f "vj g'v'g'v'k'o q'p' { "q'h'c'p"z'r g't'v'j cv'ec'ng'f k'p'v'q" s'v'g'v'k'q'p" v'j g' "t'g'ic'd'k'k'v'f " q'h" g' { g'y k'p'g'uu" k'f g'p'v'k'c'v'k'q'p v'g'v'k'o q'p' { "k'p"i g'p'g't'c'f'0'J g'c'm'q"r t'g'ug'p'v'g'f "g'x'k'f'g'p'eg"vj cv'ec'uv f'q'w'd'v'q'p" f'g'v'c'k'u"q'h'vj g'r t'q'ugew'k'q'p"ec'ug."u'w'ej "cu"g'x'k'f'g'p'eg v'j cv'c'm'j q'w'j "c"r t'q'ugew'k'q'p"z'r g't'v'd'g'n'g'x'gf "vj g'v'j q'q'v'g't"j cf j g'rf "vj g'c'w'q'o c'v'e'l' k'v'q'rl'k'p'j ku't'k'j j v'j c'p'f. "f gh'gp'f'cp'v'y cu'gh'v' j c'p'f g'f'0

Vj g'l'w' { "h'q'w'p'f "f gh'gp'f'cp'v'i w'k'm' { "q'h'o w'f g't'c'p'f "h'q'w'p'f "v'w'g'c'p c'm'g'i c'v'k'q'p'v'j c'v'k'p'v'j g'e'q'o o k'u'k'q'p'q'h'v'j g'et'ko g.'c'f' t'k'p'ek' c'rl'y cu c'to g'f 'y k'j "c'h'k'g'c'to 0*"E34244. "uw'df 0*c'c'0+Vj g'l'w' { "c'nu'q' h'q'w'p'f

vt'w'g'v'j g'ur g'ek'n'ek't'ewo u'c'p'eg"cm'g'i c'v'k'q'p'v'j cv'Y k'rk'co u'y cu'c r g'ceg"q'h'leg't"y j q' "k'p'v'g'v'k'q'p'c'm' { "y cu'n'k'ng'f "k'p"t'g'v'c'rl'c'v'k'q'p" h'q't v'j g'r g't'h'q'to c'p'eg"q'h'j ku'q'h'k'ek'rl'f w'k'u'0*"E3; 204. "uw'df 0*c'c'0+Vj g'l'w' { "h'q'w'p'f "p'q'v'v'w'g'v'j g'c'm'g'i c'v'k'q'p'v'j cv'Y k'rk'co u'y cu'c y k'p'g'uu"v'q" c'et'ko g'y j q'y cu'k'p'v'g'v'k'q'p'c'm' { "n'k'ng'f "k'p"t'g'v'c'rl'c'v'k'q'p h'q't"j ku'v'g'v'k'o q'p' { "E3; 204. "uw'df 0*c'c'0+32+. "cpf "vj cv'f gh'gp'f'cp'v k'p'v'g'v'k'q'p'c'm' { "n'k'ng'f "vj g'x'k'v'k'o "y j k'g'v'q' l'p'i "k'p"y c'k'0*"E3; 204. uw'df 0*c'c'0+37+0-

Vj g'l'w' { "c'nu'q' h'q'w'p'f "f gh'gp'f'cp'v'i w'k'm' { "q'h'eq'p'ur k't'ce" { "v'q'eq'o o k'v v'j g'o w'f g't'q'h'Vj q'o cu'Y k'rk'co u'0*"E3; 4."3; 90+Vj g'l'w' { "c'nu'q h'q'w'p'f "f gh'gp'f'cp'v'i w'k'm' { "q'h'v'j g'c'w'g'o r'v'g'f "o w'f g't'q'h'I g'q't'i g E'c't'r'g'p'v'g't'0*"E3; 9."8860-

B. Penalty Phase Evidence

1. Prosecution case

Vj g'r t'q'ugew'k'q'p'r t'g'ug'p'v'g'f "g'x'k'f'g'p'eg"v'j cv'f gh'gp'f'cp'v'j cf "d'ggp eq'p'x'k'v'g'f "q'h'v'j q'eq'w'p'v'q'h't'g'eg'k'k'pi "u'v'q'ng'p'r t'q'r g't'v'f "c'p'f "y cu r m'eg'f "q'p"r t'q'd'c'v'k'q'p"q'p"eq'p'f'k'k'q'p"j g'ur g'p'f "q'p'g' { g'c't "k'p"v'j g eq'w'p'v'f "l'c'k'n'0'F gh'gp'f'cp'v'c'nu'q"j cf "d'ggp"eq'p'x'k'v'g'f "q'h'c'u'uc'w'v' d { "o g'c'p'u"q'h"q'q't'eg"r'k'ng'v'f "v'q"r t'q'f'w'eg"i t'g'c'v'd'q'f'k'v'f "k'p'l'w' { "q'p J q't'ceg"O q'p't'q'g."l'10'F gh'gp'f'cp'v'r r'g'c'f'g'f "i w'k'm' { "v'q"v'j ku'q'h'g'p'ug c'p'f "y cu'r m'eg'f "q'p"r t'q'd'c'v'k'q'p."q'p"eq'p'f'k'k'q'p"j g'ur g'p'f "q'p'g' { g'c't k'p'v'j g'eq'w'p'v'f "l'c'k'n"v'q"dg'v'g't'x'g'f "eq'p'ew't'g'p'v'v'f "y k'j "v'j g'v'g'to "h'q't t'g'eg'k'k'pi "u'v'q'ng'p'r t'q'r g't'v'f'0

Vj g' r t'q'ugew'k'q'p" r t'g'ug'p'v'g'f " g'x'k'f'g'p'eg" t'g'i c't'f'k'pi " v'j g e'k'ewo u'c'p'egu"u'w't'q'w'p'f'k'pi " v'j g' "c'u'uc'w'v" eq'p'x'k'v'k'q'p'0'J q't'ceg O q'p't'q'g." l'10" v'guk'h'gf " v'j cv' j g' y cu" *941 " g'p'v'g't'k'pi " j ku c'w'q'o q'd'k'g" q'p" P q'x'g'o d'g't" 44." 3; 9: ." y j g'p" f gh'gp'f'cp'v c'r r t'q'ceg'f'g'f "v'j g'c'w'q'o q'd'k'g"l'p'v'j g'eq'o r c'p' { "q'h'c'o c'p"y j q'o v'j g'y k'p'g'uu"n'p'g'y "cu"r'k'0'F gh'gp'f'cp'v'c'p'f "C'rk'y g't'g'c'to g'f'0 F gh'gp'f'cp'v'v'q'rf "O q'p't'q'g"v'q'i g'v'q'w'q'h'v'j g'x'g' k'erg'c'p'f "v'q'rf "C'rk'v'q u'j q'v'v'j ko 0'F gh'gp'f'cp'v'c'p'f "C'rk'd'g'c'v'0 q'p't'q'g."ec'w'ul'pi "l'p'l'w'k'gu t'g's w'k'k'pi "52"u'k'ej gu'v'q'j ku'h'q't'g'j g'c'f'0

K'y cu'f'k'ue'q'ug'f "q'p"et'q'u'v'g'z'co k'p'c'v'k'q'p'v'j cv'f gh'gp'f'cp'v'g'c't'r'k'g't j cf "k'p'v'g't't'w'v'g'f "O q'p't'q'g"y j k'g'v'j g' "r'c'w'g't"y cu't'g'o q'x'k'pi "v'j g y j g'g'u'f'q'o "f gh'gp'f'cp'v'u'E'q't'x'g'w'g'0O q'p't'q'g'f'g'u'k'v'g'f "y j g'p'v'j g r q'rl'eg" c't't'k'x'g'f. "c'p'f "f gh'gp'f'cp'v' eq'p'h'g't'g'f "y k'j "v'j g'q'h'k'eg't'u'0 O q'p't'q'g'c'nu'q"y cu'k'o r g'ceg'f'f "y k'j "l'p'eq'p'uk'v'g'p'v'uc'v'go g'p'u"j g o cf g'c'v'c'p"g'c't'r'k'g't"r t'q'eg'g'f'k'pi "t'g'i c't'f'k'pi "y j g'y g't'f gh'gp'f'cp'v j cf "d'ggp"c'to g'f "f w'k'p'pi "v'j g'c'u'uc'w'v'0

J q't'ceg"O q'p't'q'g."U'0"v'guk'h'gf "vj cv'q'p"v'j g'f'c { "h'q'm'y k'pi "v'j g c'u'uc'w'v"q'p"j ku"u'q'p."J q't'ceg"O q'p't'q'g."l'10"j g'y cu"v'q'rf "v'j g f gh'gp'f'cp'v'y cu'c'et'q'u'u'v'j g'w't'g'g'v'f'q'o "v'j g'q'rf g't"o c'p'u"j q'o g. c'to g'f'0Y j g'p'0 t'0O q'p't'q'g."U'0"b'r r t'q'ceg'f'f'j ku't'v'eni'k'p'v'g'f'k'pi

vq'tgvtlqxcg'c'uj qxgn'y kj 'y j lej 'v'f ghgpf 'j ko ugrh 'f ghgpf cpv qr gpgf 'hktg'qp'O t0O qptqg. 'U0'uj qqvpi 'j ko 'lp'yj g'uj qwf gt0 J qtceg'O qptqg. 'U0'cpf 'O tu0O qptqg. 'U0'eqphko gf 'uggkpi f ghgpf cpv'cpf 'c'eqo r cplqp. 'y j qo 'y g{ 'hpgy 'cu'Crk'hkt'pi 'qp O t0O qptqg. 'U0Cnj qwi j 'y g'y kpguugu'ucv'f 'y g'c'wcently cu wpr tqxqngf 'cpf 'y cv'y g{ 'j cf 'j cf 'pq'eqpcev'y kj 'f ghgpf cpv dghqtg'j g'dgi cp'hkt'pi. 'y g{ 'y gt'g'ko r gcej gf 'y kj 'kpeqpukv'g'p'v vgu'ko qp{ 'cv'gctrlgt'r tqeggf kpi u'lp'y j lej 'y g{ 'ucv'f 'y cv'y g{ j cf 'zzej cpi gf 'j ctuj 'y qtf u'y kj 'f ghgpf cpv'dghqtg'j g'cu'c'w'v'0 Vj gt'g'y cu'cnuq'g'xkf gpeg'q'h'kpeqpukv'g'p'v'g'gi ctf kpi 'y j lej qh'y g'cu'ck'p'u'y' cu'cto gf. 'j qy 'o cp{ 'cu'ck'p'u'y' g't'y g'tg. cpf 'y j g'y g't'y g{ 'hkt'gf 't'g'g'cv'f n' 'chgt'j k'v'pi 'O t0O qptqg. U0'Vj gt'g'y cu'cnuq'g'xkf gpeg'y cv'f ghgpf cpv'u'eqo r cplqp. 'Crk Dt{ cpv'y cu'npqy p'cu'c'xk'q'p'v'r gtu'qp0

2. Defense case

F ghgpf cpv'r t'gug'p'v'f 'g'xkf gpeg'kp'o kki cv'kp'v'q'f go q'p'v'c'v'g j ku'dceni tqwpf 'cpf 'j ku't'gr wcv'kp'lp'yj g'eqo o w'p'k{0J g'y cu d'q't'p'kp'Mcpucu'cpf 'y cu'ugr cte'v'f 'h'qo 'j ku'uk'd'p'i u'y j gp j ku'o q'y gt'dt'q'wi j v'j ko 'v'q'Nqu'Ci p'g'u'v'q'ix'g'y kj 'j g't0J ku o q'y gt'j cf 'ug'x'g't'g'o g'p'v'c'n'j g'c'n'j 'r tq'd'rgo u'0Y j gp'uj g'i c'x'g d'k't'y 'v'q'c'f'c'wi j v'g't. 'f ghgpf cpv'u'o q'y gt'y cu'w'p'c'd'rg'v'q'ect'g'h'qt j ko 'cu'c'eq'p'ugs w'p'eg'q'h'j gt'o g'p'v'c'n'f ku'c'd'k'k'v'. 'cpf 'f ghgpf cpv y cu'r'nc'eg'f 'lp'h'q'v'g't'ect'g'h'qt'c'r' g't'k'q'f 'q'h'f g'c'tu'0F ghgpf cpv'y cu c'ix'x'k'pi 'u'q'p0J g'y cu'w'p'cy c't'g'q'h'yj g'k'f g'p'v'k'f 'q'h'j ku'h'c'y gt0

Y j gp'j g'ng'h' h'q'v'g't'ect'g'f ghgpf cpv'u' i t'c'p'f o q'y gt'ect'g'f h'qt'j ko "cpf" h'qt'j ku' o q'y gt0 F ghgpf cpv' y q't'uj k'r g'f "j ku i t'c'p'f o q'y gt'cpf 'y cu'go q'v'k'p'c'm'f 'f'g'x'c'v'c'v'f 'y j gp'uj g'f'k'g'f0 J g'j' cf 'q'h'g't'g'f 'v'q'f q'p'c'v'g'j ku'ix'g't'v'q'j gt.'dw'k'v' *942 'y cu v'q'q'ix'v'0J g't'f'g'c'y 'q'ee'w't'g'f 'q'p'g'o q'p'y 'd'g'h'q't'g'yj g'o w'f gt'q'h F g'v'g'v'k'g'Y k'rk'ko u0

O cp{ "y kpguugu" v'g'u'h'k'f "t'gi ctf kpi " f ghgpf cpv'u" z'g'z'g'p'v' t'g'r w'c'v'k'p'cu'c'nc'p'f "cpf "t'g'ur q'p'uk'd'rg'h'c'y g't'cpf "cu'c'ht'k'p'f v'q'ej k'f'g'p'kp'j ku'p'g'k'i j d'q't'j q'q'f "cpf "eqo o w'p'k{0J g'y cu'c i q'f h'c'y g't'v'q'c'ht'k'p'f u'ej k'f. 'cpf 'uj q'y g'f 'i t'g'c'v'eq'p'eg't'p'y j gp j g'x'k'k'g'f "y j g'ej k'f "kp'yj g'j' q'ur k'c'n'c'v'd'k't'y "cpf "f w'k'pi "cp k'p'p'g'u'0Y k'p'g'u'g'u't'g'r'v'f "c'f'f'k'k'q'p'c'n'c'v'u'q'h'k'p'f p'g'u'u'v'q'q'yj g't r g'tu'q'p'u0

F ghgpf cpv'y cu'cp'g'p't'g'r t'g'p'g'w't'c't'g'ur q'p'uk'd'rg'd'w'k'p'g'u'o cp y j q'g'u'c'd'k'k'ij g'f "c"ec'p'f { "u'q't'g'y kj "c"x'k'g'q'c't'ec'f'g'cpf "c r'ko q'w'k'p'g'd'w'k'p'g'u'o

C" h'k'p'f "q'h' f ghgpf cpv'u" v'g'u'h'k'f "y cv' q'p" y q' q'ee'c'uk'q'p'u f ghgpf cpv'cev'f "cu'c'I q'q'f "U'co c't'k'c'p."q'p'eg'd{"u'q'r r k'pi "v'q q'h'g't'cu'k'v'c'p'eg'v'q'c'r' g'tu'q'p'k'p'w't'g'f 'k'p'c'p'c'w'q'o q'd'k'g'c'ee'k'f g'p'v cpf "q'p'eg'd{"u'q'r r k'pi "v'q'cu'k'v'c'r' g'tu'q'p'y j q'j' cf "d'g'g'p'uj q'v0

Vj g'lw' { 't'g'w't'p'g'f 'c'x'g't'f k'v'q'h'f' g'c'y 0

II. Discussion

A. Guilt Phase Issues

1. Claim of error in denying motion for change of venue

Dghqtg'v't'k'n'f ghgpf cpv'o q'x'g'f 'h'q't'c'ej c'p'i g'q'h'x'g'p'w'g'q'p'yj g i t'q'w'p'f "y cv'j ku'eq'p'uk'w'k'q'p'c'n't'k'i j v'v'q'c'h'c't'v't'k'n'j' cf "d'g'g'p r t'g'l'w'f k'eg'f "d{ "r g't'x'c'k'x'g'r t'g'v't'k'n'r w'd'r'k'k'f{0'k'p'uw'r q't'v'q'h'yj g o q'v'k'p'."j g'q'h'g't'g'f 'eq'r k'g'u'q'h'i, 5'p'g'y ur cr g't'c't'v'k'eng'u'f g'u'et'k'd'k'p'i yj g't'k'o gu."j ku'c't't'g'u'v'yj g'x'k'v'k'o)'h'w'p'g't'c'n'eq'o o g'p'w'd{ "y j g' n'ec'n'r q'r'k'eg'ej k'g'h't'g'i c't'f k'p'i "y j g't'k'o gu."cpf "f g'x'g'q'r o g'p'w k'p'yj g'r q'r'k'eg'k'p'x'g'u'k'i c'v'k'p'q'h'yj g'ec'ug'0J g'c'nuq't'g'h'g't't'g'f "v'q q'p'i q'k'p'i "t'c'f'k'q'c'p'f "v'g'g'x'k'k'q'p'eq'x'g't'c'i g'q'h'yj g'ec'ug."y kj q'w ur g'ek'h'k'p'i "y j g'yj g't' q't" v'q" y j cv' g'z'v'g'p'v' yj ku'eq'x'g't'c'i g' y cu r t'g'l'w'f k'ek'n'0Vj g'v't'k'n'eq'w't'v'f g'p'k'g'f "y j g'o q'v'k'p'."uc'v'k'p'i "o'yj g d'w'm'i'q'h'yj g'eri'k' r k'p'i u'yj cv'f{ q'w'c'n'm'f g'v'q'y g't'g'k'p'yj g'r cr g'tu'k'p'yj g'x'g't{ 'd'gi k'p'k'p'i '00'q't'k'i j v'k'o o g'f k'c'v'g'f 'y j g't'g'c'h'g't'0K'y q'w'f c'i t'g'g'yj cv'p'q'y "y g'y k'm'd'g'ugg'k'p'i "u'q'o g'o q't'g'k'p'yj g'r cr g'tu c'd'q'w'v'yj g'ec'ug'0J"_"J q'y g'x'g't."K'f'q'p'v'yj k'p'n'yj cv'ht'q'o "y j cv'f{ q'w j c'x'g'f'u'w'd'o k'w'g'f "yj cv'k'v't'k'g'u'v'q"c't'g'c'u'q'p'c'd'rg'v'k'g'k'j q'q'f "y j cv yj g'f ghgpf cpv'ec'p'p'q'v't'g'eg'k'g'c'h'c't'c'p'f 'k'o r c't'v'k'n'v't'k'n'k'p'X'c'p P'w'f'0'K'f'q'p'v'yj k'p'n'uko r n' "y j g'uj q'y k'p'i "q'h'yj g'r w'd'r'k'c'v'k'p'u t'k'g'u'v'q"yj cv'ix'g'g'0J"_"Q'd'x'k'q'w'u'n'."f'v't'k'p'i "y j g'eq'w't'ug'q'h'lw' { u'g'r'g'v'k'p'v'yj g'f ghg'p'g'k'u'ht'g'v'q't'g'p'g'y "y ku'v'r' r'g'q'h'c'o q'v'k'p'k'h y j g'ugg'yj cv'k'p'k'c'v'yj g'c't'g'p'q'v'c'd'rg'v'q'q'd'v'c'k'p'c'h'c't'c'p'f 'k'o r c't'v'k'n lw' {0J"_"U'q'yj g'o q'v'k'p'c'v'yj ku'v'k'o g'y k'n'd'g'f'g'p'k'g'f'0'v'j g'o q'v'k'p y cu'p'q'v't'g'p'g'y g'f 'cv'yj g'v'k'o g'q'h'lw' { "u'g'r'g'v'k'p'0' *943

*3c-"F ghgpf cpv' eq'p'v'p'f u' q'p' cr r g'c'n'v' cv' v'j g'f g'p'k'n' q'h'j ku o q'v'k'p' h'q't'ej c'p'i g'q'h'x'g'p'w'g'eq'p'uk'w'g'f "c" f'g'p'k'n'q'h'j ku'uc'v'g cpf 'h'g'f g't'c'n'eq'p'uk'w'k'q'p'c'n't'k'i j u'v'q'c'h'c't'v't'k'n'c'p'f 'v'q'd'g'v't'k'g'f d{ "c'h'c't'c'p'f 'k'o r c't'v'k'n'lw' {0J g't'g'r'k'g'u'k'p'nc't'i g'r c't'v'w'r q'p'yj g g'x'k'f g'p'eg'q'h'p'g'i c'v'k'g'r' t'g'v't'k'n'p'g'y ur cr g't'r w'd'r'k'k'f "y cv'y cu yj g'd'c'uk'a'h'q't'j ku'o q'v'k'p'k'p'yj g'v't'k'n'eq'w't'0J g'c'nuq'eq'p'v'p'f u. y kj q'w'k'c'v'k'p'v'q'yj g't'g'eq't'f. "y cv'83'q'h'374'r q'v'g'p'v'k'n'lw'q'tu uc'v'f "y j g{ "j cf "r t'k'q't'np'q'y r'g'f i g'q'h'yj g'ec'ug'0J g'c'nuq'cu'g't'u yj cv'yj t'g'g't' g'tu'q'p'u'g'r'g'v'f h'q't'lw' { 'u'g't'x'k'g'v'c'v'f 'q'p'yj g'k'lw'q't s'v'g'u'k'q'p'p'c't'g'u'v'yj cv'yj g{ "j cf "u'q'o g'k'o k'k'c't'k'f "y kj "y j g'ec'ug'0 J g'uc'v'g'u'yj cv'q'p'n'f "q'p'g'q'h'yj g'ug'y cu's'w'g'u'k'q'p'g'f "d{ "f ghg'p'g eq'w'p'ug'n't'g'i c't'f k'p'i "j g't'g'z'r q'w't'g'v'q'r w'd'r'k'k'f{0

Y g'f'q'p'q'v'k'p'f "cp{ "g't'q't'k'p'yj g'v't'k'n'eq'w't'v'u'q't'f g't'f'g'p' { k'p'i "y j g o q'v'k'p' h'q't'ej c'p'i g'q'h'x'g'p'w'g'0

*4+"U'g'v'k'p'3255."u'w'd'f'k'x'k'k'q'p' *c+."t'g's'v'k't'g'u'c"v't'k'n'eq'w't'v'v'q i t'c'p'v'c'o q'v'k'p' h'q't'ej c'p'i g'q'h'x'g'p'w'g'k'h'o'yj g't'g'k'u'c't'g'c'u'q'p'c'd'rg

rkngrkj qaf 'vj cv'c'hck'cpf 'ko r ctvkn'tkcn'ecppqv'dg'j cf 'kp'vj g eqwpv(6'Y g'j cxg'gzz rckpgrf 'vj cv'ö]vj g'r j tcug')tgcupcdng rkngrkj qaf 'kp'vj ku'eqpvgz'v) gcpu'uqo gvj kpi 'tguu'vj cp'öo qtg r tqdcdng' vj cp' pqvö') 'cpf' 'uqo gvj kpi 'o qtg' vj cp' o gtnf ö' quukdrö')Ekeckp0.Kp'twki 'qp'wvej 'c'b qvqrp.'cu'vq'y j lej f ghgpf cpv'dgctu'vj g'dwtf gp'qhr'tqqh'vj g'vkn'eqwv'eqpukf gtu cu'hcexqtu'vj g'i tckxk' 'cpf' 'pcwtg'qh'vj g'etko g.'vj g'gzvpgv'cpf pcwtg'qh'vj g'r wdrckk'f.'vj g'uk' g'cpf' 'pcwtg'qh'vj g'eqo o wpk'f. vj g'ucwu'qh'vj g'xkewo . 'cpf' 'vj g'ucwu'qh'vj g'ceewguf 6*'People v. Proctor'*3; ; 4+6'Ecnf6j '6; ; .745']37'EcnfR r v0f'562.'. 64 R0f '3322_0-

5+Qp'cr r gcn'ö')vj g'f ghgpf cpv'ö wv'uj qy 'dqvj 'vj cv'vj g'eqwv gttgf 'kp'f gp'kpi 'vj g'ej cpi g' qh'xgpgw'o qvqrp.'k0'vj cv'cv vj g'vko g' qh'vj g'o qvqrp'k'y cu'tgcupcdng' rkngrkj 'vj cv'c'hck' vkn'eqwv' pqv'dg'j cf . 'cpf' 'vj cv'vj g'gttqt'y cu'r tglwf lekcn'k0' vj cv'k']ku_'tgcupcdng' rkngrkj 'vj cv'c'hck' vkn' cu'pqv'in fact j cf 0'ö'People v. Proctor.'supra.'6'Ecnf6j 'cv'r 0745.'kcn'eu kp'vj g'qtki kpcr0'Qp'cr r gcn' y g'wpf gtvng'c'f g'pqxq'tgxky qh'vj g'hkxg'eqpvtqmkpi 'hcevtu'pqv'f'cdqxg'*cu'f go qpwtcv'f d' 'vj g' g'xkf gpeg' dghqtg' vj g' vkn' eqwv' cv' vj g' vko g' qh' vj g o qvqrp+lp'qtf gt'v'g'v'g'vj g'hkuv's wvukqp/y j gvj gt'vj g'vkn eqwv'gttgf 0'htw'j gt. 'öj _kj 'tgi ctf 'vq'vj g'ugeqpf 'r ctv'qh'vj g' vj qy kpi . 'kp'qtf gt'v'f'v'gto kpg'y j gvj gt'r tgvkn' r wdrckk' 'j cf c'r tglwf lekcn'gh'gev'qp'vj g'lw'f. 'y g'cnuq'gzco kpg'vj g'xqk'f k'g qh'vj g'lw'qtu6*'Id.'cv'r 07460-

3d+Vj g'etko g'y cu'qh'vj g'i tcvxgu'qtf gt.'kpxqk'kpi 'vj g'o wtf gt qh'c'r r qn'eg' qh'leg'. 'cpf' 'cnj qwi j 'vj ku'ekewo uvpeg'y gki j u kp'hcxqt'qh'c'ej cpi g'qh'xgpgw'People v0Daniels'*3; ; 3+74 Ecnf' : 37.' : 74']499'EcnfR r v0344.' : 24'R0f' ; 28_+.'k'f qgu'pqv d' 'kugr'hts w'g'c'ej cpi g'qh'xgpgw0'Ugg'People'v.'Cummings *3; ; 5+6'Ecnf6j '3455.'3498']3: 'EcnfR r v0f'9; 8.' : 72'R0f'3_0- F ghgpf cpv'u'o qvqrp'ht'ej cpi g'qh'xgpgw'y cu'o cf g'wr qp'vj g dcuku'qh' *944 'cuugt'v'f n' 'r tglwf lekcn'cpf 'gzvpguk'g'r wdrckk'f(0 Cnj qwi j 'j ku'o qvqrp'cpf 'cti wo gpv'v'vj g'eqwv'tghgtgf 'vq vgrxkukqp'cpf 'tcf kq'eqxgtci g.'cm'vj g'gzco r ngu'qhr'tglwf lekcn r wdrckk'f 'vq'y j lej 'j g'tghgtu'qp'cr r gcn'y gtg'f kuugo kpcv'f vj tqwi j 'vj g'r tlv'ö gf kwo 0J g'cm'f gu'v'q'ctv'ngu'gzv'qmkpi 'vj g xkewo 'cpf' 'gzz rckpki 'vj cv'j g'y cu'o wtf gtgf 'kp'eqppgev'kqp y kj 'vj g'r tqgewkqp'qh'cpq'v'j g'qh'f ghgpf cpv'u'etko gu.'cpf' 'vq' ctv'ngu'u'o r cvj g'vckm'f 'f gr lckpi 'vj g'xkewo 'u'hc'o k'f 'cv'vj g xkewo 'u'hwpgtcn'tgrckpi 'vj g'qr kpkqp'qh'kpxguki cvkpi 'qh'legtu vj cv'f ghgpf cpv'v' cu'vj g'hc'f gt'q'h'c'equr k'ce'f 'vq'hkn'vj g'xkewo cpf 'vj cv'j g'j cf 'o cf g'cwgo r w'v'q'eqo o k'v'j g'etko g'dghqtg ceeqo r rkuj kpi 'k.'tghgt'p'egu'v'q'eqp'hu'k'p'u'qh'eq'f ghgpf cpv. cpf 'hqto gt'Nqu'Cpi grgu'Rqr'eg'ej lgh'I cvgu'u'eqo o gpv'vj cv f ghgpf cpv'v' cu'c'j gct'v'gu'hkn'gt'0J g'cnuq'eqp'v'p'f u'j ku'tce'g'y cu o cf g'qdxk'q'w'vj tqwi j 'r j qv'q' tcr j u0

Cnj qwi j 'gzv'puk'xg'cpf 'uqo g'vko gu'gf kqtkcn'vj g'dwml'qh'vj ku eqxgtci g'f cv'f 'htqo 'vj g'vko g'vj g'etko g'y cu'eqo o kwgf.'uqo g v'q' { gctu'dghqtg'vj g'j gctkpi 'qp'vj g'o qvqrp'ht'ej cpi g'qh xgpgw.'cpf' 'cm'vj g'ctv'ngu'f cv'f 'htqo 'cv'hc'uv'32'o qp'v' u'r tkqt v'q'vj g'o qvqrp0Uvej 'c'hr ug'qh'vko g'y gki j u'ci k'p'v'c'ej cpi g'qh xgpgw0'People'v. Proctor.'supra.'6'Ecnf6j 'cv'r 0747.'cpf' 'ecugu ek'f 'u'gg'cnuq'People'v0Pride'*3; ; 4+5'Ecnf6j '3; 7.'447']32 EcnfR r v0f'858.' : 55'R0f'865_]vj g'ör cu'ci g'qh'vko g'y gki j u j g'cxk'f 'ci k'p'v'c'ej cpi g'qh'xgpgw0_0'Vj g'vkn'q'eev'w'gtgf 'kp Xcp'P w'f u'kp'Nqu'Cpi grgu'Eqwp'v'f. 'cp'gzv'g'v'k'p'cm'f 'r qr w'v'wu ctgc0'Ugg'People'v.'Cummings.'supra.'6'Ecnf6j 'cv'r 03498]kpxqk'kpi 'c'vkn'j gr'f 'kp'Nqu'Cpi grgu'Eqwp'v'f 'u'Ucp'Hgt'p'cp'f q Xcng'f 'ht'vj g'o w'f gt'qh'c'r r qn'eg' qh'leg' t'ug'cnuq'People v.'Jennings'*3; ; 3+75'Ecnf'f'556.'585']49; 'EcnfR r v0f'9: 2. : 29'R0f'322;_]j'ö')Vj g'rcti gt'vj g'm'q'cn'r qr w'v'k'p.'vj g'o qtg rkngrkj 'k'ku'vj cv't' tgeq'p'g'v'k'p'u'cdq'w'vj g'ecug'j cxg'p'qv'd'geqo g ko dg'f'f'gf 'kp'vj g'r wdrckk' eqpue'k'w'p'gu'0'ö_0' Cnj qwi j 'vj g xkewo 'y cu'c'r r qn'eg' qh'leg'. 'cr ctv'htqo 'vj cv'uv'wu'p'gkj gt vj g'xkewo 'pq't'f ghgpf cpv'v' cu'r tqo k'p'gp'v'q't'p'qv'k'k'w'kp'vj g eqo o wpk'f(0'Ugg'People v. Cummings, supra.'6'Ecnf6j 'cv'r 0 3498]uko k'ct' h'ce'u_0'Vj g'f g'p'uk'f 'qh'vj g'r qr w'v'k'p'kp'vj g'ct'gc. vj g'hr ug'qh'vko g'dgy' g'p'vj g'eq'p'w'k'p'qh'vj g'r wdrckk'f 'cpf' vj g'j gctkpi 'qp'vj g'o qvqrp.'cpf' 'vj g'hc'm'qh'r tqo k'p'p'eg'qh'vj g xkewo 'cpf' 'f ghgpf cpv'ng'f 'wu'v'q'eq'p'w'f g'vj cv'vj g'vkn'eqwv f k'f 'p'qv'gt'kp'f gp'kpi 'vj g'o qvqrp'ht'ej cpi g'qh'xgpgw0

k'f'cf f k'k'p.'y kj 't'gur gev'v'q'vj g'ku'uw'q'hr'tglwf leg.'vj g'tgeqtf f qgu'pqv' gu'cd'rkuj 'c' tgcupcdng' rkngrkj qaf 'vj cv'f ghgpf cpv f k'f 'p'qv'kp'h'ev't'ge'g'k'g'c'hck'vkn'0'Vj gt'g'y cu'pq'k'p'f'k'ecv'k'p vj cv'vj g'r r tgvkn' r wdrckk'f 'j cf 'c' r tglwf lekcn' ko r cev'wr qp vj g'lw'qtu'cd'k'k'f 'vq'tgo clp'hck'cpf 'ko r ctvkn'0'Qp'f 'vj tgg lwtqtu'y j q'ug'x'g'f 'qp'f ghgpf cpv'u'lw'f { 'k'p'f'k'ecv'f 'kp'vj g'k'lw'qt s wvuk'k'p'p'ck'gu'vj cv'vj g'f 'j cf 'j gctf 'qh'vj g'ecug'r tkqt'v'v'vkn'0 Vj g'hkuv'j cf 'pq'k'p'ht'o cvk'p'q'v'j g'cp'vj cv'vj g'pco gu'qh vj g'f ghgpf cpw'y gt'g'tgeq' p'k'cdng.'vj cv'j g'j cf 'pq'k'f'g'qh'vj g uq'w'eg'qh'vj ku'k'p'ht'o cvk'p.'cpf' 'vj cv'j g'np'gy 'uq'hw'w'cd'q'w vj g'ecug' *945 'vj cv'vj g'r wdrckk'f 'y q'w'f 'j cxg'p'q'gh'gev'qp j ku'x'k'gy u't'gi ctf kpi 'vj g'o cv'gt'0'Vj g'ugeqpf 'lw'qt'y cu'cy'ctg vj cv'vj g'ecug'k'p'x'k'g'f 'c'r qn'eg'qh'leg't'y j q'j cf 'd'ggp'hkn'gf'cu j g'r k'eng'f 'wr'j ku'w'p'ht'qo 'uej qqn'dw'vj g'lw'qt'd'gn'k'x'g'f 'vj ku k'p'ht'o cvk'p'y q'w'f 'j cxg'p'q'gh'gev'qp'j ku'x'k'gy u't'gi ctf kpi 'vj g ecug'0'Vj g'vj k'f 'lw'qt'y cu'w'p'eg'v'k'p'y j gvj gt'uj g'j cf 'j gctf 'qh vj g'ecug.'d'ge'cw'w'k'j'cf 'd'ggp'uq'm'p'i 'u'k'p'eg'j gt'g'zr quw'g'v'q cp'f' r wdrckk'f.'dw'uj g'd'gn'k'x'g'f 'k'k'p'x'k'g'f 'c'o cp'r'k'p'v'k'p'i 'wr j ku'w'p'ht'qo 'uej qqr'0'Uj g'cnuq'ucv'f'vj g'r wdrckk'f 'y q'w'f 'j cxg p'q'gh'gev'qp'j gt'x'k'gy 'qh'vj g'ecug'0'Qp'x'q'k'f'k'g.'vj ku'lw'qt'cnuq ucv'f'vj cv'vj g'x'ci w'gn' t'ge'cm'f 't'g'cf kpi 'kp'c'p'gy ur cr gt'cv'vj g vko g'qh'vj g'etko g'vj cv'k'k'p'x'k'g'f 'c'o cp'y j q'y cu'uj q'v'y j k'g

r lenkpi 'wr 'j ku'ej kf 'htqo 'uej qqr0Uj g'f kf 'pqvtgecmcp{ 'qyj gt hcevu'cpf 'ucv'gf 'y cv'y g'r wdrlek'f 'y qwf 'j cxg'p'q'lo r cev'wr qp j gt 'f grkdgtcvkpu0'Ceegt f kpi 'v'q'f ghgpf cpv'p'q'q'v'j gt 'ugcv'f lwtqt'y cu's wguvkppg' 'qp'x'q'k'f'k'g'tgi ctf kpi 'r wdrlek'f0

Y g'tgecm'v'j cv'y gt'g'ku'öp'q'r tguwo r vkp'qh'c'f gr tkcvkpp"qh f w'r t qegu'q'h'ry 'ctk'kpi 'lwtqt'g'zr quwt'g'v'q'r wdrlek'f eqpegt'kpi 'y'g'ecug'6**People v. Proctor, supra*. "6'Ecrf6j "cv r 07490'F ghgpf cpv'hcku'v'r klp'v'v'cp { 'g'x'k'f'g'peg'g'u'cd'k'uj kpi v'j cv'y'j g'v'j tgg'lw'qtu'p'q'v'f "cd'x'g'y'j q'ugt'x'g'f "qp'j'ku'ecug y'gt'g'zr qu'gf "v'q'at't'gecm'f'cp { "prejudicial"grgo gpv'qh'y'g r t'g'tk'n'r wdrlek'f0'Vj g'k'zr quwt'g'v'q'r wdrlek'f "y'cu'o k'p'ko cn cpf "j'cto ngu'0'Cu'y'g'j'cx'g'q'dug'x'g'f <ö'Xci w'g't'gecm'ge'v'k'pu qh'p'gy u't'gr q't'u'd { "c'hgy 'lw'qtu'f'q'p'q'v'eqo r gn'c'ej cpi g'q'h x'g'p'w'0'ö**People v. Howard*"3; ; 4+3"Ecrf6j "3354."338; "J7 EcrfTr v04f "48: .": 46"R0f "3537_0' "O k'p'ko cn'zr quwt'g'y'gm d'gh'q't'g'y'g'eqo o'g'p'ego gpv'q'h'v't'k'n'd { 'c'lo cn'p'wo d'g't'q'h'lwt'qtu y'j q't'g'k'cd'f "t'gr q't'v'j cv'y'j g'k'zr quwt'g'y'kn'p'q'v'eq'q't'v'j g'k'x'g'y'q'h'y'g'ecug'ug'g'*People v. Proctor, supra*. "6'Ecrf6j "cv'r 0749'F q'gu'p'q'v'g'u'cd'k'uj 'c't'g'cu'p'cd'ng'f'k'ng'k'j'q'q'f 'y'cv'f ghgpf cpv f'k'f'p'q'v'k'p'h'ce'v't'g'eg'k'g'c'h'k't'v't'k'n'0

F ghgpf cpv' cu'q' eqp'v'p'f u'k' y'cu' g'tt'q't'v'q' v't'cp'uh'g't'v'j'g'ecug h'q'o 'f'q'y'p'q'y'p'N'qu'0'C'p'i'gr'u'v'q'y'g'U'cp'H'g't'p'c'p'f'q'X'cm'g'f'c'p'f v'q't'g'v'k'p'k'h'q't'v't'k'n'v'j'g't'g'0'V'j'g'ecug'k'p'k'c'm'f' "y'cu'cu'k'i'p'g'f v'q'c'f'q'y'p'q'y'p'eq'w'v'c'p'f "q'x'g't'f'ghgpf'cp'v'u'q'd'lg'ev'k'p'p'y'cu v't'cp'uh'g't'g'f' "h'q't'v't'k'n'v'q'X'cp'P'w'f'u' "y'j'g't'g'v'j'g'et'ko'g'j'c'f q'ee'w't'g'f'0'Y'j'g'p'j'g'o'q'x'g'f'h'q't'ej'c'p'i'g'q'h'x'g'p'w'g'f'ghgpf'cpv'cu'q'o'c'f'g'c'p'c'ng't'p'c'v'x'g't'g's'w'g'u'v'j'cv'y'g'o'c'w'g't'd'g't'g'w'p'g'f h'q't'v't'k'n'v'q'c'f'q'y'p'q'y'p'eq'w'v'0

F ghgpf cpv' eqp'v'p'f u' q'p' cr r g'cn'v'j'cv'y'g'y'cu' ng'u' r'k'ng'f' "v'q t'g'eg'k'g'c'c'h'k't'v't'k'n'k'p'v'j'g'U'cp'H'g't'p'c'p'f'q'X'cm'g'f' "y'j'g't'g'v'j'g'et'ko'g'q'ee'w't'g'f' "v'j'g'r'q'r'w'v'k'p'f'g'p'u'k'f' "y'cu'ng'u'v'j'c'p'k'y'cu' f'q'y'p'q'y'p' "c'p'f'h'gy'g't'o'g'o'd'g'tu'q'h'v'j'g'eqo'o'w'p'k'f' "u'j'c't'g'f'j'ku'g'y'p'k'e'd'c'emi't'q'w'p'f'0'V'j'g'u'co'g'eq'p'u'k'f'g't'c'v'k'p'u'cr'r'n'f' "v'q'c'p'k'p't'ce'q'w'p'f'v't'cp'uh'g't'cu'cr'r'n'f' "v'q'c'bo'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g'v'q'c'p'q'y'g't'eq'w'p'f' "c'p'f'd'g'ec'w'g'y'g'j'cx'g'h'q'w'p'f'p'q'g't't'q't'k'p'v'j'g'v't'k'n'le'q'w't'v'u'f'g'p'k'n'q'h'v'j'g'o'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g' "y'g'h'k'p'f'p'q'g't't'q't'k'p'v'j'g'cu'k'i'p'o'g'p'v'q'h'v'j'g'ecug' *946 'h'q't'v't'k'n'k'p'X'cp'P'w'f'u'0**People v. Cummings, supra*. "6'Ecrf6j "cv'r 03498."1p0 390-5

5 k'p'j'ku't'gr'n'f'd't'k'g'h'f'ghgpf'cpv'eqp'v'p'f'u'h'q't'v'j'g'ht'u'v'k'o'g'v'j'cv'y'k'y'cu'g'tt'q't'v'q'v't'cp'uh'g't'v'j'g'ecug' d'g'ec'w'g'v'j'g'X'cp'P'w'f'u'eq'w'v'j'q'w'g'h'c'ek'k'k'g'u'y'g't'g'k'p'c'f'g's'w'c'v'0'g'eq'p'v'p'f'u'j'g'y'cu'v'p'c'd'ng'v'q'k'p'v't'x'k'g'y' y'k'p'g'u'g'u'd'g'ec'w'g'q'h'v'j'g'g'k'p'c'f'g's'w'c'k'g'u'0'c'bo'q'v'k'p'f' h'q't'ej'c'p'i'g'q'h'x'g'p'w'g'q't'h'q't'v't'cp'uh'g't'i'q'gu'v'q'v'j'g

s wguvkpp"qh'y'g'cd'k'k'f' "q'h'y'g'l'w't' { "k'p'v'j'g'eq'w'p'f' "k'p y'j'k'ej'v'j'g'ecug'ku'v't'k'g'f' "v'q'd'g'h'k't'c'p'f' "k'o'r'c't'v'k'n'c'p'f p'q'v'v'q'v'j'g'c'f'g's'w'c'e' { "q'h'v'j'g'eq'w'v'j'q'w'g'h'c'ek'k'k'g'u'v'j'g' r'c'w'g't'k'u'w'g'k'u'eq'p'u'k'f'g't'g'f' "u'g'r'c't'c'v'g'f'0

F ghgpf cpv'cr r g'c't'u'v'q'eq'p'v'p'f'v'j'cv'y'g'v't'k'n'le'q'w't'v'uj'q'w'f'j'cx'g' i't'c'p'v'f' "j'ku'o'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g'd'g'ec'w'g'q'h'eg't'v'k'p' f'g'x'g'p'q'r'o'g'p'u'f'v'k'p'i' "x'q'k't'f'k'g'0'J'g'c'ng'i'g'u'v'j'cv'f'v'k'p'i' "x'q'k't' f'k'g'ö'y'g't'g'y'cu'o'w'ej' "f'k'u'ew'v'k'p'p'q'h'c'r'r'g'm'c'p'v'u'ecug' "c'p'f' f'k'u'g'o'k'p'c'v'k'p'q'h'h'c'ng'c'p'f' "f'c'o'c'i'k'p'i' "t'w'o'q't'u'0'V'j'g'ur't'g'c'f'c'p'f' "k'o'r'c'ev'q'h'u'w'ej' "t'w'o'q't'u' "c'p'f' "v'j'g'v't'k'n'le'q'w't'v'u't'g'h'w'c'u'v'q' c'f'g's'w'c'v'g'n'f' "x'q'k't'f'k'g' "eq'p'eg't'p'k'p'i' "v'j'q'ug' "t'w'o'q't'u' "00' r't'q'x'k'f'g'u' h'w't'v'j'g't'g'x'k'f'g'peg'v'j'cv'y'g'eqo'o'w'p'k'f' "q'h'X'cp'P'w'f'u'y'cu'k'u'g'h' v'k'p'v'g'f'd { "d'q'y' "r't'g't'k'n'r'wdrlek'f' "c'p'f' "o'q't'g'k'p'h'q't'o'c'n'u'q'w't'eg'u' q'h'r't'g'l'w'f'k'c'n'r'k'p'h'q't'o'c'v'k'p'p' "c'p'f' "v'j'cv'c'ej'c'p'i'g'q'h'x'g'p'w'g'y'cu' t'g's'w'k'g'f'0

C'p'f' 'e'r'k'o' 'v'j'cv'u'w'ej' 'c'bo'q'v'k'p'f'q'w'f'j'cx'g'd'g'g'p'i't'c'p'v'f'd'c'ug'f' w'r'q'p'f'g'x'g'p'q'r'o'g'p'u'c'v'x'q'k't'f'k'g'y'cu'y'c'k'x'g'f'd { "f'ghgpf'cp'v'0' V'j'g'v't'k'n'le'q'w't'v'f'g'p'g'f'v'j'g'bo'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g'd'g'h'q't'g' v'j'g'eqo'o'g'p'ego'gpv'q'h'l'w't' { "u'g'r'g'ev'k'p'p' "d'c'ug'f' "w'r'q'p'r'q'h'g't'g'f' g'x'k'f'g'peg' "q'h'r't'g't'k'n'r'wdrlek'f' "u'w'd'lg'ev'v'q' "t'g'p'gy'c'n'f'q'h'v'j'g'o'q'v'k'p'k'p'v'j'g'g'x'g'p'v'x'q'k't'f'k'g'g'u'cd'k'uj'g'f'c'p'f' "h'w't'v'j'g't' "d'c'u'k'u'h'q't' s'w'g'u'v'k'p'k'p'i' "y'j'g'y'g't'f'ghgpf'cp'v'y'q'w'f't'g'eg'k'g'c'h'k't'v't'k'n'k'p'v'j'g' eq'w'p'f'0'v't'k'n'le'q'w'p'ug'n'f'k'f' "p'q'v't'g'p'gy'v'j'g'bo'q'v'k'p'0'D'g'ec'w'g'v't'k'n' eq'w'p'ug'n'f'k'k'g'f' "v'q'k'w'g'q'ee'w't'g'p'eg'u'c'v'x'q'k't'f'k'g'c'u'v'j'g'd'c'u'k'u'h'q't' c't'g'p'gy'g'f' "o'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g' "j'g'c'h'q't'f'g'f' "v'j'g'v't'k'n' eq'w't'v'p'q'q'r'r'q't'w'p'k'f' "v'q'i't'c'p'v'v'j'g't'g'k'g'h'v'j'cv'f'ghgpf'cp'v'p'q'y' eq'p'v'p'f'u'uj'q'w'f'j'cx'g'd'g'g'p'c'ee'q't'f'g'f'j'k'o'0'V'j'w'u'y'g'eq'p'en'f'g' v'j'cv'f'ghgpf'cp'v'u'v'k'o'j'cu'd'g'g'p'y'c'k'x'g'f'v'q'v'j'g'g'z'v'g'p'v'k'u'd'c'ug'f' w'r'q'p'q'ee'w't'g'p'eg'u'c'v'x'q'k't'f'k'g'0*U'g'g'*People v. Bolin*"3; : : +3: Ecrf6j "4; 9.'534'J97'EcrfTr v04f '634.'; 78'R0f '596_0-6

6 C" o'q'v'k'p'f' "h'q't' "o'k'u't'k'n'r'f'q'gu'p'q'v' "eq'p't'c't' { "v'q' f'ghgpf'cp'v'u'v'k'o' "f't'g'ug't'x'g'y'g'k'u'w'g'h'q't'g'x'k'g'y' "h'q't' v'j'g'q'd'x'k'q'w'u't'g'c'u'p'v'j'cv'u'w'ej' 'c'bo'q'v'k'p'f'q'gu'p'q'v'g'g'm' v'j'g't'g'k'g'h'q'w'i'j'v'd { 'v'j'g'bo'q'v'k'p'f'q't'ej'c'p'i'g'q'h'x'g'p'w'g'0

2. Severance of trials

*6- F ghgpf cpv' eqp'v'p'f u' v'j'cv'v'j'g' r't'q'ug'ew'q't' q'd'v'k'p'g'f' "c' u'g'x'g't'c'p'eg'q'h'f'ghgpf'cp'v'u'c'p'f' "eq'f'ghgpf'cp'v'0'q'u'u'u'v't'k'n'l'ht'q'o' v'j'cv'q'h'eq'f'ghgpf'cp'w'f'w'ep'g'0'q'q'f' { "X'q'n'c'k'g'Y'k'n'k'o'u' "c'p'f' T'g'g'e' { "E'q'q'r'g't' "h'q't'v'j'g'k'o'r'g't'o'k'u'k'd'ng'r'w'r'q'ug'q'h'q'd'v'k'p'k'p'i' c' "l'w't' { "eq'o'r'q'ug'f' "q'h'Y'j'k'g' "r'g't'u'q'p'u'0'F'ghgpf'cp'v'eq'p'v'p'f'u' v'j'g' "r't'q'ug'ew'q't'u' "k'o'r't'q'r'g't'r'w'r'q'ug' "k'u'f'g'o'q'p'u't'c'v'g'f' "d { "v'j'g' r't'q'ug'ew'q't'u'v'c'v'g'o'g'p'v'v'j'c'v'j'g'y'c'p'v'g'f'v'j'g'v't'k'n'v'q'd'g'eq'p'f'w'ev'g'f' k'p'X'cp'P'w'f'u' "c'p'f' "p'q'v'k'p' "E'g'p't'c'n'r'N'qu' " *947 "C'p'i'g'ru' "k'p' v'j'g'eq'p'v'z'v'q'h'v'j'g'eq'w't'v'u'k'p'f'k'ec'v'k'p'v'j'cv'c'v't'c'p'uh'g't'v'q'X'cp' P'w'f'u'y'cu'r'q'u'k'd'ng'q'p'q'f' "k'h'v'j'g'ecug'y'cu'd't'q'ng'p'k'p'v'q'ö'o'q't'g

o cpci gcdng'wpku'F ghgpf cpv'eqpegf gu'j g'f kf "pqv'qr r qug vj g'r tqugewqt'u'ugxgtcpeg"o qv'kp"qp"vj g'i tqwvf "cuugt'vf qp" cr r gcr'f' k'p' h'cev" f ghgug' eqwpugn' ci tggf "r tkqt" vq' t'kcn vj cv'ugxgtcpeg'y cu'cr r tqr tkvg."cnj qwi j "eqwpugn'ucv'gf "j g y qwf "qr r qug" cp{"v'cpuhgt" qh'v'j g"ecug"v'Xcp"P w'f u'Vj g eqw'v'ci tggf "y kj "f ghgug'eqwpugn'v'j cv'v'j g's w'guk'qp"qh'v'j g v'cpuhgt"v'j g"Xcp"P w'f u'eqw'v'v' cu'c"ugr ctcvg"o cwtg"v'j cv y qwf "dg"j gctf "qp"cpqj gt" f cvg'Ulo k'ctn'f."cv't'kcn'f ghgug eqwpugn'eqpegf gf "v'ugxgtcpeg'y cu'cr r tqr tkvg'cp'f "v'cv'j g s w'guk'qp"qh'v'j g"v'cpuhgt"qh'v'j g"v'kcn'v'q"Xcp"P w'f u'y cu'pqv'cv kuuw'g"lp"v'j g"eqpvz'v'qh'v'j g"ugxgtcpeg"o qv'kp'U'Ceetf lpi n'f. cp{"erko "tgi ctf lpi "v'j g'r tqugewqt'u' o qv'k'cv'kp"lp"o qxkpi hqt"ugxgtcpeg"y cu'y c'kxgf O'Ugg" *People v. Williams* "3; ; 9+38" *Ecnf6j* "375."476" *J88" EcnfTr v04f* "345." ; 62" *R04f* "932_]erko "qh'r tqugewqt'kcn' o k'ueqpf wv'v' i gp'gcm'f "ku'y c'kxgf "kh f ghgpf cpv'f qgu'pqv'qdlgevdngy _=*People v. Hawkins* "3; ; 7+32" *Ecnf6j* " ; 42." ; 62" *J64" EcnfTr v04f* "858." ; 9" *R04f* "796_]f ghgpf cpv'v' j q'f'k'ku"v'q"o q'xg"v'ugxgt"eqw'v'u'y c'kxgu'erko qp"cr r gcn'=*People v. Mitcham* "3; ; 4+3" *Ecnf6j* "3249."326: *J7" EcnfTr v04f* "452." : 46" *R04f* "3499_"]f ghgpf cpv'v' c'kxgu'erko v'j cv'eqw'v'gtt'gf "lp" f gp { lpi "eqf ghgpf cpv'u'ugxgtcpeg"o qv'kp y j gp "f ghgpf cpv'f kf "pqv'lqkp"lp"v'j g"o qv'kp_0" k'p"cp { "g'xgpv v'j g"tgeqtf "f k'ueq'v'v'j cv'v'j g'r tqugewqt"y cu'o qv'k'cv'gf "d { "c f gu'k'g"v'ugxgt"v'j g"ecug"lp"y j lej "v'j g'r tqugew'kp"uqwi j v'v'j g f gc'v' "r gpcn'f "k'p'xq'k'k'p'i "f ghgpf cpv'cp'f "O quu'ht'qo "v'j g"ecug kp"y j lej "v'j g" f gc'v' "r gpcn'f "y cu'pqv'dgl'p'i "uqwi j v'k'p'xq'k'k'p'i v'j g"q'v'j g" f ghgpf cpw'+"cp'f "v'q" c'xq'k'f "cp" w'p'o cpci gcdng" t'kcn k'p'xq'k'k'p'i "v'q'v' o cp { "f ghgpf cpw'v'v'j cv'v'j g'r tqugewqt"y cpv'gf "v'q v' { "dqj "ecug"lp"Xcp"P w'f u'dgecwug"v'j ku'y cu'v'j g"n'ecv'kp"lp y j lej "v'j g"etko g'y cu'eqo o k'wgf."cp'f "v'j cv'j g" f'kucxqy gf "cp { w'ngt'k'q' r w'r qug0

3. Severance of counts

*7c+F ghgpf cpv'eqpv'gf u'v'j g"v'kcn'eqw'v'gtt'gf "lp" f gp { lpi "j ku o qv'kp"v'j g"ugxgt"v'j g"v'kcn'qh'eqw'v'5."cmgi lpi "v'j g"cwgo r v'gf o w'f gt"qh'I g'qti g'Ectr gpv'gt."ht'qo "v'j g"v'kcn'qh'eqw'v'u'3"cp'f "4. cmgi lpi "o w'f gt"cp'f "eqpur k'ce { "v'q'v' w'f gt "F g'v'g'v'x'g"Vj qo cu Y k'k'ko u0

Cm'qh'v'j g'ug"q'f'g'p'ug'u'dgn'p'i gf "v'q"v'j g"u'co g'er'cu'qh'etko gu. uq'v'j cv'lq'p'gf "y cu'cr r tqr tkvg't' w'u'w'cp'v'v'q' *ugev'kp* ; 76"wp'nguu c"er'get"uj qy lpi "qh'r q'v'p'k'cn'r tglw'f leg"y cu'o cf g0 *People v. Bradford* "3; ; 9+37" *Ecnf6j* "344; .3537" *J87" EcnfTr v04f* 367." ; 5; " *R04f* "47; _0" *8+"Y g"t'g'x'k'g'y "v'j g"v'kcn'eqw'v'u' t'w'k'p'i hqt"cdwug"qh'f k'ue'g'v'kp."y j lej "y k'ni'dg" h'q'w'p'f "oy j gp"v'j g"v'kcn eqw'v'u' t'w'k'p'i "y'oh'cm'q'w'uk'f g'v'j g"dq'w'p'f u'qh't'g'cu'q'p'0"o" *Ibid.* + F gr gp'f lpi "w'r qp"v'j g'r ct'v'w'w'ct"ek'ewo u'w'p'egu'qh'g'cej "ecug. c"o")t_ghw'ucn'v'q'ugxgt"o c { "dg"cp"cdwug"qh'f k'ue'g'v'kp"y j gt'g< *3+"g'x'k'f g'peg"qp"v'j g"etko gu"v'q"dg"lq'k'p'w'f "v'k'gf "y q'w'f "pqv'dg

etquu/cf o ku'k'dng"lp"ugr ctcvg"v'k'kcn"=*4+"eg't'v'kp"qh'v'j g'ej cti gu ctg"wp'w'w'cm'f " *948 "nkngn {"v'q"l'p'k'co g'v'j g"lwt {"ci c'k'p'u'v'j g f ghgpf cpv'v'5+c"oy g'cn'0'ecug'j cu'dggp'lq'k'p'gf "y kj "c"0'w'p'i 0 ecug."qt"y kj "cp'q'v'j g't'oy g'cn'0'ecug."uq"v'j cv'v'j g"0'ur k'm'q'x'g't'0 gh'g'ev'qh'ci i tgi cv'g"g'x'k'f g'peg"qp"ugxgt'cn'ej cti gu'o ki j v'y gm cngt "v'j g"q'w'eqo g'qh'u'qo g"qt"cm'qh'v'j g'ej cti gu'cp'f "6+"cp { qp'g"qh'v'j g'ej cti gu'ectt'k'gu"v'j g" f gc'v' "r gpcn'f "qt"lq'k'p'gf "qh v'j go "w'w'p'u"v'j g"o c'w'gt"lp'v'q" c"ecr k'cn'f'ecug'0"0" *Ibid.* +7 "P qv cm'qh'v'j g'ug" eq'p'uk'f g't'c'v'k'p'u"ctg"qh'gs w'cn'y g'ki j v'<0")Vj g h'k'u'v'ug'r "lp"cu'gu'k'p'i "y j g'v'j g't'c"eqo d'k'p'gf "v'k'cn'j y q'w'f "j c'xg dggp_"r tglw'f k'k'cn'k'u"v'q" f g'v'g'to k'p'g'y j g'v'j g't'g'x'k'f g'peg"qp" g'cej qh'v'j g'lq'k'p'gf "ej cti gu"y q'w'f "j c'xg" dggp"cf o ku'k'dng."w'p'f gt *G'x'k'f g'peg"Eqf g'ugev'kp* "3323."lp"ugr ctcvg"v'k'kcn"qp"v'j g"q'v'j g'tu0 k'i"uq."cp {"k'p'ht'g'peg"qh'r tglw'f leg"ku" f k'ur gm'gf 0"]E'k'c'v'k'p'u0_ Etquu/cf o ku'k'd'k'k'v'f "u'w'k'k'g'u"v'q"p'gi cv'g'r tglw'f leg."dw'w'k'k'u'p'q'v gu'g'p'v'k'cn' hqt"v'j cv'r w'r qug0" *People v. Bradford, supra.* "cv r r 0'3537/3538="ugg"cn'q" *People v. Memro* "3; ; 7+33" *Ecnf6j* 9: 8." : 72/: 73" *J69" EcnfTr v04f* "43; . ; 27" *R04f* "3527_"]f gp'k'cn qh'v'j g'ugxgtcpeg"uj q'w'f "dg"u'w'w'k'p'gf "k'h"q'v'j g't'etko gu'g'x'k'f g'peg ku'etquu/cf o ku'k'dng."y kj "r qu'k'dng"z'egr v'kp"kh'lq'k'p'gf "ku"uq i t'quun {"w'p'h'k'c'cu"v'q" f gp {"f ghgpf cpv'f w'g'r t'q'egu_u_0

7 Dgecwug"v'j g"etko gu'y g't'g'eqo o k'w'gf "lp"3; ; 7."v'j g c'p'cn'f'v'ecr' g'ng'o gp'v' qh' etquu/cf o ku'k'd'k'k'v'f "ku" p'q'v c'h'g'ev'gf "d {"v'j g"v'q'v'gt'u'cf q'r v'kp"qh'v'j g'r qu'k'k'p"337 lp"3; ; 20" *Ugg" E* ; 760=*People v. Hill* "3; ; 7+56 *EcnfCr r 06j* "949.'956/957" *J63" EcnfTr v04f* "5; _0

*7d+G'x'k'f g'peg"v'j cv'f ghgpf cpv'v'w'go r v'gf "v'q'j k'g'c'j k'v'o cp'v'q' h'k'm I g'qti g'Ectr gp'v'gt "r tkqt"v'q" Ectr gp'v'gt'u'cp'v'k'c'v'gf "v'g'v'ko qp { ci c'k'p'u'f ghgpf cpv'v'v'j ku'q'p'i q'k'p'i "v'k'cn' hqt"t'q'dd'k'p'i "Ectr gp'v'gt y q'w'f "j c'xg" dggp"cf o ku'k'dng" cv'c" ugr ctcvg"v'k'cn' ej cti lpi f ghgpf cpv'v'j kj "eqpur k'ce {"v'q"o w'f gt "F g'v'g'v'x'g"Y k'k'ko u"v'q r t'g'x'gp'v'Y k'k'ko u'ht'qo "v'g'v'k'h'f lpi "cv'v'j g'v'co g'v'k'cn'0'G'x'k'f g'peg"lp g'cej "ecug"u'w'r r q't'v'gf "v'j g'k'p'ht'g'peg"v'j cv'f ghgpf cpv'v'w'v'gf "hqt"v'j g u'co g'o q'v'k'g"cp'f "y kj "v'j g'v'co g'k'p'g'p'v'cu'lp"v'j g"q'v'j g't'ecug/v'q n'k'ni'y k'p'g'ug'u'lp"q't'f g't'v'q'r t'g'x'gp'v'j go "ht'qo "v'g'v'k'h'f lpi "ci c'k'p'u'v f ghgpf cpv'v'v'j g"q'p'i q'k'p'i "t'q'dd'gt {"v'k'cn'0" *Ugg" People v. Arias* "3; ; 8+35" *Ecnf6j* " ; 4."349/34: " *J73" EcnfTr v04f* "992." ; 35" *R04f* ; : 2_"]g'x'k'f g'peg" f ghgpf cpv'v'k'f p'c'r r gf "cp'f "t'q'dd'gf "qp'g'x'k'v'o lp"q't'f g't'v'q"q'd'v'c'p'v'j g"o g'c'p'u'qh'c'x'q'k'f lpi "ctt'g'u'v' hqt" c"r tkqt o w'f gt"y cu'etquu/cf o ku'k'dng="g'x'k'f g'peg"t'gi ctf lpi "v'j g'o w'f gt u'w'r r'k'gf "g'x'k'f g'peg" qh' o q'v'k'g" hqt"v'j g"t'q'dd'gt {"n'k'f p'c'r r lpi . y j lej "lp"v'w'p'lp'f k'ec'v'gf "eq'p'ue'k'q'w'p'g'u'u'q'h'i' w'k'u' hqt"eqo o k'v'k'p'i v'j g'o w'f gt _=*People v. Cummings, supra.* "6" *Ecnf6j* "cv't' 034: 6]p'q'gt'qt "lp" f gp { lpi "ugxgtcpeg="g'x'k'f g'peg"t'gi ctf lpi "t'q'dd'gt'k'gu y cu'etquu/cf o ku'k'dng"v'q"uj q'y "o q'v'k'g" hqt"o w'f gt."d'gecwug v'j g'o q'v'k'g" "c'x'q'k'f lpi "ctt'g'u'v' cu'ek'ewo u'w'p'v'k'cn'g'x'k'f g'peg"qh r t'go gf k'c'v'k'p'cp'f "f g'k'd'g't'c'v'k'p."dqj "qh'v'j lej "y g't'g'ng'o gp'u

qh'ij g'o wtf gt'ej cti g="People v. Price"; 3;"Ecnf6j "546. 5: : "J5"EcnfT r t0f "328.": 43"R0f "832."]pq"gttqt "kp" f gp {kpi ugxgtcpeg="gxl f gpeg" yj cv'qpg"qh'ij g' xlevo u'y cu' nkrf "qp yj g'qtf gtu'qh'c'r tkuqp'i cpi "v'y j lej 'yj g'f ghgpf cpv'dgmp i gf. cpf "yj cv'ij g'qj gt' xlevo 'y cu' nkrf "kp" cp' cwgo r v'vq' ces wkg hkt gcto u'vq'ectt { "qwf i cpi "cevkxkgu. y cu'etquu/ cf o kuukdrng'vq uj qy "o qvkg = "People v. Daly"; 4+": "EcnfCr r 06j "69." 78]32"EcnfT r t0f "43."]pq" *949 "gttqt "kp" f gp {kpi "ugxgtcpeg= gxl f gpeg" qh' t qddgtkgu' y cu' tgrxcpv' vq" uj qy "o qvkg" cpf kpvv'v' y kj 't gur gev'vq' cwgo r vgf 'b wtf gt. 'd gecwug' yj g' gxl f gpeg uj qy gf "yj g' cwgo r vgf "o wtf gt" y cu' eqo o kwgf "vq" cxqkf " yj g f ghgpf cpv'u' t gwp' vq' r tkuqp' hq' t qddgtkgu' j' g' j' cf "eqo o kwgf. cpf "gxl f gpeg" qh' cwgo r vgf "o wtf gt" y cu' etquu/ cf o kuukdrng' vq gncdrkj "eqpuelqwpugau' qh' i wkn' cu' vq" yj g' t qddgtkgu' 0" Vj gt g ku' pq' uwr r qtv'lp' yj g' teqtf ' hq' f ghgpf cpv'u' eqpvv'v' vq' yj cv'ij g ej cti g' yj cv'f ghgpf cpv' cwgo r vgf "vq" o wtf gt' I gqti g' Ectr gpvgt y cu' pqv' dtqwi j v' lp" i qqf " hckj . " dw' y cu' hkrf " o gt gnf " vq ouj qt g' w' o' vj g' ecr kcn' ej cti gu' k' cf f kkp. 'f ghgpf cpv' j' cu' pqv f go qpwtcvf ' yj cv'ij g' gxl f gpeg' wpf gtn' kpi ' hpg' qh' yj g' qh' t gupugu y cu' uki p' h' ecpv' b' qt g' l' p' r' o o cvqt { ' yj cp' yj g' gxl f gpeg' kp' yj g qj gt. 'qt' yj cv' gxl f gpeg' qh' i wkn' y cu' uq' o wej ' utqpi gt' lp' qpg yj cp' yj g' qj gt' yj cv' l' q' l' p' gt' y cu' i tquu' " wphck0" *Ugg "People v. Memro, supra. 33' Ecnf6j " cv' 0: 730+

Eqpvtct { "vq" f ghgpf cpv'u' eqpvv'v' vq' yj g' f g' p' k' n' qh' f ghgpf cpv'u ugxgtcpeg" o qv' k' p' q' v' eqpuv' w' w' c' x' k' r' v' k' p' qh' yj g' Gki j yj qt "Hqwt vggpvj "Co gpf o gpv'v' yj g' Wpksgf "Ucvgu' Eqpuv' w' w' w' w' = pq' i' t' q' w' p' f "gz' k' u' v' q' u' w' r' q' u' g' yj g' f' g' p' k' n' qh' u' g' x' g' t' c' p' e' g' f' g' r' t' k' x' g' f' ghgpf cpv' qh' c' t' g' r' k' d' r' g' f' v' g' t' o' k' p' c' v' k' p' qh' i' wkn' / qt' e' c' w' u' g' f' c' "v' t' k' n' yj cv' y cu' h' w' p' f' co' g' p' v' c' m' f' " w' p' h' c' k' 0

Y g' t' g' l' g' e' v' f' ghgpf cpv'u' eqpvv'v' vq' yj cv' j' g' y cu' f' g' r' t' k' x' g' f' qh' yj g' c' d' k' i' v' f' "vq" f go qpwtcv' g' cv'ij g' j' gctkpi "qp' yj g' ugxgtcpeg" b' qv' k' p' yj cv' yj g' gxl f gpeg" qh' yj g' eqo o qp" o qv' k' g' hq' t' yj g' cwgo r vgf o wtf gt' qh' Ectr gpvgt' cpf "yj g' eqpur k' c' e' { "vq" o wtf gt' F' g' v' g' e' v' k' x' g' Y' k' n' k' o' u' y' cu' x' g' t' { "y' g' c' m' i' d' g' e' c' w' u' g' qh' yj g' r' t' q' u' e' w' q' t' u' h' c' k' n' t' g' v' q' r' t' q' x' k' f' g' v' k' o' g' n' f' k' u' e' q' x' g' t' { "t' g' i' c' t' f' k' p' i' "y' k' p' g' u' u' D' t' q' q' o' h' k' r' i' f' "c' v' yj g' r' t' g' r' i' k' o' k' p' c' t' { "j' g' c' t' k' p' i' 0' Vj g' j' g' c' t' k' p' i' "q' p' "u' g' x' g' t' c' p' e' g' "q' e' e' w' t' g' f' 32" o' q' p' yj u' c' h' g' t' " yj g' r' t' g' r' i' k' o' k' p' c' t' { "j' g' c' t' k' p' i' . " c' p' f' "f' ghgpf cpv' j' c' f' c' o' r' n' g' " v' k' o' g' " v' q' f' k' u' e' q' x' g' t' " g' x' l' f' g' p' e' g' " u' w' t' h' e' k' e' p' v' " v' q' f' g' o' q' p' u' t' c' v' g' yj cv' yj g' gxl f gpeg" qh' i' eqo o qp" o qv' k' g' y cu' w' p' t' g' r' k' d' r' g' . " q' t' " yj cv' yj g' gxl f gpeg" qh' i' f' ghgpf cpv'u' t' g' u' r' q' p' u' k' d' k' i' v' f' " h' q' t' " yj g' cwgo r vgf o wtf gt' qh' Ectr gpvgt' y cu' y' g' c' n' 0' k' p' c' p' { " g' x' g' p' v' " f' ghgpf cpv' f' k' " p' q' v' " o' c' n' g' " yj k' u' e' r' c' k' o' " c' v' " yj g' j' g' c' t' k' p' i' " q' p' " yj g' u' g' x' g' t' c' p' e' g' o' q' v' k' p' = k' p' h' e' v' j' g' u' c' v' g' f' " j' g' y' q' w' f' " p' q' v' c' w' c' e' n' i' v' j' g' e' t' g' f' k' d' k' i' v' f' qh' i' D' t' q' q' o' h' k' r' i' f' 0' J' g' u' w' i' i' g' u' g' f' " yj cv' k' y' q' w' f' " j' c' x' g' " d' g' g' p' " r' q' q' t' f' ghgpf " c' e' v' k' e' u' " v' q' " c' w' g' o' r' v' " v' q' " k' o' r' g' c' e' j' " yj g' y' k' p' g' u' u' " c' v' " yj g' r' t' g' r' i' k' o' k' p' c' t' { "j' g' c' t' k' p' i' . " c' p' f' " yj cv' j' g' r' t' g' h' e' t' t' g' f' " v' q' " t' g' u' e' t' x' g' " yj g'

f ghgpf hq' t' v' t' k' r' i' 0' Vj wu' yj k' u' e' r' c' k' o' " k' u' y' c' k' x' g' f' " q' p' c' r' r' g' c' n' 0' * Ugg "People v. Memro, supra. 33' Ecnf6j " 9: 8. " 730+

F ghgpf cpv' cnuq' eqpvv'v' u' yj cv' o' vj g' t' g' y cu' c' f' w' g' r' t' q' e' g' u' u' x' k' r' v' k' p' d' c' u' g' f' " q' p'] r' t' q' u' e' g' e' w' a' t' k' t' c' n' o' k' u' e' q' p' f' w' e' v' k' p' h' c' d' t' l' e' c' v' k' p' i' g' x' l' f' g' p' e' g' " v' q' " u' w' r' q' t' v' " c' p' " q' yj g' t' y' k' u' g' " w' p' c' x' c' k' r' d' r' g' " l' q' k' p' f' g' t' " qh' e' c' u' g' u' 0' Vj k' u' e' r' c' k' o' " k' u' d' c' u' g' f' " w' r' q' p' " yj g' " e' q' p' v' v' v' k' p' " yj cv' yj g' r' q' r' e' g' j' c' f' " h' c' d' t' l' e' c' v' g' f' " c' r' q' r' e' g' t' g' r' q' t' v' i' t' q' o' " q' p' g' F' q' p' c' i' f' " U' w' w' q' p' t' g' r' v' k' p' i' " f' ghgpf cpv' u' r' n' c' p' " v' q' " o' w' t' f' g' t' " E' c' t' r' g' p' v' g' t' . " c' p' f' " q' h' t' g' t' g' f' k' v' c' v' yj g' r' t' g' r' i' k' o' k' p' c' t' { " j' g' c' t' k' p' i' 0' Vj g' y' g' c' n' p' g' u' u' " qh' yj g' " U' w' w' q' p' g' x' l' f' g' p' e' g' / y' j' l' e' j' " y' c' u' p' q' v' r' t' g' u' g' p' v' g' f' " d' l' " yj g' R' e' g' q' r' n' g' " c' v' t' k' n' y' c' u' d' t' q' w' i' v' v' v' q' yj g' v' t' k' n' i' e' q' w' t' u' u' " c' v' g' p' v' k' p' " c' v' yj g' j' g' c' t' k' p' i' " * 950 " q' p' yj g' u' g' x' g' t' c' p' e' g' " o' q' v' k' p' 0' Vj g' e' k' t' e' w' o' u' c' p' e' g' " yj cv' yj k' u' r' c' t' v' e' w' a' c' t' g' x' l' f' g' p' e' g' y' c' u' y' g' c' n' i' f' k' f' " p' q' v' o' c' m' g' l' q' k' p' f' g' t' " w' p' c' x' c' k' r' d' r' g' . " c' p' f' " yj g' e' r' c' k' o' " yj cv' yj g' r' q' r' e' g' h' c' d' t' l' e' c' v' g' f' " yj g' g' x' l' f' g' p' e' g' k' u' w' e' p' e' q' p' x' k' p' e' k' i' 0' * Ugg' e' r' c' k' o' " P' q' 039. " p' o' s' t' = u' g' g' " c' n' u' q' " e' r' c' k' o' " P' q' 07. " p' o' s' t' 0+

4. Delay in discovery

*9+ "F ghgpf cpv' eqpvv'v' u' yj cv' yj g' v' t' k' n' i' e' q' w' t' v' g' t' t' g' f' " k' p' t' g' h' u' k' p' i' v' q' u' g' v' c' u' k' f' g' yj g' l' p' h' q' t' o' c' v' k' p' . " g' z' e' n' i' f' g' yj g' v' g' u' k' o' q' p' { " qh' C' t' x' l' e' g' E' c' t' t' q' m' " q' t' " k' o' r' q' u' g' " c' p' { " q' yj g' t' " g' h' e' v' k' x' g' " u' c' p' e' v' k' p' " h' q' t' " yj g' r' t' q' u' e' g' e' w' k' p' u' " h' c' k' n' t' g' " v' q' " f' k' u' e' i' q' u' g' " v' q' " yj g' " f' g' h' e' p' u' g' " d' g' h' t' g' " yj g' r' t' g' r' i' k' o' k' p' c' t' { " j' g' c' t' k' p' i' " yj cv' yj g' r' t' q' u' e' g' e' w' k' p' " r' u' q' u' u' g' f' " g' x' l' f' g' p' e' g' yj cv' f' ghgpf cpv' j' c' f' " o' c' f' g' l' p' e' w' r' c' v' q' t' { " u' v' c' y' g' o' g' p' v' " v' q' " l' c' k' j' q' w' u' g' k' p' h' q' t' o' c' p' v' C' t' x' l' e' g' E' c' t' t' q' m' 0

D' g' h' t' g' yj g' r' t' g' r' i' k' o' k' p' c' t' { " j' g' c' t' k' p' i' . " E' c' t' t' q' m' " c' r' t' g' t' u' p' l' p' e' c' t' e' g' t' c' v' g' f' y' k' j' " f' ghgpf cpv' lp' " yj g' e' q' w' p' v' " l' c' k' n' " k' p' h' q' t' o' g' f' " yj g' r' t' q' u' e' g' e' w' k' p' yj cv' f' ghgpf cpv' j' c' f' " c' f' o' k' w' g' f' " v' q' " E' c' t' t' q' m' " yj cv' f' ghgpf cpv' j' c' f' n' k' r' g' f' " F' g' v' e' v' k' x' g' " Y' k' n' k' o' u' 0' Vj g' r' t' q' u' e' g' e' w' k' p' " f' k' " p' q' v' k' p' h' q' t' o' yj g' f' ghgpf " qh' yj k' u' " u' v' c' y' g' o' g' p' v' " w' p' v' k' i' " c' r' r' t' q' z' k' o' c' v' g' n' f' " y' q' o' q' p' yj u' c' h' g' t' " yj g' r' t' g' r' i' k' o' k' p' c' t' { " j' g' c' t' k' p' i' 0' F' ghgpf cpv' o' c' f' g' " c' p' w' p' u' e' e' g' u' h' w' i' o' q' v' k' p' " v' q' u' g' v' c' u' k' f' g' yj g' " k' p' h' q' t' o' c' v' k' p' " q' t' " d' c' t' " yj g' v' g' u' k' o' q' p' { " qh' E' c' t' t' q' m' " c' v' t' k' n' " q' t' " h' q' t' " u' q' o' g' q' yj g' t' " c' r' r' t' q' r' t' l' e' v' g' u' c' p' e' v' k' p' " c' i' c' k' p' u' v' yj g' r' t' q' u' e' g' e' w' k' p' " h' q' t' " k' u' " f' g' r' e' { " k' p' " e' q' o' r' n' f' k' p' i' y' k' j' " yj g' v' t' k' n' i' e' q' w' t' u' u' f' k' u' e' q' x' g' t' { " q' t' f' g' t' 0' F' ghgpf cpv' eqpvv'v' u' yj cv' yj g' v' t' k' n' i' e' q' w' t' u' u' " t' g' h' w' u' c' n' i' v' q' " k' o' r' q' u' g' " c' " u' c' p' e' v' k' p' " e' q' p' u' k' w' w' g' f' " c' x' l' q' r' v' k' p' " qh' j' k' u' " U' k' z' yj " c' p' f' " H' q' w' t' v' g' g' p' v' j' " C' o' g' p' f' o' g' p' v' t' k' i' j' u' v' q' f' w' g' r' t' q' e' g' u' u' qh' i' c' y' " c' p' f' " v' q' " e' q' p' h' t' q' p' v' j' g' y' k' p' g' u' u' g' u' c' i' c' k' p' u' v' j' k' o' 0' J' g' " c' u' u' g' t' w' c' " x' k' r' v' k' p' " qh' i' r' c' t' c' m' g' n' i' r' t' q' x' k' u' k' p' u' " qh' yj g' " E' c' n' h' t' p' k' E' q' p' u' k' w' w' k' p' 0

Cu' y' j' g' j' c' x' g' " u' c' v' g' f' . " o' j' k' y' v' k' u' f' ghgpf cpv' u' d' w' t' f' g' p' " v' q' " u' j' q' y' " yj cv' yj g' h' c' k' n' t' g' " v' q' " v' k' o' g' n' f' " e' q' o' r' n' f' " y' k' j' " c' p' { " f' k' u' e' q' x' g' t' { " q' t' f' g' t' " k' u' r' t' g' l' w' f' l' e' k' n' " c' p' f' " yj cv' c' " e' q' p' v' k' w' c' p' e' g' " y' q' w' f' " p' q' v' j' c' x' g' " e' w' t' g' f' yj g' j' c' t' o' 0' " * People v. Pinholster " 3; ; 4+ 3' Ecnf6j " : 87. ; 63']6' EcnfT r t0f " 987. " : 46' R0f " 793_0" F ghgpf cpv' h' c' k' n' v' q' f' g' o' q' p' u' t' c' v' g' r' t' g' l' w' f' l' e' g' 0' J' g' " e' q' p' v' g' p' f' u' j' g' y' c' u' r' t' g' l' w' f' l' e' g' f' d' g' e' c' w' u' g' j' g' y' c' u' w' p' c' d' r' g' " v' q' z' c' o' k' p' g' E' c' t' t' q' m' " c' v' yj g' r' t' g' r' i' k' o' k' p' c' t' {

j getkpi "qt"vq"lpgvtxlgy "y kpguugu"tgi ctf kpi "vj"etgf kdkrkv qh'Ecttqm'u'ucvgo gpv'0J g'eqpvgpf u"vj g'r tqugewkqp"i clpgf c"xcvkeci'cf xcpvci g"d{ "uj kgf kpi "Ecttqm'ltqo "gzco kpcvkqp cv'vj g'r tgrko kpc{ "j gctkpi "tgi ctf kpi "f ghgpf cpvu"lpewr cvqt { ucvgo gpv'cpf 'Ecttqm'u'r quakdrng'ucvuw'cu'c'i qxgtpo gpv'ci gpv'0 J g'eqpvgpf u"j g"vj gtdg{ "y cu" f gr tkxgf "qh"cp"qr r qtwpk{ "vq f gxgnr "cp"chkt o cvkxgf ghgpfug0

Vj g'eqpvgpvkqp"ku"wpr gtucukxg0F ghgpf cpv'j cf "co r ng"ko g/ qpg'cpf "c"j cih{ gctu'chgt 'hgctkpi 'qh'Ecttqm'u'ucvgo gpv'vq'vj g r tqugewkqp"vq"r tgr ctg'vq'ej cmngi g'vj g'gxf gpeg'cpf 'f gxgnr cp{ 'chkt o cvkxgf ghgpfug0F ghgpf cpvu'ereko 'vj cv'j cf 'j g'hpy p qh'Ecttqm'u'ucvgo gpv'r tkqt "vq"vj g'r tgrko kpc{ " *951 "j gctkpi . j g'y qwf "j cxg'ecmgf 'Ecttqm'cu'c'y kpguu'cv'vj cv'j gctkpi 'cpf qdvc'kpf "gxf gpeg"vq" f kuetgf k'j ko "cpf "vq"uwr r qtv'c'f ghgpf vj cv'f ghgpf cpv'y cu'dgkpi "htco gf "ku"gpv'kgn{ "ur gawr'vkg0'k'p cp{ "gxgpv"cu"pqvgf . "f ghgpf cpv'j cf "co r ng"qr r qtwpk{ "k'p"vj g gzvgpf gf 'r g'kqf 'dgy ggp"vj g'f kuenqwtg'qh'Ecttqm'u'ucvgo gpv cpf "vj g'v'kcn'vq"i cvj gt "gxf gpeg"kp"uwr r qtv'qh'uwej "c"erko 0⁸

8 Y g" pqvg" vj cv' f ghgpf cpv' dtqwi j v" cp" kp" nko kpg o qv'kqp."r tkqt "vq"vj g'gxf g'v'kct { "r qt'v'kqp"qh'vj g'v'kcn vq"gzenvf g"vj g'v'guko qp{ "qh"lckj qvug"lphqto cpv' *kpenw kpi "vj cv'qh'Ecttqm'cpf "hqt"cp" gxf g'v'kct { j gctkpi . "cv'y j lej "j g'r tqr qugf "vq"gzr ngtg'y j gvj gt Ecttqm' y cu" qr g'v'kpi "cu" c" i qxgtpo gpv' ci gpv y j gp"j g"tgegkxgf "f ghgpf cpvu" eqphguukp0' Y j gp vj g"o cvwt "eco g'qp"ht"j gctkpi . "j qy gxgt . "eqwpugn uwo kvgf "vj g"o cvwt "qp"vj g"dcuk"qh'vj g"y tkwgp o qv'kqp"cmngi . "vj gtdg{ "hqtgi qkpi "cp"qr r qtwpk{ "vq gzco kpg'Ecttqm'w'pf gt "qcv'j "kp"cf xcpvg'qh'v'kcn0

F ghgpf cpvu'eqpvgpvkqp"cuq"ku'r tgo kugf "wr qp"vj g'cuuwo r v'kqp vj cv' c" nko kcv'kqp" qp" c" f ghgpf cpvu" cdkrkv{ "vq" f kueqxt gxf gpeg'cpf "vq" f gxgnr "c" f ghgpf cpv'vj g'r tgrko kpc{ "j gctkpi pgeguuctk{ "ku"tgxgtukdrng" gttqt0' Uwej "gttqt. "j qy gxgt. "cv'y j g r tgrko kpc{ "j gctkpi "ku"pqvt'gxgtukdrng"qp"cr r gcnk'p'vj g'cdugpeg qh'c"uj qy kpi "qh"r tglw'leg"cv'v'kcn0 *People v. Pompa-Ortiz *3; : 2+49'Ectf 73; .74; "J387'Ectf r v0: 73.'834'R0f"; 63_ lj qrf kpi "vj cv'ktgi wactk'kgu'cv'vj g'r tgrko kpc{ "j gctkpi "vj cv'ctg pqv'lw'kuf k'v'kpcn'k'p"vj g'hw'p'co g'pvcn'ugpug"o'ts wkt g'txgtucn qp"cr r gcn'qpn' "kh'vj g'f ghgpf cpv'ecp'f go qpwtcv'vj cv'j g'qt'uj g oy cu'f gr tkxgf "qh'c' hck'v'kcn'qt'qy gty kug'lw'htg'f r tglw'leg'cu c't'guw'qh'vj g'gttqt'cv'vj g'r tgrko kpc{ "gzco kpcvkqp0_0' C'v'kcn f ghgpf cpv'y cu'cdng"vq"eqphtqp'v'cpf "etqu'gzco kpg'Ecttqm j cxkpi "j cf "co r ng"qr r qtwpk{ "vq"lpxguki cv'vj g'd'cuku'ht"vj g y kpguu'u'v'guko qp{ "cpf "cp" { 'chkt o cvkxgf ghgpfug'w'i g'ugf 'd{ k0'Vj g'f g'rc{ "kp" f kuenqwtg'f k'f "pqv'ko r nkecv'f ghgpf cpvu'f w'g r tqegu'u'tki j v'vq"dg"lphqto gf "qh'o cv'kcn'gxf gpeg'hc'xqtcdrng

vq"vj g'ceewugf "ugg"Brady v. Maryland"*3; 85+595"WUO': 5. : 9"] : 5"UEv0'33; 6."33; 8/33; 9."32"NOGf 04f "437_="ugg"cuq United States v. Bagley"*3; : 7+695"WUO'889.'89: "J327"UEv0 5597."55: 3/55: 4." : 9"NOGf 04f "6: 3_="j g" was"lphqto gf "qh vj g'gxf gpeg'cpf "j cf "co r ng"ko g'vq"lpxguki cv'gdhqtg'v'kcn0 O qt'gqxtg. "vj g'gxf gpeg"kp"vj g'r tqugewkqp"u'r quugukqp"y cu pqv'hc'xqtcdrng"vq"vj g'ceewugf 0

Hkpcn{ . "f ghgpf cpv'kcu"vq"uwr r qt'v'j ku'eqpvgpvkqp"vj cv'vj g'v'kcn eqw'v'y cu'tgs wkt gf "vq"ko r qug"vj g"ucpevkqp"qh'f kuo ku'cn'qt gzenukqp"qh'gxf gpeg. "qt"cv'ngcu'vq"ko r qug" c"ur gekn'lw{ kputwekqp."d'gecvug'vj g'r tqugewkqp"cmngi gf n{ "j cf 'eqo o kvgf c" y kn'w'i xk'v'kqp"qh'c" f kueqxtg{ "qt'f gt0' Vj g" ecugu"ekgf d{ "f ghgpf cpv'tgeqi pk g'vj cv'eqw'w'j cxg'dtqcf "f kuetg'kqp"kp f gvto k'kpi "vj g"cr r tqr tkcv' ucpevkqp"ht" f kueqxtg{ "cdwug. cpf "tgeqi pk g'vj cv'ucpevkqp"tcpi kpi "htqo "f kuo ku'cn'vq"vj g i k'kpi "qh"ur gekn'lw{ "kputwekqp"may"dg'tgs wkt gf "kp"qt'f gt vq"gpwtg'vj cv'vj g'f ghgpf cpv't'gegkx'cu'c' hck'v'kcn' r ct'v'w'rcn{ y j gp"r qv'g'v'kcn{ "hc'xqtcdrng" gxf gpeg"j cu'dggp" suppressed0 *Ugg."g0 0"People v. Zamora"*3; : 2+4: "Ectf": . : . ; "J389 Ectf r v0795.'837'R0f "3583_="People v. Caldwell"*3; : 3+452 Ectf r v06f "Uwr r 03.'7"J4: 4'Ectf r v0494_]tgxgtukpi " *952 cp"qt'f gt" f kuo ku'kpi "c"eqo r nkecv'ht" f kueqxtg{ "xk'v'kqp"kp vj g"cdugpeg" qh'c"uj qy kpi "qh"r tglw'leg 0'F ghgpf cpv'ekgu pq"ecug. "cpf "qwt"t'gugctej "j cu'f kuenqwtg'p'p'p'g. "guv'ck'kpi kpi vj cv'vj g'r tqugewkqp"u'r t'g'v'kcn'f g'rc{/y j gvj gt' y kn'w'i'qt'p'qv'k'p f kuenqkpi "lpewr cvqt { "gxf gpeg"vq"vj g'f ghgpf cpv'tgs wkt'gu'c r ct'v'w'rcn' ucpevkqp"cu'c'o cvwt "qh'f w'g'r tqegu."qt"vj cv'k'k'w'g vq"ko r qug" c"ucpevkqp"ht" c" r g'kqf "qh'f g'rc{ "vj cv' qeewt'gf npi "d'ghqtg" v'kcn' tgs wkt'gu'tgxgtucn' qh'c" eqp'x'k'v'kqp" kp"vj g cdugpeg"qh' r tglw'leg"vq"vj g'f ghgpf cpv'cv'v'kcn0 Y g"pqvg"vj cv vj g"tgeqtf "f qgu'pqv'uw r qt'v'f ghgpf cpvu'eqpvgpvkqp"vj cv'vj g v'kcn'eqw'v'f k'f "pqv'kpi "vq"r tq'v'v'j ko "htqo "xk'v'kqp"qh'vj g eqw'v'f kueqxtg{ "qt'f gt0' C'v'vj g"j gctkpi "qp"vj g"o qv'kqp"vq"ugv cuk'g'vj g"lphqto cv'kqp. "cv'y j lej "vj g'r tqugewkqp"cu'gt'v'f "vj cv eqpegtp'ht" Ecttqm'u'uchgv' h'gf "vq"vj g'f g'rc{ "kp" f kuenqwtg. "vj g v'kcn'eqw'v'f gvto k'p'gf "vj cv'f ghgpf cpv'j cf "pqv'dggp"r tglw'legf d{ "vj g'f g'rc{ "kp" f kueqxtg{ . "dw'y ctpgf "vj g'r tqugewkqp"pqv'vq o cmng'cp{ "hwt'j gt"wp'k'v'g'c'n'f gekuk'p'u'tgi ctf kpi "eqo r nkepeg y kj "vj g'eqw'v'f kueqxtg{ "qt'f gt"cpf "vj g'cv'g'p'gf "ucpevkqp"kh vj g'eqw'v'v' ctpkpi "y gt'g'pqv'j g'gf gf 0'k'p'lw'wo . "pq'eqp'v'k'w'k'p'c'n xk'v'kqp"qt'v'j gt'gttqt'j cu'dggp'uj qy p0

5. Failure to disclose evidence

*. "F ghgpf cpv' eqpvgpf u"vj g'r tqugewkqp" xk'v'v'f "j ku'tki j v vq" f w'g'r tqegu'u' qh'rcy "d{ "hck'kpi "vq" f kuenqwtg" lphqto cv'kqp tgi ctf kpi "cp"cmngi gf "lphqto cpv'u'vgo "kp"vj g"Nqu" C'pi g'ru Eqw'p'v' "lck'v'j cv'cu'gt'v'f n{ "gpeqwtci gf "kpo cv'gu"vq"uggn'qt h'cd'k'cv'g'eqp'v'k'p'u'ht'qo "f ghgpf cpv'kp"pq'v'k'q'w'ec'ugu'w'ej

cu'j ku0F ghgpf cpv't gng'u'w qp'vj g'tw'g'vj cv'f w'r t qegu'q'hl'ry tgs wktgu'vj cv'vj g'r tqugewkqp'f ku'eq'g'o cvgtkcn'gzewr cvqt { g'xkf gpeg'v'q'cp'ceewugf "ugg"*Brady v. Maryland.*"supra."595 WLU'cv'r 0: 9"]: 5"UE'v'cv'r 0'33; 8/33; 9_="ugg'cnuq"*United States v. Bagley.*"supra."695"WLU'cv'r 089: "J327"UE'v'cv'r 0 55: 3/55; 4_+"kpenw'f lpi "o")cxqtcdrng" g'xkf gpeg'npqy p"v"q"(00 q'vj gtu'cew'pi "qp'vj g'i q'xgtpo g'p'v'u'dgj c'hi'(000)o"*In re Brown* *3; ; : +39"Ecrf6j " : 95." : 9; "J94"Ecrf0r v04f "8; : . : "74"R0f 937_0f g'eqp'v'p'f u'vj g'w'p'f ku'eq'ug'f "g'xkf gpeg'y cu'b cvgtkcn'cp'f g'zewr cvqt { "d'gecwug'k'y q'w'f 'j c'xg't t'q'xkf g'f 'c'w'p'qi 'd'cu'k'w'k' lo r g'cej o g'p'v'q'hl'r tqugewkqp'y k'p'gu'gu0

F ghgpf cp'v'u' eqp'v'p'v'k'p'ku'r t go k'ug'f "w'qp'j ku'cu'ug'v'k'p'vj cv uwe'j "c'u'f u'go "g'z'k'ng'f "c'v'vj g'v'ko g'q'h'j ku'k'p'ecteg'c'v'k'p'k'p'vj g Nqu'c'pi g'rg'u'Eqw'p'v'f "l'ck'0'k'p'uw'r r q't'v'f ghgpf cp'v'q'hl'g'tu'c"Nqu Cpi g'rg'u'I t'cp'f "l'w' { "T'gr q't'v'lt'qo "3; ; : /3; ; 20'Vj ku't'gr q't'v'ku p'q'v'r c't'v'q'h'j g't'geqt'f "qp'c'r r gcn'j q'y g'xg't."c'p'f "o'c'u'y g'j c'xg go r j c'uk' g'f "l'p'vj g'r cu'v'q'w'f t'g'x'k'g'y "q'p'f k'g'e'v'r r gcn'ku'h'ko k'g'f v'q'vj g'r r g'm'c'v'g't'geqt'f 0"*People v. Barnett**3; ; : +39"Ecrf6j 3266."33: 5"J96"Ecrf0r v04f "343." : 76"R0f "5: 6_0'C'u'y g'j c'xg f q'p'g'k'p'vj g'r cu'v'v'oj d'gecwug'f ghgpf cp'v'u'er'ko "ku'f g'r g'p'f g'p'v w'qp' g'xkf gpeg'c'p'f "o cvgtu'p'q'v' t'g'h'g'e'v'f "l'p'vj g't'geqt'f "q'p c'r r gcn'y g'f g'ek'p'g'v'q'eq'p'uk'f g't'k'v'c'v'j ku'w'pew'g'0"*Ibid.* +

F ghgpf cp'v'cumi'vj cv'y g'v'cng'lw'f k'ek'cn'p'q'v'g'q'h'vj g'i t'cp'f "l'w' { t'gr q't'v'Y g'f g'p' { "j g't'g's w'gu'v' d'gecwug'k'v'ku'ok'p'eq'v'c'x'g'p'v'k'p' q'h'vj g'i g'p'g't'c'n't'w'g'vj cv'cp'" *953 "c'r r g'm'c'v'g'eq'w'v'i g'p'g't'cm'f ku'p'q'v'vj g'f'q't'w'o "k'p'y j k'ej "v'q'f g'x'g'nr "c'p'c'f f k'k'q'p'c'n'hc'ew'cn t'geqt'f "(000"*People v. Peevy**3; ; : +39"Ecrf6j "33: 6."3429 J95"Ecrf0r v04f " : 87." : 75"R0f "3434_="ugg'cnuq"*People v. Stoll* *3; ; : +6; "Ecrf6j "3358."3366."lp07"J487"Ecrf0r v0333."9: 5 R0f "8; : _0"Vj g'ek'ewo u'c'p'eg'vj cv'y g'i t'cp'v'g'f "c't'g's w'gu'v'v'q v'cng'lw'f k'ek'cn'p'q'v'g'q'h'vj g'uc'o g't'gr q't'v'k'p"*People v. Gonzalez* *3; ; : 2+73"Ecrf6j "339; "J497"Ecrf0r v094; . : 22"R0f "337; _ku w'p'c'x'k'k'p'i 0"Ugg'v'v'c'v'f 0347; . "lp0760"k'p'vj cv'ec'ug'y g'i t'cp'v'g'f lw'f k'ek'cn'p'q'v'g'k'p'eq'p'p'g'v'k'p'y k'j "j g'f ghgpf cp'v'u'r g'v'k'k'p'h'q't y t'k'q'h'j c'd'g'cu'eq't'r w'0C"j c'd'g'cu'eq't'r w'u'f t'q'eg'g'f k'p'i ."q'h'eq'w'ug. c'r r t'q'r t'k'v'gn' { "o c' { "f g'x'g'nr "c"t'geqt'f "d'g { q'p'f "vj g't'geqt'f "q'p c'r r gcn'0"Ugg"*People v. Pope**3; 9; +45"Ecrf6j "634."648"J374 Ecrf0r v0954."7: 2"R0f " : 7; . 4"CN0T6j "3_0-

F ghgpf cp'v'cu'ug'v'v' d'cu'g'f "w'qp'vj g't'geqt'f "q'p'c'r r gcn'vj cv v'j g'k'p'q't'o c'p'v'u'y j q'v'g'uk'h'g'f "c'i c'k'p'v'j k'o "q'h'g't'g'f "w'p't'g'k'c'd'ng v'g'uko q'p' { ."j cv'f g'v'k'ku'q'h'vj g't'k' u'c'v'go g'p'w'eq'w'f "j c'xg'd'gg'p i c't'p'g't'f "l'q'o "p'gy u't'gr q't'w'c'p'f "c'f f k'k'q'p'c'n'u'q'w'eg'u'q'v'j g't'vj c'p f ghgpf cp'v'c'p'f "vj cv'f ghgpf cp'v'eq'o r r'c'k'p'g'f "f w'k'p'i "v'k'cn'vj cv j g'y cu'w'w'd'g'ev'v'q"j c't'cu'o g'p'v'd' { "l'ck'l'q'h'k'ek'cn'u'f w'k'p'i "j ku r t'g't'k'c'n'ew'w'q'f { 0'Vj g'ug'er'ko u'g'x'g'p'k'h'ce'eg'r v'g'f "cu't'w'g'f q'p'q'v f go q'p'w'c'v'g'vj cv'vj g't'g'y cu'c'u'f u'go "y k'j k'p'vj g'Nqu'c'pi g'rg'u

Eqw'p'v'f "l'ck'l'q'h' g'p'eq'w'c'i k'p'i "k'p'o c'v'gu'v'q" t'g'eq'w'p'v' h'c'd't'k'ec'v'g'f eq'p'h'gu'k'q'p'u'q't' "vj cv'f ghgpf cp'v'y cu'vj g'x'v'ko "q'h' uwe'j "c u'f u'go 0'F ghgpf cp'v'ku'k'p'eq't't'g'ev'k'p'uw'i i g'v'k'p'i "vj cv'vj g't'geqt'f q'p'c'r r gcn'f go q'p'w'c'v'gu'vj cv'f f g'v'g'e'v'x'g'u' k'p'x'g'uk'i c'v'k'p'i "vj g et'ko g'r w'r q'ug'h'w'm' { "r m'eg'f "k'p'o c'v'g'k'p'q't'o c'p'w'p'g'c't'f ghgpf cp'v' k'p'c'p'g'h'q't'v'q'ug'ew'g'k'p'et'ko k'p'c'v'k'p'i "u'c'v'go g'p'w'="f ghgpf cp'v'u q'y p'ek'c'v'k'q'p'u'v'q"vj g't'geqt'f "t'g'x'g'c'n'p'q'w'ej "g'x'k'f g'peg'0'w'p'f g't v'j g'ug'ek'ewo u'c'p'eg'u'f ghgpf cp'v'j cu'h'k'k'g'f "v'q" g'v'c'd'k'uj "vj cv v'j g'r tqugewkqp'y cu'k'p'r q'u'gu'uk'q'p'q'h'o cvgtkcn'gzewr cvqt { g'xkf gpeg'vj cv'k'h'k'g'f "v'q'f ku'eq'ug'v'q'vj g'f ghg'p'ug'c'p'f "y g'o w'w t'g'g'ev'j ku'er'ko 0

6. Discovery related to police activities

*c+ F ghgpf cp'v'eq'p'v'p'f u'vj cv'vj g'v'k'c'n'eq'w'v'g't'g'f "k'p't'g'h'w'k'p'i "v'q i t'cp'v'f k'ue'q'x'g't' { "q'h'eg't'v'k'p" g'x'k'f g'peg'c'p'f "vj cv'vj g'r tqugewkqp g'tt'g'f "k'p'h'k'k'p'i "v'q'f ku'eq'ug'k'0J g'eq'p'v'p'f u'vj ku'g't'g't'f "f g'r t'k'g'f j k'o "q'h'j ku'eq'p'w'k'w'k'q'p'c'n't'k'i j v'v'q'f w'r t'q'egu'q'hl'ry 0

*32+ "Vj g'f ghgpf cp'v'i g'p'g't'c'm'f "ku' g'p'v'k'g'f "v'q" f k'ue'q'x'g't' { " q'h k'p'q't'o c'v'k'p'vj cv'y k'm'cu'ku'v'k'p'j ku'f ghg'p'ug'q't' d'g' w'ug'h'w'v'q' h'q't ko r g'cej o g'p'v' q't' et'qu'u'g'z'c'o k'p'c'v'k'p' q'h' c'f x'g't'ug' y k'p'gu'gu0 **People v. Memro**3; ; : 7+5: "Ecrf6j "87: . "899"J436"Ecrf0r v0 : 54."922"R0f "668_0"C"o q'v'k'p'h'q't'f k'ue'q'x'g't' { "o w'w'f g'u'et'k'd'g v'j g'k'p'q't'o c'v'k'p'v'q'w'j j v'y k'j "u'q'o g'ur g'ek'h'k'ek'f "c'p'f "r t'q'x'k'f g c'r r w'w'k'd'ng "l'w'w'h'k'ec'v'k'p'h'q't'f k'ue'q'w'g'0"*People v. McPeters* *3; ; 4+4"Ecrf6j "336: . "3393"] ; "Ecrf0r v04f " : 56." : 54"R0f 368_0"Vj g'eq'w'v'u't'w'k'p'i "q'p'c'f k'ue'q'x'g't' { "o q'v'k'p'ku'w'd'g'ev'v'q t'g'x'k'g'y "h'q't'c'd'w'ug'q'h'f k'ue't'g'v'k'p'0"*People v. Ashmus**3; ; 3+76 Ecrf6j " : 54." : 9; "J4"Ecrf0r v04f "334." : 42"R0f "436_0" *954

W'p'f g't'vj g'f w'r t'q'egu'v'c'w'ug'q'h'vj g'h'g'f g't'c'n'Eq'p'w'k'w'k'p'vj g' i q'x'g't'p'o g'p'v'j cu'vj g'q'd'r'k'i c'v'k'p'v'q'f k'ue'q'ug'v'q"vj g'f ghgpf cp'v g'x'k'f gpeg'k'p'ku'r q'u'gu'uk'q'p'vj cv'ku'h'c'x'q't'c'd'ng'v'q"vj g'ceewug'f c'p'f "o cvgtkcn'v'q' g'ku'w'gu'q'h'i w'k'w'q't'v'k'p'k'ij o g'p'v'0"*Strickler v. Greene**3; ; ; +749"WLU'485."4: 2/4: 4"J33; "UE'v'03: 58."3: 6: . 366"NG'f 04f "4: 8_="Pennsylvania"v. *Ritchie**3; ; 9+6: 2"WLU 5; . "79"J329"UE'v'0; ; . "3223." : 6"NG'f 04f "62_"]c'r r n'f k'p'i "f w'g r t'q'egu'c'p'c'n' { u'k'i k'p'vj g'eq'p'v'z'v'q'h'eq'w'v'u'f g'p'k'c'n'q'h'f k'ue'q'x'g't' { = *People v. Marshall*" *3; ; 8+ 35" Ecrf6j " 9; ; . : 62/ : 65"]77 Ecrf0r v04f "569." : 3; "R0f "34: 2_]u'co g_0'G'x'k'f g'peg'k'u'b cvgtkcn k'i "c" t'g'cu'q'p'c'd'ng' r t'q'd'c'd'k'k'v'f "g'z'ku'w'v'j cv' c" f k'h'g't'g'p'v' t'gu'w'v y q'w'f "j c'x'g" q'ee'w't'g'f "k'p'vj g'r t'q'eg'g'f k'p'i "j c'f "vj g" g'x'k'f g'peg d'gg'p'f k'ue'q'ug'f "v'q"vj g'f ghg'p'ug'0C"t'g'cu'q'p'c'd'ng'r t'q'd'c'd'k'k'v'f "ku'c r t'q'd'c'd'k'k'v'f "w'h'h'k'ep'v'v'q'w'p'f g't'o k'p'g'eq'p'h'k'f g'peg'k'p'vj g'q'w'eq'o g q'h'vj g'r t'q'eg'g'f k'p'i u'0"*Pennsylvania v. Ritchie.*"supra."6: 2"WLU cv'r 079"J329"UE'v'0'cv'r 0'3223_="In re Sassounian"*3; ; 7+; Ecrf6j "757."765/766."("lp07"J59"Ecrf0r v04f "668." : 9"R0f 749_ "q'x'g't't'w'k'p'i "d't'q'c'f g't' u'c'v'go g'p'v'q'h'vj g'u'c'p'f c't'f "k'p"*People*

o qvqpp'qp'vj g'i tqwpf 'vj cvf ghgpug'eqwpugn'r r gctgf 'vq'dg'xgt { r tgr ctgf 'hqt'vj g'r tgrko kpct { 'j gctkpi 'cpf 'eqpf wevgf 'ouwr gtdo gzcoc kpckqp' qh' vj g' y kpguugu' Vj g' eqwtv' cmq' pqvgf " vj cv f ghgpug'eqwpugn'j cf "ecmgf "74"y kpguugu'cv'vj g'r tgrko kpct { j gctkpi 'y j krg'vj g'r tqugewkqp'j cf "ecmgf "550F ghgpf cpv'ci clp wpuweeguutwnf "uqwi j v'vq' qxgt wtp" vj ku'twki "d{ "y c{ "qh'c r gvkqp'hqt'y tkv'qh'o cpf cvg'qt'r tqj kdkkqp0

F ghgpf cpv' eqpvpgf u' vj g' f gplcn' qh' c" eqpvkpwcepg" f gr tkxgf j ko "qh' c" o gcpkpi hwn' r tgrko kpct { "j gctkpi . "kp' xkqrcvqp" qh y j cv' j g' ej ctcevgtk gu' cu" c" hgf gtcn' eqpvkwwkqpcn' tki j v' vq vj g' gxpj cpf gf " cr r rckvqp' qh' uvcg' rcy 0J g' cmq' cr r gctu' vq eqpvpgf 'vj cvf gplcn' qh' j ku' o qvqpp' hqt' c' eqpvkpwcepg" f gr tkxgf j ko "qh' vj g' tki j v' vq" vj g' ghgexg" cuukwcepg" qh' eqwpugn' vq eqvhtqpv' cpf " etquu/ gzcoc kpg" y kpguugu. " cpf " vq" r tguvp' ep chktoc cvkxg' f ghgug0J g' eqpvpgf u' j ku'ercko 'ecppqvdg' tglgevgf qp' vj g' i tqwpf 'vj cvf eqwpugn' eqpf wevgf 'vj g' r tgrko kpct { 'j gctkpi kp' c" eqo r gvpv' o cpgt. " dgecvug" vj g' etwz" qh' j ku' ercko " ku vj cv' eqwpugn' y cu' f gr tkxgf " qh' etwcln' g' xkf gpeg" cpf " vko g' vq r tgr ctgf" vj g' hceg' qh' o cvwtu' vj cvf gxpqr gf " u' j qv' " dghqtg vj g' r tgrko kpct { 'j gctkpi 0

F ghgpf cpv' o c{ " r tgrxckl' kp" vj ku' ercko " qpn{ " kti" j g" ecp f go qpvtcvg" vj cv' vj g' f gplcn' qh' c" eqpvkpwcepg" dghqtg" vj g r tgrko kpct { "j gctkpi " tguwngf " kp' vj g' f gplcn' qh' c" hck' v' tcln' qt qv' gty kug' chgevgf 'vj g' v' wko cvg' lwf i o gpv0 *People'v. Pompa-Ortiz." supra. "49" Ecnf " cv' r 0'74; /752" ugg" cmq' "People" v. Crandell" *3; : : +68" Ecnf " : 55. " : 77"]473" Ecnf r v0'449. 982" R0f " 645_0" F ghgpf cpv' ku' wpcdrng" vq" f go qpvtcvg" vj cv hckwtg" vq" i tcpv' j ko " c" eqpvkpwcepg" dghqtg" vj g' r tgrko kpct { j gctkpi " j cf " cp{ " ghgevg' qp' vj g' v' tcln' qt" vj g' lwf i o gpv' 0J g' ku wpr gtuwckxg' kp' eqpvpgf kpi " vj cv' vj g' tgs wguvgf " eqpvkpwcepg y qwf " j cxg" chqtgf gf " j ko " vko g" cpf " cdckv{ " vq" f gxpqr kphqto cvkqp' tgi ctf kpi " j ku' f ghgug" vj cv' vj g' ecug' ci clpv' j ko y cu' olkxg' v' d{ " vj g' r qnkg' 0' Qpg" { gct" cpf " plkg" o qpv' u grr ug' dgvy ggp' vj g' r tgrko kpct { 'j gctkpi 'cpf 'vj g' g' xkf gpvct { r qt' vqp' qh' vj g' v' tcln' cmq' kpi " f ghgpf cpv' co r ng' vko g' vq kpxgwk' cvg. " vq' gzcoc kpg' vj g' f kexqg' gf " o cvgtcln' vj cv' j cf " dggp r tqxkf gf " d{ " vj g' r tqugewkqp. " cpf " vq" r tgr ctgf" vq" o ggv' vj g' ecug' ci clpv' j ko 0' J ku' kpcdkv{ " vq" ugevtg" vj g' f ku' kucln' qh vj g' ej cti g' vj cv' j g' cvgo r vgf " vq" o wtf gt " I gati g" Ectr gpvg. gxp' kp' vj g' wprkngf " gxp' vj g' hckwtg" vq" i tcpv' j ko " c" r tgr tgrko kpct { / j gctkpi ' eqpvkpwcepg' y cu' vj g' ecwug. ' ku' pqv' c' dcuku hqt' t' xgtucn' qh' vj g' gpwvki ' eqpvkpwcepg' cu' hqi' cu' vj g' f gplcn' qh' c' eqpvkpwcepg' f k' pqv' r tkxgf ko ' qh' c' hck' v' tcln' qp' vj cv' ej cti g' qt qv' gty kug' chgevgf 'vj g' v' wko cvg' lwf i o gpv' 0F ghgpf cpv' j cu' o cf g pq' vj qy kpi ' vj cv' vj g' f gplcn' qh' c' eqpvkpwcepg' j cf ' uvej ' cp' ghgevg cu' vq' cp{ " qh' vj g' ej cti gu. " qt' vj cv' vj g' f gplcn' qh' c' eqpvkpwcepg j cf " cp{ " ko r cev' cv' uwdugs wgpv' v' tcln' r tqeggf kpi u' qp' j ku' tki j w

vq' eqwpugn' vq' eqvhtqpv' vj g' y kpguugu' ci clpv' j ko . ' qt' vq' r tguvp' c' f ghgug0 Ceeqtf kpi n. ' y g' tglgevg' vj g' g' ercko u0

8. Faretta motions

*34c+ F ghgpf cpv' eqpvpgf u' vj g' v' tcln' eqwtv' f gplcn' j ko ' vj g' tki j v vq' tgr tguvp' j ko ugrh' cv' vj g' i wkn' r j cu' g' qh' vj g' v' tcln' kp' xkqrcvqp qh' vj g' Ukv' j ' cpf " *959 Hqwtvggp' vj Co gp' o gpw' qh' vj g' hgf gtcn Eqpvkwwkqpcn' g' cuugt' v' vj cv' vj g' v' tcln' eqwtv' xkqrcv' vj ku' tki j v kp' vj q' tgr gew' hktuv' d{ ' eqgtkpi j ko ' vq' y k' f tcy j ku' r t' g' tcln o qvqpp' vq' tgr tguvp' j ko ugrh' " cpf " ugeqpf. " d{ " f gp{ kpi " vj g o qvqpp' hqt' ugrh' tgr tguvp' cvkqp' vj cv' j g' t' g' pgy gf " qp' vj g' g' xg' qh v' tcln0

*35+ C' F ghgpf cpv' j q' hpqy kpi n' ' cpf ' kpvngki gpw' v' y clxgu' vj g tki j v' vq' eqwpugn' quuguu' c' tki j v' wpf gt' vj g' Ukv' vj ' Co gp' o gpv qh' vj g' hgf gtcn' Eqpvkwwkqpcn' vq' eqpf wevgf ku' qt' j gt' qy p' f ghgug0 *Faretta'v. California*3; 97+644' WLU0: 28. : 57; : 58]; 7' UEv0 4747. "4763/4764. "67" NCGf Qlf "784_0" Y j gp' vj g' f ghgpf cpv o qv' vq' f ku' ku' eqwpugn' cpf " wpf g' t' cvng' j ku' qt' j gt' qy p f ghgug. " j g' qt' u' j g' o' u' j qwf " dg" o cf g' cy ctg' qh' vj g' f cpi gtu cpf " f kucf xcpvci gu' qh' ugrh' tgr tguvp' cvkqp. " uq' vj cv' vj g' t' eqtf y kn' g' u' cvd' k' vj cv' vj g' hpqy u' y j cv' vj g' ku' f kpi " cpf " j ku' ej qleg ku' o cf g' y k' j " g' { gu' qr gp0' o' " Id. " cv' r 0' : 57"]; 7' UEv0 cv' r 0 4763_ = ugg' cmq' "People" v. Pinholster, supra, "3" Ecnf vj " cv r r 0' ; 4. /; 4. 0' Hwtv' gt. " cu' y g' j cxg' g' r rckp' gf. " ocnj qvi j " kp c" etko kpcn' v' tcln' c" f ghgpf cpv' j cu' c" hgf gtcn' eqpvkwwkqpcn wpeqpf k' k' p' cn' tki j v' qh' ugrh' tgr tguvp' cvkqp. " kp' qt' gt' vq' k' p' xqng vj cv' tki j v' j g' qt' u' j g' o' wv' o' cng' cp' wpgs w' x' q' c' n' cuugt' v' k' qp' qh vj cv' tki j v' y k' j kp' c' t' g' cu' p' d' r' vko g' t' tk' t' vq' vj g' eqo o g' pego gpv qh' v' tcln' 0' E' k' v' q' pu' 0' Y j gp' c' o' qvqpp' hqt' ugrh' tgr tguvp' cvkqp' ku pqv' o' cf g' kp' c' vko gn' ' h' cu' j k' p' r' t' k' t' vq' v' tcln' ugrh' tgr tguvp' cvkqp pq' h' q' i' gt' ku' c' o' cvgt' qh' tki j v' d' w' ku' u' w' d' l' g' v' v' vj g' v' tcln' eqwtv' u' f k' u' e' t' g' v' k' p' 0' *People'v. Bradford, supra, '37' Ecnf vj ' cv' r 035870- k' p' g' z' g' t' e' k' u' k' i' vj ku' f k' u' e' t' g' v' k' p' . " vj g' v' tcln' eqwtv' u' j qwf " eqpvk' gt h' cevtu' u' wej " cu' o' v' j g' s' w' c' k' v' " qh' eqwpugn' u' tgr tguvp' cvkqp' qh vj g' f ghgpf cpv' vj g' f ghgpf cpv' u' r' t' k' t' r' t' q' e' r' k' l' v' vq' u' w' d' u' k' w' g' eqwpugn' vj g' t' g' cu' p' u' hqt' vj g' t' g' s' w' v' u' vj g' r' e' p' i' vj " cpf " u' c' i' g' qh vj g' r' t' q' e' g' g' f' k' i' u. " cpf " vj g' f' k' u' w' v' k' p' qt' f' g' r' c' { " y j k' e' j " o' k' i' j v t' g' u' p' c' d' n' " dg' g' z' r' g' e' v' g' f " vq' h' q' m' y " vj g' i' t' c' p' v' k' i' " qh' u' w' e' j " c o' qvqpp' 0' o' *People'v. Burton*3; : : +6: " Ecnf " : 65. : 75"]47: Ecnf r v0'3: 6. "993" R0f "3492_ " s' w' v' k' p' i "People'v. Windham *3; 99+3; " Ecnf "343. "34: "]359" Ecnf r v0: . "782" R0f "33: 9_0-

*34d+ Vj g' t' eqtf " t' ghgevg' vj cv' qp' Qevdgt' : . "3; : 9. " f' w' k' p' i j gctkpi u' qp" r t' g' v' tcln' o' qv' k' p' u' vq' dg' t' g' u' k' x' g' f " dghqtg" vj g' eqo o g' pego gpv' qh' lwt { " ugrg' v' k' p' . " f ghgpf cpv' y j q' c' r' g' c' f { j cf " dggp" i' t' c' p' v' g' f " u' c' w' u' cu' e' q' e' q' w' p' u' g' n' o' q' x' g' f " vq" f ku' ku' eqwpugn' cpf " w' p' f' g' t' c' v' n' g' j ku' f ghgug' cmq' p' 0' E' q' w' p' u' g' n' i' g' z' r' r' c' k' p' g' f qp' f ghgpf cpv' u' d' g' i' v' j cv' f ghgpf cpv' h' e' n' u' w' e' j " u' c' w' u' y qwf

ko r tqxg" j ku" vtgcw gpv" kp" vj g" eqwv" lckn' k" cff kklqp. eqwpugn' g'zr rckp'gf "vj cv'f g'g'p'f cpv' xkgy gf "dqy" "qh" vj g" y q cwqtpg { u'cr r qkpv'gf "vq'tgr t'gugpv'j ko "cu'kpeo r g'v'p'k'p'dgkpi wpr tgr ctgf "hqt" vj g" r gpcn' "r j cug'f g'g'p'f cpv' dg'k'x'g'f "vj cv cv'c't'gegpv'j g'ctkpi . "f g'g'p'g'p'f eqwpugn'j cf "uggo gf "wpr tgr ctgf hqt" vj g' r' t'q'g'ew'k'p'u' r'p'p'g'f "k'p'v'q'f w'v'k'p'q'h'g't'v'k'p'g'x'k'f g'p'eg cv' vj g" r gpcn' " r j cug. " dw' u'c'v'g'f " vj cv' p'q' eqp'k'p'w'c'p'eg" y cu p'g'g'u'c't { 0

Vj g' v'k'n'eqw't'v'g'zr rckp'gf "vj cv'f g'g'p'f cpv'u'eqpeg't'p'q'x'g't" j ku eqwpugn'u'r tgr ct'v'k'p'p'y cu'w'p'q'w'p'f gf . 'cp'f "vj cv'eqwpugn'g'c't'n'f y q'w'f "dg'r tgr ctgf "g'x'g'p" *960 "f w'k'p'i "vj g'i w'k'n'r j cug'q'h'v'j g v'k'n'v'q" o g'g'v'v'j g'g'x'k'f g'p'eg "t'g'g't'g'f "v'q'f'k'p'c'f'f'k'k'p'p' . "vj g'eqw't'v' k'p'q'to gf "f g'g'p'f cpv'v'j cv'v'j g'ecug'k'p'x'q'k'g'f "cp'q'x'g'ty j g'ro k'p'i co q'w'p'v' q'h'y q't'n' g'x'g'p' hqt" vj g" y q' n'y { g'tu' y j q' j cf " dg'g'p cr r qkpv'gf "vq'tgr t'gugpv'j ko . "vj cv'v'j g'eqw't'v' y cu'cy ct'g'j qy o w'ej " v'k'o g' eqwpugn' y g't'g' ur g'p'f k'p'i " q'p' " k'p'x'g'u'k'i cv'k'p' " cp'f r tgr ct'v'k'p'p'q'h'v'j g'ecug. "cp'f "vj cv'k'p'v'j g'eqw't'v'x'k'gy . "vj g'v'c'u'm y q'w'f "dg't'w'k'f "q'x'g'ty j g'ro k'p'i "hqt" cp'k'p'f k'k'f w'c'n'k'p'ew'v'q'f { 'cp'f y k'j q'w'v'g'i c'n'v'c'k'p'k'p'i 0C'n'j q'w'i j "vj g'eqw't'v'c'ep'q'y r'g'f i g'f "vj g' t'k'i j v'q'h'f g'g'p'f cpv'v'q't'g'r t'gugpv'j ko u'g'h' "k'v'c'v'g'f <öK'et'k'p'i g'cv vj cv'v'j q'w'i j v'k'p'v'j k'u'ecug'd'g'ec'w'g'k'v'k'u'q'p'g'q'h'v'j g'o q'u'v'g't'k'q'w' ecug'u' vj cv'v'j k'u'eqw'v' "j cu'j cf "k'p'c" n'p'i "v'k'o g'ö" Vj g'eqw't'v' c'ep'q'y r'g'f i g'f "vj cv'f g'g'p'f cpv'v'j cu'd't'k'i j v'd'w'v'y c't'p'g'f "j ko "vj cv j k'u'v'c'n'q'h'g'i c'n'v'c'k'p'k'p'i "y q'w'f "u'c'p'f "k'p'v' k'u'y c { 'k'p'eq'p'f w'v'k'p'i j k'u'y p' "f g'g'p'g'p'f Vj g'eqw't'v'c'v'g'f <öK'eq'w'f "p'q'v'c'f x'k'g' " { q'w u't'q'p'i n'f "g'p'q'w'i j "q'h'y j cv'cp'k'o r q'u'k'd'g' "u'k'w'c'v'k'p'v'j cv'v'j q'w'f dg'hqt' { q'w'ö" Vj g'eqw't'v'w'i g'f "f g'g'p'f cpv'p'q'v'q'ö'f g'ek'f g'k'i j v'k'ö Y k'j "t'g'i c't'f "v'q'f g'g'p'g'p'f eqwpugn'u'r tgr ct'v'k'p'p' hqt" vj g' r gpcn' r j cug. "vj g'eqw't'v't'go k'p'f g'f "f g'g'p'f cpv'v'j cv'cp' { "r gpcn' " r j cug y cu'w'p'k'p'g'n' "v'q'eqo o g'p'eg'hqt" y q'q't'v'j t'g'g'o q'p'y u. "cp'f "vj cv ö'g'x'p'v'j g'p. "k'h'v'k'o g'k'u'p'g'g'f g'f "v'q'r tgr ct'g'hqt" c' r gpcn' " r j cug. x'g't { "q'h'g'p'eq'w'v'q'f q't'g'g'u'u'hqt' u'g'x'g't'c'n'y g'g'm'ö'g'v'y g'g'p'v'j g'i w'k'n r j cug'cp'f "vj g' r gpcn' " r j cug" öö" Vj g'eqw't'v'c'v'g'f "k'v'y q'w'f ö'h'g'n'd'g'w'g't'ö" k'h'k'v'n'p'g'y "f g'g'p'f cpv'v'j cf "y j cv'k'v'eq'p'k'f g'g'f "v'q dg'v'j g'd'g'u'v'tgr t'gugpv'k'p'p'c'x'k'c'k'd'g' . "cp'f "vj cv'q'v'j g'ty k'ug'ö'v'j cv y q'w'f "t'g'c'm' "t'q'w'd'g'ö" g'ö'v'j cv'v'j q'w'f "t'g'c'm' "w' u'g'v'ö" g'ö'ö'k'i'v'j g'f g'c'v' "r gpcn' "k'u'k'o r q'ug'f . "vj g'p'k'ö "i q'k'p'i "v'q'h'g'n'ö" q't'g'c'd'g'v'q' r'k'x'g'y k'j "vj cv'k'h'g'c'ej "f g'g'p'f cpv'v'j cu'i k'x'g'p'c'm'v'j g'r t'q'eg'f w'c'n t'k'i j v'u'v'j cv' { q'w'v' g't'g' g'p'k'g'f "v'q'0C'p'f "vj cv'k'p'c'm' g'u'v'j g'd'g'u'v tgr t'gugpv'k'p'p' { q'w'eq'w'f "i g'ö

Ko o gf k'c'v'g'n' "h'q'm'y k'p'i " vj k'u' u'c'v'g'o g'p'v' "q'p'g' q'h' vj g' f g'g'p'g'p'f eqwpugn'w'i i g'w'g'f "vj cv'v'j g'y q'w'f "x'k'k'v'f g'g'p'f cpv'v'k'p'v'j g'eq'w'p'v' l'c'k'v'j g'p'g'z'v'f c { . "v'q'ö'c'm'c'd'q'w'v'j k'u'w'v'j g't'0C'p'f "o c { dg'v' y g' e'c'p' "t'g'u'q'k'g'v'j k'u'y k'j q'w'v'c'ew'c'm' "t'g's w'g'u'k'p'i "v'q" i q' r t'q'0'r g't'0 F q' { q'w'v' cp'v'v'j "v'j k'p'n' c'd'q'w'v'j k'u" c" r'k'w'g' "d'k'v'ö" F g'g'p'f cpv' t'g'ur q'p'f g'f <ö" Q'n'c' { ö" Vj g'eqw't'v'c'i t'g'g'f . "p'q'v'k'p'i "vj cv'c'n'j q'w'i j k'v'y cu'p'q'v'eq'p'eg't'p'g'f "t'g'i c't'f k'p'i "f g'g'p'f cpv'u'eq'p'f w'v'c'p'f "vj cv

k'v'o k'i j v'g'x'g'p'd'g'eq'p'x'g'p'k'p'v'h'q't" vj g'eqw't'v'k'h'f g'g'p'f cpv'v'j g't g'v' t'g'r t'gugpv'j ko u'g'h'd'g'ec'w'g'v'j g'v'k'n'c'ö" k'i j v'i q' "h'c'w'g't. "vj ku y cu'p'q'v'v'j g'eqw't'v'eq'p'eg't'p'0'F g'g'p'f cpv'v' t'g'k'g't'c'v'g'f "vj cv'v'j ku eqwpugn'f g'm' { 'k'p'r tgr ct'v'k'p'p' hqt" vj g' r gpcn' " r j cug'eq'p'eg't'p'g'f j ko . "d'g'ec'w'g'v' y k'p'g'u'g'u" o k'i j v'f k'uc'r r g'c't' "k'h'eq'w'p'ugn'y c'k'g'f w'p'v'k'i'c'h'g't" vj g'i w'k'n'r j cug'v'q'eqo r r'g'v'v'j g'k'p'x'g'u'k'i cv'k'p'0'v'j g' eqw't'v'p'q'v'g'f "vj cv'eq'w'p'ugn'y q'w'f "j c'x'g'v'k'o g'v'q'eqo r r'g'v'v'j g' k'p'x'g'u'k'i cv'k'p'f w'k'p'i "l'w' { "u'g'g'v'k'p' . "cp'f "ö'y g'ec'p'v'c'n'g'c't'g'eg'u' c'v'v'j g'p'f "q'h'v'j g'i w'k'n'r j cug'd'g'h'q't'g'v'j g'r gpcn' " r j cug'0C'p'f p'q'to c'm' "vj cv'k'u'f q'p'g'hqt" c'v'h'g'c'v'c'eq'w' r'g'y g'g'm'ö" F g'g'p'f cpv' u'c'v'g'f "j g'y q'w'f "ur g'c'm'v'q'eq'w'p'ugn'v'j g'h'q'm'y k'p'i "f c { . "ö'd'w'K u'k'n'y cp'v'v'j g't'g'eq't'f "v'q'v'j q'y "vj cv'k'ö "u'k'n'v'j k'p'n'k'p'i "c'd'q'w'v' : 2 r t'g'eg'p'v'q'h'ö { "o k'p'f "q'h'l'w'v'v'c'n'k'p'i " vj k'u'y j q'g'ec'ug'r t'q'0'r g't'0 C'p'f "K'j c'x'g'p'v'eqo r r'g'v'g'f "vj cv'f g'ek'uk'p' " { g'v'w'p'v'k'i'K'ur g'c'n'y k'j 0 t'0R't'k'g'cp'f "u'g'g'y j cv'v'j g'j cu'v'q'uc' { "v'qo q'tt'q'ö" ö" *961

C'h'g't'eq'w'p'ugn'f k'ue'w'g'f "vj g'o c'w'g't'y k'j "f g'g'p'f cpv'eq'w'p'ugn' u'g'ew't'g'f "h'q'o " vj g' eqw't'v' c' d't'k'g'h' eq'p'k'p'w'c'p'eg' k'p' q't'f g't" v'q eqo r r'g'v'v'j g' k'p'x'g'u'k'i cv'k'p'v'j cv'f f g'g'p'f cpv' h'g'n' v'j q'w'f " dg' eq'p'f w'ev'g' "k'p'c'f x'c'p'eg'q'h'v'j g'v'k'n'c'p'f "t'g'r t'gugpv'g'f "vj cv'v'j ku y q'w'f " u'c'v'k'h' { "f g'g'p'f cpv'u'eq'p'eg't'p'0'F g'g'p'f cpv' u'c'v'g'f " vj cv w'p'f g't" vj g'ug'ek't'ewo u'c'p'eg'u'j g'y q'w'f "r t'q'eg'g'f "t'g'r t'gugpv'g'f "d { eq'w'p'ugn'ö

F g'g'p'f cpv' eq'p'v'g'p'f u' vj cv' j g' " o c'f g' c' " o q'v'k'p'p' hqt" u'g'h' t'g'r t'gugpv'k'p'p'y g'm'k'p'c'f x'c'p'eg'q'h'v'j g'eqo o g'p'ego g'p'v'q'h'v'k'n c'p'f "c'ee'q't'f k'p'i n'f "y cu'g'p'k'g'f "v'q't'g'r t'gugpv'j ko u'g'h'd'w'v'j cv vj g'v'k'n'c'eqw't'v'eq'g't'eg'f "j ko "k'p'v'q'y k'j f t'c'y k'p'i "vj g'o q'v'k'p'p'd { o c'n'k'p'i "h'c'n'g'c'u'w'c'p'eg'u'v'j cv'v'j g't'g'y q'w'f "dg'co r r'g'v'v'k'o g'v'q eqo r r'g'v'v' k'p'x'g'u'k'i cv'k'p'p'd'g'v'y g'g'p'v'j g'i w'k'n'c'p'f "r gpcn' " r j cug'u q'h'v'j g'v'k'n'c'p'f "d { "ko r t'g'u'k'p'i "w'r q'p'f g'g'p'f cpv'v'j cv'k'v'y q'w'f ec'w'g'v'j g'eqw't'v'f k'v'g'u'u'k'h'j g'y g't'g'v'q't'g'r t'gugpv'j ko u'g'h'0'J g' eq'p'v'g'p'f u'v'j k'u'eq'g't'ek'p'eq'p'uk'w'g'f "c'f g'p'k'c'n'q'h'v'j g'k'i j v'v'q'f w'g r t'q'eg'u'q'h'v'v'j 0

Vj g' t'g'eq't'f " g'v'c'd'k'uj g'u. " j q'y g'x'g't. " vj cv' vj g' eqw't'v' f'k'f " p'q'v eq'g't'eg'f f'g'g'p'f cpv'v'k'p'v'q'y k'j f t'c'y k'p'i "j k'u" o q'v'k'p'p'0'T'c'y g't. "vj g' eqw't'v' r t'q'r g't'n' " c'f x'k'g'f " f'g'g'p'f cpv'v' q'h' vj g' r k'h'c'm'u' q'h' u'g'h' t'g'r t'gugpv'k'p'p'0'E'q'p'v'c't' { "v'q'f g'g'p'f cpv'u'eq'p'v'g'p'v'k'p'p' . "vj g'eqw't'v' f'k'f "p'q'v' u'w'i i g'u'v'v'j cv'k'h'f g'g'p'f cpv'v' g't'uk'g'f "k'p' t'g'r t'gugpv'k'p'i j ko u'g'h' "j g'y q'w'f "h'c'eg'c'j" q'u'k'g'eq'w't'0C'n'j q'w'i j "f g'g'p'f cpv'u o q'v'k'p'p' hqt" u'g'h' t'g'r t'gugpv'k'p'p' y cu' d'c'ug'f " k'p' r c't'v' w'r q'p' " c' eq'p'eg't'p'v'j cv'f g'g'p'g'p'f eq'w'p'ugn'j cf "h'c'k'g'f "v'q'k'p'x'g'u'k'i c'v'g'eg't'v'k'p r t'q'r q'ug'f "r gpcn' " r j cug'g'x'k'f g'p'eg. "y g'c't'g'w'r g't'uw'c'f g'f "vj cv vj g'eqw't'v'eq'g't'eg'f "f g'g'p'f cpv'v'k'p'v'q'y k'j f t'c'y k'p'i " vj g'o q'v'k'p'p' d { " o c'n'k'p'i " c' " h'c'n'g' r t'q'o k'ug' vj cv' c' " eq'p'k'p'w'c'p'eg' y q'w'f " dg i t'c'p'v'g'f "d'g'y g'g'p' vj g'i w'k'n'c'p'f "r gpcn' " r j cug'u'0'v'j g't'g'eq't'f g'v'c'd'k'uj g'u'v'j cv'f g'g'p'f cpv'v' y cu' u'c'v'k'h'g'f " vj cv'c' " eq'p'k'p'w'c'p'eg d'g'h'q't'g' l'w' { "u'g'g'v'k'p' " eqo o g'p'eg'f " y q'w'f " r t'q'x'k'f g'c'f g's w'c'v'g

vlo g" hqt" kpxguki cvkqp0' Cnuq. "cu" yj g" eqwtv' r tgf levgf. "yj gtg y cu'cp'crr r tqzko cvgnf "y q/y ggnlj kwwu'dgw y ggp' yj g'xgtf lev cv' yj g" i wkn' r j cug" cpf " yj g" eqo o gpego gpv' qh' yj g' r gpcmf r j cug0Hkpcmf. k'ku'gxkf gpv'yj cvk'y cu'f ghgpf cpv'u'eqpuwncvqpy y kj " f ghgpug" eqwpugn' tevj gt" yj cp" yj g" eqwtv'u' eqo o gpwu yj cv' r gtuwcf gf "f ghgpf cpv'vq"y kj f tcy "j ku"o qvqkp" hqt" ugrh/ tgr tguypcvkqp0

Y kj " tgur gev' vq" f ghgpf cpv'u' ugeqpf " o qvqkp" vq" tgr tguypv j lo ugrh" yj g" o cwtg" y cu' rgh' vq" yj g" vlcni' eqwtv'u' uqwpf f kuetgvkqp." dgecwug" yj g" o qvqkp" y cu" o cf g" chgt" yj g" lwt { j cf " dggp" ugrgevgf " cpf " yj g" r tqugewvqkp" j cf " f grkxgtgf " ku qr gpłpi "ucvgo gpv0*People v. Barnett, supra."39"Ectf6y "cv rr03326/33270-

Vj g" tgeqtf " guvdrkuj gu" yj cv' f ghgpf cpv' o qxgf " vq" tgr tguypv j lo ugrh'qpv' yj ku'ugeqpf "qecucakp'y kj qw'gzz r nclłpi " yj g' d'cuku hqt" j ku' tgs wgu0J g' f k' "pqv' tgs wgu'c" eqpvkwcpeg0' Vj g' vlcni' eqwtv' f gerctgf " yj cv. " i wkf gf " d { " yj g" hcvqtu" gpwo gtcvgf " kp *People v. Windham, supra.*"3; "Ectf5f"343. "k'y cu'gz gteklłpi ku' f kuetgvkqp" vq" f gp { " yj g' o qvqkp0' Vj g' eqwtv' ucvgf <0Hktu'v' qh cm" { qw' j c' xg' vq' t' gcrk' g' yj ku' ku' pqv' j ku' hktu' tgs wgu' vq' i q' r tq0 r g0K0' j ku' ugeqpf " qpg' lp' h' qp' v' *962 'qh' o g'000' Vj g' t' g' engctn' ku' c' r t' qerxk' k' qh' uqo g' n' k' p' vq' uggm' vq' uwdunkwg' eqwpugn' q' t' go q' xg' eqwpugn' j y gp' O t0Lgp' n' ku' v' p' j cr r { " yj kj " yj g' y c { yj g' r tqeggf łpi u' ctg' i qłpi 0' Vj g' eqwtv' t' geqwpvgf " cv' r' p' i yj yj g' g' zegm' p' e' qh' v' j g' t' gr t' guypcvkqp' yj cv' j cf " dggp' c' h' t' f gf " vq f ghgpf cpv0

Vj g' eqwtv' cnuq' t' ghgtgf " vq' yj g' r qv' p' k' ni' h' q' t' f' kutw' v' k' p' . " p' q' v' łpi f ghgpf cpv'u' o c' p' p' g' t' c' p' f' f' go g' c' p' q' t' . " c' p' f' " j' ku' y' t' k' w' p' " yj g' t' c' v' v' q' f' kutw' v' yj g' vlcni' c' p' f' " vq' v' g' ni' l' w' t' q' u' t' q' h' o' c' w' g' t' u' y' j' cv' yj g' eqwtv' j' cf y kj j' grf " h' t' q' o' " yj go 0' " Vj g' eqwtv. " q' d' u' g' t' x' ł' p' i " yj cv' f' ghgpf cpv cr r gctgf " vq' r' e' n' i' u' c' d' k' i' k' s' " c' p' f' " go q' v' q' p' c' n' o' c' w' t' k' s' . " u' c' v' g' f' <0K hgg' n' yj cv' j' g' j' cu' f' go q' p' u' t' c' v' g' f' " f' w' ł' p' i " yj g' u' g' r' t' q' e' g' g' f' ł' p' i u' ł' p' j' ku h' c' k' w' t' g' v' q' " eqo g' q' w' . " j' ku' yj t' g' c' w' v' q' yj g' eqwtv. " c' r' e' n' i' q' h' e' q' p' t' q' n q' x' g' t' " j' ku' go q' v' q' p' u' c' p' f' " j' ku' d' g' j' c' x' k' q' t' 0' " H' e' t' " h' t' q' o' " g' p' i' c' i' ł' p' i " ł' p' d' c' u' g' n' u' " o' c' o' c' v' g' w' " r' u' e' j' q' n' i' { . " o' " c' u' " c' m' g' i' g' f' " d { " f' ghgpf cpv yj g' eqwtv' ectghw' n' " t' g' e' q' w' p' v' g' f' " f' ghgpf cpv'u' t' g' e' g' p' v' e' q' p' f' w' e' v' ł' p' t' g' h' w' ł' p' i " vq' cr r gct " ł' p' eqwtv' y j gp' j' g' y cu' c' p' p' q' { g' f' " yj kj " yj g' eqwtv' u' t' w' ł' p' i u' q' p' " o' q' v' q' p' u' 0' Vj g' eqwtv' u' c' v' g' f' " f' ghgpf cpv' j' cf y t' k' w' p' " yj g' eqwtv' c' r' g' w' t' " ł' p' y' j' k' e' j' " j' g' u' c' v' g' f' " j' ku' ł' p' v' p' v' q' p' / r' e' v' t' cr r ctgpw' " t' g' v' t' c' e' v' g' f' / vq' " f' kutw' v' yj g' r' t' q' e' g' g' f' ł' p' i u' 0' Vj g' eqwtv eqo o gpv' g' <0K' e' c' p')' v' e' n' g' yj g' t' k' u' n' i' q' h' j' c' x' ł' p' i " j' lo " t' g' h' w' u' g' v' q' u' j' q' y w' " f' w' ł' p' i " vlcni' j' q' w' f' " k' l' w' g' c' i' c' k' p' u' v' j' lo 0' Vj g' eqwtv' c' n' u' q' " p' q' v' g' f' f' ghgpf cpv'u' t' q' e' r' x' k' k' s' " h' q' t' c' t' i' w' ł' p' i " c' v' i' g' p' i' yj yj kj " yj g' eqwtv' c' h' g' t' yj g' eqwtv' j' cf " ł' p' h' q' t' o' g' f' " j' lo " yj cv' p' q' " h' w' t' yj g' t' c' t' i' w' o' g' p' v' y' cu ł' p' " q' t' f' g' t' . " c' p' f' " s' w' g' u' k' q' p' g' f' " yj g' yj g' t' " j' g' e' q' w' f' " t' g' u' t' c' k' p' " j' lo ugrh h' t' q' o' " r' g' t' u' k' ł' p' i " ł' p' " yj ku' r' t' c' e' v' e' g' " h' i' j' g' y' g' t' g' j' ku' q' y' p' " e' q' w' p' u' g' f' 0

Cnj qwi j " f ghgpf cpv' cuwv' g' " yj g' eqwtv' j' g' y' q' w' f' " cr r gct " qp gcej " f' c { " qh' vlcni' h' i' c' e' e' q' t' f' g' f' r' t' q' u' g' u' c' w' u' . " yj g' eqwtv' g' x' k' f' g' p' w' f' f' k' " p' q' v' e' t' g' f' k' v' j' ku' c' u' w' t' c' p' e' g' 0

C' h' g' w' g' t' y' t' k' w' p' " d { " f' ghgpf cpv' v' q' " yj g' eqwtv' ł' p' e' n' i' m' f' g' f' u' c' v' g' o' g' p' w' u' w' e' j' " c' u' <0K' o' c { " v' c' n' g' o' g' j' c' x' ł' p' i " vq' r' c { uqo g' u' ł' p' i ł' p' i " v' g' r' e' i' t' c' o' o' g' t' } sic_ " vq' u' k' s' / ł' p' " e' q' w' v' " c' p' f' yj gp' " q' w' / q' h' p' q' y' j' g' t' g' . " i' g' v' w' r' " c' p' f' " t' g' c' f' " o { " 5' r' ł' p' g' u' c' v' g' o' g' p' v' ł' p' " e' q' w' t' 0' Q' t' " K' o' c { " j' c' x' g' " vq' j' c' x' g' " uqo g' r' t' ł' p' v' ł' p' i " r' e' e' g' v' q' j' c' x' g' 32' v' g' g' p' c' i' g' t' u' y' c' k' s' / w' p' v' i' r' 6' t' 0' 0' q' p' g' f' c { " c' p' f' " r' w' h' n' g' t' u' q' p' c' m' i' y' j' g' e' c' t' u' ł' p' " yj g' r' c' t' n' ł' p' i " q' v' c' p' f' " y' kj ł' p' " y' q' " d' n' e' m' i' q' h' v' j' ku' e' q' w' t' v' u' c' v' ł' p' i " yj g' t' g' u' c' u' p' y' j { " k' o' " p' q' v' t' c' t' v' e' k' r' c' v' ł' p' i 0' Q' t' " K' o' c { " u' c { " yj cv K' f' q' y' c' p' v' v' q' " c' w' g' p' f' " o { " vlcni' " eqo g' ł' p' " e' q' w' t' v' . " y' c' k' s' / 52' u' g' e' q' p' f' u' c' h' g' t' " yj g' l' w' t' { " j' cu' d' g' g' p' u' g' c' v' g' f' . " yj gp' u' c' p' f' w' r' " c' p' f' " u' c { " yj j' c' v' k' j' c' x' g' v' q' u' c { " d' g' h' q' t' g' " j' q' w' f' g' r' w' ł' g' u' t' w' j' " o' g' q' w' 000'] [_ q' w' e' c' p')' u' x' q' r' " o' g' 000' K' o' c { " d' g' c' y' g' g' n' i' q' t' " yj t' e' g' g' o' p' q' y' u' h' t' q' o' " p' q' y' 0' C' p' q' y' g' t' " h' g' w' g' t' g' z' r' n' c' ł' p' g' f' " j' q' y' " w' u' g' v' f' ghgpf cpv' y' cu' v' j' cv' yj g' eqwtv j' cf " t' g' h' w' u' g' f' " vq' " v' g' m' i' l' w' t' q' u' t' " ł' p' h' q' t' o' c' v' k' a' p' " f' ghgpf cpv y' c' p' v' g' f' " yj go " vq' j' c' x' g' . " j' q' y' " j' g' h' e' m' / w' p' h' i' c' k' n' i' " v' t' g' c' v' g' f' d { " yj g' eqwtv' c' p' f' " d { " yj g' r' t' q' u' g' e' w' q' t' . " c' p' f' " e' q' p' e' n' i' m' f' g' f' < 0' V' c' n' g' " c' m' i' v' j' ku' ł' p' v' q' " c' e' e' q' w' p' v' . " j' q' y' " f' q' { " q' w' g' z' r' g' e' v' c' r' g' t' u' q' p' " vq' " h' g' g' r' " j' ku' e' q' o' r' q' u' w' t' g' q' t' " go q' v' q' p' u' q' w' a' 0

Vj g' eqwtv' cnuq' p' q' v' g' f' " yj g' c' f' x' c' p' e' g' f' " u' c' i' g' q' h' v' j' g' r' t' q' e' g' g' f' ł' p' i u. c' p' f' " u' c' v' g' f' " yj cv' yj g' q' p' n' i' " h' e' v' e' q' t' " ł' p' f' ghgpf cpv'u' h' c' x' q' t' " y' cu' v' j' cv' j' g' f' k' " p' q' v' t' g' s' w' g' u' v' c' " e' q' p' v' k' w' c' p' e' g' 0

F ghgpf cpv' h' c' k' u' " vq" guvdrkuj " yj cv' yj g' vlcni' eqwtv' cdwugf " ku f kuetgvkqp" ł' p' f' gp { ł' p' i " yj ku" o qvqkp" hqt" ugrh' tgr tguypcvkqp0 Vj g' eqwtv' t' g' c' u' p' c' d' n' i' " e' q' w' f' " e' q' p' e' n' i' m' f' g' " yj cv' f' ghgpf cpv' y' cu y' g' n' i' t' g' r' t' g' u' g' p' v' g' f' " d { " e' q' w' p' u' g' n' " yj cv' j' g' j' c' f' " u' q' o' g' r' t' q' e' r' x' k' k' s' " vq x' c' e' k' m' v' g' " yj kj " t' g' u' r' g' e' v' v' q' " t' g' r' t' g' u' g' p' v' k' q' p' " d { " e' q' w' p' u' g' n' " c' p' f' " yj cv yj g' i' t' c' p' v' ł' p' i " q' h' v' j' g' o' q' v' k' a' p' " y' q' w' f' " f' kutw' v' yj g' q' t' f' g' t' n' i' " e' q' p' f' w' e' v' q' h' v' j' g' vlcni' 0

F ghgpf cpv' eqpvgpf u' yj g' y' cu' p' q' t' k' u' n' i' j' g' y' q' w' f' " f' kutw' v' yj g' r' t' q' e' g' g' f' ł' p' i u. " d' w' v' j' g' eqwtv' t' g' c' u' p' c' d' n' i' " e' q' p' e' n' i' m' f' g' f' " q' y' j' g' t' y' k' u' g' 0 Vj g' eqwtv' y' cu' c' y' c' t' g' v' j' c' v' " *963 " f' ghgpf cpv' j' c' f' " c' w' g' o' r' v' g' f' " vq ł' p' h' w' g' p' e' g' v' j' g' eqwtv' v' q' e' j' c' p' i' g' c' t' w' ł' p' i " f' w' ł' p' i " l' w' t' { " u' g' r' e' v' k' p' " d { c' d' u' g' p' v' ł' p' i " j' lo ugrh' h' t' q' o' " yj g' r' t' q' e' g' g' f' ł' p' i u. " c' p' f' " yj cv. " u' k' o' k' e' c' t' n' . f' ghgpf cpv' j' c' f' " t' g' h' w' u' g' f' " vq' cr r gct " h' q' t' " yj g' r' t' q' u' g' e' w' q' t' u' c' p' f' " j' ku q' y' p' " e' q' w' p' u' g' n' u' q' r' g' p' ł' p' i " u' c' v' g' o' g' p' w' 0' Vj ku' e' q' p' f' w' e' v' " ł' p' " c' f' f' k' k' q' p' v' q' v' j' g' y' t' k' w' p' " yj g' t' c' v' v' q' " f' kutw' v' yj g' r' t' q' e' g' g' f' ł' p' i u. " f' go q' p' u' t' c' v' g' f' c' " r' i' k' n' i' j' q' q' f' " * p' q' v' g' x' k' f' g' p' v' c' v' j' g' v' o' g' " q' h' v' j' g' r' t' g' t' k' n' i' Faretta o q' v' k' p' + yj cv' yj g' r' t' q' e' g' g' f' ł' p' i u' y' q' w' f' " d' g' " f' kutw' v' g' f' " ł' p' " yj g' g' x' g' p' v' f' ghgpf cpv' yj g' t' g' r' g' t' o' k' w' g' f' " vq' " t' g' r' t' g' u' g' p' v' j' lo ugrh0

F ghgpf cpv\u'eqpvqpvkq "j cv'j g"eqw\u'twtkpi "y cu'j g'tguwv qh'tgugpvo gpv'qp'j g'r ctv'qh'j g"eqwv'ku'pqv'uwr r qtvgf "d { vj g'tgeqtf OJ g'f qgu'pqv'uwr r qtvy kj "cwj qtkf "j ku'eqpvqpvkq vj cv' j g" eqwv' mcngf" f kuetgkqpv "vq" f gp { "j g" o qvqpv" qp vj g" i tqwvf ." kp" r ctv. "j cv' j ku' tghwcn' vq" r ctv'ekr cvg" kp" vj g r tqeggf kpi u'y j gp'f kucr r qkvvgf "y kj "j g"eqwv\u'twtkpi u'y cu r tgf kvxg" qh' f kutw vxg" dgj cxkqt" f wtkpi " vtkn' F ghgpf cpv tgrgu'wr qp"cwj qtkf. "cr r ncedng"vq" c"ko gn' "o qvqpv" hqt'ugrh' tgr tguvqpvkq. "j cv'ku'pqv'cr r qukvj y j gp'v'j g'o qvqpv"ku'o cf g chngt'v'j g'eqo o ppego gpv'qh'vtkn'cpf "ku'f kgevgf "vq"v'j g'eqwv\u' f kuetgkqpvO*Ugg" *People v. "Superior Court" *George* *3; ; 6*46 *EcnCrr* (6j "572"j4; "EcnCrr vOlf "527_"j qrf kpi "j cv'v'j g"vtkn eqwv'gttgf "kp" f gp { kpi "c" *Faretta* "o qvqpv" o cf g"kp" cf xcpeg" qh vtkn' y j gp' f ghgpf cpv\u'tki j v'v'q'ugrh'tgr tguvqpvkq'y cu'cm quv cduqng. "qp" v'j g'dcuku'qh'c" f gvgto kpcvqpv'j cv'v'j g" f ghgpf cpv r tguvqpv' c'ugewk' "cpf" guerc g'tkum="ugg" cnuq "U.S."v. *Flewitt* *; j "Ek03; ; +; 96" *Hlf* "88; . '896" f ghgpf cpv'u' j q'j cf "dggp i tcvpvgf "r tq'ug'ucwu'kp" cf xcpeg"qh'vtkn'eqwv' "pqv'dg'f gr tkvgf qh' v'j cv'ucwu' dgecvug" qh' v'j gk' "hcnw" g"vq" r tgr ctg" r tqr gtn' hqt "vtkn" gur gekm' "y j gp" c" "hcnw" g"vq" qdg { "c" eqwv' qtf gt "qt cp" cev'qh'eqpvgo r v'y cu'pqv'cnqi gf =f ghgpf cpv'u' o'lr _t gvtkn cev'v'ku' tgr gxcpv'v'pn' "hik'ch'htf u'c' lvt qpi 'kp' lec'v'v'j cv'v'j g f ghgpf cpv'u' knf kutw v'v'j g'r tqeggf kpi u'kp'v'j g'eqwv'tqqo d_0-

Eqpv'tct { "vq" f ghgpf cpv\u'eqpvqpvkq. "j g"eqwv'gzgtekugf "ku f kuetgkqpv"cpf "hqwvf "v'j cv'eqpvk'gtkpi "j g'tgrgxcpv' hcvqtu. vj g" o qvqpv" hqt'ugrh'tgr tguvqpvkq" uj qwv' "dg" f gpkgf O' Vj g ektevo ucpeg"v'j cv'f ghgpf cpv'f kf "pqv'uggn'c"eqpvkpcpeg"ku pqv'f gvgto kpcv'xgO* *People* v. *Barnett*. *supra*. '39' *Ecn* (6j "cv' r 0 33280" P q'cdwug'qh'f kuetgkqpv"cr r gctu0

9. Pretrial motions to suppress evidence

a. Evidence obtained as a result of interrogation of Duane Moody

*36+F ghgpf cpv\u'eqpvqpvf u'y g'vtkn'eqwv'gttgf "kp'r gto kvkpi 'j g kpv'qf wkvq'qh'g'xkf gpeg"v'j g'r qrlkg"qd'v'k'p'gf "cu'v'j g'tguwv'qh ucvg o gpv'o cf g'd { "F wcp"O qvf { /ucvgo gpv'u'v'j g'vtkn'eqwv' f gvgto kpgf "y gtg" kpxqmpvct { O'F ghgpf cpv' eqpvqpvf u'v'j cv'v'j g o wtf gt "y gcr qp. "g'xkf gpeg'tgrv'kpi "vq"v'j g'cwqo qdkg"v'j qvi j v vq"j cxg'dggp" wugf "kp"v'j g'uj qv'kpi "qh'F gvgv'xg"Y knko u."cpf *964 "j g'v'guko qp { "qh'Cnk'cpf "Ec'v'j { "Y qvf uqp"uj qwv' "j cxg dggp'gzenvf gf "cu'v'j g'htwk'qh'O qvf { "u'kpxqmpvct { "ucvgo gpv'u' Ceeqtf kpi n. "f ghgpf cpv'eqpvqpvf u'v'j g'vtkn'eqwv'xkqv'v'g" j ku tki j v'v'q'f wgr" tqegu'qh'r'y "cu'i wctcvpvgf "d { "v'j g"ucvgo"cpf hgf gtcn'Eqpvk'wkv'ku'p'J g'cnuq'eqpvqpvf u'y ku'g'xkf gpeg'uj qwv' j cxg'dggp'gzenvf gf "cu'v'j g'htwk'qh'c'xkqv'v'k'p'qh'O qvf { "u'htk'j Co gpv' r tkk'gi g'ci kpv'u'ugrh'kpetko kpcv'kqpv0

Kp" r tgrtkn' r tqeggf kpi u." dghqg" v'j gk' "ecugu" y gtg" ugxgtgf . f ghgpf cpv'v'k'p'gf "kp'eqf ghgpf cpv'O qvf { "u'o qvqpv"v'q' uwr r tguu g'xkf gpeg"r wtuwcpv'v'q" *ugev'kqpv* *375: 0'0'F ghgpf cpv'eqpvqpvf gf j g'j cf "ucpv' kpi "vq"enck "v'j cv'O qvf { "u'ctt'g'v'xkqv'v'g"v'j g Hqwtv' Co gpv' o gpv'dgecvug"v'j g'y cttcp'v'g'u'ctt'g'u'qh'O qvf { eqpv'k'w'g'f "qwtci gqwu' qxgt'p' g'p'v'eqpf wv'kp'xkqv'v'k'p'qh'v'j g eqpv'k'w'k'p'cn'i wctcvpvg'qh'f wgr" r tqegu'0J g'o clpv'k'p'gf "v'j cv O qvf { "u'ucvgo gpv'v'q'v'j g'r qrlkg"cpf "cm'g'xkf gpeg"qd'v'k'p'gf "cu v'j g'htwk'qh'v'j g'ucvgo gpv'uj qwv' "dg" uwr r tguugf O'F ghgpf cpv' cnuq"l'q'k'p'gf "kp'eqf ghgpf cpv'O qvf { "u'o qvqpv"v'q' uwr r tguu"v'j g ucvgo gpv'u'qp'v'j g'v' tqwvf "v'j cv'v'j g' { "y gtg" kpxqmpvct { "dgecvug v'j g' { "y gtg"qd'v'k'p'gf "cu'v'j g'tguwv'qh'v'htgu'qh'v'htg'p'k'p'gf { "cpf "v'j gt r j { ulecn'cpf "r u' { ej qn'i kcn'eqgtekpv" r tgegf kpi "cpf" f wtkpi kpv'tt'qi cvkq'0F ghgpf cpv'cuugt'v'g' v'j cv'v'j g'j cf "ucpv' kpi "vq'tckug v'j g"enck "v'j cv'O qvf { "u'ucvgo gpv'u' y gtg" kpxqmpvct { "wpf gt Hkt'j "Co gpv' o gpv'r tkpkr ngu."cnuq"cuugt'v'kpi "cp"kp'f gr gpv' f wgr' tqegu'tki j v'v'p'gf gt "v'j g'ucv'g'cpf hgf gtcn'Eqpvk'wkv'ku'p'qv v'j" cxg'j ku'eqpv'k'p'gf "dcugf "wr qp"v'j g' kpxqmpvct { "eqpv'k'w'k'p'qt" ucvgo gpv' qh' cpv'v'j g't'J g" o qxgf "vq" uwr r tguu" O qvf { "u ucvgo gpv'cpf "cm'v'kpi kdr'g"cpf "k'v'kpi kdr'g" g'xkf gpeg"qd'v'k'p'gf d { "v'j g'g'zr k'k'c'v'k'p'qh'v'j g' kpxqmpvct { "ucvgo gpv'cpf "v'j gk' ht'v'ku0

G'xkf gpeg"r tguvqpv'f "cv'v'j g'j gctkpi "qp"v'j g'o qvqpv"v'q' uwr r tguu k'p'f lec'v'f "v'j cv'kp" c" P qxgo dgt"6."3; : 7."kpv'tt'qi cvkq. "O qvf { k'p'ht'g' gf "v'j g" r qrlkg" y j gtg" j g'j cf "uget'v'g'f" v'j g" o wtf gt y gcr qp0' Vj g" y gcr qp" y cu' f kv'eqxgtgf" cv' v'j g" n'ecv'k'p' k'p'f lec'v'f /v'j g" Y qvf uqp" j qwug'0 Kp" c" P qxgo dgt"8."3; : 7. ucvgo gpv' O qvf { "uck' "v'j g'x'g'j keng"v'j cv'v'j cf "dggp" wugf "kp"v'j g uj qv'kpi "qh'F gvgv'xg"Y knko u'y cu'c"un' /dmg" Qrf uo qdkg y kj "c"y j kg"v'q. "cpf "j g'f guetkdgf "ku'n'ecv'k'p'0Vj g'x'g'j keng y cu' hq'wpf "cv'v'j cv'v'k'p'0

Vj g'vtkn' eqwv' j gctf "pwo g'qwu" y k'p'g'u'g'u."cpf "eqpv'w'f gf v'j cv' O qvf { "u' ctt'g'v' y cu' uwr r qtvgf "d { "r tqdcdng" ecwug= O qvf { "u' enck "v'j cv'v'j g" r qrlkg" r j { ulecn' "o k'v'g'v'gf" j ko y cu'pqv' uwr r qtvgf "d { "v'j g'tgeqtf =ucvgo gpv'u' O qvf { "o cf g vq"v'j g' r qrlkg" r tkqt "vq" P qxgo dgt"6."3; : 7." y gtg" xqmpvct { . dw'v'j cv'O qvf { "u'ucvgo gpv'u'v'q"v'j g' r qrlkg"qp" P qxgo dgt"6. 3; : 7."y gtg" kpxqmpvct { "cpf "k'p'cf o kuukdr'g."cr r ctg'p'v' "qp"v'j g i tqwvf "v'j cv'v'j g' { "y gtg"v'j g" r tqf wv'qh'qh'htu'qh'v'htg'p'k'p'gf { O'Kp' cf f k'k'p'."v'j g'eqwv' hq'wpf "O qvf { "u'ucvgo gpv'v'q"v'j g' r qrlkg qp" P qxgo dgt"8."3; : 7."k'p'cf o kuukdr'g"cu'c"htwk'qh'v'j g' g'ctr'ngt eqg'egf "ucvgo gpv'0P q'p'v'j g'guu. "v'j g'eqwv'v'j g'f "v'j cv'v'j g'o wtf gt y gcr qp."v'j g'x'g'j keng" *965 "eqpv'p'gevgf "y kj "v'j g'o wtf gt."cpf v'j g'v'guko qp { "qh'Cnk'cpf "Ec'v'j { "Y qvf uqp" y gtg"cf o kuukdr'g dgecvug" k'p'g'x'k'cdn' "v'j g' { "y qwv' "j cxg" dggp" f kv'eqxgtgf "f wtkpi v'j g'eqwv'ug'qh'c'rcy hwn' "eqpf wv'gf "k'p'g'v'k'v'k'v'k'p'0

Qp" cr r gcn" f ghgpf cpv' eqpvpgf u' vj cv' vj g" tlcni' eqwtv' gttgf
kp" cf o kwpi " kvq" gxf gpeg" vj g" o wtf gt" y gcr qp." gxf gpeg
eqpegtkpi "vj g"xgj kerg"ltqo "y j lej "vj g"hcni'uj qu'cr r gctgf
vq" j cxg" dggp" hktgf ." cpf " egtvclp" uj gmi' ecukpi u" f kucxgtgf
kp" vj g" xgj kerg' F ghgpf cpv' cnuq" ercko u" vj cv' vj g" tlcni' eqwtv
gttgf "kp" r gto kwpi "vj g"vuwko qp{ "qh'vj g"Y qqf uqpu'tgi ctf kpi
eqf ghgpf cpv'O qqf { "u'cevkap"kp"uqtkpi "vj g"o wtf gt" y gcr qp
cv'vj gkt"j qo g"qp"vj g"pki j v'hl'vj g"o wtf gt'J g"o clpvcapu"vj cv
vj ku'gxf gpeg'y cu'vj g'htwk'qh'O qqf { "u'lxqnpvct { "ucvgo gpw.
cpf "vj cv'vj g"tlnieqwtv'gttgf "kp" f gvto kpi "vj cv'vj g" gxf gpeg
kpgxkcdn' " y qwf " j cxg" dggp" f kucxgtgf " kp" vj g" eqwtug" qh
c" rny hwn' " eqpf wevf " kpxguki cvkap" gxgp" y kj qw" O qqf { "u
ucvgo gpw'kpi" j ku'tgr n' "dtlgh' f ghgpf cpv'cnuq' eqpvpgf u' vj cv'j g
j cu'ucpf kpi "vq" tclug'vj ku'ercko "dgecwug'xkqrvkap"qh'O qqf { "u
r tklkgi g'ci clpuv'ugrh'kpetko kpcvkap' eqpvkap' "c'xkqrvkap"qh
j ku'qy p" f wgr' treguu'tki j vu'Vj g" eqgtelqp" cr r rkgf "vq" O qqf { .
j g' eqpvpgf u. "ecwugf " O qqf { "vq" f kucxgtgf " vj g" y j gtdcdqwu'qh
vj g" y gcr qp" cpf " vj g" xgj kerg. " cpf " vq" f kucxgtgf " vj g" k' gpw' " qh
vj g" Y qqf uqpu'Y kj qw' c" t wrg' tgs wtkpi " uwr r tguakp" qh' vj g
ej cmgi gf " gxf gpeg. " j g' cmgi gu. r rkgf " o kucqpf wev' y qwf " dg
gpeqwtci gf " tvj gt " vj cp' f gvttgf O

Tgur qpf gpv'eqpvpgf u' vj cv'vj g' tlnieqwtv'gttgf "kp" f gvto kpi
vj cv' O qqf { "u" ucvgo gpw" y g' g' kpxqnpvct { . " vj cv' f ghgpf cpv
rcnu" ucpf kpi " vq" eqo r rclp" qh' cp { " xkqrvkap" qh' O qqf { "u
Hkhj " Co gpf o gpv' tki j u. " cpf " vj cv' vj g" tlcni' eqwtv' eqttgevf
f gvto kpgf " vj cv' vj g" ej cmgi gf " gxf gpeg" kpgxkcdn' " y qwf
j cxg" dggp" f kucxgtgf " kp" vj g" eqwtug" qh' c" rny hwn' eqpf
wevf " kpxguki cvkap' O Tgur qpf gpv'ercko u. " h' kpcmf. " vj cv' vj g
kpvqf wevkap' qh' vj g' gxf gpeg. " gxgp' h' qdvcapgf " cu' c' tguwv' qh' cp
kpxqnpvct { " ucvgo gpw. f k' " bq' v' xkqrv' f ghgpf cpv' u' f wgr' treguu
tki j v' q' c' h' c' tlcni' Cu' y g' vj cmgzr rclp. " y g' b' g' g' " bq' v' cpf " f q' bq
f gvto kpg' y j gvj gt " vj g' ucvgo gpw' y g' g' xqnpvct { " qt' y j gvj gt
vj g' gxf gpeg' kpgxkcdn' " y qwf " j cxg" dggp' f kucxgtgf . " dgecwug
y g' ci tgg' y kj " t' gur qpf gpv' u' h' kpcni' eqpvkap' vj cv. " kp' cp { " gxgpv.
vj g' kpvqf wevkap' qh' vj ku' gxf gpeg' f k' " pqv' xkqrv' f ghgpf cpv' u
f wgr' treguu'tki j uo

Cu'cp' kpkni' o ewgt. " y g' ci tgg' y kj " t' gur qpf gpv' vj cv' f ghgpf cpv
rcnu" ucpf kpi " vq" tclug' vj g" ercko " vj cv' kp" eqpf wevpi " vj gkt
kpvgtqi cvkap. " r rkgf " qh' k' gtu" xkqrv' f O qqf { "u" r tklkgi g
ci clpuv' ugrh' kpetko kpcvkap' O C" f ghgpf cpv' rcnu" ucpf kpi " vq
eqo r rclp' qh' vj g' xkqrvkap' qh' c' vj k' f " r ctv' " u' Hkhj " Co gpf o gpv
r tklkgi g' ci clpuv' ugrh' kpetko kpcvkap' O *People v. Badgett* 3; ; 7+
32" Ecrf6j " 552. " 565" j63" Ecrf6r u0f " 857. " : ; 7" R0f " : 99 =
People v. Douglas* 3; ; 2+72" Ecrf6f " 68. " 723" j48: " Ecrf6r u0
348. " 9: : " R0f " 862_ " f kuc r t' xgf " qp" cpqj gt " r k' p' v' kp " People
v. Marshall* 3; ; 2+72" Ecrf6f " 29. " ; 55. " Ip06" j48: " Ecrf6r u0
48: . " 9; 2" R0f " 898_0" *966

F ghgpf cpv' f qgu' p' q' v' eqpvpgf u' vj cv' vj g' tlcni' eqwtv' gttgf
kp" cf o kwpi " kvq" gxf gpeg" vj g" o wtf gt" y gcr qp." gxf gpeg
eqpegtkpi "vj g"xgj kerg"ltqo "y j lej "vj g"hcni'uj qu'cr r gctgf
vq" j cxg" dggp" hktgf ." cpf " egtvclp" uj gmi' ecukpi u" f kucxgtgf
kp" vj g" xgj kerg' F ghgpf cpv' cnuq" ercko u" vj cv' vj g" tlcni' eqwtv
gttgf "kp" r gto kwpi "vj g"vuwko qp{ "qh'vj g"Y qqf uqpu'tgi ctf kpi
eqf ghgpf cpv'O qqf { "u'cevkap"kp"uqtkpi "vj g"o wtf gt" y gcr qp
cv'vj gkt"j qo g"qp"vj g"pki j v'hl'vj g"o wtf gt'J g"o clpvcapu"vj cv
vj ku'gxf gpeg'y cu'vj g'htwk'qh'O qqf { "u'lxqnpvct { "ucvgo gpw.
cpf "vj cv'vj g"tlnieqwtv'gttgf "kp" f gvto kpi "vj cv'vj g" gxf gpeg
kpgxkcdn' " y qwf " j cxg" dggp" f kucxgtgf " kp" vj g" eqwtug" qh
c" rny hwn' " eqpf wevf " kpxguki cvkap" gxgp" y kj qw" O qqf { "u
ucvgo gpw'kpi" j ku'tgr n' "dtlgh' f ghgpf cpv'cnuq' eqpvpgf u' vj cv'j g
j cu'ucpf kpi "vq" tclug'vj ku'ercko "dgecwug'xkqrvkap"qh'O qqf { "u
r tklkgi g'ci clpuv'ugrh'kpetko kpcvkap' eqpvkap' "c'xkqrvkap"qh
j ku'qy p" f wgr' treguu'tki j vu'Vj g" eqgtelqp" cr r rkgf "vq" O qqf { .
j g' eqpvpgf u. "ecwugf " O qqf { "vq" f kucxgtgf " vj g" y j gtdcdqwu'qh
vj g" y gcr qp" cpf " vj g" xgj kerg. " cpf " vq" f kucxgtgf " vj g" k' gpw' " qh
vj g" Y qqf uqpu'Y kj qw' c" t wrg' tgs wtkpi " uwr r tguakp" qh' vj g
ej cmgi gf " gxf gpeg. " j g' cmgi gu. r rkgf " o kucqpf wev' y qwf " dg
gpeqwtci gf " tvj gt " vj cp' f gvttgf O

Vj g" xkqrvkap" qh' c" vj k' f " r ctv' " u' r tklkgi g" ci clpuv' ugrh/
kpetko kpcvkap" o c { " f gr t' k' g" c" f ghgpf cpv' qh' j ku' qt" j gt" f wgr
r treguu'tki j u' k' h' u' w' j " c' v' k' p' c' f xgtug' " c' h' g' e' u' v' j g' t' g' r' k' d' k' s' v' " qh
vuwko qp { " qh' g' t' g' f " c' i clpuv' vj g' f ghgpf cpv' cv' tlcni' Cu' y g' j cxg
ucl' < o j " j gp" vj g' gxf gpeg" r tqf wevf " at trial" ku' uwdlgev' vq
eqgtelqp" (O) f ghgpf cpv' u' f wgr' r treguu'tki j u' " j ctg_ " ko r rkecvf
cpf " vj g' gzenwukpct { " twrg' (O) ku_ cr r rkgf O' Y j gp' c' f ghgpf cpv
uggnu' vq' gzenw' g' gxf gpeg' qp' vj ku' i tqw' p' . " vj g' f ghgpf cpv' o wv
cmgi g' vj cv'vj g' tlcni' vuwko qp { " ku' eqgtelg' " jekcvkap_ " cpf " vj cvku
cf o kuakp' y k' n' f gr t' k' g' j ko " qh' c' h' c' tlcni' jekcvkap_ (O) *People
v. Badgett. supra. " 32" Ecrf6j " cv' r 0566. " k' r' k' e' u' l' p' t' k' i k' p' c' i

F ghgpf cpv' f qgu' p' q' v' eqpvpgf u' vj cv' vj g' tlcni' eqwtv' gttgf
kp" cf o kwpi " kvq" gxf gpeg" vj g" o wtf gt" y gcr qp." gxf gpeg
eqpegtkpi "vj g"xgj kerg"ltqo "y j lej "vj g"hcni'uj qu'cr r gctgf
vq" j cxg" dggp" hktgf ." cpf " egtvclp" uj gmi' ecukpi u" f kucxgtgf
kp" vj g" xgj kerg' F ghgpf cpv' cnuq" ercko u" vj cv' vj g" tlcni' eqwtv
gttgf "kp" r gto kwpi "vj g"vuwko qp{ "qh'vj g"Y qqf uqpu'tgi ctf kpi
eqf ghgpf cpv'O qqf { "u'cevkap"kp"uqtkpi "vj g"o wtf gt" y gcr qp
cv'vj gkt"j qo g"qp"vj g"pki j v'hl'vj g"o wtf gt'J g"o clpvcapu"vj cv
vj ku'gxf gpeg'y cu'vj g'htwk'qh'O qqf { "u'lxqnpvct { "ucvgo gpw.
cpf "vj cv'vj g"tlnieqwtv'gttgf "kp" f gvto kpi "vj cv'vj g" gxf gpeg
kpgxkcdn' " y qwf " j cxg" dggp" f kucxgtgf " kp" vj g" eqwtug" qh
c" rny hwn' " eqpf wevf " kpxguki cvkap" gxgp" y kj qw" O qqf { "u
ucvgo gpw'kpi" j ku'tgr n' "dtlgh' f ghgpf cpv'cnuq' eqpvpgf u' vj cv'j g
j cu'ucpf kpi "vq" tclug'vj ku'ercko "dgecwug'xkqrvkap"qh'O qqf { "u
r tklkgi g'ci clpuv'ugrh'kpetko kpcvkap' eqpvkap' "c'xkqrvkap"qh
j ku'qy p" f wgr' treguu'tki j vu'Vj g" eqgtelqp" cr r rkgf "vq" O qqf { .
j g' eqpvpgf u. "ecwugf " O qqf { "vq" f kucxgtgf " vj g" y j gtdcdqwu'qh
vj g" y gcr qp" cpf " vj g" xgj kerg. " cpf " vq" f kucxgtgf " vj g" k' gpw' " qh
vj g" Y qqf uqpu'Y kj qw' c" t wrg' tgs wtkpi " uwr r tguakp" qh' vj g
ej cmgi gf " gxf gpeg. " j g' cmgi gu. r rkgf " o kucqpf wev' y qwf " dg
gpeqwtci gf " tvj gt " vj cp' f gvttgf O

Qw' r' k' p' k' p' " kp" People v. Badgett, supra. " 32" Ecrf6j " 552.
j qy gxtg. " gu' d' k' u' j gu' vj cv' c' f ghgpf cpv' o c { " pqv' r' t' g' x' k' i' u' k' o r n'
d { " cmgi kpi " vj cv' vj g" ej cmgi gf " gxf gpeg" y cu' vj g" h' w' k' qh
cp" cuugt' v' f n' " kpxqnpvct { " ucvgo gpv' qh' c" vj k' f " r gtuq' p' k' p'
vj cv' ecug. " y g' f gvto kpgf " ur gek' k' e' c' m' { " vj cv' c' f ghgpf cpv' o c {
pqv' u' g' e' w' t' g' vj g' gzenwukp" qh' vj g' trial testimony" qh' c" vj k' f
r ctv' " uko r n' " qp" vj g' i tqw' p' vj cv' k' y cu' vj g' h' w' k' qh' vj g' vj k' f
r ctv' " u' l' p' x' q' n' p' v' c' t { " ucvgo gpv' o *Id. " cv' r 0568. " 56: / 5720" Y g
g' z' r' k' p' g' f " vj cv' y j gp' vj g' f ghgpf cpv' u' ercko " ku' d' c' u' g' f " w' r' q' p' vj g
kpxqnpvct k' p' u' qh' c' vj k' f " r ctv' " u' ucvgo gpv' vj g' gzenwukpct {
twrg' cr r rkecdrg' vq' c' ercko gf " xkqrvkap' qh' vj g' r tklkgi g' ci clpuv
ugrh' kpetko kpcvkap' f qgu' p' q' v' cr r n' (O) *Id. " cv' r 05680" T' vj gt. " vj g
f ghgpf cpv' o c { " r' t' g' x' k' i' q' n' d { " f g' q' p' u' t' c' v' k' i' " h' w' p' f' c' o' g' p' v' n

wphckpguu'cv'tkcn'pqto cmf { "guwdkuj kpi 'vj cv'gxf gpeg'vq dg'r tqf wegf 'cv'tkcn'y cu'o cf g'wptgrkcdng'd { 'eqgtekp0%Id. 'cv r r 0569/56: 0-

Cu'y g"qdugtxgf "kp"vj g"Badgett"ecug. "öj g"r tko ct { "r wtr qug qh"zcnwf kpi "eqgtegf "vguko qp { "qh"vj kf "r ctvku"ku"vq"cuuwtg vj g"tgrkcdkx { "qh"vj g"tkcn' *967 "r tqeggf kpi u"000" *People v. Badgett."supra."32"Ecrt6j "cv'r 05690"Kp"cf f kxkp. "ö]vj g r wtr qug"qh"zcnwf kpi "gxf gpeg"r wtuwcpv'vq"cf"wg"r tqeguu erko "00"ku'cf gs wcvgnf "ugtxgf" d { "hqwulpi "qp"vj g"gxf gpeg'vq dg't tguwpvf 'cv'tkcn'cpf 'cunipi 'y j gyj gt"that"evidence"ku'b cf g wptgrkcdng'd { 'qpi qkpi "eqgtekp000%Id. 'cv'r 0569/56: . 'kcrleu kp"qtki kpcr0-

F ghgpf cpvu' cuugt vqp" vj cv' vj g" ej cmgpi gf " gxf gpeg"uj qwf j cxg"dgpp"zcnwf gf "kp"qtf gt "vq" f gvg"r qnleg"o kueqpf wev'ku kpequkuvp'v y kj "vj g"r tko ct { "lwukhckvqp"ht" tgeqi pl kpi vj g"ceewugf u' rko ksf "ucpf kpi "vq"eqo r rckp"qh"vj g"xlqrkvp qh"cpqvj gt "kpf kxf wcnu"r tkxkrgi g"ci clpuv'ugrh'kpetko kpcvqp/ c" eqpegt" vq" r tqxf g" hwpf co gpvcn' hckpguu' cv' tkcn' d { gpuwtkpi "vj g"tgrkcdkx { "qh"vj g" gxf gpeg" r tguwpvf "cv"vj cv r tqeggf kpi 0F ghgpf cpvu'cuugt vqp"vj cv'vj g"i qcn'qh'f gvgtkpi r qnleg" o kueqpf wev' kp" cni' etko kpcn' kpxgunki cvkpu" tgs wktgu vj g"zcnwf kpi "qh"vj g" gpuwki "gxf gpeg"y qwf "tguwn'lp"vj g cf qr vqp"qh" c" Hkij "Co gpf o gpv'zcnwf kpi { "twg"lp"uwej ecugu. "chqtf kpi "f ghgpf cpw'wpko ksf "ucpf kpi "vq"eqo r rckp qh"vj g"xlqrkvp"qh" c" vj kf "r gtuqp'u"r tkxkrgi g"ci clpuv'ugrh' kpetko kpcvqp. "y kj qw"vj g"pgeguu { "qh" f go qputcvkpi "cp { hwpf co gpvcn'wphckpguu'lp"vj g"tkcn'kuwrh0Vj g"rwy "r tqxf gu. j qy gxtg." vj cv' k' ku" qpn { "vj g" f ghgpf cpvu' own" tki j v' vq hwpf co gpvcn'wphckpguu'vj cv'ku'cv'ucmg"lp"uwej "ektewo ucpegu. cpf "vj cv'vj g"zcnwf kpi { "twg"cr r rckcdng"vq"xlqrkvp"qh"vj g r tkxkrgi g"ci clpuv'ugrh'kpetko kpcvqp" f qgu'pqv'cr r n { 0

Y j gp"lp"vj g"r cuv'y g"j cxg"eqpukf gtgf "f wg"r tqeguu"erko u uwej "cu'f ghgpf cpvu'vj g"tkcn'gxf gpeg"uqwi j v'vq"dg"zcnwf gf y cu' vj g" testimony" qh"vj g" vj kf "r ctv { "y j q" cuugt vgf n { "j cf dgpp"uwdlgev'vq"eqgtekp0%Ugg" *People v. Badgett."supra."32 Ecrt6j "cv'r 0564= *People v. Douglas."supra."72"Ecrt5f "cv r r 06; ; /6; ; 0"Kp"vj g" r tguwp'ecug. "f ghgpf cpv'f kf "pqv'ugm'vq zcnwf g"ucvgo gpv'qh'vj g"vj kf "r ctv { 00 qqf { "f kf "pqv'ugm'k { . ppt"y cu'gxf gpeg"qh"j ku'kpxqmpvct { "ucvgo gpv'vq"vj g"r qnleg r tguwpvf "kp" gxf gpeg0T cvj gt. "cv'tkcn'f ghgpf cpv'uqwi j v'vq zcnwf g" f go qputcvkxg" gxf gpeg"j g'erko u'y cu'f kueqxtgf "cu c'r tqf wev'qh'vj g"eqgtekp"qh"O qqf { /vj g'o wtf gt"y ger qp"cpf gxf gpeg"tgrkcdkx { "vq"vj g" xgj kerg"htqo "y j lej "k'y cu'cuugt vgf vj g"hcwn'uj qvu"y gtg"htgf /cu"y gni'cu"vj g"vguko qp { "qh"vj g Y qqf uqpu'lp"vj j qug'j qo g'O qqf { "vqtf g"vj g'b wtf gt"y ger qp0 Y g"ugg"pq"tgcupj. "j qy gxtg. "vq"eqpenw"vj cv'f go qputcvkxg

gxf gpeg"uj qwf "dg"uwdlgev'vq" c" dtqcf gt "zcnwf kpi { "twg wpf gt"vj g"ug"ektewo ucpegu"vj cp"ku"cr r rckcdng"vq"vguko qpkcn gxf gpeg/s wkv"vj g"tgxgtug. "ukpeg"eqgtekp"qh" c"ucvgo gpv'ku hct'hgua'hkrgn' "vq"tgpf gt"r j { ulecn'gxf gpeg'wptgrkcdng"vj cp'ku'ku rknrgn' "vq"chge'v'vj g'tgrkcdkx { "qh"tkcn'vguko qp { 0

Y g" f gvev'pq"eqppgevqp"dgw ggp"vj g"cuugt vgf "eqgtekp"qh O qqf { /cr r ctgpw { "ctkukpi "qw'qh'qh'htu'qh'ngpkpe { "lp"tgwtp hqt"j ku'eqqr gtcvqp"y kj "vj g" kpxgunki cvkpi "qhtkgtu/cpf"vj g tgrkcdkx { "qh"vj g" Y qqf uqpu"vguko qp { "cv' tkcn"qt"qh"vj g o wtf gt"y ger qp"qt"vj g" xgj kerg. "cu'gxf gpeg"qh" f ghgpf cpvu *968 "i wkn0Kpf ggf. "f ghgpf cpv'j cu'pqv'eqpv'gf "vj cv'vj g g ku'uwej "c"eqppgevqp0Cuwo kpi. "y kj qw'f gekf kpi. "y cv'lp uqo g"ektewo ucpegu"r j { ulecn' gxf gpeg"o ki j v'dg"zcnwf gf cu'wptgrkcdng"cu" c"eqpugs wpege"qh"vj g"eqgtekp"qh" c"vj kf r ctv { "y g"qdugtxgf"vj cv'f ghgpf cpv'o cngw"pq"erko "vj cv'vj g r j { ulecn' gxf gpeg"j g"uqwi j v'vq"zcnwf g"y cu'wptgrkcdng. "qt vj cv'ku'tgrkcdkx { "y cu'lp"uqo g'y c { "chge'v' d { "cp { "r qnleg eqgtekp"qh"O qqf { 0Y g'tglgev'f ghgpf cpvu'eqpv'vqp"dgcewug j g'hcnu'vq"ectt { "vj g'dwtf gp"qh'f go qputcvkpi "cp { hwpf co gpvcn wphckpguu'cv'tkcn'0Ugg" *People v. Badgett."supra."32"Ecrt6j cv'r 056: 0-

Y g" j cxg" cenpqy rgi gf "vj cv' lp" uqo g" kpuvpegu. "öeqwtu cpcn { | kpi "erko u"qh"vj kf "r ctv { "eqgtekp"j cxg" gztguwgf uqo g"eqpegt"vq"cuuwtg"vj g"lpvki tkx { "qh"vj g"lwf kelen'u { ugo ö d { "xlpf kcvkpi "c" f wg"r tqeguu"tki j v'qh"vj g" f ghgpf cpv'lp"vj ku eqpvz0 *People v. Badgett."supra."32"Ecrt6j "cv'r 0569. "ekskpi United States"v. Chiavola" *9j "Ek03; ; 6+966" *Hdf "3493. "3495= United States"v. Fredericks" *7j "Ek03; 9: +7: 8" *Hdf "692. "6: 3. ("lp0'36= *LaFrance"v. Bohlinger" *3uv"Ek0'3; 96+6; ; " *Hdf 4; . "54/560" C" tgegpv'f gekukp"qh"vj g"Vgpj "Ektekw'Eqwtv'qh Cr r gcu. "ht"gzco r ng. "tgeqi pl ku'vj cv'vj g" wptgrkcdkx { "qh" c eqgtegf "eqpgeuqk"qh" c"vj kf "r gtuqp"ku'pqv'vj g"sole"tgcup hqt"ku"zcnwf kpi "htqo "gxf gpeg<ö" *K'ku'wpj kpnrdng"vj cv'c ucvgo gpv'qdvckpgf "d { "vqtwg"qt" d { "qj gt"eqpf wev'dgnpi kpi qpn { "kp" c"r qnleg"ucv'vj qwf "dg"cf o kwgf "cv'vj g"i qxgtpo gpvu dgj guv'lp"qtf gt"vq"dqmvgt"ku"ecug000 [gv'o gj qf u'qhtgpkxg y j gp"wugf "ci clpuv'cp"ceewugf "f q"pqv'o ci kcmf "dgeo g"cp { ngu'u'vq"y j gp"gzgtv'f "ci clpuv'c'y kpguu0ö" *Clanton"v. Cooper *32j "Ek03; ; 9+34; "Hdf "3369. "337: 0-

Kp"vj g" r tguwp'ecug. "pq"ö"ucvgo gpv'qdvckpgf "d { "vqtwg"qt" d { qj gt"eqpf wev'dgnpi kpi "qpn { "kp" c"r qnleg"ucv'ö" *Clanton v. Cooper."supra."34; "Hdf "cv'r 0337: +y cu'cf o kwgf "cv'tkcn'0Vj g tkcn'eqwtv'f gvgto kpgf "vj cv'vj g" r qnleg" f kf "pqv'eqgteg"O qqf { r j { ulecn' . "cpf "vj g" cuugt vgf n { "eqgtegf "ucvgo gpv' y cu'pqv' cf o kwgf "cv'cm0Ceeqtf kpi n { "y g'ctg"pqv'ecngf "wr qp"vq" f gekf g y j gyj gt" gxf gpeg"r tqf wegf "d { "wcti gqwu' r qnleg" b kueqpf wev.

dw'pqv'qj gty kug'uj qy p"vq"dg"vptgrkcdrg"qt"uwdlgev"vq"vj g qpi qkpi "ghgewa"qh'eqgtekqp."uj qwrf "dg"gzewf gf "kp"qtf gt"vq xlpf lecvg'vj g'lpvgi tkv' qh'vj g'lwf lecln'u{ungo 0

; Kp'r cuukpi . "f ghgpf cpv'eqpvgpf u"vj cv'vj g'vklcn'eqwtv gttgf "kp"tggevkpi "vj g'erlko "vj cv'O qqf {u}cttguv qeewtvgf "y kj qw'r tqdcdrg"ecwug."kp"xlqrvkqp"qh vj g'Hqwtvj "Co gpf o gpv'vq" ghgpf cpv'j cu'pq'ucpf kpi vq"cuugt'vj g"Hqwtvj "Co gpf o gpv'tki j w'qh'qvj gtu. cpf "j ku'erlko "ku'tglgevgf "qp"vj cv'dcuku0*People v. Badgett.'supra.'32'Ecn6vj 'cv'r 05650-

F ghgpf cpv'vklcu'vq'f go qpucv'vj cv'j ku'tki j v'q'c'hclt'vklcn'y cu vpf gto kpgf "d{ "vj g'kptqf vevkqp"qh'r j { ulecln'gxlk' gpeg'y j qug tgrkcdkklv' "ku"pqv's wguvkppgf . "qt" d{ "vj g'kptqf vevkqp"qh'vj g vguiko qp{ "qh'v kpguugu'y j q"y gtg"pqv'uj qy p"vq"dg"uwdlgev vq"cp{ "r qrlkg'eqgtekqp"dghqts"qt" f wtkpi "vklcn'Wpf gt"vj gug ekteu ucpegu. "vj g'vklcn'eqwtv'f kf "pqv'gt"kp"cf o kwkpi "vj g ej cmgpi gf "gxlk' gpeg. "cpf "y g'tglgev'f ghgpf cpv'u'f vgr' tgeguu erlko 0 *969

b. Seizure of defendant's briefcase

*37c+Kp" c" o qvklp"vq"uwr r tguu'gxlk' gpeg"dtqwi j v'r wtuwepv'vq ugevkp"375: 07. "f ghgpf cpv'eqpvgpf gf "vj cv'vj g'ugk' wtg"qh"j ku dtlghcug"cpf "ku"eqpvgpw"ltqo "j ku'ukvgt'u"j qo g"xlqrv'gf j ku' tki j v' vpf gt" vj g' Hqwtvj " Co gpf o gpv' vq" dg" ltrgg" ltrgo vptgcuqpcdrng"ugctej gu"cpf "ugk' wtgu'Vj g"vklcn'eqwtv'f gplgf vj g'o qvklp."hkp' kpi "vj cv'c"y cttcpv'cwj qtk' kpi "vj g'ugctej "qh f ghgpf cpv'u'lggr. "y j lej "j cf "eqvklp'gf "vj g'dtlghcug"wpvkl'kv y cu'tgo qxgf "d{ "f ghgpf cpv'u'ukvgt. "cwj qtk' gf "vj g'ugctej "qh vj g'dtlghcug="vj cv'f ghgpf cpv'u'ukvgt"eqpvgpf "vq"vj g'ugk' wtg qh'vj g'dtlghcug="vj cv'vj g'eqpvgpw"qh'vj g'dtlghcug"kp'gxlkcdn' y qwrf "j cxg'dggp" f kueqxtgf. "dgecwug" c"y cttcpv'y qwrf "j cxg kuwgf" vq" cwj qtk' g" vj g' ugctej = cpf " hpcmf. " vj cv' gzki gpv ekteu ucpegu'lwvkl'gf "vj g'ugctej "qh'vj g'dtlghcug"0F ghgpf cpv' eqpvgpf u"vj g'vklcn'eqwtv' gttgf "cu"vq" gcej "i tqwrf "ucv'gf "kp f gp{ kpi "vj g'o qvklp"vq"uwr r tguu'0J g'cnuq"eqpvgpf u"vj cv'vq"vj g gzv'p'k'hwqpf "j ku'ukvgt. "F kcpg"lgpmkpu."j cf "eqpvgpf "vq vj g'ugctej. "vj g'eqwtv' gttgf "kp" f gvgto kpkpi "vj cv'j gt"eqpvgp y cu' xqnpwct {0' Tgur qpf gpv' eqpvgpf u" f ghgpf cpv' wengf " c tgcucpdrng'gzr gev'kqp'qh'r tkxce { 'kp' ku'dtlghcug. 'cpf "vj cv'vj g vklcn'eqwtv'eqttgevd' f gvgto kpgf "vj cv'vj g'ugctej "y cu'tgcucpdrng qp"vj g'i tqwrf u"qh'eqpvgp."kp'gxlkcdng" f kueqxtgf. "cpf "gzki gpv ekteu ucpegu'0Kp"cf f kkpq. "tgur qpf gpv'eqpvgpf u"cp{ "gttqt"kp cf o kwkpi "vj g'gxlk' gpeg"y cu"j cto nguu"dg{ qpf "c"tgcucpdrng f qvd0

Hqt" vj g" tgcucpu" vj cv' hmqy. "y g" eqpenf g" vj cv' vj g" eqwtv r tqr gtn' "f gplgf "vj g'o qvklp"vq"uwr r tguu'dgecwug"vj g'ugctej

y cu'eqpvgpw'0*38+Kp" tglxgy kpi "vj g'vklcn'eqwtv'u'f gplcn qh" c" o qvklp"vq"uwr r tguu'gxlk' gpeg. "y g'xlgy "vj g'tgeqtf "kp vj g' rki j v'o quv'hcxqtcdrng"vq"vj g'vklcn'eqwtv'u'wtkpi . "f ghgtpkpi vq"vj qug"gzr tguu"qt"ko r rkgf "hkp' kpi u"qh'hcev'uwr r tqv'gf "d{ uwdv'vklcn'gxlk' gpeg0*People v. Alvarez"*3; ; 8+36"Ecn6vj 377."3: 4" J7: " Ecn0Tr v04f"5: 7."; 48" R04f"587 = People" v. Miranda"*3; ; 5+39"Ecn0Cr r 06vj ; 39."; 44" J43" Ecn0Tr v04f 9: 7_0"Y g'kpf gr gpf gpv'v' tglxgy "vj g'vklcn'eqwtv'u'cr r rkecvkqp qh'vj g'ncv "vq"vj g'hcev'0*People v. Alvarez, supra.'36"Ecn6vj cv'r 03: 40-

*37d+Vj g"j gctkpi "qp"vj g'o qvklp"vq"uwr r tguu'r tqf vefg "vj g hmqy kpi "gxlk' gpeg'0F ggevkxg"J qrf gt" qh' vj g'Nqu" Cpi grgu Rqrkg' F gr ctwo gpv' ugtxgf "c"ugctej "y cttcpv'cv'f ghgpf cpv'u tgu'k' gpeg"qp" P qxgo dgt"4. "3: : 70C"pgki j dqt"lphqto gf "j ko vj cv'qp" vj g'r tglxkwu" gxp'kpi . "uqo g'r tguu"j cf "tgo qxgf r tqr gtv' "ltqo "vj g'tgu'k' gpeg'0Vj g'pgki j dqt"uwr r rkgf "J qrf gt y kj "vj g'negpug"pwo dgt"qh'vj g'xgj keng" wugf "vq"tgo qxg"vj g r tqr gtv'0'Qp"vj g'hmqy kpi "f c{. "J qrf gt. "cmppi "y kj "ugxgtcn qv'j gt" qh'kgtu. "y gpv'vq"vj g'cf f tguu"y j gtg"vj g'xgj keng"y cu tgi kngtgf 0J qrf gt "vku'kl'gf "vj cv'vj g'qeev' cpv' F kcpg"lgpmkpu. y j q"lphqto gf "Qh'kg" J qrf gt"vj cv'vj g'tgu'k' gpeg"y cu"j gtu. r gto kwgf "j ko "vq"gpv'gf "y j gp'j g'v'qrf "j gt'j g'y cu'eqpf vevkpi 'cp kpxguki cvkqp'qh'c'b wtf gt'qh'c'b qrlkg'qh'kg'cpf "cungf "y j gv'j gt j g'cpf "qv'j gt"qh'kgtu"eqwrf "eqo g'kp"cpf " *970 "mqmictqwpf 0 J g'f kf "pqv'j cxg" c"y cttcpv'0'0 u'0lgpmkpu"eqpvgpf "xgtdcm' vq" vj g'ugctej. "cpf "uj g'uki pgf "c" y tkwgp" hqto " kpf lecvkpi j gt"eqpvgp'cpf "cnuq"pqv'kpi "vj cv'uj g'r ckl "vj g'tgpv'qp"vj g r tgo kugu'Y j gp"J qrf gt" cunf "y j gv'j gt"vj g'tg'y g'tg'y gcr qp u kp'vj g'j qwug. "uj g'cl'kt'o gf "vj cv'vj g'tg'y g'tg. "h'gf kpi "j ko "vq"j gt dgt tqo "cpf "f kuerukpi "vj g'htecv'kqp"qh'v' q'f wpu'uj g'cuugt'gf dgrpi gf "vq"j gt"dq{ h'kgpf 0'0'0 quv'uko wncp'gqwu' "y kj "j ku tgs wguv"vq"eqpf vev'vj g'ugctej. "J qrf gt" cunf "y j gv'j gt"vj g'tg y cu'cp{ "r tqr gtv' "dgrpi kpi "vq"j gt"dtqj gt. "f ghgpf cpv' "kp"vj g j qo g0J qrf gt" dng'xgf "vj cv'uj g'wpf gtuqqf "j g'y cu"vj g'tg"vq kpxguki cv'g'c'b wtf gt'kp'y j lej "j gt"dtqj gt"o ki j v'dg'kpxqrxgf 0 Y j gp"J qrf gt" cunf "y j gv'j gt" vj g'tgu'k' gpeg" eqp'vklp'gf "cp{ r tqr gtv' "dgrpi kpi "vq"j gt"dtqj gt. "0 u'0lgpmkpu'tgur qpf gf "vj cv vj g'tg"y cu" c" dtlghcug" dgrpi kpi "vq"j ko 0'Y j gp"uj g"j cpf gf vj g'wpmengf "dtlghcug"vq"j ko "kp"j gt"dgt tqo. "j g'qr gpgf k'vq" f gvgto kpg"y j gv'j gt" k'eqp'vklp'gf "ht gcto u."kp" r ct'vewct vj g'o wtf gt"y gcr qp. "y j lej "vq"j ku'npqy rnf i g"j cf "pqv'dggp tgeqxtgf 0J g'cnuq"gzco kpgf "vj g'eqpvgpw"qh'vj g'dtlghcug"vq ckl "kp'kf gpv'kl' kpi "cf f kkp'cn'lwur gev. "hkp' kpi "vj cv'v'eqp'vklp'gf c" dlp'gf "y kj "vj g'pco g" F cp" qp" k. "xct'kwu" r cr gtu. "uqo g y kj "pco gu. "cf f tguu. "cpf "vgrgr j qpg" pwo dgtu" qp" vj go . r j qv'j tcr j u. "cpf "c'xgj keng'htecpug'0J g'v'qnm'y g'dtlghcug"y kj j ko "y j gp'j g'gh'v'j g't tgo kugu'ch'gt'eqpenf kpi "vj g'ugctej 00 u'0 lgpmkpu'kpf lecv'gf "kp'y tkkpi "vj cv'vj g't tqr gtv' ugk' gf "f wtkpi "vj g

ugctej . 'ur gekhlecml "kpenw lpi "vj g"dtlghhecug"cpf "ku"eqpvgrvu . y cu"oi kxgp"vq"fgvexkxg"J qrf gt"d{ "o g"tggm "y kj qwv"j tgcvc qt"r tqo kug0

F gvgvexkxg"Vj lgu"vukhlegf "vj cv"j g"tgegkxgf "vj g"dtlghhecug"ltqo J qrf gt"cpf "gzco kpgf "ku"eqpvgrvu0k"eqpvclpgf "c"tiegug"t rvg. c"r j qpg"o guaci g"tgxlxgn"cr r ctcwu."c"eqo dlpcvkap"nplkg. dtcuu" npvemgu." c" dqam' eqpvclpki " f ghgpf cpvu" nko qwulpg rkavpi u." r j qpg" dkmu." c" vgrj j qpg" cpf " c f f tguu" dqam' y kj pqvcvkapu"lp" f ghgpf cpvu"j cpf y tkkpi . "cpqvj gt"vgrj j qpg"cpf c f f tguu" dqam' dgctkpi " cpqvj gt" r gtuqpu" j cpf y tkkpi ." cpf c" dwulpguu"ectf 0' k" c f f kklq." vj gtg" y cu" c" r kgeg" qh" r cr gt dgctkpi "Gnj wg"Dtqo hgrf u"vgrj j qpg"pwo dgt0Vj g"b cvgtkenu hqwpf "lp"vj g"dtlghhecug"cnq"eqpvclpgf "vj g"vgrj j qpg"pwo dgtu qh" Tgge{ "Eqqr gt" cpf "V{tqpg" J kemu." cpf "vj g" c f f tguu"cpf vgrj j qpg"pwo dgt"qh" Cpjv qp{ "Dt{ cp0

F kcpg" lgpnpku" vukhlegf "cv" vj g" j gctkpi " qp" vj g" o qvkap" vj uwr r tguu" vj cv" uj g" j cf" nctpgf " qh" f ghgpf cpvu" cttguv" qp P qxgo dgt"3."3; : 7."ltqo "c"r gtuqpu"y j qug"lf gpvkl"uj g"eqwrf pqv'tgecn0Uj g" f k" "pqv'cmi"vq" f ghgpf cpv'qp"vj cv'f cvg0Cv"j gt o qj gt'u'tgs wgu"uj g'r kengf "wr" f ghgpf cpvu"wpqengf "Lggr" cv vj g"Ucp"Hgtpcpf q'eqwt vj qwug. hkp f lpi "vj g"hg{ u'wpf gt"vj g"htqt o cv0Uj g"tgo qxgf "vj g"dtlghhecug"ltqo "vj g"lgr "cpf" r rnegf "kv lp"j gt"tgukf gpeg0Uj g"ur gpv"vj g"plj j v'cv'f ghgpf cpvu"j qo g. hgctkpi "k'o ki j v'dg"uwdlgev"vq" c"dtgcm'lp"lp"j ku"cdugpeg0Uj g vukhlegf "vj cv"j j gp"J qrf gt"ctlkxgf "cv"j gt"j qo g"qp" P qxgo dgt 4."3; : 7."uj g"cumgf "y j gvj gt"j g"j cf" c"ugctej "y cttcpv"cpf j g" tgur qpf gf "vj cv"j g" f k" "pqv." *971 "dw"vj cv" wprguu"uj g eqpugpvf "vq" c"ugctej . "j g'y qwrf "cttguv"j gt"qp"cp"qwuvcpf lpi vclhhe"y cttcpv'cpf "ugctej "vj g"r tgo kugu"cp{ y c{0Uj g"ucvgf vj cv"J qrf gt"qdugtxgf "vj g"dtlghhecug"lp"j gt"dgf tqo . "ugk gf "kv. cpf "gzco kpgf "ku"eqpvgrvu0Uj g"vukhlegf "vj cv"uj g"y cu"wpf gt f wguu"y j gp"uj g'uki pgf "vj g"htqo "lpf kcvlpi "j gt"eqpugpv"vq"vj g ugcdej "cpf "vj g"tgo qxcn'qh'r tqr gtv' "ltqo "j gt"tgukf gpeg0

Vj g"vkn'eqwt'ucvgf "vj cv"kv'dgrkxgf "ugxgcn'gzegr vkpu"vq vj g"ugctej "y cttcpv" tgs wtkgo gpv' cr r rkgf 0' Hktuv" k' f gerctgf vj cv"vj g"qhhegtu"r quuguugf "c"y cttcpv"vq"ugctej "f ghgpf cpvu lgr . "cpf "ucvgf "ku"dgkgh'v cv'ovj gtg"ku" c"i qaf "cti wo gpv'vj cv vj cv' dtlghhecug"j cf "dggp"lp"vj g"ect="vj cv"vj g"ugctej "y cttcpv cwj qtk gf "c"ugctej "qh"vj g'ect'cpf "cwj qtk gf "c"ugctej "qh"0 t0 lgpnpku" r tqr gtv{ "lpukf g"vj g"j qwug="vj cv"vj gtg"cewcm{ "y cu c"ugctej "y cttcpv"vq"eqxg" k0"Vj g"eqwt'cf f gf . "oKvj kpm'vj g qjv gt"vj gqt{ "ku'f quakdn{ "c"eqpugpv"vj gqt{ . "cnj qwi j "Klqo gy j cv ci tgg"jy kj "f ghgug"eqwugnu"cti wo gpv"vj cv'eqpugpv"vq" wtp k'qxgt"qt" wtpkpi "k'qxgt" f qgup"pgeguact kn{ "i kxg"eqpugpv"vq qr gp"kv'cpf "vq"ugctej . "lp"cpf "qh"kuh0"Qvj gt"vj gqtkgu"vj g eqwt'v'hwpf "or quakdn{ "cr r rkecdng0"y gtg"lpgxkcdng" f kueqxt{

cpf "gzki gpv'ekewo ucpegu0Y kj "tgur gev'vq"vj g"htuv"vj g"eqwtv gzt rklpgf <ovj gtg'j cf "dggp" c"ugctej "y cttcpv'hw"vj g'ect'cpf "vj g r tqr gtv{0K'y qwrf "bqv'j cxg"vcnpg"tupi "hqt"vj go "jy g't qreg_ "vq j cxg'i qwgp" c"ugctej "y cttcpv'cpf "qr gpgf "vj g"dtlghhecug0"Y kj tgur gev'vq"vj g"ugeqpf . "k'gzr rklpgf <0k' gcm{ "f q"vj kpm'vj cv'j g go gti gpe{ "gzegr vkp. "vj g"gzki gpv'ekewo ucpegu"gzegr vkp. cr r kgu"y j gp{ "qwj cxg'c'p'kg/o knko ggt' y gcr qp"qwuvcpf lpi vj cv'j cu{ "g'v'q"dg"hw"pf 0Cpf "dcugf "qp"vj g"lphqto cvkqp"lp"vj g chlhf cxk'vj gtg'y cu'c'xgt{ "i qaf "ej cpeg'vj cvk' b ki j vj cxg'dggp hqwpf "y kj lp"vj g"dtlghhecug0

*39+ " Vj g" Hqwtv " Co gpf o gpv' r tqvgeu" cp" lpf kxk' wcnu tgcupcdng" gzt gev'vq" qh" r tkxce{ " ci clpuv" wptgcuqcdng kpt wulqp"qp"vj g'r ctv'qh'vj g'i qxgtpo gpv'0C"y cttcpv'ku'tgs wtkgf wprguu'egt'vclp"gzegr vkpu"cr r n{ . "kpenw lpi "vj g"gzegr vkp"vj cv r gto ku"eqpugpuwcn'ugctej gu0*Florida"v. Jimeno"*3; ; 3+722 WLU046: .472/473"J333"UEv03: 23."3: 25/3: 26."336"NOGf 0f 4; 9_<In re Tyrell J."*3; ; 6+; "Ecn0vj "8: .9; "J54"Ecn0r v0f 55.: 98"R0f "73; 0-

Cu" vj g" j ki j " eqwtv" j cu" gzt rklpgf < ovj g" vqvej uqpg" qh vj g" Hqwtv " Co gpf o gpv' ku" tgcupcdngppgu0]Ekcvkqp0_ Vj g Hqwtv " Co gpf o gpv' f qgu" pqv' r tquetkdg" cni' ucvg/kpkkcvgf ugctej gu"cpf "ugk wtu="k'o gtn{ "r tquetkdgu"vj qug"y j kej "ctg wptgcuqcdng0" *Florida" v. Jimeno." supra." 722" WLU' cv" r 0 472"J333"UEv0'cv'r 0'3: 25_0"C"y cttcpv'guu"ugctej "o c{ "dg tgcupcdng"pqv'qpn{ "kh"vj g" f ghgpf cpv'eqpugpv"vq"vj g"ugctej . dw'cnq"kh" c"r gtuqpu"qvj gt"vj cp"vj g" f ghgpf cpv'y kj "cwj qtk{ qxgt"vj g'r tgo kugu"xqnpvctkn{ "eqpugpv"vq"vj g"ugctej 0*United States"v. Matlock"*3; 96+637" WLU'386."392/393"j; 6"UEv0 ; : . . ; 4; ; 5."5; "NOGf 0f "464_"j r gtuqpu"uj ctkpi "c"dgf tqo y kj "f ghgpf cpv'j cf " *972 "cwj qtk{ "vq"eqpugpv"vq" c"ugctej "qh vj g'r tgo kugu"cpf "f ker gt" dci "hw"pf "vj g'tkpf _ugg"cnq" Frazier v. Cupp"*3; 8; +5; 6" WLU'953."962"j; ; "UEv0'3642."3647."44 NOGf 0f "8: 6_]eqwulp"j cf "cwj qtk{ "vq"eqpugpv"vq"ugctej "qh"vj g f ghgpf cpvu" f w'hn'dci . "y j kej "dqj "o gp" wugf "cpf "y j kej "j cf dggp" hgn'lp"vj g"eqwulpu"j qo g_0-

Hwtv gt. "vj g" Wplkgf " Ucvgu" Uwr tgo g" Eqwtv" j cu" ucvgf "vj cv okp"qt f gt"vq"enko "vj g'r tqvgevkp"qh"vj g" Hqwtv "Co gpf o gpv. c" f ghgpf cpv' o wv' f go qputcvg" vj cv' j g" r gtuqpcm{ " j cu" cp gzt gev'vq" qh" r tkxce{ "kp"vj g" r rneg"ugctej gf . "cpf "vj cv' j ku gzt gev'vq" ku' tgcupcdng=" . e0' qpg'y j kej "j cu" c" uqwtg' qwulkg qh'vj g" Hqwtv "Co gpf o gpv' gkxj gt" d{ "tghgtpeg"vq" eqpegr w'qh tgcn'qt" r gtuqpcn' r tqr gtv{ "rcy "qt"vq" wpf gtuvcpf lpi u"vj cv'ctg tgeqi pk gf "cpf "r gto kwgf "d{ "uqelgv{0'0" *Minnesota"v. Carter *3; ; +747" WLU' 5: . : "J33; "UEv0'68; "694."364"NOGf 0f 595_ "s vqkpi "Rakas"v. Illinois"*3; 9: +65; "WLU'34: ."356 j; ; "UEv0'643."647/648."7: "NOGf 0f "5: 9_0" Vj g" f ghgpf cpv

o wuv'cuugt'v'c"tgcupcdrg"gzr gev'v'q"qh'r t'kx'ce{"lp"o"}j g particular area searched or thing seized"lp'qt'f'g't'v'q'dt'kpi'c H'q'w'v'j'Co'g'p'f'o'g'p'v'e'j'c'm'g'p'i'g'O'o'v'People'v. McPeters, supra, 4'Ecr'f'6'v'j'cv'r'03393.'k'c'r'k'e'u'lp'q't'k'i'k'p'c'r'i'

C'f'g'h'g'p'f'c'p'v'j'c'u'v'j'g'd'w'f'g'p'c'v'v't'k'r'i'q'h'i'g'u'e'd'r'k'u'j'k'p'i'b'h'g'i'k'k'o'c'v'g'gzr'g'e'v'v'q'q'h'r't'k'x'c'e'{"l'p"j'g'r'm'e'g'ug't'e'j'g'f'q't'v'j'g'v'j'k'p'i'u'g'k'g'f'0'U'g'g'Rakas'v. Illinois.'supra.'65;'W'U'0'c'v'r'r'0352/353.'h'p'03.'356'j';'U'E'v'0'c'v'r'r'0646.'647/648'='u'g'g'c'n'u'q'P'e'o'p'l'e'v. McPeters.'supra.'4'Ecr'f'6'v'j'cv'r'033940'V'j'g'r't'q'u'e'w'v'k'p'j'c'u'v'j'g'd'w'f'g'p'q'h'i'g'u'e'd'r'k'u'j'k'p'i'v'j'g't'g'c'u'p'c'd'r'g'p'g'u'u'q'h'i'c'y'c't't'e'p'v'g'u'u'ug't'e'j'0'U'g'g'P'e'o'p'l'e'v. Williams'*3; : +67'Ecr'f'5'348:.'3522'j'46:'Ecr'f'r'v'0: 56.'978'R'0'f'443'='u'g'g'c'n'u'q'U'n'i't'e'd'S't'a't'e's'v. Matlock.'supra.'637'W'U'0'c'v'r'r'0393.'399'j'; 6'U'E'v'0'c'v'r'r'0; ; 5; ; 8'0'V'j'g'u'v'c'g'o'c'{"e'c't't'{"k'u'd'w'f'g'p'q'h'i'f'g'o'q'u'p'u't'c'v'k'p'i'v'j'g't'g'c'u'p'c'd'r'g'p'g'u'u'q'h'i'c'ug't'e'j'j'd'{"f'g'o'q'u'p'u't'c'v'k'p'i'v'j'c'v'v'j'g'q'h'l'e'g't'e'q'p'f'w'e'k'p'i'v'j'g'ug't'e'j'j'c'f'c'c'g'c'u'p'c'd'r'g'd'r'i'g'h'i'v'c'v'v'j'g'r'g't'u'q'p'e'q'p'u'g'p'v'k'p'i'v'q'v'j'g'ug't'e'j'j'c'f'c'w'j'q't'k'f'{"v'q'f'q'q'="k'k'u'p'q'v't'g's'w'k'g'f'v'j'c'v'v'j'g'u'v'c'g'g'u'e'd'r'k'u'j'v'j'c'v'v'j'g'r'g't'u'q'p'e'q'p'u'g'p'v'k'p'i'v'q'v'j'g'ug't'e'j'j'c'f'c'c'w'c'n'l'c'w'j'q't'k'f'{"v'q'="e'q'p'u'g'p'v'0'U'n'i't'e'd'S't'a't'e's'v. Rodriguez'*3; ; 2+6; 9'W'U'0'399.'3: 8'j'332'U'E'v'0'49; 5.'4: 22. 333'N'G'f'0'f'36: ='u'g'g'c'n'u'q'P'e'o'p'l'e'v. Jacobs'*3; ; 9+65'Ecr'f'5'694.'6: 3'j'455'Ecr'f'r'v'0545.'94; 'R'0'f'979'='P'e'o'p'l'e'v. Bishop'*3; ; 8+66'Ecr'f'r'v'06'j'442.'458'j'73'Ecr'f'r'v'0'f'84; _0'

*37e+'F'g'h'g'p'f'c'p'v'j'c'u'v'j'g'g'j'c'f'c'p'{"r'q'u'u'g'u'q't'{"k'p'v'g't'g'u'v'q't'ng'i'k'k'o'c'v'g'gzr'g'e'v'v'q'q'h'r't'k'x'c'e'{"l'p"j'k'u'uk'ng't'u'j'q'o'g.'u'q'j'g'h'k'g'f'v'q'g'u'e'd'r'k'u'j'v'j'c'v'v'j'g'ug't'e'j'q'h'i'v'j'g'j'q'o'g'k'u'g'r'h'x'k'r'c'v'g'f'j'k'u'q'y'p'e'q'p'u'k'w'k'q'p'c'n'l'k'i'j'w'0

F'g'h'g'p'f'c'p'v'f'k'f'."j'q'y'g'x'g't'."cuugt'v'v'j'c'v'j'g'j'c'f'c'c"t'g'c'u'p'c'd'r'g'gzr'g'e'v'v'q'q'h'i'r't'k'x'c'e'{"l'p'j'k'u'd't'l'g'h'e'c'ug.'c'p'f'y'g'c'u'u'w'o'g'h'q't'v'j'g'r'w'r'q'u'g'q'h'i'v'k'u'c'r'r'g'c'n'l'v'j'c'v'j'g' *973 "e'c't't'l'g'f'j'k'u'd'w'f'g'p'q'h'uj'q'y'k'p'i'c'h'i'g'i'k'k'o'c'v'g'gzr'g'e'v'v'q'q'h'i'r't'k'x'c'e'{"l'p'v'j'c'v'q'd'l'g'e'v'0'32'P'q'p'g'v'j'g'r'g'u'u.'y'g'e'q'p'e'n'w'f'g'v'j'c'v'v'j'g'ug't'e'j'q'h'i'v'j'g'd't'l'g'h'e'c'ug'y'c'u'g'c'u'p'c'd'r'g'd'{"x'k'w'g'q'h'i'f'g'h'g'p'f'c'p'v'u'uk'ng't'u'x'q'n'w'p'c't'{"e'q'p'u'g'p'v'v'q'v'j'g'ug't'e'j'0

32 T'g'ur'q'p'f'g'p'v'e'q'p'v'g'p'f'u'f'g'h'g'p'f'c'p'v'j'c'u'v'j'g'g'j'c'f'c'c"t'g'c'u'p'c'd'r'g'gzr'g'e'v'v'q'q'h'r't'k'x'c'e'{"l'p"j'k'u' d't'l'g'h'e'c'ug."cuugt'v'k'p'i'v'j'c'v'v'f'g'h'g'p'f'c'p'v'j'c'f'g'r'i'k'p's'w'k'j'g'f'c'p'{"g'z'r'g'e'v'v'q'q'h'r't'k'x'c'e'{"l'p"v'j'g'd't'l'g'h'e'c'ug' d'{"t'g'r'i'k'p's'w'k'j'k'p'i'="e'q'p'u'q'r'l'q'x'g't'v'j'g'd't'l'g'h'e'c'ug'v'q'j'k'u'uk'ng't'0'Y'g'="e'q'p'e'n'w'f'g'v'j'c'v'v'j'g'g'x'k'f'g'p'eg'k'p't'q'f'w'e'g'f'c'v'v'j'g'j'g'c't'k'p'i'f'q'g'u'p'q'v'g'u'e'd'r'k'u'j'v'j'c'v'v'f'g'h'g'p'f'c'p'v'c'w'c'n'l'c'u'ng'f'j'k'u'uk'ng't'v'q'v'c'ng'r'q'u'g'u'k'p'q'h'i'v'j'g'd't'l'g'h'e'c'ug."c'n'j'q'w'i'j'c'v'v'j'g'v'k'o'g'v'j'g'ug't'e'j'y'c'u'="e'q'p'f'w'e'g'f'."v'j'g'q'h'l'e'g't'u'k'p'x'q'r'k'g'f'g'c'u'p'c'd'r'g'="e'q'w'f'="d'r'i'g'x'g'v'j'c'v'v'f'k'c'p'g

I'g'p'n'k'u'j'c'f'g'g'w'g'v'f'g'h'g'p'f'c'p'v'e'q'p'v'g'p'f'u'f'v'j'c'v'v'j'k'u'uk'ng't'u'e'q'p'u'g'p'v'v'q'ug't'e'j'j'g't'j'q'o'g'g'c'p'f'v'j'g'd't'l'g'h'e'c'ug'y'c'u'p'q'v'x'q'n'w'p'c't'{"0'U'g'g'S'c'h'n'e'c'k'l'o't'h'v. Bustamonte"*3; 95+'634'W'U'0'43:.'449'j'; 5'U'E'v'0'4263.'426:/426;.'58'N'G'f'0'f'76:_'j'y'j'g'v'j'g't'="e'q'p'u'g'p'v'y'c'u'x'q'n'w'p'c't'{"q't'y'c'u'v'j'g'r'r'q'f'w'e'v'q'h'="e'q'g't'e'k'p'p'q'v'j'g'r'c't'v'q'h'ug't'e'j'k'p'i'q'h'l'e'g't'u'k'u'c'="s'w'g'u'k'p'q'h'i'c'e'v'v'q'g'f'g'v'g't'o'k'p'g'f'k'q'o'v'j'g'v'q'v'c'r'k'f'q'h'i'v'g'="e'k't'e'w'o'u'c'p'eg'u'0'V'j'g'g'x'k'f'g'p'eg'c'v'v'j'g'j'g'c't'k'p'i'q'p'v'j'g'o'q'v'k'p'v'q'="u'w'r'r't'g'u'u'y'c'u'k'p'="u'j'c't'r'="e'q'p'h'l'e'v'q'p'v'j'k'u'r'q'k'p'0'F'g'v'e'k'x'g'J'q'r'f'g't'="v'g'u'k'h'g'f'v'j'c'v'v'f'g'h'g'p'f'c'p'v'u'uk'ng't'y'c'u'="h'l'g'p'f'f'c'p'f'="e'q'q'r'g't'c'v'k'x'g.'c'p'f'="t'g'c'f'k'f'("e'q'p'u'g'p'v'f'v'q'v'j'g'ug't'e'j'y'k'j'q'w'v'v'j'g'c'r'r'="r'k'e'c'v'k'p'q'h'i'c'p'{"r'g't'u'w't'g'q'p'v'j'g'r'c't'v'q'h'i'v'j'g'r'q'r'k'e'g'0'J'g'f'g'p'k'g'f'v'j'g't'g'c'v'g'p'k'p'i'j'g't'y'k'j'c't't'g'u'0'U'j'g'o'g'o'q't'k'r'k'g'f'j'g't'="e'q'p'u'g'p'v'k'p'y't'k'k'p'i'."u'v'c'v'k'p'i'v'j'c'v'v'k'y'c'u'k'g'g'n'l'i'k'x'g'p'0'0'u'0'U'g'p'n'k'u'v'g'u'k'h'g'f'."j'q'y'g'x'g't'."v'j'c'v'v'j'g't'="e'q'p'u'g'p'v'v'q'v'j'g'ug't'e'j'y'c'u'="e'q'g't'e'g'f'd'{"c"v'j'g'c'v'v'q'="c't't'g'u'v'j'g't'q'p'c'p'q'w'w'c'p'f'k'p'i'y'c't't'e'c'p'v'k'h'="u'j'g't'g'h'w'g'f'v'q'="u'w'r'r'f'j'g't'="e'q'p'u'g'p'v'0'Y'g'x'k'g'y'v'j'g'="t'g'e'q't'f'k'p'v'j'g'r'i'k'j'v'o'q'u'v'="h'c'x'q't'c'd'r'g'v'q'v'j'g'v't'k'e'n'="e'q'w'v'u't'w'k'p'i'."f'g'h'e't't'k'p'i'v'q'v'j'g'q'u'g'="g'z'r't'g'u'v'q't'k'o'r'k'g'f'="h'k'p'k'p'i'u'q'h'i'c'e'v'="u'w'r'r'q't'v'g'f'd'{"u'w'd'u'c'p'v'k'n'l'g'x'k'f'g'p'eg'0'U'g'g'P'e'o'p'l'e'v. Alvarez.'supra.'36'Ecr'f'6'v'j'cv'r'03: 4='P'e'o'p'l'e'v. Miranda.'supra. 39'Ecr'f'r'v'06'j'cv'r'r'043;/440'k'k'u'g'x'k'f'g'p'v'k'p'v'k'q'o'v'j'g'v't'k'e'n'="e'q'w'v'u't'g'r'i'k'c'p'eg'v'r'q'p'="e'q'p'u'g'p'v'c'u'c'="l'w'k'h'h'e'c'v'k'p'="h'q't'v'j'g'ug't'e'j'v'c'v'v'j'g'v't'k'e'n'="e'q'w'v'v'g'u'v'g'u'q'x'g'f'k'p'="h'c'x'q't'q'h'i'v'j'g'r't'q'u'e'w'k'p'v'j'g'h'e'w'c'r'i'f'k'ur'w'g'="t'g'i'c't'f'k'p'i'v'j'g'="e'k't'e'w'o'u'c'p'eg'u'w'p'f'g't'y'j'k'j'0'u'0'U'g'p'n'k'u'f't'c'p'v'g'f'j'g't'="e'q'p'u'g'p'v'c'p'f'f'k'f'p'q'v'v'e't'g'f'k'j'g't'="v'g'u'k'o'q'p'{"v'j'c'v'v'j'g't'="e'q'p'u'g'p'v'y'c'u'v'j'g'r'r'q'f'w'e'v'q'h'i'c'v'j'g'g'c'v'v'q'="c't't'g'u'v'j'g't'0'Y'g'f'g'h't'v'q'v'j'k'u'k'o'r'k'g'f'="h'e'w'c'n'l'f'g'v'g't'o'k'p'c'v'k'p'."y'j'k'j'k'u'="u'w'r'r'q't'v'g'f'd'{"u'w'd'u'c'p'v'k'n'l'g'x'k'f'g'p'eg'0'E'q'p'ug's'w'g'p'v'f'."y'g'="t'g'l'g'e'v'f'g'h'g'p'f'c'p'v'u'e'q'p'v'g'p'v'k'p'v'j'c'v'v'0'u'0'U'g'p'n'k'u'u'e'q'p'u'g'p'v'v'q'v'j'g'ug't'e'j'y'c'u'="l'p'x'q'n'w'p'c't'{"0

Y'g'p'g'z'v'w't'p'v'q'v'j'g'g's'w'g'u'k'p'y'j'g'v'j'g't'v'j'g'x'q'n'w'p'c't'{"e'q'p'u'g'p'v'i'k'x'g'p'd'{"0'u'0'U'g'p'n'k'u'g'u'e'd'r'k'u'j'g'f'v'j'g'ug't'e'j'y'c'u'="t'g'c'u'p'c'd'r'g'0'0'u'0'U'g'p'n'k'u'="e'r'g'c't'n'{"j'c'f'c'w'j'q't'k'f'{"v'q'="e'q'p'u'g'p'v'v'q'c"ug't'e'j'q'h'i'j'g't'q'y'p'="c'r'c't'v'o'g'p'v'c'r'm'e'g'k'p'y'j'k'j'="f'g'h'g'p'f'c'p'v'j'c'f'p'q'r'q'u'u'g'u'q't'{"k'p'v'g't'g'u'0'*3: +'k'p'="u'q'o'g'="e'k't'e'w'o'u'c'p'eg'u'."j'q'y'g'x'g't'."v'j'g'="e'q'p'u'g'p'v'v'q'c"ug't'e'j'="i'k'x'g'p'd'{"c"r'g't'u'q'p'y'k'j'="c'w'j'q't'k'f'v'q'="e'q'p'u'g'p'v'v'q'c"ug't'e'j'q'h'i'v'j'g'r'="t'g'o'k'u'g'u'f'q'g'u'p'q'v'p'g'e'g'u'c't'k'f'k'="u'w'r'r'f'="e'q'p'u'g'p'v'v'q'ug't'e'j'="r'g't'u'q'p'c'n'l'r'q'r'g't'v'f'="h'q'w'p'f'y'k'j'k'p'v'j'g'r'="t'g'o'k'u'g'u'0'c'u'="l'w'k'g'Q'E'q'p'p'q't'="g'z'r'="r'k'p'g'f'k'p'j'g't'="e'q'p'e'w't'k'p'i'q'r'k'p'k'p'k'p'="*974'U'n'i't'e'd'S't'a't'e's'v. Karo'*3; : 6+'68:.'W'U'0'927. 947'j'326'U'E'v'0'54; 8.'552:.'4'N'G'f'0'f'752_'o'j'c_'r'k'x'c'e'{"k'p'v'g't'g'u'k'p'c'j'q'o'g'k'u'g'r'h'p'g'g'f'p'q'v'd'g'e'q'z'g'p'u'k'x'g'y'k'j'c't'k'x'c'e'{"k'p'v'g't'g'u'v'k'p'v'j'g'="e'q'p'v'g'p'w'0'0'q'h'i'g'x'g't'v'j'k'p'i'="u'k'w'c'v'g'f'k'p'k'f'g'v'j'g'j'q'o'g'0'V'j'k'u'j'c'u'="d'g'g'p'="t'g'e'q'i'p'k'g'f'="d'g'h'q't'g'k'p'="e'q'p'p'g'e'v'k'p'v'v'q'v'j'k'j'k'f'/"r'c't'v'f'="e'q'p'u'g'p'v'v'q'ug't'e'j'g'u'0'c'j'q'o'g'q'y'p'g't'u'="e'q'p'u'g'p'v'v'q'c

ugctej 'qh'v'j' qo g'b c{ 'pqv'dg'ghgex'g'eqpugpv'v'c'ugctej 'qh
c'equgf 'qdlgev'kpkf'g'y'g' qo g'Eqpugpv'v'ugctej 'c'eqpvc'kpgt
qt'c'r' rceg'ku'ghgex'g'qpn' 'y' j' gp'i' kxgp'd' 'qpg'y' kj')eqo o qp
cwj qtkf' 'qxgt'qt'q'y' gt'uwthlekpv't'gr'v'kpuj' kr' 'v'q'y' g'r' tgo kugu
qt'ghgew'u'qwi' j' v'q'dg'kpur' gev'g' 0'United States v. Matlock.
637'WLU'c'v'393'; 6'UE'v'c'v'0'; ; 5_0'Eqo o qp'cwj qtkf' (00
tguv'00)qp'o wwn'wug'qh'v'j' g'r' tqr' gtv' 'd' { 'r' gtuqpu'i' gpgtcm'
j' c'kpi' 'lqkp'v'ceegu'qt'eqpvt'qn'ht' 'o' quv'r' wtr' qugu'(00)'Ido'cv
393.'p09'; 6'UE'v'c'v'0'; ; 5_0

Cu' v'j' ku' rpi wci g' 'kpf' kcv'u.' cv' r'gcu' v'y' q' s'wug'kpu' c'tg
r' t'gugpv'f' 'y' j' gp' v'g' u'cv'g'uggm'v' l'wukh' 'c'y' c'tt'cp'v'g'u'ugctej
d' { 'tgn' kpi' 'w' qp' v'j' g' eqpugpv' qh'c' v'j' kf' 'r' c'tv' 'y' j' q' ku' v'j' g'
qeew' cpv'q'h'v'j' g'r' tgo kugu'ugctej' gf' <'y' j' g'y' gt' v'j' g'v'j' kf' 'r' c'tv'
j' cf' 'cwj' qtkf' 'v'q' eqpugpv'v'v'j' g'ugctej' . 'cpf' 'y' j' g'y' gt' v'j' g'ueqr' g'
qh'v'j' g' eqpugpv'v' i' kxgp' 'kpen'f' gf' 'v'j' g' qdlgev' qt' 'eqpvc'kpgt' v'j' cv'
y' cu'ugctej' gf' 0'k'v'j' g' t'g'u'q'w'k'q'p'qh'v'j' g'ug' s'wug'kpu.' cu'pqv'f' .
v'j' g' u'cv'g' o' c' { 'ectt' { 'ku' d'w'f' gp' d' { 'f' go' q'p'w'c'k'p' i' v'j' cv'k'y' cu'
qdlgev'kxgn' 't'gcu'q'p'cd'ng' hqt' v'j' g'ugctej' kpi' 'qh'leg' t' v'j' d'gr'k'x'g'
v'j' cv'v'j' g'r' gtuqp' i' k'kpi' 'eqpugpv'v' j' cf' 'cwj' qtkf' 'v'q' f' q' uq.' 'cpf'
v'j' d'gr'k'x'g' v'j' cv'v'j' g'ueqr' g'qh'v'j' g'eqpugpv'v' i' kxgp' g'p'eqo' r' cu'ugf'
v'j' g' kgo' 'ugctej' gf' 0'Florida'v. Jimeno.' supra.'722'WLU'cv
r'0473'j'333'UE'v'c'v'0'3: 25/3: 26_]ueqr' g'qh'eqpugpv'v' o' c'
d'g' g'w'c'd'k'ug' gf' d' { 'uj' q'y' kpi' v'j' cv'v'j' g'ugctej' kpi' 'qh'leg'tu'j' cf' 'cp'
qdlgev'kxgn' 't'gcu'q'p'cd'ng' d'cuku'v'q' d'gr'k'x'g' v'j' g'eqpugpv'v' kpen'f' gf'
v'j' g' kgo' 'ugctej' gf' =Illinois'v. Rodriguez.' supra.'6; 9'WLU'cv
r'03: 8'j'332'UE'v'c'v'0'4: 22_]ugctej' 'o' c' { 'd'g' t'gcu'q'p'cd'ng' kh'
qh'leg' t' j' cf' 'cp' qdlgev'kxgn' 't'gcu'q'p'cd'ng' d'gr'k'g'h' v'j' cv'v'j' g'r' gtuqp'
eqpugpv'v' kpi' 'v'q' v'j' g'ugctej' j' cf' 'cwj' qtkf' 'v'q' f' q' uq_0

k'p'Florida'v. Jimeno.' supra.'722'WLU'46: . 'v'j' g' j' ki' j' 'eqwtv'
g'zr' r'k'p'gf' 'v'j' cv'v'j' g'ueqr' g'qh'eqpugpv'v'w'w'cm' 'ku'f' gh'k'p'gf' d' { 'v'j' g'
g'zr' t'gugf' 'qdlgev'q'h'v'j' g'ugctej' 0'Id.' cv'r'0473'j'333'UE'v'c'v'
r'03: 25/3: 26_0'k'v'j' cv'ecug.' 'y' j' g't'g'c' r' q'leg' q'h'leg' t' u'qr' r' gf'
c' x'g'j' k'eng. 'k'p'q'to' kpi' 'v'j' g' qeew' cpv'q'h'v'j' g' q'h'leg' t' u'w'ur' k'ek'p'
v'j' cv'v'j' g' x'g'j' k'eng' eqpvc'kpgf' 'p'cteq'v'eu.' v'j' g'f' t'k'x'g' t' u'eqpugpv'v'
c'ugctej' 'qh'v'j' g' x'g'j' k'eng' t'gcu'q'p'cd'ng' 'eqw'f' 'd'g' w'p'f' g'tu'v'q'f' 'v'q'
k'p'nm'f' g' y' k'j' k'p' 'ku' u'eqr' g' v'j' g'ugctej' 'qh'c' e'nu'g'f' 'r' cr' g't' d'ci'
f' k'ue'q'x'g'f' g' y' k'j' k'p' v'j' g' x'g'j' k'eng' 0'V'j' g' u'v'p'f' c'tf' h'q't' b' g'cu'w't'k'p' i' v'j' g'
ueqr' g'qh'eqpugpv'v' j' g' eqwtv' u'ckf' . 'ku' v'q' c'um'f'oy' j' cv'v'j' q'w'f' 'v'j' g'
v'f' r' k'ec'n' t'gcu'q'p'cd'ng' r' gtuqp' j' c'x'g' w'p'f' g'tu'v'q'f' d' { 'v'j' g' g'z'ej' c'p'i' g'
d'g'y' g'p'p' v'j' g' q'h'leg' t' c'p'f' v'j' g' u'w'ur' g'ev'0' *Ibid.' + V'j' g' eqwtv'
r' k'p'v'g'f' 'q'w'v'j' cv'k'p' i' t'cp'v'k'p' i' r' g'to' k'u'k'q'p' v'q'ugctej' v'j' g' x'g'j' k'eng.
v'j' g'f' g'hp'f' cpv'of' k'f' 'p'q'v'r' r'ceg' cp' { 'g'zr' r'ek'v' r'ko' k'c'v'k'p' q'p' v'j' g'
ueqr' g'qh'v'j' g'ugctej' 0' *Ibid.' + V'j' g' q'h'leg' t' j' cf' 'k'p'q'to' gf' v'j' g'
f' g'hp'f' cpv'j' g' d'gr'k'x'g'f' v'j' g'f' g'hp'f' cpv'v'j' cu'ectt' { k'p' i' 'p'cteq'v'eu.
c'p'f' v'j' cv'v'j' g' q'h'leg' t' y' q'w'f' 'd'g' t'q'q'k'p' i' h'q't' 'p'cteq'v'eu' 0'V'j' g' eqwtv'
eqp'nm'f' gf' <'o'Y' g' v'j' k'p'n'v'j' cv'k'y' cu' qdlgev'kxgn' 't'gcu'q'p'cd'ng' h'q't'
v'j' g'r' q'leg' v'q' eqp'nm'f' g' v'j' cv'v'j' g' i' g'p'g't'cn' *975' eqpugpv'v' q'

ugctej 't'gur' q'p'f' g'p'v'v'ect' 'k'p'nm'f' gf' 'eqpugpv'v'ugctej' 'eqpvc'kpgt'
y' k'j' k'p' v'j' cv'ect' y' j' k'ej' 'o' ki' j' v'd'g'ct' f' t'w' i' u'0C' t'gcu'q'p'cd'ng' r' gtuqp'
o' c' { 'd'g' g'zr' g'ev'f' 'v'q' h'p'q'y' v'j' cv'p'cteq'v'eu' c't'g' i' g'p'g't'cm' { 'ectt' k'ef'
k'p' u'q'o' g' h'q'to' 'qh'c' eqpvc'kpgt' (00) V'j' g' cwj' qtk' c'v'k'p' v'q'ugctej' 'k'p'
v'j' ku'ecug.' v'j' g't'g'ht'g'. 'g'z'v'p'f' gf' 'd'g' { q'p'f' v'j' g' u'w't'h'ceg'u' q'h'v'j' g'ect' u'
k'p'v'g't'k'q't' v'q' v'j' g'r' cr' g't' d'ci' h'f' k'p' i' q'p' v'j' g'ect' u' h'q'q't' 0' *Ibid.' +

C'nj' q'w' j' 'v'j' g' eqwtv' ecw'k'q'p'gf' 'v'j' cv'v'j' g'f' g'hp'f' cp'v'v'v' eqpugpv'
r' t'q'd'c'd'ng' 'y' q'w'f' 'p'q'v'g'z'v'p'f' 'v'q' c' t'q'eng'f' 'd't'g'k'f'ecug' k'p' v'j' g' t'w'p'm'
q'h'v'j' g'ect.' v'j' g' eqwtv' t'g'g'ev'f' v'j' g'f' g'hp'f' cp'v'v'v' eqpugpv'v'k'p' v'j' cv'
v'j' g'r' q'leg' o' w'w'v' t'gs' w'g'u'v'g'r' c'tc'v'g' r' g'to' k'u'k'q'p' v'q'ugctej' 'g'cej'
eqpvc'kpgt' k'p' v'j' g' ct'g'c' v'q' d'g'ugctej' gf' 0'Florida'v. Jimeno.
supra.'722'WLU'cv'r'0473/474'j'333'UE'v'c'v'0'3: 25/3: 26_0-
V'j' g' eqwtv' h'q'w'p'f' 'p'q' d'cuku' h'q't' c'f' f' k'p' i' u'w'ej' 'c' t'gs' w'k't' go' g'p'v'.
q'd'ug't'x'k'p' i' v'j' cv'v'j' q'w' j' 'c' u'w'ur' g'ev' o' c' { 'r'ko' k'v'j' g'ueqr' g' q'h'
eqpugpv'v' k'h'eqpugpv'v' t'gcu'q'p'cd'ng' 'y' q'w'f' 'd'g' w'p'f' g'tu'v'q'f' 'v'q' g'z'v'p'f'
v'q' c' eqpvc'kpgt'. 'p'q' h'w'v'j' g't' cwj' qtk' c'v'k'p' 'ku' t'gs' w'k't' gf' 0'Id.' cv'r'0
474'j'333'UE'v'c'v'0'3: 26_0'V'j' g' eqwtv' t'g'k'f' 'w'r' q'p' v'j' g'r' v'd'k'le' u'
k'p'v'g't'g'u'k'p' r' g'to' k'v'k'p' i' eqpugpv'v'w'c'v'ugctej' g'u' u'v'k'p' i' v'j' cv'v'j' v'j' g'
eqo' o' w'p'k'f' { 'j' cu'c' t'g'c'n' k'p'v'g't' g'u'v'k'p' g'p'eqw'c'i' k'p' i' eqpugpv'v' h'q't'
v'j' g' t'g'u'w'k'p' i' 'ugctej' 'o' c' { 'k'ng'f' 'p'g'eg'u'c't' { 'g'x'k'f' g'p'eg' h'q't' v'j' g'
u'q'w'k'q'p' c'p'f' r' t'q'ug'ew'k'q'p' q'h'et'ko' g'. 'g'x'k'f' g'p'eg' v'j' cv'v'j' o' c' { 'k'p'w'g'
v'j' cv'v'j' y' j' q'm' { 'k'p'p'q'eg'p'v'r' g'tu'q'p' 'ku' p'q'v'y' t'q'p'i' n'f' 'e'j' c'ti' gf' 'y' k'j' 'c'
et'ko' k'p'c'n' q'h'eg'p'ug' 0'0' *Ibid.' +

Q'v'j' g't' eqwtv' c'p'f' 'eqo' o' g'p'v'q'tu' j' c'x'g' q'd'ug't'x'g'f' v'j' cv'v'j' q'r' g'p'
g'p'f' gf' 'eqpugpv'v'ugctej' 'p'q'to' c'm'f' 'f' q'gu' p'q'v' u'w' i' g'u'v'j' cv'v'j' g'
r' g'tu'q'p' eqpugpv'v'k'p' i' y' q'w'f' 'g'zr' g'ev'v'j' g'ugctej' 'v'q' d'g' r'ko' k'v'f' 'k'p'
c'p' { 'y' c' { 'c'p'f' v'j' cv'v'j' g'p'g't'c'n' eqpugpv'v'ugctej' 'k'p'nm'f' g'u' eqpugpv'
v'q' r' w'w'ug' v'j' g' u'cv'g'f' 'qdlgev'q'h'v'j' g'ugctej' d' { 'q'r' g'p'k'p' i' e'nu'g'f'
eqpvc'kpgt' u'0'U'gg' People'v. \$48,715 United States Currency
*3; ; 9+ 7: 'E'c'n'0'c'r'r' 0'6'j' 3729.' 3737' j'8: 'E'c'n'0'f'r' v'0'f'f' : 4; _
j'eqpugpv'v'ugctej' 'x'g'j' k'eng' h'q't' f' t'w' i' u'k'p'nm'f' gf' 'u'gg'f' 'd'ci' u'c'p'f'
u'w'k'ec'ug'u' . q't' c'p' { 'c't'g'c' q'h'v'j' g' x'g'j' k'eng' v'j' cv'v'j' ki' j' v'eqpvc'k'p' f' t'w' i' u=
U.S.'v. Stewart' *7'j' 'E'k'0'3; ; 8+; 5' 'H'5'f' '3; ; . 3; 4' j'eqpugpv'
v'q' 'o'm'q'm' c'v'v'j' o' g'f' k'ek'p'g' d'q'w'g' k'p'nm'f' g'u' eqpugpv'v' q'z'co' k'p'g'
eqp'v'p'w' = U.S.'v. Snow' *4f' 'E'k'0'3; ; 7+ 66' 'H'5'f' '355.' 357
j'eqpugpv'v'ugctej' 'x'g'j' k'eng' h'q't' f' t'w' i' u'k'p'nm'f' g'u' eqpugpv'v'q' q'r' g'p'
c'p'f' 'ugctej' 'c' f' w'h'g'n' d'ci' 'k'p'k'f' g'v'j' g' x'g'j' k'eng' = U.S.'v. Zapata
*3'v' 'E'k'0'3; ; 6+ 3: 'H'5'f' ; 93.; 99' j'eqpugpv'v'ugctej' 'x'g'j' k'eng'
k'p'nm'f' g'u' eqpugpv'v' v'q'ugctej' 'f' w'h'g'n' d'ci' 'h'q'w'p'f' 'k'p' i' v'w'p'm' = 5
N'e'x'g.' 'U'g'ctej' 'c'p'f' 'U'g'k'f' w'g' *5'f' g'f' 0; ; 8+ 'E' : 0' *e+ 'r' 0'835
j' i' g'p'g't'c'n' eqpugpv'v' q't'f' k'p'c't'k'f' 'o' c' { 'd'g' w'p'f' g'tu'v'q'f' 'v'q' g'z'v'p'f' v'q'
c'p' g'z'co' k'p'c'v'k'p' / k'p' h'w'v'j' g't'c'p'eg' q'h'v'j' g' qdlgev'q'h'v'j' g'ugctej' / q'h'
e'nu'g'f' 'eqpvc'kpgt' u' h'q'w'p'f' k'p' v'j' g' c't'g'c'. 'o'r' c't'v'ew'r't'c'n' { k'h'v'j' g'r' q'leg'
j' c'x'g' k'p'f' k'ec'v'g'f' v'j' g' { 'c't'g'ugctej' k'p' i' h'q't' c' u'o' c'm' qdlgev'v' j' k'ej'
o' ki' j' v'd'g' eqp'eg'c'ng'f' k'p' u'w'ej' 'c' eqpvc'kpgt' 0' = u'gg' c'nu'q' G'ty' k'p' g'v'
c'v'0' E'c'n'0'Et'ko' k'p'c'n'f' g'hp'ug' R't'c'v'ek'g' *3; ; : 'g'f' 0' E'4404' j'8_ 'r' 0
44/53' v'q' 44/54' j'eqpugpv'v'ugctej' 'i' g'p'g't'c'm'f' 'k'o' r' r'k'g'u' eqpugpv'

vq" c"eqo r rvgv"ugctej . "wprguu" c"nko kcvkqp" ku" g"zr tguugf _="dw
ugg" U.S. v. Infante-Ruiz" *3uvEk03; ; 6+35" H5f "6; : . "726/727
Jy j gp" vj kf" r ctv{ "eqpugpv" *976 "vq"ugctej "c" xgj kerg" cpf
vwpnku's wcktkgf "d{ "c" y ctplpi "vj cv'vj g" dtlghcug" dgrpi gf "vq
cpqj gt. "qhlhgtu" eqwrf "bqv'cuwo g'y kj qwhwtj gt lps vkt { "vj cv
vj g" eqpugpv'gz vgpf gf "vq" vj g" dtlghcug_0³³

33 Y g" pqvg" vj cv' vj qug" ecugu" nko kxpi "vj g" cdkkx{ "qh
r rkeg" qhlhgtu" vq" ugctej "eqpvckpgtu" dgrpi kpi "vq
r cuugpi gtu" qh'xgj kergu" bqv'vy pgf "d{ "v' g' r cuugpi gt.
kp" vj g" cdugpeg" qh' xckf "eqpugpv" d{ "v' g' r cuugpi gt.
o c{ "tgs vkt g" tggzco kpcvqp" chgt "v' j" k j "eqwv'u
tgegpv" f gekkqp" kp" Wyoming. Houghton" *3; ; ; +
748" WLU04; 7" J33; "UE v034; 9. "365" NGf 04f "62: _
y j lej " j qrf u" vj cv' r rkeg" qhlhgtu" vj kj " r tqdcdrg
ecwug" vq" ugctej "c" xgj kerg" qtf koptkx{ "o c{ "ugctej "vj g
dgrpi kpi u" qh' r cuugpi gtu. "y j gp" uwej " dgrpi kpi u
tgcupcdn{ "o c{ "dg' dgrgxf "vq" eqpvckp" vj g' dldgevh
vj g" ugctej 0

*37f +Wpf gt "vj g' ekewo ucpegu" qh' vj g' r tguugv' ecug. "vj g" qhlhgtu
j cf "bp" qdlgev' xgn{ "tgcupcdn" d' cu" vq" eqpenm' g' vj cv' vj g' ueqr g
qh' F kcpg" Lgpnkpu" u" eqpugpv' kpenm' gf "vj g" dtlghcug 0F gvgev' xg
J qrf gt" g"zr rckpgf "vq" O u' Lgpnkpu" vj cv' j" g" y cu" kpxguki cvkpi
vj g' o wtf gt "qh' c' r rkeg" qhlhgt/ cp" kpxguki cvkqp" vj cv' tgcupcdn
y qwrf "dg" wpf gtuvqf "cu" kpxqmkpi "cp" kv' g' p' ukxg" ugctej "hqt
uwej " qdlgeu" cu" y gcr qpu' Y j gp" vj g" i tcv' gf "qr gp/ gpf gf
eqpugpv" vj g" ugctej "qh' i" gt" j qo g. "uj g' j" cf "dggp" kphqto gf
vj cv' vj g" qhlhgt" y cu' ugnkpi "gxkf gpeg" eqpegtplki "j gt" dtqvj gt 0
k{ "cf f kxkp. "j cxkpi "uwr r kfg" eqpugpv' vq" ugctej . "y j gp" cungr
y j gj gt "cp{ "qh' j" gt" dtqvj gt" u' dgrpi kpi u' y gt g' k' j" gt" j qo g. "lj g
j cpf gf "vj g" qhlhgt" j" gt" dtqvj gt" u' dtlghcug 0" Ugg. "g 0" People
v. Fierro" *3; ; 3-4" Ecn6j "395. "439. "hp036" J5" Ecn0T r v04f
648. " : 43" R0f " 3524_ " jv kf" r ctv{ "vq" eqpugpv' vq" ugctej " j gt
qy p' r wtug. "y kj "ucvgo gpv' vj cv' y cngv' eqpvckpgf "vj g' k' y" cu
f ghgpf cpv' u. "cti wcdn{ "gz v' p' u' vj g' ueqr g" qh' eqpugpv' vq" kpenm' g
vj g' y cngv' 0" J gt" y tkwgp' eqpugpv' k' p' k' v' g' z' r tguu' eqpugpv' vq
ugctej " j gt" j qo g. "cpf "kpenm' gf "c" ucvgo gpv' vj cv' vj g" dtlghcug
j cf "dggp" i kxgp' vq" J qrf gt" tggg. "y kj qw' vj g' tcv' q' r t' qo kug 0 Cu
pqvgf . "J qrf gt" y cu' pqv' tgs vkt gf "vq" uggm' ugr ctcv' g' eqpugpv' hqt
gcej "eqpvckpgt" ugctej gf . "r tqxkf kpi "vj g" ugctej "qvj gty kug" y cu
tgcupcdn 0" Florida v. Jimeno. supra. "722" WLU0c v' r 0473/474
J333" UE v0c v' r 03: 25/3: 26_0-

C" dtlghcug" qdxkqwn{ "ku" c' eqpvckpgt" vj cv' tgcf kx{ "o c{ "eqpvckp
kpetko kpcvpi " gxkf gpeg. " kpenm' kpi " y gcr qpu' Dgecwug" vj g
cpqwpgef "qdlgevh" vj g' ugctej "y cu' gxkf gpeg" eqppgevgf "y kj
vj g" o wtf gt "qh' c" r rkeg" qhlhgt/ vj wu" kpenm' kpi "y gcr qpu' vj cv
eqwrf " dg" j kf gp" k' c" dtlghcug/ cpf " kpxqmkpi " j gt" dtqvj gt.

O u' Lgpnkpu" u" eqpugpv' vq" ugctej " j gt" j qo g" cpf " j gt" cev' kqp
k' f kuenqkpi "vj g" eqpvckp" qh' vj g" dtlghcug. "kf gpv' k' kpi "k' cu
j gt" dtqvj gt" u. "cpf " j cpf kpi "k' vq" vj g" r rkeg" qhlhgt" y qwrf "dg
wrf gtuvqf " d{ " c" tgcupcdn" r gtuq" vq" kpenm' g" eqpugpv' vq
ugctej "vj g" dtlghcug 0

*3; c- "Cu" hqt "O u' Lgpnkpu" u" authority" vq" eqpugpv' vq" vj g' ugctej
qh' f ghgpf cpv' u' dtlghcug. "k' ku" ugwrf "vj cv' vj g' eqpugpv' qh' qpg
y j q' r quuguug' eqo o qp" cwj qtkx{ "qxgt" r tgo kugu' qt" ghg' ewu" ku
xckf "cu" ci k' p' v' vj g' cdugpv. "bqpeqpv' kpi " r gtuq" vj kj "y j qo
vj cv' cwj qtkx{ "ku" vj ctgf 0" *977 "United States v. Matlock.
supra. "637" WLU0c v' r 0392" J; 6" UE v0c v' r 0; ; 5. 0" Hqt "gzco r rg. "kp
vj g" Matlock" ecug. "vj g' j" k j "eqwv' f gvto kpgf "vj cv' vj g' eqpugpv'
qh' c" v' g' p' v' y j q' u' j ctgf "c" dgf tqo "y kj "vj g' f ghgpf cpv' cpf
y cu' v' n{ "vj cv' vj g' r rkeg" y gt" ugctej kpi "hqt" uv' r' p' ewt gpe {
y cu' ghg' v' xg" vq" l' w' k' h{ "c" ugctej "qh' vj g' dgf tqo . "kpenm' kpi "c
f kcr gt" dci "h' w' p' f "kp" c" em' u' g' 0" Id. "cv' r 0388/389" J; 6" UE v0c v'
r r 0; ; 2; ; 3. 0" Vj g' eqwv' g' z' r rckpgf "vj cv' vj g' eqpugpv' qh' c' vj kf
r ctv{ "o c{ "dg' xckf "k' h' vj cv' vj ctv{ "or quuguug' "eqo o qp" cwj qtkx{
qxgt" qt' vj g' gt "u' v' h' l' e' k' p' v' t' g' r' v' k' p' u' j' k' r' vq" vj g' r tgo kugu' qt" ghg' ewu
uqvi j v' vq' dg' k' p' ur gev' g' 0" Id. "cv' r 0393" J; 6" UE v0c v' r 0; ; 5. _ugg
cnuq" People v. Clark" *3; ; 5+7" Ecn6j " ; 72. " ; 9; "144" Ecn0T r v04f
8; ; . "79" R0f "32; ; _="People v. Jacobs. supra. "65" Ecn0f "cv' r 0
6: 30-

Cr r n{ kpi " vj g' u' g' twgu. " eqwv' u' j cxg" f gvto kpgf " kp" xctk' wu
ekewo ucpegu" vj cv' vj k' f " r ctv' ku" y gt g' cwj qtkx{ gf "vq" eqpugpv
vq" c" ugctej "qh' nwi i ci g. "dci u. "qt" qv' j" gt" r gtuqpcn' dgrpi kpi u
qh' c" f ghgpf cpv' 0" U.S. " v. Davis" *4f " Ek0' 3; ; 4+; 89" H0f
: 6. " : 7. " : 8/ 9" Jv' g' p' v' j" cu' cwj qtkx{ "vq" eqpugpv' vq" ugctej "qh
h' qv' u' q' n' g' t' j" ctgf "y kj " f ghgpf cpv' v' p' qh' eqpvckpgt" u' dgrpi kpi
vq" f ghgpf cpv' h' w' p' f " y kj kp" vj g' h' qv' u' q' n' g' t' _=" United States
v. Falcon" *32j " Ek0' 3; ; 7+988" H0f "368; . "3696" Jdtqvj gt u
eqpugpv' vq" gzco kpcvqp" qh' f ghgpf cpv' u' cwf k' v' r' g" o ctngr "o
eqp' h' k' gp' v' k' n' 0' y cu' v' wj qtkx{ gf "dg' ecwug" vj g' v' r' g' y cu' f k' e' q' x' g' t' g' f
kp" c" tqo "q' e' w' r' k' g' f "u' q' r' n{ "d{ "v' j" gt" dtqvj gt. "cpf "v' j" gt" dtqvj gt
j cf "gz' ewu' k' g' eqpv' t' q' n{ "qxgt" ku" eqpv' g' u' _=" United States" v.
Miroff" *9j " Ek0' 3; 9; +828" H0f "999. "99: /99; " Jof qo k' p' v' o
q' e' w' r' cpv' qh' r tgo kugu' cwj qtkx{ gf "vq" eqpugpv' vq" ugctej "qh
f ghgpf cpv' i w' g' u' v' r' gtuqpcn' dgrpi kpi u' h' w' p' f "kp" ctgc' u' w' d' l' g' ev
vq" eqo o qp" wug. "gur gek' m{ "dg' ecwug" i w' g' u' v' cu' u' o gf "vj g' t' k' u' m
qh' k' p' ur gev' k' p' d{ "cu' w' t' kpi "q' e' w' r' cpv' vj g' t' g' y cu' p' q' j' kpi "k' r' e' k' v
vj g' t' g' p' _=" State v. Schadd" *3; ; 3+34; " Ct k' 0779" J855" R0f "588.
594_ " j' i' k' r' h' t' k' p' f "cwj qtkx{ gf "vq" eqpugpv' vq" ugctej "qh' f ghgpf cpv' u
y cngv' "qp" i' t' q' w' p' f "vj cv' vj g' ghgpf cpv' v' cu' u' o gf "vj g' t' k' u' m' l' u' j' g' y qwrf
r gto k' l' p' ur gev' k' p' y j gp" j" g' i' cxg" k' v' q' j" gt _=" Johnson" v. State
*H' r' 0f k' u' E' v' C' r r 0' 3; ; : +73; " Uq' 0f "935. "936" Jv' k' f " r ctv{ "kp
y j qug' r quuguug' k' p' f ghgpf cpv' j" cf "h' g' n' c' u' w' k' e' c' u' g' j" cf "cwj qtkx{
vq" eqpugpv' vq" c' ugctej "qh' vj g' u' w' k' e' c' u' g' j" g' k' p' v' k' h' f "cu' dgrpi kpi

vq'f ghgpf cpv=U.S.'v. *Salinas-Cano**32y 'Ek03; ; 4+; 7; 'H4f : 83..": 87"]pqr'tgcuqpcdrng'hqt"qhlegit"vq'dgrkxg"gf ghgpf cpv i krittkgpf "j cf "cwj qtkf "v"eqpugpv"vq"ugctej "qh'f ghgpf cpv i ni i ci g"hwpf "lp"j gt"j qo g'y j gp"vj gtg'y cu'pq'gxf gpeg"qh o wwni'wug"qt "lqkv"lpgtgv'cpf "eqpvtqn'qxgt"vj g"uwkecug= *Owens*'v. *State**3; ; 3+544"O f 0'838"j7; ; "C04f"7; .."88/89_]qhhlegtu'eqwrf "pqr'tgcuqpcdrng "dgrkxg"qewr cpv'qh'cr ctvo gpv j cf "cwj qtkf "v"eqpugpv"vq"ugctej "qh'ni i ci g'rhv'dgk jpf "d' xkukqt. "dgecwug"vj gtg'y cu'pq'gxf gpeg"qh'eqo o qp "cwj qtkf qxgt"vj g'dci _0-

*37g+Vj g's wvukqp"dgthqg"wu'ku'y j gv gt "vj g'ohcevu'cxckrdrg vq"vj g"qhlegit"cv'vj g'o qo gpv'00]y qwf _)"y cttcpv'c"o cp"qh tgcuppcdrng'ecwklp'lp"vj g'dgrkxg"vj cv'vj g'eqpugpv'vi "r ctvf "j cf cwj qtkf d"qxgt "vj g'r tqr gtvf "cu"vq"y j lej "eqpugpv'ku" i kxgp0 *978 *Illinois*'v. *Rodriguez*."supra."6; 9"WO0cv'r 03: : "j332 UEv'0'cv'r 0'4: 23_0'Wpf gt "vj g'ektewo ucpegu"qh'vj g'r tgupev ecug. 'k'y cu'qdlgexgn' tgcuppcdrng'vq'eqpenf g'F kcpj Igpnpku j cf "cwj qtkf "v"eqpugpv"vq"vj g'ugctej "qh'f ghgpf cpv'utlghceug. dgecwug'k'y cu'tgcuppcdrng'hqt"vj g"qhlegit"vq'dgrkxg"uj g'j cf gzgtekugf "eqpvtqn'qxgt"vj g'dtlghceug"cpf "j cf "pqv'qpn"lqkv. dw'cv'vj g'k'o g'qh'vj g'ugctej. 'gzemuxg'ceeguu'vq'k'cpf "eqpvtqn qxgt "k'o'k'ku"tgcuppcdrng"vq'eqpenf g'vj cv'c"ho kf "o go dgt y j q"qhlegit" dgrkxg"j cu" tvgkxgf "c" dtqvj gt)u" dgrupi lpi u htqo "j ku" r tgo kugu"cpf "uqgfg "uwej "dgrupi lpi u"lp"j gt"qy p dgf tqo "j cu'cv'vj g' xgt {"ngcu"lqkv"ceeguu"vq"cpf "eqpvtqn qxgt"vj g'dgrupi lpi u'Wpf gt "vj g'ektewo ucpegu"npqy p"vq"vj g' qhhlegit"cv'vj g'k'o g'qh'vj g'ugctej /vj cv'vj qtn' chgt'f ghgpf cpv' cttguv. "kgo u'y gtg'tgo qxgf "lp"c" xgj kerg "tgi kngt"gf "vq'F kcpj Igpnpku'htqo "vj g'ctgc'pco gf "lp"c"ugctej "y cttcpvf'ktgevgf "cv f ghgpf cpv'u'tgukf gpeg"cpf "xgj kergu. "cpf "vj cv'vj g'qpn' "kgo dgrupi lpi "vq"j k'o "tgo clkpi "lp"j gt"j qo g'y cu'vj g'dtlghceug/ k'y cu"tgcuppcdrng'hqt"vj g"qhlegit"vq'eqpenf g'vj cv'F kcpj Igpnpku'j cf 'ugewtgf 'vj g'dtlghceug'cv'j gt'dtqvj gt'u'dgi guu'Uwe j c'tgs wguv."qh'eqwtug. "y qwf "k'o r qug"vr qp" f ghgpf cpv'vj g'tkum vj cv'F kcpj Igpnpku' o ki j v'eqpugpv"vq"c'ugctej "qh'vj g'dtlghceug0 *Ugg. 'g0'Frazier'v. *Cupp*."supra."5; 6"WO0cv'r 0962"]; ; 'UEv 0 cv'r 03647_]f ghgpf cpv'lp'r tgo k'kpi "vj k'f r ctvf "vq'wug'c'f vhtgnci "cpf "lp"ngcxlpi "vj g'dci "cv'vj g"j qo g'qh'vj g"vj k'f r ctvf. ocuwo gf "vj g'tkum'vj cv'vj g'vj k'f r ctvf _y qwf "cmjy "uqo gqpg gnuq'vq'hqnmkpukf g0_ugg'cuq' *United States*'v. *Matlock*."supra. 637"WO0cv'r 0393. 'hp09"]; 6'UEv0cv'r 0; ; 5_=*People*'v. *Jacobs*. supra."65'Ecrl5f'cv'r 06: 3=U.S.'v. *Davis*."supra."; 89'H4f'cv r 0: : 0-

Uqo g'ny gt "hgf gtcn'eqwtu"j cxg'cuugtgf "vj cv'cwj qtkf "vq eqpugpv"vq"c'ugctej "f gr gpf u'lp'r ctv'vr qp"c'uj qy lpi "vj cv'vj g r tguqp"eqpugpv'vi "gplq{gf "pqv'qpn' "ceeguu"vq"cpf "eqpvtqn qxgt. "dw'cuq" o wwni'wug"qh'vj g'r tqr gtvf "ugctej gf 0' *Ugg.

gd 0"U.S.'v. *Whitfield**F 0'E0'Ek03; ; 3+; 5; "H4f"3293."3296]4; 3"Cr r 0'0'465_]o qvj gt "rengf "cr r ctgvp'cwj qtkf "vq eqpugpv"vq"ugctej "qh'cf w'u'up'u"dgf tqo "y kj qw'gxf gpeg vj cv'vj g'gplq{gf "eqo o qp'wug'qh'vj g'tqo "cpf 'emqv'lp'y j lej eqpvtcdcpf 'y cu'hwpf _ugg'cuq' *U.S.*'v. *Welch**; y 'Ek03; ; 5+ 6"H5f"983."986"]vj k'f r ctv' "y j q"lqkv"j cf "tgpvf "xgj kerg y kj "f ghgpf cpv'j cf "cwj qtkf "v"eqpugpv"vq"c'ugctej "qh'vj g xgj kerg"dw'rengf "cewen'qt"cr r ctgvp'cwj qtkf "vq"eqpugpv"vq" c'ugctej "qh'vj g'f ghgpf cpv'u'r wtug'ngcvgf "lp"vj g'tw'pni'qh'vj g xgj kerg. "dgecwug"vj gtg'y cu'pq'gxf gpeg"qh"lqkv"ceeguu'qt eqpvtqn'qt "wug'qh'vj g'r wtug=U.S.'v. *Salinas-Cano, supra*," 7; H4f'cv'r 0: 85"]i krittkgpf 'rengf "cr r ctgvp'cwj qtkf "vq'eqpugpv vq"ugctej "qh'f ghgpf cpv'u' uwkecug"ngv'lp"j gt"j qo g."y j gp j g'ungr v'lp"vj g'j qo g'ugxgtcn'pkj w'c'y ggn'cpf "o clpvckpgf eqpvtqn'qxgt"vj g'uwkecug. "cpf "vj gtg'y cu'pq'gxf gpeg"j ku i krittkgpf "wugf "vj g'uwkecug 0-

*3; d+Vj g'ecugu'ekgf 'tgn' 'vr qp'c'hw'qpvq'cr r gctkpi 'lp'*United States*'v. *Matlock*-0E'eqo o qp'cwj qtkf 'ku'qh'eqwtug. 'pqv'vq'dg ko r rkgf "htqo "vj g'o g'tg'r tqr gtvf "lpgtgv'c"vj k'f r ctvf "j cu'lp vj g'r tqr gtvf 0'Vj g'cwj qtkf "y j lej " *979 "Iwukhku"vj g'vj k'f / r ctvf "eqpugpv'f qgu"pqv'tguv'vr qp"vj g'rey "qh'r tqr gtvf. "y kj ku'cwgpf cpv'j kvqtkecn'cpf "ngi cni'tghkpgo gpvu."ugg'*Chapman v. United States*."587"WO0832"]: 3'UEv0998."7"NGF 04f": 4: _ *rpf nqt' eqwf "pqv'xckf n' "eqpugpv"vq"vj g'ugctej "qh'c'j qwug'j g j cf 'tgpv'f "vq'cpqvj gt+. *Stoner v. California*."598"WO06: 5"]: 6 UEv0: : "33'NGF 04f": 78_]pki j v'j qvni'ngt'meqwrf "pqv'xckf n' eqpugpv"vq"ugctej "qh'ewuqo gt'u'tqo +dw'tguu'tcv'j gt" qp o wwni'wug'qh'vj g'r tqr gtvf "d' r tguupu'i gpgtcm'j c'xkpi "lqkv ceeguu'qt"eqpvtqn'htqo "o quvr w'r qugu. "uq"vj cv'k'ku"tgcuppcdrng vq'tgeqi pk'g'vj cv'cp{"qh'vj g'eq'kpj cdkcpu"j cu'vj g'tki j v'vq r gto k'vj g'lpur g'v'qp"lp"j ku'qy p'tki j v'cpf "vj cv'vj g'qv'gtu j cxg'cuwo gf "vj g'tkum'vj cv'qpg'qh'vj gk'pwo dgt'o ki j v'r gto kv vj g'eqo o qp'ctgc'vq'dg'ugctej gf 0'*United States*'v. *Matlock, supra*.'637"WO0cv'r 0393. 'hp09"]; 6'UEv0cv'r 0; ; 5_0-

Vj ku'rcpi wci g. "tgcf "lp" eqplwepv'qp"y kj "vj g'ecugu"ekgf. j qy gxgt. 'cf f tguugu'vj g'r tqdrgo "qh'vj g'cwj qtkf "qh'cp'qy pg. o cpki gt. "qt'eq/qeewr cpv'qh'premises"vq'eqpugpv"vq"c'ugctej qh'vj qug'r tgo kugu'k'uwej "c'ecug."o wwni'wug'qh'vj g'r tgo kugu y qwf "dg'uki p'k'ecpv'lp"guv'cd'kuj lpi "c'vj k'f r ctvf u'cwj qtkf vq'eqpugpv"vq"c'ugctej "qh'vj g'r tgo kugu. "dgecwug'k'eg'wclpn' ku"pqv'vj g'ecug'vj cv'gxgt {"qy pgt"qh'r tqr gtvf "o c{"eqpugpv vq"c'ugctej "qh'j ku'qt"j gt"vgp'p'u'j qo g'O'Y g'f q'pqv'dgrkxg. j qy gxgt. "vj cv'vj g'Wpkgf "Ucv'gu'Uwr tgo g'Eqw'v'lp'v'gf gf "vq tgs wkt"vj cv'lp"gxgt {"ektewo ucpeg"lp"y j lej "c"vj k'f r ctvf qeewr cpv'qh'r tgo kugu"eqpugpv"vq"vj g'ugctej "qh' *personal property*"qh'cpqvj gt"ngcvgf "qp"vj g'r tgo kugu. "cwj qtkf "vq eqpugpv"vq"ugctej 'f gr gpf u'vr qp"vj g'vj k'f r ctvf u'cewen'bo wwni

use"qh"vj" g"r gtuqpcn'r tqr gtv{."kp"cf f kkp"vq"ceegu"vq"cpf eqpvtqnl'qxgt"vj" g"r tqr gtv{0'Cu'y g"j cxg"gzr rckpgf."öqdlgeu rgh'lp"cp"ctgc"qh'eqo o qp"wug"qt"eqpvtqnl'o c{"dg'y kj kp"vj g ueqr g'qh'vj g'eqpugpv'i kxgp'd{ 'c'vj kf'r ctv{ 'hqt'c'ugctej 'qh'vj g eqo o qp'ctgc6*People v. Clark, supra."7'Ecif6j"cv'r 0; 9; 0-

Y g'dgrkxg"vj cv'y j gp"vj g'r gtuqp'y j q'eqpugpv"vq"vj g'ugctej gplq{ u'c'r quuguuqt { 'kpvgt guv'vj cv'vj g'f ghgpf cpv'f qgu'p'qv'lj ctg kp"vj g'r tgo kugu'ugctej gf "cpf"cnuq"gpplq{ u'cr r ctgpn'lqkp'vt gzenwukxg"ceegu"vq"cpf "eqpvtqnl'qxgt"vj g'r gtuqpcn'r tqr gtv{ ugctej gf."vj g'r tkxce{"kpvgt guv'qh'vj g"qy pgt'qh'vj g"enugf eqpvcpgt"qt"qj g'r gtuqpcn'r tqr gtv{ "ku'hct'tgf weg'f"cpf"vj g cwj qtkv{"qh'c"j kf"r ctv{"vq"eqpugpv"vq"c"ugctej "o c{"dg guncdkuj gf 0'Ugg"United States v. Falcon, supra."988"HDf cv'r 0'3696=United States v. Miroff, supra."828"HDf cv'r r 0 99: /99; =ugg"cnuq"People v. McPeters."supra."4'Ecif6j"cv'r 0 3394"Jf ghgpf cpv'tg'ckpgf "pq"gzr gev'v'kp'qh'r tkxce{ 'y j gp"j g tkf"j ko ugrh'qh'c"etko g'y gcr qp"d{ 'i kxkp'i "kv"vq"vj g"qeerw cpv qh'vj g'r tgo kugu'ugctej gf 0'K'ecp"j ctf n{ "dg"vj g"ecug."hqt gzc o r g."vj cv'vj g'r qileg'y qwf "dg"vpt'gcuqpcdn'g"kp"ceegf kpi vq"vj g"tgs wguv'qh'vj g"uqrg"qeerw cpv'qh'c"j qo g"vq"ugctej nwi i ci g'w'p'f gt'vj g'q'eerw cpv'u'eqpvtqnl'dw'dgmp'i kpi "vq"cpqj gt kp'q'f gt"vq"gz'q'p'g'v'vj g'q'eerw cpv'vt'r tq'vev'j ko "qt'j gt'ltqo j c| ctf 0'Ugg."g'f 0' *980 "Com. v. Latshaw"*3; 9; +6: 3'RC04; : J5; 4'COHf "3523."3528/3529"lqy pgt'qh'dctp."y j q'uwur gev'f vj cv'eqpvcpgtu'hq'w'f"vj g'tgk'p'dgmp'i kpi "vq"cpqj gt'eqpvcpgf eqpvtcdcpf."y cu'cwj qtk'gf "vq"eqpugpv'vq"b'r qileg'ugctej 'qh'vj g eqpvcpgtu.0'Vj g'j ki j 'eqw'v'j cu'o cf g'erget'vj cv'q'p'g'dcuku'hqt vj g'eqpugpv'gzeg'v'kp'vq"vj g'y cttcpv'tgs vktgo gpv'ku'vq'ugtxg vj g'eqo o w'p'k'v'lp'vgt guv'lp'r tqf welpi "ö"pgeguuct {"gxkf gpeg hqt"vj g'lu'nw'k'p'cpf "r tq'gew'k'p'qh'etko g."gxkf gpeg"vj cv'o c{ kpuw'g"vj cv'c"y j qm'f "lpp'q'egpv'r gtuqp"ku'p'qv'y tqpi n{ 'ej cti gf y kj 'c'etko kpcn'q'ht'p'ug'0'ö"Florida v. Jimeno, supra."722"WL0 cv'r 0474"J333"UEv'0cv'r 03: 26_0-

*37hCeeqtf kpi n{."cnj qwi j "vj g"ugctej kpi "qhtleg"j cf "rkwrg tgcup" vq" uwr r qug" vj cv' F kcp"j Lgpnkpu"j gtu'grh' y cu' wulpi f ghgpf cpv'u'dt'k'g'ecug."vj ku'ektewo uncpeg'f qgu'p'qv't'gs vkt'g'ku'vq eqpenmf g"vj g"qhtleg"ncengf "c'tgcuqpcdn'g'dcuku'hqt'dg'rkxkpi uj g'j cf "cwj qtkv{"vq"eqpugpv'vq"b'ugctej 'qh'vj g'dt'k'g'ecug."y j gp vj g'h'cevu'npqy p"vq"j ko "kpf k'ecv'f"uj g'j cf "gz'g'ekugf"eqpvtqnl' qxgt"vj g'dt'k'g'ecug"kp"vj g'o c'p'p'gt'uj qy p'd{ "vj g'v'gunko qp{ "cv vj g'j gctkpi "qp"vj g'o q'v'kp'vq"uwr r tguu0

F ghgpf cpv' cuugtu"vj cv' k'ku"p'x'gt"tgcup'cdn'g"ht" c" r qileg qhtleg"vq"eqpenmf g"vj cv'c'vj kf'r ctv{ 'j cu'cwj qtkv{"vq"eqpugpv vq"b'ugctej "y j gp"vj g'r gtuqpcn'r tqr gtv{ "ugctej gf "ku'kf gp'v'k'g'f cu"dgmp'i kpi "vq"cpqj gt"r gtuqp."dw"vj ku'erko "ku"y kj qwv o gtk'0'CNj qwi j "c"vj kf'r ctv{ 'y j q'ku'vj g'uwdlgev'qh'c'ugctej

cpf "cf o qpkuj gu"cp"qhtleg"vj cv'c'dci "dgmp'i u"vq"uqo gqpg g'ug" o c{ "dg"wpf gtu'v'q'f "vq" f gp { "lqkp'v'ceegu"cpf "eqpvtqnl' qxgt"vj g'r tqr gtv{ "ugg"U.S. v. Jaras"*7j "Ek03; ; 8+:" 8"HDf 5: 5."5: ; + "qt"vq"rko k'vj g'ueqr g'qh'j ku'qt"j gt'eqpugpv'ugg U.S. v. Infante-Ruiz, supra."35"HDf "cv'r r 0'726/727+"c"vj kf r ctv{ "y j q'tgur qpf u"vq"c"ugctej "h'gew'g'f"wr qp"vj g'f ghgpf cpv d {"j cpf kpi "qxgt"vj g'f ghgpf cpv'u'dgmp'i kpi u"vj cv'ctg"kp"vj g vj kf'r ctv{ 'u'gzenwukxg'r quuguukp'cpf "eqpvtqnl'o c{ "etg'ev'g" c tgcup'cdn'g'dg'rk'gh'qp"vj g'r ctv'qh'vj g'ugctej kpi "qhtleg"vj cv'vj g vj kf'r ctv{ "j cu'cwj qtkv{"vq"eqpugpv"vq"vj g'ugctej 0'United States"v. Falcon."supra."988"HDf "cv'r 0'3696"l'g'ge'v'kpi "vj g erko "vj cv'k'p'geguuct'k'k' "ku"v'p't'gcuqpcdn'g"vq"ugctej "r tqr gtv{ kf gp'v'k'g'f "cu"dgmp'i kpi "vq"cpqj gt =United States"v. Carter *6j "Ek03; 99+78; "HDf ": 23.: 26/: 27"juco g =United States"v. Buckles"*: vj "Ek03; 96+6; 7"HDf "3599."35: 4"juco g =Johnson v. State."supra."73; "Uq0f "cv'r 0936"juco g 0-

Y g'eqpenmf g"vj g"v'kcn'eqwv'r tqr gtn{ "f g'p'k'f "vj g"o q'v'kp"vq uwr r tguu"cpf "vj cv'pq"xl'q'v'kp'qh'vj g" Hqwt vj "Co gpf o gpv qeewt'gf 0³⁴

34 Dgecwug" y g" f g'v'gto k'p'g" qp" vj g" dcuki" qh' vj kf r ctv{ "eqpugpv"vj cv'vj g"v'kcn'eqwv'r tqr gtn{ "f g'p'k'f vj g"o q'v'kp"vq" uwr r tguu."y g" p'g'g'f "pqv' eqpuk'f gt t'gur qpf gp'v'u" qj g't "eqp'v'p'v'kp'u"kp" uwr r q'tv' qh' vj g v'kcn'eqwv'u'q'f gt 0

10. Claim of denial of representative jury

*42c+ k'p" r tq'x'kf kpi " lwt {" r cp'gnu" ltqo " y j k'ej " f ghgpf cpv'u lwt {" y qwf " dg" ugr'ev'g'f." vj g" v'kcn' eqwv'r q'f gt'gf "vj g" lwt { Eqo o ku'k'q'p'gt'qh'Nqu'Cpi grgu" *981 "Eqw'p'f "vq"ug'rev'lwt'qtu ltqo "y kj kp"c"42/o k'g"t'cf k'w'u'qh'vj g"Xcp"p'w'f u'eqw'v'j qwug. y j gt'g"vj g"v'kcn'y cu"j gr'f 0'Rt'qur gev'k'g"lwt'qtu"y gt'g"ug'rev'g'f qp" Qev'q'dgt" 35." 36." cpf " 37." 3; : 9." dw' q'p'n{ "qp" Qev'q'dgt 36" f kf "vj g"lwt {" eqo o ku'k'q'p'gt'u" qhtleg" go r r'q {" vj g"o g'v'j qf qh'ug'rev'v'kp" q'f gt'gf "d {" vj g"eqw'v'0'Qp" Qev'q'dgt" 35" cpf " 37. r t'qur gev'k'g" lwt'qtu" y gt'g" ugr'ev'g'f " d {" vj g" uq'ec'ng'f " dw'n'u/ g {" g"o g'v'j qf 0³⁵ " W'p'f gt" vj ku" eqw'p'v'f y kf g"o g'v'j qf." vj g" lwt { eqo o ku'k'q'p'gt" g'zr r'ck'p'g'f < " ö"]V.j g" eqo r wgt" ku" c'ung'f " vq t'cp'f qo n{ "ug'rev'lwt'qtu"ltqo "vj ku'r q'q'n'q'h's w'ck'k'g'f "r t'qur gev'k'g lwt'qtu"000"] " _Ngv'u"cu'uw'g" vj cv'y g'j cxg'q'w'v'qh'vj g'r qu'k'ld'g 54"eqw'v'v'q'ec'v'k'p'u."Nqu'Cpi grgu"Eqw'p'f "y j gt'g"lwt'qtu"ecp'dg cu'ki p'g'f." vj cv'y g'j cxg'32"eqw'v'v'q'ec'v'k'p'u"l'p'g'g'f kpi "lwt'qtu_0C lwt'q't'y k'rd'g'd {" eqo r wgt't'cp'f qo n{ "ug'rev'g'f." 000"cpf "vj gp"j vj g eqo r wgt'_cum'u'qh'vj g'ug'c't'g'c'p {" qh'vj g'ug'eqw'v'u'y kj kp'42'o k'rgu qh'vj ku'r gtuq'p'u't'g'uk'f g'peg'AC'p'f "vj gp'k'h'vj g'c'puy gt'ku'f gu."vj gp cu'ki p"vj cv'lwt'q't"vq"vj g'em'ug'v'eqw'v'qh'vj q'ug"eqw'v'u"vj cv'ctg y kj kp'42'o k'rguö

35 Qp"Qevdgt"35."y g" dwnu/g{g'o gj qf "y cu" wugf dgecwug"ky' y cu"vqg"rcv"vq"uqr "y g"eqo r wgt"twp hqt"y g"eqwtv"u" wucn'o gj qf "Qevdgt"37."y g dwnu/g{g'b gj qf "y cu" wugf "dgecwug"y g"tj cf "dggp cp" gctvj s weng"cpf "y g'b gj qf "qtf gtf "d{ "y g"eqwtv y cu"lo r tcelecdr0

Vj g" f ghepf cpv'o cf g" c" o qvqp"v" s wcu" "y g" xgpk" g" qp" y g i tqwpf "k' f k' "pqv" eqpukw" c" tgr tgu"pvc" xg" etqu/ugevqp qh" y g" eqo o wpk{0' k' c" j gctkpi "qp" y g" o qvqp." y g" lwt { eqo o kuuqpgt" v" u" h" g" y" cv' ; 0 " r gtegpv' qh' y g" r qr w" v" k" qp r kxkpi "y kj k' c"42/o k" g" tcf kuu" qh' y g" Xcp" P w' u" eqwtv qwug cpf " r tguwo r v" x" g" n' g" k" d" r" g" h" t" lwt { " ugtxleg" y cu" Chtlecp/Co gtlecp0C" f ghepug" g" zr gtv' v" u" h" g" . "qp" y g" qy g" t' j" cpf . "y cv yj g" r gtegpvc" g" qh' Chtlecp/Co gtlecp" r gtuqpu" r kxkpi "y kj k' yj cvtcf kuu" y cu"320: " r gtegp0Qp"Qevdgt"35."y g" r gtegpvc" g qh' Chtlecp/Co gtlecp" r gtuqpu" ecngf " hqt" ugtxleg" k' f ghepf cpv' u" ecug" y cu"30 9" r gtegpv' cpf " qp" Qevdgt"37." k' y cu"409" r gtegp0 Qp"Qevdgt"36."8065" r gtegpv' qh' y g" r gtuqpu" ecngf " hqt" ugtxleg k' f ghepf cpv' u" ecug" y g" Chtlecp/Co gtlecp0Ceeqtf kpi n' . "cu yj g" v' kcn' eqwtv' u" cvgf " cpf " f ghepf cpv' eqpegf gu." 607" r gtegpv qh' y g" v' qcn' pwo dgt" qh' r tqur gev" xg" lwtqtu" c" x" k" c" d" r" g" v" q" ugtxg k' r cpnu" h" t" qo "y j lej " f ghepf cpv' y cu" v" u" g" r" e" v" j" k' lwt { "y g" Chtlecp/Co gtlecp0

F ghepf cpv' u" g" zr gtv' v" u" h" g" " yj cv' yj g" dwnu/g{g" o gj qf f guetkdgf "bdqxg" r tqf wegf "cp" wpf gttgr tgu"pvc" v" k" qh' Chtlecp/Co gtlecp" r gtuqpu" eqo r ctgf "y kj " yj gk" r tgu"pvc" g" k' yj g"42/ o k" g" tcf kuu" qh' yj g" Xcp" P w' u" eqwtv qwug. " cpf " yj g" g" zr gtv qwupgf " cp" cngt"pvc" xg" o gj qf "qh' ugrgevp" yj g" lwt { " xgpk" g dcugf " w" qp" egpuwa" v' cewa" yj cv' y qwf " tgc f k' " r tqf wegf " c tgr tgu"pvc" xg" xgpk" g0

Vj g" v' kcn' eqwtv' f gplgf " yj g" o qvqp" v" s wcu" . " f vgtto k' kpi " yj cv yj g" f k' h" g" t" g" p" e" g" d" g" y" g" g" p" yj g" r gtegpvc" g" qh' Chtlecp/Co gtlecp r tqur gev" xg" lwtqtu" *607" r gtegpv' k' f ghepf cpv' u" ecug. " cpf " yj g r gtegpvc" g" qh' Chtlecp/Co gtlecp" r gtuqpu" g" k' i" k" d" r" g" h" t" lwt { f w' " k' p" yj g"42/o k" g" ctgc" ugtxgf " d { " yj g" Xcp" P w' u" eqwtv qwug *; 0 " r gtegpv' y cu" p' qv' u" v' k' u" k' c" m' " u" k' i" p' k' h" e" c" p' 0' k' p' c' f' f' k' k' p' . " yj g v' kcn' eqwtv' f vgtto k' p' g" f " yj cv' f ghepf cpv' j' cf " h" k' g" f " v" q" guvdrkuj u{ ugo cvk' " gzenwukqp" qh' c" " *982 " eqi p' k' c" d" r" g" e" r" u" . " dgecwug yj g" eqwv' u" wug" qh' F gr ctvo gpv' qh' O qvt " Xgi k' e" g" u" c' p' f " xqvt tgi k' u" t' c' v' k' p' " r' k' u" u" k' p' f' k' e" c' v' g" f " yj cv' yj g" eqwv' " y cu" f' q' k' pi " cni" yj cv tgcuppcdn' " eqwf " dg" g" zr gev" g" v" q" c" e" j" k' x" g" c' " h" k' " e" t" q" u" / u" g" e" v" k' p' 0

F ghepf cpv' tggpy u" j' k' u" erko " yj cv' j' k' u" h" g" f" g" tcn' eqpukw" k' p' c" n' tki j' v' q' c' l' w' t { " f tcy p' h" t" qo " c' t' g" r tgu"pvc" xg" e" t" q" u" / u" g" e" v" k' p' qh' yj g eqo o wpk{ "y cu" xkqrvgf 0" *WLU'Eqpu0"8y "Co gpf 0" Duren v. Missouri" *3; 9; +65; "WLU'579."57: /589" j; ; "UEv0'886.

887/892."7: "NOGf 04f "79; 0" *43+ "Vj cv' tki j' v' i wctcpv" ggu" o" yj cv yj g' t' qnu' h" t" qo " y j lej " lwt k' u" c' t' g' f' tcy p' o wupv' qv' u" { ugo cvk' c" m' gzenw' f' g' f' k' u' k' p' e" x" g" i tqur u" l' k' yj g" eqo o wpk{0' Ekvk' p' 0" } k' qtf g' t' v" q" guvdrkuj " c" r tko c" h" e" k" g" x" k' q" v" k' p' qh' yj g" h" k' t' / e" t" q" u" / u" g" e" v" k' p' " t" g" s" w" k' t' g" o" g" p" v" yj g" f' ghepf cpv' o wu' u" j' qy " *3+ " yj cv' yj g i tqur " cngi g' f " v" q" dg" gzenw' f' g' f " k' u" c" o" f' k' u' k' p' e" x" g" o" i tqur " k' p yj g" eqo o wpk{ " *4+ " yj cv' yj g" tgr tgu"pvc" v" k' p' qh' yj k' u" i tqur k' p" xgpk" g" u" h" t" qo " y j lej " lwt k' u" c' t' g" ugrgevgf " k' u" p' qv' h" k' t" c' p' f tgcuppcdn' k' p" tgr v" k' p' v" q" yj g" pwo dgt" qh' uwe j " r gtuqpu" k' p yj g" eqo o wpk{ " c' p' f " *5+ " yj cv' yj k' u' w' p' f gttgr tgu"pvc" v" k' p' k' u' f' v" g v" q" u" { ugo cvk' " gzenwukqp" qh' yj g' i tqur " k' p" yj g" lwt { / ugrgevgf r tqeguo0 } Ekvk' p' u0 " The relevant 'community' for cross-section purposes is the judicial district in which the case is tried0" *People v. Horton" *3; ; 7+33" Ecn06y "328: .32: 9/32: :]69" Ecn07r v04f "738."; 28" R04f "69: _ " k' c' r' e" u" c' f' f' g' f . " s' v' q' v' k' p' i Duren" v. Missouri." supra."65; "WLU'cv' r 0'586" j; ; "UEv0'cv r 088: 0" F ghepf cpv' eqpvgf u' v' yj g' o gj qf "go r nq { g' f' v' ugrgevg yj g' xgpk" g" h" t" qo " y j lej " j' k' u' r' c' p' gnu' y g' t' f' tcy p' u" { ugo cvk' c" m' ecwugf " w' p' f' g' t' t' g' r tgu"pvc" v" k' p' qh' Chtlecp/Co gtlecp" r gtuqpu0

*42d+ " F ghepf cpv' h" k' g" f " v" q" guvdrkuj " c" r tko c" h" e" k" g" ecug" qh u{ ugo cvk' w' p' f' g' t' t' g' r tgu"pvc" v" k' p' qh' c' e" q' i p' k' c" d" r" g" e" r" u" . " dgecwug j' g' h" k' g" f " v" q" t' g' h" t' " v" q" yj g' c' r r tqur tlc' v' eqo o wpk{ " k' p" c' wgo r v' k' p' i v" q" r tqxg" yj g" f' g' p' k' c' n' i' qh' c" t' g' r tgu"pvc" xg" lwt { " xgpk" g' 0 J g cwgo r v' g' f " v" o ggv' yj g" ugeqpf " r tqpi " qh' yj g" Duren" v" g" u" v d { " f go qpwtv' k' p' i " c" f' k' u' r' c' k' s' { " d" g" y" g" p" yj g" r gtegpvc" g" qh Chtlecp/Co gtlecp" r gtuqpu" k' p" yj g' xgpk" g" c' p' f " yj g" r gtegpvc" g qh' Chtlecp/Co gtlecp" r gtuqpu" g" k' i" k" d" r" g" h" t" lwt { " ugtxleg" y j q r kxg" f' y kj k' p'42" o k' g" u" qh' yj g" Xcp" P w' u" eqwtv qwug0C" u" p' qv' g' f . yj g" c' r r tqur tlc' v' eqo o wpk{ " y kj " y j lej " v" q" guvdrkuj " uwe j " c eqo r c' t' k' u' p' y cu" yj g" l' w' f' l' e' k' n' i' f' k' u' t' l' e' v' k' p' y j lej " yj g" Xcp" P w' u" eqwtv qwug" k' u" u" k' w' c' v' g' f 0" *People v. Horton." supra."33" Ecn06y cv' r 0'32: 9/32: : =People v. Mattson" *3; ; 2+72" Ecn05f "48: : 66"]48: " Ecn07r v0: 24."9: ; "R04f " ; 5 =Williams" v. Superior Court" *3; ; ; +6; " Ecn05f "958."967"]485" Ecn07r v0'725."9: 3 R04f "759_0" *36. " k' p' c' p' { " g' x' g' p' v' . " cu' yj g' v' k' c' n' i' e' q' w' t' v' h' q' w' p' f . " yj g' t' g' y' cu k' p' u' h' l' e' k' p' v' u' j' qy k' p' i " yj cv' c' p' { " w' p' f' g' t' t' g' r tgu"pvc" v" k' p' y cu' f' v' g' v" q c' u" { ugo cvk' " gzenwukqp0" h" t' " yj g' u" g' t' g' c' u' p' u" . " f' ghepf cpv' h" k' g" f " v" q o cng" yj g' t' k' o c' h" e" k" g" u" j' qy k' p' i " t' g' s' w' k' t' g' f' d { " *983 " Duren." c' p' f j' k' u' e' r' k' o " c' e' e' q' t' f' k' p' i" n' " k' u' t' g' l' g' e' v' g' f 0" *People v. Horton." supra."33 Ecn06y cv' r 0'32: : /32; 2=People v. Mattson." supra."72" Ecn05f cv' r 0: 660

36 Y g" p' q' v" yj cv' cng' qwi j " f ghepf cpv' f k' " p' qv' q' h' t' g' t' cp { " r tqh' t' g' i' c' t' f' k' p' i " yj g" r gtegpvc" g" qh' Chtlecp/Co gtlecp" r gtuqpu" r kxkpi " k' p" yj g" l' w' f' l' e' k' n' i' f' k' u' t' l' e' v' . " yj g r tqegewqt" u" cvgf " k' p" c' t' i' w' o" g' p' v' yj cv' yj g'3; : 2' egpuwa u' j' qy g' f " yj cv' yj g" Chtlecp/Co gtlecp" r qr w" v" k' p' 0

eqpukwvqf "30" r gtegpv' qh' vj g' r qr wvkvqp' qh' vj g
lwf lckrlf kntlev'lp' y j lej 'f ghgpf cpv'y cu'v'lgf 0

11. Claim of juror contamination

*44c- F ghgpf cpv' eqpv'p' u' vj cv' j g' y cu' f gr tkxgf " qh' j ku
eqpukwvqpcrltki j v'v'c' h'ck'v'k'rl'd { 'cp'ko r ct'v'k'rl'w' { "dgecwug
f wtkpi 'lwt { 'h'grgevkqp. 'y j gp'g'x'k'f gpeg'eco g'v'k'k' j v'v'w' i gukpi
vj cv'lwtqtu'y gt'g'lp' h'gct'q'h'j ko . 'vj g'v'k'k'rl'eqwt'v' h'ck'rg' 'v'k' s' wguv'k'p
vj g' lwtqtu' cf gs wcv'ng' "tgi ctf kpi "vj g'k' h'gct'v' cpf "gtt'q'p'g'q'w'w'f
f g'p'k'g' j ku' o q'v'k'p' h'qt' o k'v'k'k'rl'0

Vj g't'geqtf 't'gh'g'ew'v'j cv'Rt'qur gev'k'g' lwtqt' J y 0'y j q'v'w'ko cv'ng'
y cu'gzewugf 'h'qt' ecwug. 'l'w'v'g'f 'v'k'v'j g'eqwt'v'q'w'w'k'f g'v'j g't' t'gugpeg
q'h'q'v'j gt' r t'qur gev'k'g' lwtqtu'v'j cv'v'p'v'j g't' t'gegf kpi 'p'ki j v'v'ij g'j cf
t'geg'k'x'g'f 'c'v'g'r'j q'p'g'ec'm'lt'qo 'O u'0J x'0'c' r' t'qur gev'k'g' lwtqt' 'q'p
vj g'r' cp'g'v'ly j q'v' cu'p'q'v'v'g'ev'g'f 'v'k'v'g't'x'g'q'p'f ghgpf cpv'u' lwt { . 'kp
y j lej 'J x'0'k'p'ht'o gf 'j g't'v'j cv'v'j g'l'w'f i g't' t'g'k'f kpi 'k'p'f ghgpf cpv'u
ecug'j cf "t'geg'k'x'g'f 'f g'c'v'j 'v'j t'g'c'w'v' cpf "y cu' d'g'k'p' i "r t'q'v'g'v'g'f "d {
c' "d'q'f { i w'c't'f "c'v'c'm'v'k'o gu'0'c' h'g't' "Rt'qur gev'k'g' lwtqt' J y 0'j cf
r'gh'v'j g' "eqwt'v'q'q'o . "vj g' r' t'q'g'ew'q't' "k'p'ht'o gf "vj g' "eqwt'v'j cv
vj g't'g'j cf "d'g'g'p'v'j t'g'c'w'v' c' k'p'u'v'j ko "cpf "cp'q'v'j gt' f'gr' w'w' 'f k'v'k'lev
cv'q't'p'g'f 'k'p'v'j ku'ecug. 'vj q'w' j "p'q'p'g' y g't'g'v'c'g'f 'v'k'f ghgpf cpv
dw'v'j cv'v'j k'j "f ghgpf cpv'u'j k'v'q't' { "q'h'c'w'c'k'p' i "y k'p'g'u'g'u' cpf
u'j q'q'v'k'p' i "r g'q'r' r'g' y j q' "o'v'g'm' c' i k'p'u'v'j ko . o'k'v' y cu' k'p'g'x'k'c'd'g'
vj cv'lwtqtu'y q'w'f "d'g' h'g'c't'w'v'0'v'j g'r' t'q'g'ew'q't' y c't'p'g'f <0>] k'h'y g
c't'g' i q'k'p' i "v'k' d'g'gzewug' lwtqtu' d'gecwug' v'j g' { "c't'g' i k'p' i j v'g'p'g'f .
y g' c't'g' p'q'v' i q'k'p' i "v'k' j c'x'g' c' lwt { "d'gecwug' v'j g' { "c't'g' i q'k'p' i "v'k
d'g' h'k' i j v'g'p'g'f 0" Vj g' v'k'k'rl' eqwt'v' j gp' k'p'ht'o gf "J y 0'v'j cv'k'v
j cf "p'q'v' t'geg'k'x'g'f "cp { "v'j t'g'c'w'v' cpf "f'k' "p'q'v'j c'x'g' c' "d'q'f { i w'c't'f 0
J y 0'v'j gp' x'q'n'w'p'v'g'g't'f "vj cv'J x'0'c'm'j cf "k'p'ht'o gf "j g't'v'j cv'cp
c'c'w'k'p'c'p'eg'j cf "v'c'ng'p'v'j g'v'k'k'rl'w'f i g'v'k'v'j g'et'ko g'ueg'p'g' . 'vj cv
vj g' lwt' i g'f'k' "p'q'v'j cpv'v'k' d'g' l'p'x'q'k'g'f "y k'j 'v'j ku'ecug' d'gecwug
k'v'k'p'x'q'k'g'f "i c'p' i u'cpf "e'q'c'k'p'g' . "cpf "vj cv'J x'0'p'q'v'g'f "vj cv'v'q'o g
y k'p'g'u'g'u' y g't'g' "k'p'v'j g' y k'p'g'u' r t'q'v'g'v'k'p' r t'q' i t'c'o 0J y 0'uck'f
u'j g'f'k' "p'q'v' t'g'c'm'J x'0'uc { k'p' i 'cp { v'j k'p' i 'k'p'v'j g'r' t'gugpeg' q'h'q'v'j gt
r t'qur gev'k'g' lwtqtu' c'd'q'w'v'j g'ecug. 'd'w'v'p'q'v'g'f 'J x'0'f'k'f 'j c'x'g' l'q'o g
eqp'c'v'v' y k'j "cp'q'v'j gt' r t'qur gev'k'g' lwtqt. "O u'0'J y 0'v'j u'v'v'g'f
u'j g'j cf "d'g'g'p'x'g't' { "h'k' i j v'g'p'g'f "c'h'g't'v'j g'eq'p'x'g't'v'k'p' y k'j "J x'0
Vj g' v'k'k'rl' eqwt'v' cu'w'g'f "j g't'v'j g' two q'tu' u'j g'j cf "j g'c't'f "y g't'g
h'c'ng'0

Vj g' v'k'k'rl' eqwt'v' q'w'w'k'f g'v'j g' r t'gugpeg' qh' vj g' lwt { . "u'v'v'g'f "k'v
y q'w'f "d'g'p'g'g'u'c't' { 'v'k' s' wguv'k'p' J x'0'v'k' y c't'p'j g't' p'q'v'v'k' eqp'c'v'v'
cp { q'p'g'g'ng' . "cpf "v'k' s' wguv'k'p' v'j g't'go c'k'p'f gt' q'h'v'j g' lwtqtu'v'k' d'g
eg't'v'k'p' v'j g' { j cf "p'q'v'j cf "cp { "eqp'c'v'v' y k'j "J x'0

W'v' q'p' s' wguv'k'p'k'p' i . "J x'0'c'f o k'w'g'f "v'g'r'j q'p'k'p' i "J y 0'c'p'f "v'g'n'k'p' i
j g't'v'j g' lwt' i g' y cu'w'p'f gt' "46/j q'w' r t'q'v'g'v'k'p' f'w'g'v'k'v'j t'g'c'w'v'0
J x'0'v'v'g'f 'v'j g'j cf "j g'c't'f "v'j ku'k'p'ht'o c'v'k'p' h'q'o "j g't'g'o r n'q'j g't.

cpf "c'm'q' h'q'o "cp'q'v'j gt' r t'qur gev'k'g' lwtqt' y j q' *984 "o cf g
vj g' cu'g't'v'k'p' "k'p' j g't' r t'gugpeg' cpf "v'j cv' q'h'v'q'v'j gt' r t'qur gev'k'g
lwtqtu'0'Q'p' q'p'g'q't' 'v'v' q'q'ec'c'uk'q'p'u'v'j g'j g'c't'f "r t'qur gev'k'g' lwtqtu
u'v'v'g'v'j g' { "y g't'g' c'h'c'k'f "v'k'v'g't'x'g' "k'p'v'j ku'ecug'0'U'j g'c'm'q' t'g'c'ng'f
q'v'j gt' "lwtqtu' u'v'v'k'p' i "v'j cv'f ghgpf cpv'y cu' r c' { k'p' i "h'q't' j ku' q'y p
c'w'q't'p'g' { "cpf "v'j cv'f ghg'p'g' "eq'w'p'ug'v'ly cu'f t'k'k'k'p' i "c'p'g'y "l'c'i w'c't'0
U'j g' cu'g't'v'g'f "u'j g'j cf "p'q'v'v'g'r'j j q'p'g'f "cp { "r t'qur gev'k'g' lwtqt
q'v'j gt' "v'j cp' J y 0'v'j g' "eq'w't'v'q't'f g't'g'f "j g't' p'q'v'v'k' "eq'p'c'v'v' cp { q'p'g
k'p'x'q'k'g'f "k'p'v'j g'ecug'0

Vj g'v'k'k'rl' eqwt'v' l'p'k'k'c'm' { "f g'p'k'g'f "f ghgpf cpv'u' o q'v'k'p'v'k'v'g'zewug
h'q't' ecwug. "d'w'v'j g' h'q'm'y k'p' i "f c' { "f g'v'g't'o k'p'g'f "v'j cv' lwtqt' J y 0
y q'w'f "d'g'gzewug'f 0

Vj g'v'k'k'rl' eqwt'v' c'm'q' "g'z'c'o k'p'g'f "Rt'qur gev'k'g' lwtqt' "0 j 0" y j q
c'm'q' j cf "d'g'g'p'gzewug'f 0'U'j g' u'v'v'g'f "v'j cv'J x'0'j cf "v'q'f' j g't'v'j cv
vj g' "eqwt'v'j cf "d'g'g'p'v'j t'g'c'v'g'p'g'f "cpf "j cf "46/j q'w' u'g'ew't'k'f 0'U'j g
t'geq'w'v'g'f "j g'c't'k'p' i "J x'0'b' c'ng'v'j ku' l'w'c'v'g'o g'p'v'k'p'c'j c'm'y c' { "y j g't'g
c' "i t'q'w' "q'h'32"v'k'34" r t'qur gev'k'g' lwtqtu' eq'w'f "j c'x'g'j g'c't'f "k'0
U'j g'j g'c't'f "v'j ku' two q't' h'q'o "p'q'v'j g't' u'q'w'g' . "cpf "j g'c't'f "p'q
f k'w'ew'u'k'p' c'd'q'w'v'j g'ecug' co q'p' i "q'v'j g't' r t'qur gev'k'g' lwtqtu'0
U'q'o g'r' t'qur gev'k'g' lwtqtu' f'k' "u'g'g'o "w'p'g'c'u' . "u'k'o r n'q' "d'gecwug' q'h
vj g'p'c'w't'g' q'h'v'j g'ecug'0'v'j g' l'w' i g'u'k'p'v'j cv'v'j g'v'k'k'rl' eqwt'v' y cu
k'p'p'g'g'f "q'h'c'f f k'k'q'p'c'rl' u'g'ew't'k'f { "o cf g'0'j 0'w'p'g'c'u' { 0

Vj g'v'k'k'rl' eqwt'v' eq'p'ew'f g'f "v'j cv'J x'0'y cu' p'q'v'v' q't'v'j { "q'h' d'g'k'g'h
cpf "u'w' i g'w'g'f "v'j cv'v'j g'j cf "d'g'g'p'f k'p' i g'p'w'q'w'v'k'p' c'w'g'o r v'k'p' i
v'k'v'g'z'q'p'g't'v'g'j g't'g'u'h' h'q't' j g't' o k'w'eq'p'f v'v'v'k'p'v'g'r'j q'p'k'p' i "J y 0
v'k'f k'w'ew'u'v'j g'ecug'0'v'j g' "eq'w't'v'v'v'g'f "v'j cv'v'k'p' cp' c'd'w'p'f c'p'eg' q'h
e'c'w'k'p'v'k'v' y q'w'f "c'u'n'g'c'g'j "lwtqt' "k'h'j g'q't' u'j g'j cf "j g'c't'f "v'j g
u'v'v'g'o g'p'v'0'j 0'c'm'g'j g'f "J x'0'j cf "o cf g'k'p'v'j g'j c'm'y c' { "k'p'v'j g
j g'c't'k'p' i "q'h'q'v'j gt' r t'qur gev'k'g' lwtqtu'0

Vj g'v'k'k'rl' eqwt'v' u'v'v'g'f "k'v' y q'w'f "k'p' s' w'k't'g' q'h'v'j g't'go c'k'p'k'p' i "lwtqtu
y j g'v'j g't'v'j g' { j cf "j g'c't'f "J x'0'uc { 'cp { v'j k'p' i 'c'd'q'w'v'j g'ecug'q't'j cf
j g'c't'f "q'v'j g't' r t'qur gev'k'g' lwtqtu' v'm'ic'd'q'w'v'j g'ecug'q'v'j g't'v'j cp
k'p'v'j g'o q'w'v' g'p'g't'c'rl'v'g't'o u'0'G'g'x'g'p' q'h'v'j g' lwtqtu' y j q'v'g't'x'g'f "q'p
v'j g'ecug'k'p'f k'ec'v'g'f "v'j g' { j cf "p'q'v'j g'c't'f "q'v'j g't' r t'qur gev'k'g' lwtqtu
f k'w'ew'u'v'j g'ecug' cpf "y g't'g' "p'q'v' r t'gug'p'v' j g'p' c' "r t'qur gev'k'g
lwtqt' y j q'v' y cu'gzewug'f "o g'p'v'k'p'g'f "u'q'o g'v'j k'p' i "t'g'r'v'g'f "v'k'v'j g
ecug'k'p'v'j g'j g'c't'k'p' i "q'h'q'v'j gt' r t'qur gev'k'g' lwtqtu'0'v'j g't'go c'k'p'k'p' i
lwtqtu'cp'f "c'ng't'p'c'v'g'u'j cf "d'g'g'p' u'g'g'ev'g'f "c'h'g't' "O u'0J x'0'j cf "d'g'g'p
gzewug'f 0"v'j g'v'k'k'rl' eqwt'v' t'g'v'g'v'g'f "f ghg'p'g' "eq'w'p'ug'v'ly t'g's w'g'u'v'
v'j cv'v'j g' lwtqtu' d'g' s' wguv'k'p'g'f "t'g' i c't'f k'p' i "two q'tu' q'h'v'j t'g'c'w'
c' i k'p'u'v'j g' "eq'w't'v'c'p'f "q'v'j g't' i t'q'w'p'f u' h'q't' h'g'c't'k'p' i "f ghg'p'f cp'0'v'j g
v'k'k'rl' eqwt'v' g'z'r' r'k'p'g'f "v'j cv'k'p' "ku' x'k'g'y . "u'w'ej "s' wguv'k'p'p'u' y q'w'f
r t'g'w'f k'g' "q'v'j g't'y k'ug' "w'p'v'k'p'v'g'f "lwtqtu' d' { "i k'k'p' i "t'k'ug'v'k' "h'g'c'tu
cpf "ur g'ew'v'k'p'v'j cv'q'v'j g't'y k'ug' y q'w'f "p'q'v'g'z'k'u'0

F ghgpf cpv'o cf g'c'o qvqp'hqt'o kwtkrlqp'y g'i tqwpf u'y cv'y g r tqur gev'xg'lwqtu'o c' "j cxg'dggp'eqpwo kpcv'g' d' "two qtu cdqw'y tgcw'ci clpuv'y g'eqwv'cpf 'y cv'y g'eqwv'u's wgunkqkpi qh' y j g'lwqtu' j cf "pqv' dggp' uwthlekgp'w' "f gw'krgf "v" g'zr qug qt' eqwv'gtcev' uwej "eqpwo kpcv'kp0 F ghgpf cpv'u' o qvqp' hqt *985 "o kwtkrl'y cu'f gplgf 0F ghgpf cpv'tgpgy gf "y j g'o qvqp hqt' hwt'y gt' s wgunkqkpi "qh' y j g'lw' ". "ci clp' o clp'cklpi "y j cv y j g'lwqtu'uj qwf "j cxg'dggp'cumgf "ur gekh'ecm' "y j g'y gt' y j g' j cf "j gctf "qh' y j tgcw'v' "y j g'v'kcl'lw' f i g'0Vj g'eqwv'f gplgf "y j g tpgy gf "o qvqp. "qdugtxkpi "y j cv' k' y j qw' j v' J x0' y cu' n' kpi cdqw'j cxkpi "j gctf 'cdqw' y j tgcw'ci clpuv'y g'eqwv'htqo "q'y gt r gtuqpu. 'cpf "y j cv'y g'o'y cu' n' kpi "v'eqxgt' j gtu'gr' hqt' j cxkpi qr gpgf "j gt' o qw' j 6

Y g' j cxg' g'zr r'clp'gf " y j cv' o'lc_ " v'kcl' eqwv' o wuv' eqpf wev c' uwthlekgp' kps wkt { " v' f gvgto kpg' h'ew' cmgi gf " cu' lwqt o k'ueqpf wev' y j gpgxgt' y j g'eqwv'ku' r w' q' p'q'v'eg' y j cv' i q'q' ecwug' v' " f k'uej cti g' c' "lwqt" o c' { "gzkw'0' o' *People' v. Davis *3; ; 7+32"Ecr6j "685."769"j63"Ecr0r v04f " : 48. " : ; 8"R04f 33; _0"Vj g'v'kcl'eqwv'k' y j g'r t'gugp'v'ecug'eqpf wev'f 'cp' kps wkt { uwthlekgp'v'v' f gvgto kpg' y j cv'gzewug' "Rtqur gev'xg'lwqt' J x0u eqo o wplecv'kpu'v' "Rtqur gev'xg'lwqt' J y 0'tgs wktgf "y j cv'y j g r'ewg' "dg' gzewug' "hqt' ecwug' cpf " v' ucwuh' { "kugr' y j cv' y j g tgo clp' gf "qh' y j g' r tqur gev'xg'lwqtu' j cf "pqv' dggp' g'zr qugf v' r tglw' l'ekcl' two qtu'qt' j gctf "J x0u'eqo o g'pw'cdqw' y j tgcw ci clpuv' y j g' v'kcl' eqwv'0' Eqpvtct { " v' f ghgpf cpv'u' cuugt'v'k'p. y j g'eqwv'f k' "pqv'eqphk'p'kugr'v'q' cumkpi "r tqur gev'xg'lwqtu y j g'y gt' "y j g' { "j cf "j gctf "cp' { "f k'uewukp' qh' y j g' h'ew' qh' y j g ecug. 'c' s wgunkq' f ghgpf cpv'v'eklo u'o k' j j v' j cxg'dggp' k'p'v'gr t'v'gf cu' t'ghgt'kpi " q'p' { " v' y j g' ekewo ucpegu' qh' y j g' etko g'0' Vj g eqwv'tgr gev'gf n' "cumgf "y j g'y gt'lwqtu' j cf "j gctf "f k'uewukp qh' y j g' h'ew' qh' y j g' ecug' or anything else relating to the case0 k' "cf f k'k'p. "y j g'eqwv'cumgf "y j g' r tqur gev'xg'lwqtu' y j g'y gt v' j g' { "j cf "j gctf "c' r tqur gev'xg'lwqtu' y j q' y cu' uwdugs wgpv'v' gzewug' "o cmg' eqo o g'pw' k' h'k'p'v' qh' c' i tqw' "qh' 32" v' 34 lwqtu. 'cpf 'cnuq'cumgf "y j g' r tqur gev'xg'lwqtu' y j g'y gt' v' j g' { "j cf j gctf "q'y gtu'o cmg'cp' { "r gtuqpcit'go ctmu'cdqw' y j g'cwqtpg' u0 Vj g'eqwv'k'p' cumkpi "y j g'y gt'lwqtu' j cf "j gctf "f k'uewukp' qh cp' { v' j kpi "t'gr'v'kpi "v' y j g' ecug. "pqv'gf "y j cv'k'v' y cu'pqv't'ghgt'kpi v' "o cv'gtu' uwej "cu' uej gf w'kpi "qt' "f g'rc' { u' k'p' y j g' v'kcl'0' W'p' gf v' j g'ekewo ucpegu. "pq'lwqt' y qwf "j cxg'w'p'f gtuq'q'f "y j cv' y j g eqwv'v' s wgunkqpu' y g'g' t'gunt'lev'gf "v' "f k'uewukp' qh' y j g' etko g kugr'0' k' "cf f k'k'p. "y j g'eqwv'cev'gf "y j k'p' ku' f k'uewukp' k'p f gvgto k'p'kpi "y j cv' o qt'g' r k'p'v'gf "s wgunkqpu' t'gi ctf kpi "cmgi gf v' j tgcw'ci clpuv'y g'eqwv'y qwf "bgtxg'v'c'rc'cto "y j g' r tqur gev'xg lwqtu'cv'j gt' "y j cp' v' "w'p'eqxgt' r tglw' leg' "qt' cmc' { "hgctu'0' Ugg. g'0' 0' People' v. Pinholster, supra, '3'Ecr6j "cv'0; 4: "j cr n' kpi cdwug' qh' f k'uewukp' u'cpf ctf "v' "erc'ko gf "h'cl'w'g' v' "eqpf wev j gct'kpi " cf gs w'v'g' v' f gvgto kpg' y j g'y gt' lwqt' u' j qwf " dg

f k'uej cti gf 'hqt'o k'ueqpf wev' _ugg'cnuq' People' v. Ray' *3; ; 8+35 Ecr6j '535.'565'j74'Ecr0r v04f '4; 8. ; 36'R04f ' : 68.]'f gekulq'p y j g'y gt' "v' k'p'xg'v'ki cv'g'lwqt' d'lcu'ku' y k'j k'p' u'qwpf "f k'uewukp' qh v'kcl'eqwv' _= People' v. Beeler' *3; ; 7+; "Ecr6j " ; 75. " : ; "j5; Ecr0r v04f '829. " : ; 3'R04f '375_]k'ku' y k'j k'p' eqwv'u' f k'uewukp v' f gvgto kpg' y j cv' r t'qegf w'g'v'q' go r m' { "qt' k'ps wkt { "v' eqpf wev v' f gvgto kpg' y j g'y gt' lwqt' u' j qwf "dg' f k'uej cti gf _0-

*45+C' "o qvqp'hqt'o kwtkrl'ku' f k'gevgf "v' y j g' u'qwpf "f k'uewukp qh' y j g'v'kcl'eqwv'0' Y g' j cxg' g'zr r'clp'gf "y j cv' o'lc_ "o kwtkrl'uj qwf dg' i t'cpv'gf "k' y j g'eqwv'ku' *986 " cr r' k'ueg' "qh' r tglw' leg' y j cv k'lw' f i gu' k'pew'cdng' d' { "cf o q'p'k'k'p' "qt' k'p'w'v'k'p'0' E k'v'k'p'0_ Y j g'y gt' "c" r ct'v'w'rt' "k'p'k'f g'p'v' ku' k'pew'cdng' " r tglw' l'ekcl' ku d' { "ku' pcw'g' c" ur g'ew'v'xg' "o cv'wt. "cpf " y j g' v'kcl' eqwv' ku x'g'v'gf "y j k'j " eqpuk'f g'cdng' f k'uewukp' k'p' t'w'kpi " qp' o kwtkcl o q'v'k'p'u'0' *People' v. Haskett' *3; ; 4+52'Ecr6f " : 63. " : 76'j3: 2 Ecr0r v0862.'862'R04f '998_0' *44d+Vj g'eqwv'f k'f "pqv'cdwug ku' f k'uewukp' k'p' f g'p' { kpi "y j g'o qvqp' k'p' y j g' r t'gugp'v'ecug'0' Vj g r tqur gev'xg'lwqtu' f k'gevg' k'o r r'ecv'gf k'p' y j g' two qtu' t'gi ctf kpi y j tgcw'ci clpuv' y j g' eqwv'f k'f "pqv'ugtxg' "qp' f ghgpf cpv'u' lw' { cpf "y j g' t'go clp'kpi 'lwqtu. 'y j g'p' s wgunkq'p'gf. 'i cxg'p'q' k'p'f k'ecv'k'p y j cv'y g' { "j cf "j gctf "y j g' two qtu'qt' y j cv'y g'k' k'o r ct'v'k'k'f "y cu k'o r ckt'gf 0Vj g'eqwv'cf o q'p'k'j gf "g'cej 'lwqt' pqv'v' f k'uewuk' y j g ecug' y k'j "y j g' q'y gtu'cpf "k'p'w'v'eg' "y j g'lw' { "v' f k'ueg'f g' y j g' ecug w' r'q' y j g' h'ew' r t'gugp'v'gf "cv'v'kcl'cpf "pqv'd'cug'f "w' r'q' cp' { "q'y gt u'q'w'eg'0' Vj g' t'geqtf "f go q'p'w'v'g' y j g' cdug'peg' qh' cp' { "k'pew'cdng r tglw' leg' qh' y j g' u'q'v' y j cv' y qwf "tgs wkt g' "y j g' i t'cp'kpi "qh' c o qvqp'hqt'o kwtkrl'0' Ugg' Illinois' v. Somerville' *3; 95+632'W00 67: . '683/684'j; 5' UCE'v03288.'328; . '57'N0Gf 04f '647_]p'q'v'kpi v'kcl'eqwv'u' dt'q'cf "f k'uewukp' k'p' t'w'kpi "qp' o kwtkcl' o q'v'k'p'u'0- Hqt' y j g' u'co g' t'gcuqpu. "y j g' t'gl'gevg'f ghgpf cpv'u' eqp'v'p'k'p'u' y j cv y j g' v'kcl'eqwv' gtt'gf "k'p' f g'p' { kpi "j ku' o qvqp' hqt' o kwtkcl' cpf y j g'gd' { "k'o r ckt'gf "j ku' t'ki j v' v' "f w'g' r t'qeguu' qh' r'cy "qt' "v' cp k'o r ct'v'kcl'lw' { 0

12. Claims that various alleged errors committed during jury selection violated defendant's right to a fair and impartial jury, due process, and a reliable verdict

a. Challenges for cause

*46c+ F ghgpf cpv' eqp'v'p'f u' y j cv' y j g' eqwv' gtt'gf " f w'kpi lw' { " u'g'v'k'p' k'p' t'w'kpi " qp' xct'k'q'u' ej cmgpi gu' hqt' ecwug'0 Ur gekh'ecm'. "j g' eqp'v'p'f u' y j cv' y j g' eqwv' gtt'gf "k'p' u'w'v'k'p'kpi y j g' r t'qegew'qt' u' ej cmgpi gu' v' R'qur gev'xg'lwqtu' Y v'0' U'0' cpf O p0 ³⁷ lwqtu' y j qo "f ghgpf cpv'e'j ct'cev'g't'k' gu' cu'0' r'k'g' r t'qpg. '0 cpf "k'p' r r' n' kpi "cp' k'p'eq'p'uk'v'p'v'nc'p'f ctf "k'p' q'x'gt'w'kpi "f ghg'p'ug ej cmgpi gu' v' "35" q'y gt' r tqur gev'xg'lwqtu' y j qo "f ghgpf cpv' ej ct'cev'g't'k' gu' cu'0' f g'c'y / r t'qpg'0'0' F ghgpf cpv' eqp'v'p'f u' y j g' v'kcl' eqwv' y cu' pqv'g'x'g'p'j cpf gf "k'p' r r' n' kpi "y j g' u'nc'p'f ctf u' u'g'v'q'w

kp "Wainwright" v. Witt" *3; : 7+68; "WUO634" J327" UEv0: 66. : 5"NOGf 04f": 63 "hqt" f gvgto kpki 'y j gvj gt 'c'r tqur gevxxg'lwqt uj qwf 'dg'gzewugf 'qp'vj g'dcuku'qh'xky u'q'hecr kcnr wpkuj o gpv vj cv'y qwf 'r tggpvt'uwducpvkm' 'ko r ck 'vj g'lwqt'u'cdkklv' vq'r gthqto 'j ku'qt'j gt 'f wkgu' *987

37 F ghepf cpv'qdlgew'qpn' 'kp'r cuulpi 'vj cvRtqur gevxxg Lwtqt'O p0'c'Ecj qre't lkgu'v'y j q'j g'lwto kugf 'b ki j v r tqxg'c'lu{o r cvj g'le'lwqt. 'ko r tqr gtn' 'y cu'gzewugf 0 Y j gp'vj g'lwqt'y cu'gzewugf 'hqt'j ctf uj kr 'r wtucpv vq'Eqf g'qh'EkklRtqegf vt g'ugevqp'426. 'twdf kxkukpp *d+: 'vj g'eqwtvt'ghgtgf 'v'vj g'ekewo ucpegu'vj cv'j ku f kqegug'r tqr qugf 'v'vtcpuhgt'j ko "qwm'qh'vj g'ctgc cpf 'cmq'v'vj g'j' ctf uj kr 'v'j' ku'r ctukj kqpgtu'kh'vj gkt qpn' 'Ur cpukj /ur genkpi 'r tkgu'v'y gtg'wpcxckrdrg'hqt cp'gzvpgf gf 'r gtkqf'qh'vko g0'Vj g'eqwtvu'f gekukpp vq'gzewug'vj g'lwqt'qp'vj g'i tqwpf'qh'j' ctf uj kr 'y cu y kj kp'ku'cwj qtkv'0 *Peplev. Mickey" *3; ; 3+76 Ecr0f '834.'887'J4: 8'Ecr0f r v0: 23.'.: 3: 'R0f': 6_0-

*47+ Crr n' lpi " Wainwright" v. Witt." supra." 68; " WUO 634. 646" J327" UEv0 : 66." : 74_ " y g" j cxg" ucvgf " vj cv' o")k_p c" ecr kcn' ecug. " c" r tqur gevxxg' lwqt" o c{ " dg" gzenmf gf " kh vj g" lwqt'u' xky u" qp" ecr kcn' r wpkuj o gpv' y qwf " or tggpvt qt" uwducpvkm' " ko r ck o' vj g" r gthqto cpeg" qh' vj g" lwqt'u f wkgu'0'Ekcvtkpu0'C" r tqur gevxxg'lwqt'ku'r tqr gtn' 'gzenmf gf kh'j' g'qt'uj g'ku'wpcdrg'v'eqpuekpvkwn' 'eqpuk'gt'cm'qh'vj g ugpvpeki " cngt pcvkxu. " kpenmf lpi " vj g' f gcvj " r gpcnm' " y j gtg cr r tqr tkvg'0'Ekcvtkpu0' *Peplev. Barnett, supra, '39'Ecr0f vj cv' r 0' 33360" k'p' cf f kkkp. " o")q_p" cr r gen' " y g" y km' wr j qrf vj g" v'kcn' eqwtvu' twkpi " kh' kv' ku' hckn' " uwr r qtvgf " d{ " vj g tgeqt f. " ceegr vki " cu' dklp lpi " vj g" v'kcn' eqwtvu' f gvgto kpcvqp cu" v' vj g" r tqur gevxxg' lwqt'u' v'wvg' ucvg' qh' o kpf " y j gp" vj g r tqur gevxxg' lwqt'j' cu' o cf g' ucvg' o gpv' vj cv' ctg' eqphrvkpi " qt co dki wqwu'0'Ekcvtkpu0' *Ibid.+

*46d+ Rtur gevxxg' Lwtqt' Y v0' i cxg' eqphrvkpi " cpuy gtu' v' s wgvkqpu' tgi ctf lpi 'j ku'c'kwk' g'v'y ctf 'vj g' f gcvj 'r gpcnm'. 'dw gpf gf 'y kj 'vj g' qdugt'xcvqp' vj cv' vj gtg' y gtg' p'q' ekewo ucpegu wpf gf 'y j lej 'j g'y qwf "xqvg'v'ko r qug'v'j g' f gcvj " r gpcnm' 0Vj g v'kcn' eqwtvu' kpf kecvf 'vj cvk' d'grkxgf 'vj g' lwqt' y cu' b gpcnm' ko r ck gf " cpf " oengctn' " y cu' p'qv' i qkpi " v'q' dg' cdrg' v' f gcn' y kj vj ku' uwdlgev' l'p'v'gni g'p'w' 0Cpf " j g'y cu' p'qv' i qkpi " v'q' dg' cdrg' v' r gthqto 'j ku' f wkgu' cu' c' lwqt' 0' w'p' gf 'vj g' ekewo ucpegu. " y g ugg' p'q' gttqt' k'p' gzewulpi 'vj g' lwqt' 0

Rtur gevxxg' Lwtqt' U0y cu'gzewugf 'hqt' ecwug' p'qv' d'gecvug' qh'j' ku xky u'tgi ctf lpi 'vj g' f gcvj 'r gpcnm'. 'dw' d'gecvug' vj g' v'kcn' eqwtv eqpenmf gf 'j g'y cu' b gpcnm' 'lpego r gvgp'v'v' r gthqto 'vj g' f wkgu qh' c' lwqt' 0Vj g' eqwtv' ucvgf <0Kj kpn'j' g' lwu'v'ku' p'qv' eqo r gvgp

v'q' ugt'xg' cu' c' lwqt' dcugf " qp' j ku' cpuy gtu' v' v' j g' s wgvkqpu. j ku' cpuy gtu' k'p' j ku' s wgvkqppckt g' 0Cpf " k'ko " i qkpi " v'q' g' zgtetekug o { " f kuet' g'v'k'p' cpf " gzewug' j ko " 000Kj kpn' j' g'u' etc' } { 0Kj cvg v'q' dg' uq' d'w'p'v' 0Kj kpn' j' g' ku' o gpcnm' " f kuwtdgf " qt' o gpcnm' qh' cpf " k'co " p'qv' i qkpi " v'q' j' cxg' c' o gpcnm' " qh' lwqt' 000Vj ku o cp' ku' uwducpvkm' " ko r ck gf . 'b gpcnm' " ko r ck gf " ugt'xkpi 'cu' c' lwqt' 0000 { " lwf i o gpv' ku' k'p' xky kpi 'j ko " cpf " h'v'g'p'kpi " v'q' j' ko cpf " qdugt'xkpi " j ko . 'vj gtg' ku' uqo g'v' kpi " o gpcnm' " y tqpi " y kj j ko " cpf " k'ko " i qkpi " v'q' g'zgtetekug' o { " f kuet' g'v'k'p' cpf " k'ko " i qkpi " v'q' gzewug' j ko 0'Vj g' k'p' kecvk'p' u'q' v'j g' h'ceg' qh' v'j g' t' g' eqtf " v'j cv uggo " v'q' j' cxg' hqto gf 'v'j g' d'cuku' hqt' v'j ku' eqpenwukpp' ctg' v'j cv' vj g r tqur gevxxg' lwqt' d'grkxgf 'v'j cv' vj g' o quv' g' h'gecvxg' r tqv'gevkp ci ckpuv' etko g' y cu' v'q' t' gn' " wr qp' cp' c' w'c' qh' r'ki j v' j' g' d'grkxgf uwt' q'w'p' u' g' cej " r gtuqp' 0Vj g' r tqur gevxxg' lwqt' 'incvgf <0' ku' h'kng k'x' v'j g' k' " r'kg' g' p'gti { 0' Cp' " v'j ku' d'w' d'rg' qh' y j k'g' r'ki j v' ku' r'kng c' j' g' c' r'ki j v' v'j cv' j' g' r' u' v'q' r tqv'ge'v' j' go 0' k'p' c' f' k'kkp. " v'j g v'kcn' eqwtv' c' r ctg' p'v' " y cu' f' kuwtdgf " d{ " v'j g' r tqur gevxxg' lwqt' u' t'gr g'cvf " t'ghgt' g'peg' v'q' h'q'ny kpi " v'j g' f' kecv' u' qh' j' ku' o' k'p' g' t' xqleg 0' Vj g' lwqt' 'eqwf' p'qv' r' t' g' lev' v'j g' l'p' h'w'peg' qh' v'j ku' xqleg qt' " *988 " k'p' w'k'p' w' r' qp' j' ku' f' grkdt' cv' k'p' u' cu' c' lwqt' 0' 38 " Vj g v'kcn' eqwtv' b ki j v' j' cxg' ko r ck gf " v'j g' f' g' h'g' p'f' cp' v' u' t' ki j v' v'q' dg' v' t' k'g' d{ " c' eqo r gvgp' v' t' k' d'w' p' c' n' j' cf " k'p' p' q' v' i' t' cp' v' g' f' v'j g' e' j' c' n' g' p' i' g' h'qt ecwug' c' i' ckpuv' c' lwqt' y j qo " v'j g' eqwtv' d'grkxgf " v'q' dg' w' p' c' d'rg v' f' g' r' k' d' g' t' c' v' t' c' v' k' p' c' m' 0' Ugg' Jordan v. Com. of Massachusetts *3; 34+447' WUO389. '398' J54' UEv0873. '874.' 78' NOGf 0325: = People v. Millwee" *3; ; : +3: " Ecr0f vj "; 8. '366' J96' Ecr0f r v0f 63: .; 76' R0f " ; ; 2_ = U. S. v. Hall" *6j " Ek03; ; 5+; ; ; " H0f 933. '936= ugg' c' m' q' E' q' f' g' E' k' 0' R' t' e' 0' h' q' to g' t' E' 3; : . 'twdf 0' c' +4+ cu' co g' p' f' d{ " U' c' w' 03; ; 8. " e' j' 03393. " E' 3. " r' 06387" j' f' g' h' k' p' i c' " o' e' qo r gvgp' v' lwqt' cu' uqo g' p' g' o' o' j' k' p' r' qu' u' g' u' k' p' qh' j' ku' q' t j' g' t' p' c' w' t' c' n' h' c' e' w' k' g' u' c' p' f' qh' q' t' f' k' p' c' t' { " k' p' v' g' n' k' i' g' p' e' g' o' 0- 39 " Vj ku s wgvkqpu' ku' r g' e' w' k' t' n' " q' p' g' l' p' x' q' r' k' p' i " v'j g' v' k' c' n' eqwtv' u' c' d' k' k' v' v'q' c' u' g' u' u' v' j' g' r' t' q' u' r' g' e' v' x' g' lwqt' u' t' g' o' g' c' p' q' t' " u' g' g' Wainwright v. Witt, supra. '68; " WUOcv' r' 064: " J327" UEv0cv' r' 0: 76_+ " cpf' y g uj qwf " wr j qrf " vj g' v' kcn' eqwtv' u' t' w' k' p' i " kh' k' v' ku' h' c' k' n' " uwr r qtvgf d{ " vj g' tgeqt f 0' *Ugg' People v. Barnett, supra. '39' Ecr0f vj cv r 033360" k'p' vj g' r' t' g' u' g' p' v' l' p' u' c' p' e' g' . 'vj g' v' kcn' eqwtv' u' c' u' g' u' o' g' p' v' qh' vj g' r' t' q' u' r' g' e' v' x' g' lwqt' u' l' p' c' d' k' k' v' v'q' e' c' t' t' { " q' w' v' j' g' f' w' k' g' u' qh c' lwqt' " k' p' c' " t' c' v' k' p' c' n' o' c' p' p' g' t' k' u' c' f' g' s' w' c' v' g' n' " uwr r qtvgf " d{ " vj g tgeqt f 0

38 Y g' t' g' l' g' e' v' f' g' h' g' p' f' c' p' v' u' i' e' r' k' o " v' j' c' v' v' j' g' v' k' c' n' eqwtv gttgf " k'p' t' g' h' w' k' p' i " v'q' e' q' t' t' g' e' v' v' j' g' t' g' e' q' t' f " qh' U0u ucvg' o gpv' t' g' i ctf lpi 'vj g' o' c' w' c' qh' r' k' i j v' o' j' g' d' grkxgf r tqv'ge'v' f' g' e' j' r' gtuqp' 0Vj g' o' c' w' g' t' y' cu' y' k' j' k' p' v' j' g' f' k' u' e' t' g' v' k' p' qh' v' j' g' e' q' w' t' v' y' j' k' e' j' " u' c' v' g' f' v' j' c' v' k' v' j' c' f' " c' r' g' t' u' q' p' c' n' i' t' g' e' q' m' g' e' v' k' p' qh' v' j' g' lwqt' u' u' c' v' g' o' g' p' v' c' p' f' y' cu' e' q' p' h' f' g' p' v' v' j' g' t' c' p' u' e' t' r' v' y' cu' c' e' e' w' t' c' v' g' 0' k' p' c' p' {

gxgpv."y g"grgo gpv'qh'y g'ucvgo gpv'y cv'f ghgpf cpv eqo r rclpu" y cu" gttqpgqwan{ " vcpuetkdgf " y cu" pqv tghgtgf "vq'd{ "y g'tkcn'eqwtv'kp'i tcv'kpi "y g'o qv'kqp vq"gzewug"y g'r tqur gev'xg"lwtqt"lqt"ecwug'Ofwt yj gt. cr ctv'ltgo "y j g'ucvgo gpv'tgr'kpi "vq" y j g'ocwtc.ō y j g'eqwtv'tgr'kpf "wr qp"y j g'r tqur gev'xg"lwtqt"u"qv'j gt ucvgo gpw'cpf "wr qp"y j g'eqwtv'q'dugt'xcv'kpu'qh'y j lwtqt"u"eqpf wv'cpf "f go gcpqt0

39 Lwt{ "ugr'evkqp" qeewt'gf "lp" 3; : 9." uj qtwn " dghgtg Eqf g'qh'EkkiRtqegf wt g'ugev'kp"3; : "y cu'tgr gcr'gf 0 *Ucvu03; : . : 'ej 03467. 'E'3."r 063620-

F ghgpf cpv'qdlgevu'y cv'y j g'tkcn'eqwtv'cev'f "wr qp"r tglw'f leg ci clpu'v { u'lekcn'tgrki kqwu'dgr'ghu"lp"gzewulpi "U0'tcvj gt"y cp wr qp"r y gm'hqwpf gf "dgr'gh"y cv'y j g'r tqur gev'xg"lwtqt"y cu o gpvcn{ "wpd'c'p'egf "qt"wpd'c'ng"vq"r gthqto "y j g'f w'kgu"qh'c lwtqt'0J g"eqp'v'p'f u'y cv'y j ku'cev'kqp"qp"y j g'r ctv'qh"y j g'tkcn eqwtv'ku"cp"ō" ch'ht'ppv"vq" y j g'eqpuk'w'k'q'p'cni' v'ctcp'v'gg"y cv l'ggf qo "qh'tgrki kqwu"y q'uj k"y ku'p'q'v'dg"l'p'ht'kpi gf "wr qp"d{ y j g'ucv'gō'cpf "y cv'ho k'kpi "y g'ōt'cpi g'qh't gto ku'kdrg'tgrki kqwu x'ky u"lqt"lwtqtu"ut'kn'gu"cv"y j g'j gctv'qh'dqj "y j g'Hktu"cpf Ulz yj "Co gpf o gpw'0"Y g'dgr'k'xg."j qy g'xgt."y cv'y j g'tgeqtf f go qpwt'cv'g'y g'eqwtv'y cu'ō q'v'k'cv'g'f "pqv'd{ 'r tglw'f leg'qt'd'lcu ci clpu'v'cp{ 'i tqwr "vq'y j lej "y j g'r tqur gev'xg"lwtqt'dg'm'pi gf "dw d{ 'c't'gcu'p'cdrg'eq'p'eg'p'yj cv'y j g'r tqur gev'xg"lwtqt"u'ō { u'lekno cpf "qv'j gt'q'dug'x'cdrg'ej ct'cev'g'k'v'k'v'ku'eu'y q'w'f "ko r ckt"y ku'cd'k'k'v' /cu"cp"lp'f k'k'f w'cn'vq"f gr'kd'g'cv'g"t'cv'k'p'cni'0 *Ugg." g'f 0' U.S." v. Stafford" *9y "Ek0'3; ; : +358" H5f "332; . "3336" jf gekuk'qp"qh Rqupgt."Ej l'gh'l'w'f i g."ucv'kpi "lp"y j g'eqp'v'g'v'qh'c"er'kco "wpf gt Batson" v. Kentucky" *3; : 8+ 698" WLU'9; "J328" UE'v'0'3934. ; 2"NGGf 0'f "8; _ "y cv'ō]k'v'y q'w'f "dg"ko r tqr gt"cpf "r gtj cr u w'p'eq'p'uk'w'k'q'p'cni'vq"ut'kn'g"c"lwtqt"qp"y j g'd'cu'ku"qh"j ku" *989 d'g'kpi "c"Ec'y q'k'c."c"l'gy."c"O w'arko . "g'v'0'k'y q'w'f "dg"r tqr gt"vq ut'kn'g'j ko "qp"y j g'd'cu'ku'qh'c'd'gr'gh'y cv'y q'w'f 't'g'x'gp'v'j ko 'ltqo d'cu'kpi "j ku'f gekuk'qp"qp"y j g'g'x'k'f g'p'eg"cpf "lp'wt'w'v'k'p'pu."gx'gp"kh y j g'dgr'gh'j cf "c't'grki kqwu'd'c'nc'kpi '0000_0-

Vj g'ugeqpf "er'kco /y cv'y j g'eqwtv'gtt'gf "lp"t'gl'g'ev'kpi "ej c'm'gpi gu vq"cu'ug'v'g'f n' "f gc'y /r tqpg'r q'v'p'v'k'ni'lwtqtu/t'g'c'f k'f "ku't'gl'g'ev'g'f 0 P q"gtt'qt"cr r g'ctu"qp"y j ku't'g'eqtf 0'F ghgpf cp'v'u"q'p'n{ "ur gek'k'le qdl'g'ev'k'p'u"ct'g"vq"lwtqtu"Dp0"Eu0"Xp0"cpf "F p0'Cu"vq"gc'ej lwtqt."y j g'tkcn'eqwtv'cr r tqr t'k'v'g'n{ "eqw'f "f g'v'g'to l'p'g"y cv'y j g'r tqur gev'xg"lwtqt"u"x'ky u't'g'i c'tf k'pi "y j g'f gc'y "r g'p'cni{ "y q'w'f p'q'v'r t'g'x'gp'v'qt"u'w'd'uc'p'v'k'cni{ "ko r ckt"y j g'r gthqto c'p'eg"qh'y j g'r gtu'p'u'f w'kgu"cu"c"lwtqt'0'Dp0'y q'w'f "r'k'v'g'p"vq"y j g'g'x'k'f g'p'eg d'gh'gt" f g'v'g'to l'p'kpi " cr r tqr t'k'v'g" r g'p'cni{ ." gx'gp" kh" ur gekcn ek'ewo uc'p'egu"l'q'w'p'f "v'w'g'g'z'r t'g'u'g'f "p'g'w't'c'k'k'f "y k'j "t'g'ur g'ev vq"r g'p'cni{ "g'z'r t'g'u'g'f "cp"q'r g'p"o l'p'f "y q'w'f "p'q'v'j g'uk'c'v'g"vq ko r q'ug'r w'p'kuj o gpv'qh'rk'g"lp"r t'ku'q'p."g'ur gekcn{ "kh"g'x'k'f g'p'eg

uj qy gf 'ōuqo g'y kpi 'i q'q'f "vq'uc'k'ci gō'qt'v'qo g'ek'ewo uc'p'eg'lp o k'ki cv'k'p' =Eu0'y q'w'f "j c'x'g"vq"j g'ct "r g'p'cni{ "r j c'ug"g'x'k'f g'p'eg d'gh'gt'g'f g'v'g'to l'p'kpi "r g'p'cni{ =d'g'k'x'g'f "f ghgpf cp'v'u'd'c'nci t'q'w'p'f y cu"t'g'r'x'c'p'v"vq"r g'p'cni{ =y q'w'f "p'q'v'ko r q'ug"r w'p'kuj o gpv'qh f gc'y "uko r n' "d'g'ec'w'ug"qh"ur gekcn'ek'ewo uc'p'eg"qh'o w'tf gt"qh r q'r'eg'q'h'k'g'g't'g'z' y q'w'f "eq'p'uk'f g't'x'q'v'kpi "h'q't'k'k'g'v'g'to "y q'w'f "p'g'g'f vq"j g'ct "r g'p'cni{ "r j c'ug"g'x'k'f g'p'eg" d'gh'gt'g'f g'v'g'to l'p'kpi "r g'p'cni{ = Xp0'y q'w'f "p'q'v'ko r q'ug" f gc'y "r g'p'cni{ "uko r n' " d'g'ec'w'ug" qh i w'k'n' f g'v'g'to l'p'c'v'k'p' "qt" d'g'ec'w'ug" qh"ur gekcn'ek'ewo uc'p'eg" qh o w'tf gt" qh" r q'r'eg" q'h'k'g'g't'g'z'r t'g'u'g'f "p'g'w't'c'k'k'f "y q'w'f f gc'y r g'p'cni{ =p'q'v'c'w'q'o c'v'k'e"u'w'r r q't'v'g't'qh'f gc'y "r g'p'cni{ ."k'p'cni' k'pi h'q't" r g'tu'p'u"y j q"o w'tf gt" r q'r'eg" q'h'k'g'g't'g'z' y q'w'f "dg"uy c' f g'f d{ "o k'ki cv'k'pi "ek'ewo uc'p'egu =F p0'y q'w'f "p'q'v'c'w'q'o c'v'k'c'ni{ x'q'v'g'h'q't'v'j g'f gc'y "r g'p'cni{ "c'h'g't' h'k'p'f k'pi "ur gekcn'ek'ewo uc'p'egu v'w'g' =y q'w'f "v'c'ng" g'x'k'f g'p'eg" k'p" o k'ki cv'k'p' "k'p'vq" c'ee'q'w'p'v' k'p f g'v'g'to l'p'kpi "r g'p'cni{ =p'q'v'k'z'g'f "q'r l'p'k'q'p"y k'j "t'g'ur g'ev"v'q'f gc'y r g'p'cni{ =o k'ki cv'k'pi "g'x'k'f g'p'eg"eq'w'f "y c'tt'c'p'v'rk'g'v'g'to "g'x'gp"kh d't'w'cni'ur{ k'pi "r t'q'x'g'f =y q'w'f "u'g't'k'q'w'n{ "eq'p'uk'f g't'g'x'k'f g'p'eg" k'p o k'ki cv'k'p_0-

F ghgpf cp'v'eq'p'v'p'f u'y j g'eqwtv'y cu'p'q'v'g'x'gp'j cp'f gf "lp"t'w'k'pi "q'p o q'v'k'p'u"vq"gz'ew'f g'h'q't'ec'w'ug'0J g'eq'p'v'p'f u'y j g'eqwtv'gz'ew'ug'f ōf gc'y /f q'w'd'v'w'ō" lwtqtu"y j q"i c'x'g"co d'ki v'q'w'u"cpuy gtu'dw t'g'h'w'ug'f "vq"gz'ew'ug'ōf gc'y /h'x'q't'c'd'rg'ō"lwtqtu"y j q"i c'x'g"gs w'cni{ co d'ki v'q'w'u"cpuy gtu'0Vj g't'g'eqtf ."j qy g'xgt."f go qpwt'cv'g'yj cv y j g'f gc'y /h'x'q't'c'd'rg' lwtqtu" qh" y j qo " f ghgpf cpv' eqo r rclpu er'g'c'ni{ "lp'f k'c'v'g'f "y j g'k' "c'd'k'k'v' "vq"eq'p'uk'f g't'ek'ewo uc'p'egu"lp o k'ki cv'k'p."vq'y k'j j q'r' l'w'f i o gpv'v'r qp"y j g's w'g'u'k'q'p'q'h'k' g'p'cni{ w'p'v'k'ij g'g'x'k'f g'p'eg"y cu'd'gh'gt'g'v'g'go . "cpf "u'g't'k'q'w'n{ "vq"gp'v'g't'c'k'p y j g'r v'k'p'qh'ko r q'uk'pi "c"ug'p'v'p'eg"qh'rk'g"y k'j q'w'r' qu'k'd'k'k'v' q'h'k' c't'q'rg'0Vj g'q'p'g'f gc'y /f q'w'd'v'w'ō"lwtqtu"y j q"y cu'gz'ew'f gf "lp r ct'v'd'g'ec'w'ug'q'h'k'k'g'y u't'g'i c'tf k'pi "y j g'f gc'y "r g'p'cni{ ."q'p'v'j g'q'v'j gt j cp'f ."f go qpwt'cv'g'f "cp"l'p'c'd'k'k'v' "vq"r w'w'c'uk'f g'r t'g'eq'p'eg' v'k'p'pu cp'f "q'r l'p'k'q'p'u"t'g'i c'tf k'pi "y j g'f gc'y "r g'p'cni{ "cp'f "vq"eq'p'uk'f g't c'ni'qh'y j g'ug'p'v'p'ek'pi "q'r v'k'p'u'0Vj g'q'v'j g't'f gc'y /f q'w'd'v'w'ō"lwtqt y j q" f ghgpf cpv'er'kco u'y cu'gz'ew'f gf "ko r t'qr g't'n{ "y cu" *990 g'z'ew'ug'f "h'q't"cp'q'v'j g't'g'cu'q'p."y cv'ku."y cv'y j g'eqwtv'q'd'ug't'x'g'f "lp j ko "g'x'k'f g'p'eg"qh'o g'p'w'c'ni'ko r c'k'to gpv'v'qt'lp'uc'd'k'k'v'0Vj g't'g'eqtf f q'g'u"p'q'v'w'r r q't'v'f ghgpf cp'v'u'er'kco "y cv'y j g'tkcn'eqwtv'h'k'k'g'f vq'cr r n' "y j g'uc'p'f c'tf "gp'w'p'ek'v'g'f "lp"Wainwright"v. Witt."supra. 68; "WLU634."lp"cp"gx'gp'j cp'f gf "o c'p'p'g't0³:

3: F ghgpf cp'v'u" uwi i g'u'k'q'p" y j cv' k' "y cu" g'tt'qt" h'q't y j g' r t'q'ug'ew'qt" vq" r g'tgo r v'q't'k'f "ej c'm'gpi g" lwtqtu y j q" g'z'r t'g'u'g'f "t'g'ug't'x'c'v'k'p'u"eq'p'eg't'p'k'pi "y j g'f gc'y r g'p'cni{ "ku" t'gl'g'ev'g'f "cu" y k'j q'w' "o g't'k'ō *Peoplev. Ashmus."supra."76'Ec'r'ōf'c'v'r'0; 890-

b. Restriction on voir dire

*49c+F ghgpf cpv'eqpvpgf u'vj g'v'kcn'eqwtv'gtt'gf 'kp'f gvgto klpki j g'j cf "hckrgf"vq" guvcdkuj "c" r tko c "hcekg"ecug"wpf gt "*People v. Wheeler*"*3; 9: +44"Ecnf"47: "]36: "Ecnf"v0: ; 2."7: 5 Rf"96: _**Wheeler*+vj cv'vj g'r tqugewqt "gzewugf "Rtqur gevkg Lwtqt "T'0'dgecwug"qh'tcekn'dlcu0J g'eqpvpgf u'vj cv'vj ku'gttqt eqpvkxwgf "c" xkrcv'kqp" qh' j ku' tki j v' vq" v'kcn' d{ "c" hck" cpf ko r ctv'cnlwt { "wpf gt'vj g'Ukz'vj 'cpf 'Hqwtv'ggpy 'Co gpf o gpv'qh vj g'hgf gtcn'E'qpvkxw'kqp0

Cv' v'kcn" vj g" r tqugewqt "gzetekugf" c" r gtgo r vqt { "ej cngpi g ci clpuv' Rtqur gevkg" Lwtqt "T'0" cp" Chk'ecp/Co gtlecp" o cp0 F ghgpf cpv'qdl'gevgf "vq" vj g'ej cngpi g. "emcko kpi "k'y cu'dcugf r wtgn { "wr qp" vj g'r tqur gevkg' lwtqt' h' tceg. "cpf "o cf g'c" o qv'kqp hqt" o kvt'kcn' d'cugf "vr qp" *Wheeler*. "supra." 44"Ecnf" 47: . "cpf *Batson*" v. *Kentucky*. "supra." 698" WU09; 0J g'eqpvpgf gf "vj cv pq'ektewo ucpeg'dw' tceg' eqw'f j cxg' b' qv'kx'cvf "vj g'ej cngpi g. dgecwug" Rtqur gevkg" Lwtqt "T'0' f' k' "pqv' g'zr t'guu" ungr v'ekuo eqpegtpkpi "vj g'f gcv'j 'r gpcn' { "cpf 'j ku' h'cv' gt'j cf "dggp" c'f gr w'f uj g'tkh' hqt" 42" { gctuo' F ghgpf cpv'cuugt'vgf "vj g' r tqugewqt" j cf guvcdkuj gf "c" r tcevg' qh' g'z'etekukpi "r gtgo r vqt { "ej cngpi gu ci clpuv' Chk'ecp/Co gtlecp' r tqur gevkg' lwtqtu. 'eqpvpgf kpi "vj cv vj g'tg'j cf "dggp" b'q' l'w'k' h'ecv'k'p' g'zegr v' tceg' hqt' vj g' r tqugewqt u gctikt' r gtgo r vqt { "ej cngpi g" qh' Rtqur gevkg" Lwtqt "Ur 0" cp Chk'ecp/Co gtlecp" o cp0

Vj g'eqwtv'tgur qpf gf <0jY _kj qw'hkpf kpi "c" r tko c "hcekg"ecug j cu'dggp" o cf g'Ky qwf "cun'k'v'j g' r tqugewk'p" y qwf "ectg" vq t'gur qpf A0

Vj g' r tqugewqt "g'zr r'cl'p'gf" vj cv'j g' j cf "gzewugf" Rtqur gevkg Lwtqt "T'0'dgecwug" j g'dgn'x'gf "j ku'go r m { o gpv'cu" c" t'gr q'v'gt hqt "c" n'ecn'p'gy ur cr gt' y qwf "vj t'gcv'p" vj g' r tqur gevkg' lwtqt u ko r ctv'cnlwt { "wpf gt'vj g'Ukz'vj 'cpf 'Hqwtv'ggpy 'Co gpf o gpv'qh vj g'hgf gtcn'E'qpvkxw'kqp0

Vj g'eqwtv'f gplgf "vj g'f ghg'pug" o qv'kqp. "ucv'kpi <0K'v'j kpm'v'j g tgeqtf "pggf u" vq" dg" engt" vj cv'v'j g'tg" y g'tg" r qv'p'v'kcn' { "h'qwt Chk'ecp/Co gtlecp" lwtqtu" ecngf "vq" vj g' lwt { "dqz" <0 t0']U_ O tu0']J _ "O t0']T'0_" cpf "O t0']N_0' K'v'j kpm'v'j g' tgeqtf "f qgu pggf "vq' t'gh'ng'ev'j cv' { guv'gt'f c { "O t0']U_ y cu'gzewugf. "dw'v'j g'tg y g'tg' t'gcu'qpu" ucv'gf "r t'kt' "vq" vj cv'0'Vj cv'0 tu0']J _ "cp" Chk'ecp Co gtlecp' y qo cp. 'y cu'gzewugf "d { "vj g'f ghg'pug0

0K'cnq' hgn'v'j cv'0 t0']T'0_" y cu'kp' f kvt'guu' { guv'gt'f c { 0'Y cu'kp go qv'kpcn'f kvt'guu'0J g'm'qmgf "r cl'p'gf " { guv'gt'f c { "ukv'kpi "wr "kp vj g'ug'cv0

0K'cnq' t'gekg'x'gf "c" r'j q'p'g'ecm'lt'qo "j ku'go r m { gt0'Cr r ct'g'p'v'f. vj g't' r' q'nt' { "ku'q'pn' { "vq' t' c { "hqt' 32' f' c { u'qt' 37' f' c { u'qt' b'qo g'v' kpi 0 Cpf "Ky cu' i' qkpi "vq' j' cxg" *993 "vq" o cng' c' ur gekn' r' j q'p'g'ecm qt' y t'kg' c' h'g'w'gt' y j' k'ej . " { qw' h'p'qy . 'K0 "cny c { u'y k'k'kpi "vq' f' q' vq i' g'v'j ko "vq' u'v' c { 0

0Ky cu'v' t'qwd'ngf "d { "j ku'go r m { o gpv'uk'w'cv'k'p'0 Ky cu'v' t'qwd'ngf d { "vj g' h'ce'v'j g' y g'tg' i' qkpi "vq' j' cxg' vq' j' cxg' ur gekn' r' t'gecw'k'p' u'cngp' hqt' j ko "k'j' g' y g'p'v' vq' y q'tn' q'p" H'k'f c { u' "qt" q'x'gt' vj g j' q'k'f c { u'qt' y j' g'p' y g' y g'tg' p'q'v'k'p' u'gu'k'p' vj cv' u'qo g'p'g' y q'w'f j' cxg' vq' u'et' g'p' vj g' p'gy ur cr gt' hqt' j ko "cpf 'r g'q' r'ng' y q'w'f 'j' cxg vq' p'q'v' c' m' i' c' d' q' w' k' l' p' h' t' q' p' v' q' h' j' ko 0

0Y g' cmi' n'p'qy "vj cv' vj g" F ckn' "P gy u' j cu' eqx'gt' gf "vj ku' ecug g'z'v'p'uk'x'gn' 0'K' y kmi' eqx'gt' vj g' ecug' g'z'v'p'uk'x'gn' { y j' g'p' k'v' u'c' t' u' u' ci cl'p'0

0Kj cf 'b { "qy p' s' w'c'm u' c' d' q' w' k' 0' v' j g' h'ce'v'j g' r g'q' r'ng' g'z' g'tekugf c' r' gtgo r vqt { "f q'gu' p'q'v' u'gg'o "vq" o g'vq' d'g' t'cekn' { "dcugf 0'Uq Ky q'w'f "h'k'p' vj cv' k'v' y cu' p'q'v. "cpf "Ky q'w'f "f g'p { "vj g' *Wheeler* o qv'k'p'0

*4: +Vj ku' eqwtv' guvcdkuj gf "kp" *Wheeler*. "supra." 44"Ecnf" 47: . "0j cv' r' gtgo r vqt { "ej cngpi gu' b' c { "p'q'v' d'g' w'ugf "vq' t'go q'xg r tqur gevkg' lwtqtu" u'q'ng' { "qp" vj g' d'cu'ku' qh' r' t'guwo gf "i' t'qwr d'cu'0'Y g' f' gh'k'p'gf "i' t'qwr "d'cu'cu" c" r' t'guwo r v'k'p' vj cv' e'gt' v'cl'p lwtqtu" ct'g' d'cugf "o g'tgn' "d'gecwug" vj g' { "ct'g" o go d'gtu' qh' cp k'f g'p'v'k'c'd'ng' i' t'qwr "f' k'k'k'p' v'k'uj gf "q'p' t'cekn' t'g'k' i' k'q'w. 'g'j' p'le' q't u'ko k'ct' i' t'q'w'p'f u'0']E'k'v'k'p'u'0_0_ **People*" v. *Johnson*" *3; ; +69 Ecnf" 33; 6. "3437"]477" Ecnf" r v'078; . "989" Rf" 3269_0_

C' r' ct'v' { y j' q' l'w'ur g'eu'ko r t'q' r' g't' w'ug' q'h' r' gtgo r vqt { "ej cngpi gu o w'v' t'c'k'ug' c' v'ko g'n' { "q'd' l' g'ev'k'p' c'p'f "o cng' c' r' t'ko c' h'cekg' l'uj qy kpi vj cv' p'p'g' q't" o q'tg' lwtqtu" j cu' dggp' g'zen'w'f gf "qp" vj g' d'cu'ku' qh i' t'qwr "qt' t'cekn' k'f g'p'v'k' (0'Vj g' j' k' i' "eqw' v'j cu' g'zr r'cl'p'gf "vj cv'j g f' ghg'pf cp'v'k' t'g' s' w'k' gf "vq' d' t'c'k'ug' c'p' k'p' h'gt' p'eg'0' vj cv'j g' g'zen'w'k'p' y cu' d'cugf "qp" i' t'qwr "qt' t'ceg' d'lcu'0_0_ **Batson*" v. *Kentucky*. "supra. 698" WU0' cv' r'0' ; 8"]328" UE'v'0' cv' r' r'0' 3944/3945_0_ "Qpeg" c r t'ko c "hcekg" u'j qy kpi "j cu' dggp" o cf g. "v'j g' r tqugewqt" vj g'p o w'v' e'c'tt { "vj g' d'w'f g'p' q'h' l'uj qy kpi "vj cv'j g' q't' l'uj g' j' cf "i' g'p'v'k'p'g p'q'p'f k'uet'ko k'p'cv'qt { 't'g'cu'qpu' hqt' vj g'ej cngpi gu' c'v' k'uu'w'g'0_0_ **People v. Monteil*" *3; ; 5+7" Ecnf" vj " : 99. " 2; "]43" Ecnf" r v'0f' 927. " : 77 Rf" 3499_0_

Vj g'v'kcn'eqwtv'u'f gvgto k'p'cv'k'p' vj cv'p'q' r' t'ko c "hcekg' l'uj qy kpi "qh i' t'qwr "d'cu'j" cu' dggp" o cf g' ku' u'w' d' l' g'ev' vq' t'g'x'k'gy "vq' f' gvgto k'p'g y j' g'v'j g't' k'v' ku' u'w' r' q't' v'gf "d { "u'w' d' u'c'p'v'k'cn' g'x'k'f g'p'eg'0_0_ **People*" v. *Alvarez*, supra, "36" Ecnf" vj "cv' r' r'0'3; 8/3; 90." 42 "Y g' g'zco k'p'g

vj g'tgeqtf "qh'vj g'xqkt f'kt g'cpf "ceeqt f'r ctvlewct f'ghgt ppeg'vq
vj g' *994 'v'ctkn'eqwtv'u' hcv'v'hp f'gt. 'dgecwug' qh'ku'r'r q't wplv'k
vq' qdugt' xg'vj g'r ctv'lek' cpv'c'v' h'ku'v'j cpf 0*'People v. Howard,
supra.' 3' Ecrfbj 'cv'r 033770+

42 Vj g'v'ctkn' eqwtv' o cf g'k' ercgt "kp'ku' gctrlgt "twlki
qp' f' ghgpf cpv'u' Wheeler" o qv'kp" y kj " t'gur gev' vq
Rtqur gev'xg' Lwtqt' U'vj cv'cnj qwi j 'k'hqwpf 'p'q' r tko c
h'celg' ecug. 'k'p'p'p'g'j gr'gu'cun'gf "vj g' r t'q'ug'ew'k'p'v'q
t'gur q'p'f "v'q' j' g' o q'v'k'p' h'q' t'vj g' r v'w'r qu'g' qh' e't'g'c'v'k'p'i
c' eqo r'ng'v'g' t'geqtf "h'q' t'vj g' t'g'x'k'y k'p'i "eqwtv' U'vj g'
eqwtv' r t'gu'w'o cdn' 'h'q'm'y g'f "vj g' u'c'o g' r t'c'v'k'g' y kj
t'gur gev'v'q' vj g' o q'v'k'p' e'q'p'eg't'p'k'p'i "Rtqur gev'xg' Lwtqt'
T'v'U'v'cnj qwi j "vj g' e'q'w't'v' f' k'f 'p'q'v'z'r r'k'p' 'k'u'g' r'h'c'u' h'w'm'
k'p' vj k'p' u'c'p'eg'0

*49d+ Vj g' t'geqtf " uwr r q'tw' " vj g' v'ctkn' eqwtv'u' f'gv'to k'p'cv'k'p'
vj cv' f' ghgpf cpv' h'c'k'f "v'q' o cng' c' r t'k'o c' h'celg' u'j q'y k'p'i " vj cv
vj g' r t'q'ug'ew'q't' e'j cng'p'i g'f "Rtqur gev'xg' Lwtqt' T'v'U'q'p' vj g' d'c'uku
q'h' j ku' t'ce'g'0' Vj g' t'geqtf " qh' Rtqur gev'xg' Lwtqt' T'v'U'v' xq'k'
f'k'g' co r' n'f' " uwr r q'tw' " vj g' e'q'p'ew'k'p' vj g' r t'q'ug'ew'q't' f'k'f' p'q'v
e'j cng'p'i g'j k'o " d'g'ecw'ug' q'h' i t'q'w' " d'k'u'0' Rtqur gev'xg' Lwtqt' T'v'U'
c'p'v'k'c'v'g'f " u'q'o g' f' k'h'k'ew'm' k'p' vj g' e'q'w't'ug' q'h' v'ctkn' u'j k'g'f' k'p'i
j k'o u'g' r'h' l'q'o 'q'w'k'f g' k'p'h'q'to c'v'k'p' e'q'p'eg't'p'k'p'i vj g' e'c'ug' d'g'ecw'ug'
q'h' j ku' go r' n'f' { o g'p'v'c'u'c' t'g'r q't'v'g't' y kj " c' n'q'ec'n' p'g'y u'r c'r g't'0' k'p'
c'f f' k'k'q'p' " vj g' r t'q'ur gev'xg' Lwtqt' p'q'v'g'f " vj cv'j g'j c'f " t'g'eg'k'g'f " c'
r q'q't' r' g't'h'q'to c'p'eg' t'g'x'k'y 'c'v'y q't'm' d'g'ecw'ug' q'h' j k'u' r ctv'lek' c'v'k'p'
k'p' x'q'k' f'k'g' r t'q'eg'g'f k'p'i u' " c'p'f " vj cv' l'w't { " u'g't'x'k'g' y q'w'f " d'ecw'ug'
c'p' " go q'v'k'p'c'n' j c't'f u'j k' " d'g'ecw'ug' q'h' vj g' u'w'g' u' k'p'x'q'k'g'f " y kj
o { " l'q'd'0' k'p' c'r r g'c'tu' vj g' r t'q'ur gev'xg' Lwtqt' t'k'um'g'f " n'q'k'p'i " j ku'
go r' n'f' { o g'p'v'q't' u'w'h'g'k'p'i " f'g't'k'o g'p'v'q'j k'u' e'c't'g'g't' k'h'j g' y g't'g'
t'g's v'k't'g'f " v'q' u'g't'x'g' q'p' c' h'g'p'i vj { " v'ctkn'0

Vj g' r t'q'ug'ew'q't' t'gh'tt'g'f " v'q' vj g'ug' e'k't'ewo u'c'p'eg'u' k'p' l'w'u'k'h' k'p'i
j k'u' e'j cng'p'i g' q'h' Rtqur gev'xg' Lwtqt' T'v'U'v' c'p'f " z'r r'k'p'g'f " vj cv'j g'
h'g'c't'g'f " vj g' l'w't'q't' y q'w'f " d'g' v'q'q' v'q't'p' d' { " e'q'p'h'k'ew'k'p'i " n'q' { c'n'k'g'u'
v'q' j k'u' go r' n'f' { o g'p'v'c'p'f " v'q' vj g' e'q'w't'v'v'q' h'w'h'k'n' j k'u' h'w'p'ev'k'p'0
*U'gg' " People v. Mayfield " *3; ; 9+ 36" Ecrfbj " 88: ." 945/946
]82" Ecr0'r v'0'f " 3. " ; 4: " R0'f " 6: 7 _] t'g'n' k'p'i " k'p' " r c'tv' w'r q'p'
l'w'u'k'h' c'v'k'p'u' q'h'g't'g'f " d' { " r t'q'ug'ew'q't' k'p' u'w'r r q't'v'q'h' v'ctkn' eqwtv'u'
f'gv'to k'p'cv'k'p' vj cv' p'q' r t'k'o c' h'celg' ecug' j c'f " d'ggp' " o c'f g'
v'p'f g't' " Wheeler_0' " Vj g' r t'q'ug'ew'q't' r q'k'p'g'f " q'w' vj cv'j g' c'nu'q'
j c'f " r g't'g'o r v'q't'k'k' " e'j cng'p'i g'f " c' r t'q'ur gev'xg' Lwtqt' " y j q' y cu'
p'q'v' " C'h'l'k'ep'/C'o g't'k'ep' " q'w' q'h' c' " u'k'o k'r'c't' " e'q'p'eg't'p' vj cv' vj g'
r t'q'ur gev'xg' Lwtqt' u'f' k'k'f' g'f " n'q' { c'n'k'g'u' y q'w'f " k'o r c'k' j' g't' c'd'k'k'v'
v'q' h'w'p'ev'k'p'0

F' ghgpf cpv'u' e'q'p'v'p'k'p' vj cv' vj g' r t'q'ug'ew'q't' u' c'ev'k'p' k'p'
g'z'ew'k'p'i " y q' " C'h'l'k'ep'/C'o g't'k'ep' " l'w't'q't' u' k'ug'r'h' e'q'p'k'w'g'f " c'
r c'w'g't'p' q'h' i t'q'w' " d'k'u' f' k'f " p'q'v' u'w'h'k'eg' v'p'f g't' vj g' e'k't'ewo u'c'p'eg'u

v'q' o cng' q'w' c' r t'k'o c' h'celg' ecug' v'p'f g't' Wheeler. " r c't'v'lew'ct'n'
k'p' r'h'j j v'q'h' c'p' " C'h'l'k'ep'/C'o g't'k'ep' " l'w't'q't' u'j c'x'k'p'i " u'g't'x'g'f " q'p' vj g'
l'w't' { 0* U'gg' " People v. Turner " *3; ; 6+ " Ecrfbj " 359. '389/38: "]54
Ecr0'r v'0'f " 984. " : 9: " R0'f " 743_0' C'u'h'q't' vj g' e'q'p'v'p'k'p' vj cv'v'j g'
r t'q'ug'ew'q't' u' e'j cng'p'i g' " v'q' " Rtqur gev'xg' Lwtqt' " U'0' u'w'r r q't'v'g'f " c'p'
k'p'h'g't' p'peg' vj cv'v'j g' r t'q'ug'ew'q't' y cu' o q'v'x'c'v'g'f " d' { " i t'q'w' " d'k'u' k'p'
e'j cng'p'i k'p'i " Rtqur gev'xg' Lwtqt' T'v'U'v' vj g' t'geqtf " d'g'r'k'g'u' vj g' e'r'c'k'o 0
Vj cv' l'w't'q't' y cu' c' f' g'c'v'j " r g'p'c'n'f' " u'n'g'r v'k'e' y j q' d'c't'g'n'f' " u'w't'x'k'g'f " c'
e'j cng'p'i g' h'q't' " e'c'w'ug' d'g'ecw'ug' q'h' j k'u' k'x'g'y u't'g'i c't'f k'p'i " vj g' f' g'c'v'j
r g'p'c'n'f' . " c'p'f " vj g' r t'q'ug'ew'q't' " z'r r'k'p'g'f " vj cv'j g' j c'f " g'z'ew'ug'f
j k'o " d'g'ecw'ug' q'h' vj g' l'w't'q't' u' t'g'm'v'c'p'eg' v'q' e'q'p'k'f g't' k'o r q'uk'p'i
v'j g' f' g'c'v'j " r g'p'c'n'f' " c'p'f " d'g'ecw'ug' vj g' l'w't'q't' j c'f " d'ggp' " u'n'g'r k'p'i " cu'
j g' u'c'v'k'p' vj g' l'w't' { " d'q'z' " f' w'k'p'i " i g'p'g't'c'n' x'q'k' f' k't'g'0' k'p' " f' g'p' { k'p'i
*995 " f' ghgpf cpv'u' u'g'r c't'c'v'g' Wheeler" o q'v'k'p' d'c'ug'f " w'r q'p' vj g'
e'j cng'p'i g' v'q' " Rtqur gev'xg' Lwtqt' " U'0' vj g' v'ctkn' eqwtv' e'q'p'h'k'o g'f
v'j cv'v'j g' l'w't'q't' j c'f " d'ggp' " u'n'g'r k'p'i . " f' g'ur k'g' y c't'p'k'p'i " i g'uw't'g'u'
h'q'o " vj g' e'q'w't'0

O q't'g' vj c'p' c'f g's w'c'v'g' g'x'k'f p'peg' u'w'r r q't'w' vj g' v'ctkn' eqwtv'u'
f'gv'to k'p'cv'k'p' vj cv' p'q' r t'k'o c' h'celg' ecug' q'h' i t'q'w' " d'k'u' y cu'
u'j q'y p'0'Y g' h'k'p'f " p'q' g't't'q't' k'p' vj g' f' g'p'k'n' q'h' f' ghgpf cpv'u' Wheeler
o q'v'k'p'0

13. Claims regarding excessive security measures

a. Metal detector

*4; c+ F' ghgpf cpv' e'q'p'v'p'f u'j k'u' f' w'g'r t'q'eg'u' t'k'i j v'v'q' c' h'c'k' v'ctkn'
y cu' k'o r c'k'g'f " y j g'p' vj g' v'ctkn' eqwtv' e'c'w'ug'f " v'q' d'g' " k'p' u'c'ng'f
c' o g'v'n' f' g'v'ev'q't' vj t'q'w' j " y j k'ej " vj g' r v'w'r k'e' y cu' t'g's v'k't'g'f
v'q' r cu' v'j y k'g' g'p'v'g't' k'p'i " vj g' e'q'w't' v'q'q'o 0'J g' q'd' l'g'ev'g'f " c'v' v'ctkn'
c'p'f " c'v' c'j g'c't' k'p'i " q'p' vj g' q'd' l'g'ev'q'p' . g'x'k'f p'peg' y cu' r t'g'ug'p'v'g'f
t'g'i c't'f k'p'i " c' " n'g'w'g't' " c'p'f " c' r q'u'v'g't' " v'c'eg'c'd'g' v'q' f' ghgpf cpv' vj cv
v'j g' r t'q'ug'ew'q't' " cng'i g'f " e'q'p'k'w'g'f " x'g'k'g'f " vj t'g'c'u' " c'i c'k'p'u'v'
r t'q'ug'ew'k'p' y k'p'g'uu'g'0' k'p' c'f f' k'k'q'p' . k'k'y cu' r q'k'p'v'g'f " q'w' vj cv
vj g' e'j c't'i g'u' " cng'i g'f " vj cv' vj g' o w't'f g't' y cu' v'p'f g't'v'cng'p' y kj
vj g' r v'w'r qu'g' q'h' u'k'g'p'ek'p'i " c' y k'p'g'u' k'p' " c'p'q'v' g't' " e't'k'o k'p'c'n'
r t'q'eg'g'f k'p'i " c'i c'k'p'u'v' f' ghgpf cpv'0' H'k'p'c'n'f' . " c' " p'g'y u' " t'g'r q't'v'g't'
v'g'u'k'h'g'f vj cv'v'j g'j c'f " t'g'eg'k'g'f " e'p'q'p' { o q'w'u' r j p'p'g' e'c'n'u' k'p' y j k'ej
c' u'j q'q'v'w'k'p' vj g' e'q'w't' v'q'q'o " y cu' vj t'g'c'v'p'g'f 0C v'c' h'v'g't' j g'c't' k'p'i
t'g's v'g'w'k'p'i " t'g'eq'p'k'f g't'c'v'k'p' q'h' vj g' e'q'w't' u' t'w'k'p'i " f' g'p' { k'p'i " vj g'
o q'v'k'p' . g'x'k'f p'peg' y cu' r t'g'ug'p'v'g'f " t'g'i c't'f k'p'i " vj t'g'c'u' " c'i c'k'p'u'v'j g'
r t'q'ug'ew'q't' " c'p'f " vj g' v'ctkn' eqwtv' o c'f g' d' { " r g't'uu'p' u' v'j g't' vj c'p'
f' ghgpf cpv'0

*52+ Y g' j c'x'g' t'g'eq'i p'k' g'f " vj cv' e'g't'v'k'p' u'g'ew't'k' { " o g'c'u't'g'u' o c'
d'w't'f g'p' vj g' t'k'i j v'v'q' c' h'c'k' v'ctkn' k'p' " r c't'v'lew'ct' . " v'q' " t'g's v'k't'g' vj g'
f' ghgpf cpv' v'q' c'r r g'c't' d'g'h'q't'g' vj g' l'w't' { " v'p'f g't' r j { u'k'ec'n' t'g'u'c'k'p'v'
o c' { " k'o r c'k' " vj cv' t'k'i j v'v' " h'q't' " g'z'c'o r'ng' d' { " n'g'c'f k'p'i " vj g' l'w't' { " v'q'
k'p'h'g't' j " g' " ku' c' " x'k'q'p'p' v' r g't'uu'p' c'p'f " d' { " v'g'p'f k'p'i " v'q' f' k'ur g'n' vj g'

*id."cv'r 03453+"cpf "lp" State v. Hartzog."supra."857"R04f 8; 6."y g"eqwtv'hqwpf "o ci pgvqo gvt "ugctej gu'qh'jurors"vq"dg j cto nguu'gttqt0*Id."cv'r 0927/9280-

Ugewtkv' b gcuwtgu'vj cv'vtg'p'qv'lpj gtgpv' r' tglwf lekcn'p'ggf 'p'qv dg'lw'v'k'g'f 'd' { 'eqo r gmkpi 'g'x'k'f p'g'g'q'h'f'lo o k'p'g'p'v'y t'g'c'w'v'q' 'y' g ugewtkv' 'q'h' 'y' g'eqwtv'0*Ugg'Holbrook'v. Flynn.'supra.'697'WLU cv'r 078: /78; 'J328'UE'v'cv'r 03567/3568. =People'v. Duran. supra."38'Ecn'f'f'cv'r 04; 3."lp'0: =Morgan'v. Aispuro"*; y Ek03; ; 3+; 68'HDf'3684.'36870'P qt'f' qgu'f' g'g'p'f' cp'v'k'f' g'p'v'k'f' cp' { 'cewcn'r' t'g'lw'f' leg' 'ct'kulpi 'It'qo 'y' g'v't'cn'eqwtv'f' gekukpp'v'q go r nq' { "c" o g'cn'f' g'v'g'v'q' 'cv' 'y' g' g'p'v'c'p'eg'v'q' 'y' g' eqwtv'q'qo 0 *Holbrook'v. Flynn.'supra.'697'WLU'cv'r 0794'J328'UE'v'cv'r 0 3569/356: =ugg'c'nuq'People'v. Miranda.'supra.'66'Ecn'f'f'cv'r 0 3370'Y g'eqpen'v'f' g'y' g'v't'cn'eqwtv'f' k'f' 'p'q'v'c'd'w'ug'ku'f' k'uet'g'v'k'p' 'lp o cl'p'v'cl'p'p'i 'c' 'o' g'cn'f'f' g'v'g'v'q' 'cv' 'y' g' g'p'v'c'p'eg'v'q' 'y' g' eqwtv'q'qo lp' 'y' j' lej 'f' g'g'p'f' cp'v'u'ecug' 'y' cu'd'g'k'p'i 'v't'k'g'f' 0

b. Numerous bailiffs

F' g'g'p'f' cp'v'eqp'v'g'p'f' u' 'y' cv' 'y' g' eqwtv'x'k'q'v'g'f' 'j' ku't'k'i' j' v' 'v' 'q' 'f' v'g r' t'q'g'uu' q'h' 'n'cy "d' { "r' g'to' k'v'k'p'i . "lp" c'f'f' k'k'q'p'v'q' 'y' g' d'c'k'k'k'hu p'q'to' c'n'f' "cu'k'i' p'g'f' "v'q' 'y' g' eqwtv'q'qo . " *998 "y' g' r' t'g'ug'p'eg' 'q'h' c'f'f' k'k'q'p'c'n' c'to' g'f' "d'c'k'k'k'hu" f' w't'k'p'i "y' g' v'g'u'ko' q'p' { "q'h' 'y' k'p'g'uu L'g'ht'g' { 'D't' { cp'v'0

C'v' v't'cn'f' f' g'g'p'f' cp'v' q'd'lg'v'g'f' "v'q' 'y' g' c'r' r' g'c't'c'p'eg' "q'h' 'y' t'g'g' c'f'f' k'k'q'p'c'n' d'c'k'k'k'hu" lp' 'y' g' eqwtv'q'qo "f' w't'k'p'i "y' g' lp' "n'ko' k'p'g' v'g'u'ko' q'p' { 'q'h' L'g'ht'g' { 'D't' { cp'v'0

V'j' g' eqwtv'eqp'p'g't'g'f' "y' k'j' "q'p'g'q'h' 'y' g' d'c'k'k'k'hu."y' j' q' g'z'r' r'cl'p'g'f' y' j' cv' 'u'q'o' g' u'k'g'p'v' eq'o' o' w'p'k'c'v'k'p'p' d'g'v' g'p' 'y' g' 'y' k'p'g'uu' c'p'f' f' g'g'p'f' cp'v'u' 'd't'q'v' g't.'y' j' q' 'u'c'v'lp' 'y' g' eqwtv'q'qo . 'ec'w'ug'f' 'j' ko' 'v'q' q't'f' g't' 'y' g' c'f'f' k'k'q'p'c'n' u'g'ew't'k'v' { '0'V'j' g' eqwtv'p'q'v'g'f' 'y' cv' 'c'n'j' q'w'i' j' k'v'f' k'f' "p'q'v' 'y' k'j' "v'q' r' t'q'x'k'f' g' g'z'g'eu'k'x'g' u'g'ew't'k'v' { . "k'i' 'y' g' d'c'k'k'k'hu y' cu' q'h' 'y' g' "q'r' k'p'k'p'v' 'y' cv' c'f'f' k'k'q'p'c'n' u'g'ew't'k'v' { 'y' cu' p'g'eg'uu'c't' { . y' j' g' eqwtv' 'y' q'w'f' "f' g'g'ht' "v'q' 'y' g' d'c'k'k'k'hu" f' gekukpp'0' V'j' g' eqwtv' f' k'g'v'g'f' "f' g'g'p'ug' eq'w'p'ug'n'v'q' eq'p'g'ht' 'y' k'j' 'y' g' d'c'k'k'k'hu'v'q' t'g'u'q'k'g' y' j' g'f' k'k'k'ew'v'0

V'j' g' h'q'm'y' k'p'i "f' c' { . "f' g'g'p'ug' eq'w'p'ug'n' q'd'lg'v'g'f' "y' cv' 'y' g't'g' "j' c'f' d'g'g'p' g'z'v'c' d'c'k'k'k'hu" lp' 'y' g' eqwtv'q'qo "y' j' g'p' "y' k'p'g'uu' L'g'ht'g' { 'D't' { cp'v' v'g'u'k'k'g'f' . "c'p'f' "c'ung'f' "y' cv' 'y' g' p'w'o' d'g't' "q'h' d'c'k'k'k'hu" dg' t'g'f' w'eg'f' 0E'q'w'p'ug'n'p'q'v'g'f' 'y' cv' q'p'n'f' "c' h'g'y' "q'h'f' g'g'p'f' cp'v'u' 'l't' k'g'p'f' u' c'p'f' "t'g'r'v'k'g'u' 'y' g't'g' c'w'g'p'f' k'p'i "y' g' v't'k'cn' c'p'f' "y' cv' d'g'ec'w'ug' 'y' g' { 'j' c'f' "r' cu'ug'f' "y' t'q'w'i' j' "y' g' b' g'cn'f'f' g'v'g'v'q't' . "y' g' { "r' q'ug'f' "p'q'f' c'p'i' g't'0 V'j' g' eqwtv' q'd'ug't'x'g'f' "y' cv' 'y' g' p'w'o' d'g't' "q'h' d'c'k'k'k'hu" h'w'ew'c'v'g'f' d'g'v' g'p' 'y' t'g'g' c'p'f' "h'q'w' . "y' cv' 'y' g' t'g'g' 'y' cu' 'y' g' d'c't'g'o' k'p'lo' w'o' "cv' c' l'q'k'p'v't'k'cn'q'h' 'y' q' l'p'c't'eg't'c'v'g'f' "f' g'g'p'f' cp'w' . "y' cv' 'u'q'o' g'v'ko' g'u' 'k'v' y' cu' 'y' g' r' t'g'ug'p'eg' q'h' l'eg't' v'cl'p' 'ur' g'ew'c'v'q't'u' 't'c'v'j' g't' 'y' cp' 'y' g' k'f' g'p'v'k'f'

q'h' 'y' g' 'y' k'p'g'uu' 'y' cv' r' t'q'o' r' v'g'f' "c'f'f' k'k'q'p'c'n' u'g'ew't'k'v' { . "y' cv' 'u'q'o' g' q'h' 'y' g' d'c'k'k'k'hu" 'y' g't'g' p'q'v'x'k'k'ud'g'v'q' 'y' g' l'w't' { . "y' cv' 'y' g' r' t'g'ug'p'eg' q'h' c'p' c'f'f' k'k'q'p'c'n' d'c'k'k'k'hu" 'y' cu' 'o'k'p'p'q'ew'q'w'u' . o' c'p'f' "y' cv' 'y' g't'g' 'y' cu' p'q' 'o'c't'o' g'f' "eco' r' o'c'v'o' q'ur' j' g't'g' . "d'w' 'q'p' 'y' g' eq'p'v't'c't' { "c' 'h'q'y' /n'g' { c'v'o' q'ur' j' g't'g' } c'f' "d'g'g'p' r' t'g'ug't'x'g'f' 0

Eq'p'v't'c't' { "v'q' 'f' g'g'p'f' cp'v'u' "eq'p'v'g'p'v'k'p'u' . "p'q' c'd'w'ug' "q'h' f' k'uet' g'v'k'q'p' q't' "c'd't'q'i' c'v'k'p'p' q'h' l'w'f' k'ek'cn' c'w'j' q't'k'v' { "q'x'g't' eq'w't'v'q'q'o' "u'g'ew't'k'v' c'r' r' g'c't'u' 0'Y' g' j' c'x'g' g'z'r' r'cl'p'g'f' "y' cv' r' w't'w'c'p'v'v'q' "W'p'k'g'f' "U'c'v'g'u' U'w' t'g'o' g' "Eq'w't'v' c'w'j' q't'k'v' { . "o'y' g' 'w'ug' "q'h' k'f' g'p'v'k'k'c'd'g' "u'g'ew't'k'v' i' w'c't'f' u' "lp' "y' g' "eq'w't'v'q'q'o' "f' w't'k'p'i "c" e't'ko' k'p'c'n' v't'k'cn' k'u' "p'q'v' k'p'j' g't'g'p'v' "r' t'g'lw'f' k'ek'cn' o' k'p' r'c't'i' g'r' c't'v' d'g'ec'w'ug' u'w'ej' "c' r' t'g'ug'p'eg' k'u' u'g'g'p' d' { "l'w'q't'u' cu' q't'f' k'p'c't' { "c'p'f' "g'z'r' g'v'g'f' "c'p'f' "d'g'ec'w'ug' "q'h' y' j' g' "o' c'p' { "p'q'p'r' t'g'lw'f' k'ek'cn' k'p'ht'g'p'eg'v'q' "v'q' "d'g' "f' t'c'y' p' "l't'q'o' "y' g' r' t'g'ug'p'eg' "q'h' u'w'ej' "u'g'ew't'k'v' "r' g't'g'p'p'g'n'r' *People v. Miranda. supra.'66'Ecn'f'f'cv'r 0336/3370'Y' g'z'c'o' k'p'g'q'p' "c' ec'ug' d' { / ec'ug' d'cu'k'v'j' g's' w'g'u'k'p'v'j' j' g'v'j' g't' "c'f'f' g'g'p'f' cp'v'c'ew'c'm' { "j' cu' d'g'g'p' r' t'g'lw'f' k'g'f' 'd' { 'y' g' r' t'g'ug'p'eg' q'h' u'g'ew't'k'v' q'h' h'k'g't'u'0*Id. "cv'r 03370-

P'q' r' t'g'lw'f' k'g'f' c'r' r' g'c't'u' 'lp' 'y' g' r' t'g'ug'p'v'ec'ug' 0'V'j' g' t'g'eq't'f' "t'g'h'g'ew' u'j' cv' 'v' n'g'cu'v' 'y' t'g'g' "q'h' h'k'g't'u' "y' g't'g' "y' g' "o' k'p'lo' w'o' "p'w'o' d'g't' u'w' h'k'g'p'v'q' r' t'q'x'k'f' g' l'g'ew't'k'v' { 'k'p'c' l'q'k'p'v't'k'cn'q'h' 'y' q' l'p'c't'eg't'c'v'g'f' f' g'g'p'f' cp'w' . "r' c't'v'ew'c't'n'f' "y' j' g'p' "q'p'g' "q'h' h'k'g't' "y' cu' "p'g'g'f' g'f' "v'q' c'w'g'p'f' "v'q' 'y' g' "o' g'cn'f'f' g'v'g'v'q't'0'U'q'o' g' "q'h' 'y' g' "q'h' h'k'g't'u' "y' g't'g' "p'q'v' x'k'k'ud'g'v'q' 'y' g' l'w't' { . "c'p'f' "y' g' eq'w't'v'p'q'v'g'f' "h'q't' 'y' g' t'g'eq't'f' "y' cv' 'y' g' c'v'o' q'ur' j' g't'g' 'lp' 'y' g' " *999 "eq'w't'v'q'q'o' 'y' cu' p'q'v'q'p'g' q'h' 'c'p'c't'o' g'f' eco' r' . "d'w' 'q'p' 'y' g' eq'p'v't'c't' { 'y' cu' t'g'r'v'k'x'g'n'f' "t'g'r'z'g'f' 0'V'j' g't'g' k'u' p'q' k'p'f' k'ec'v'k'p' "y' cv'f' g'g'p'f' cp'v' 'y' cu' r' t'g'lw'f' k'g'f' "d' { "y' g' "q'ec'cu'k'q'p'c'n' r' t'g'ug'p'eg' q'h' q'p'g'q't' 'y' q' w'p'k'k'q't'o' g'f' "d'c'k'k'k'hu" dg' { q'p'f' 'y' g' p'w'o' d'g't' eq'p'u'k'w'k'p'i "y' g' d'c't'g'o' k'p'lo' w'o' "p'g'eg'uu'c't' { "v'q' r' t'q'x'k'f' g' u'g'ew't'k'v' { 0 V'j' g' eq'w't'v' u'j' g'z'v'g'p'f' g'f' "eq'o' o' g'p'w' "q'p' 'y' g' t'g'eq't'f' "k'p'f' k'ec'v'g' "y' cv' k'v'f' k'f' "p'q'v' c'd't'q'i' c'v'g' "ku' c'w'j' q't'k'v' { "q'x'g't' "y' g' "o' c'w'g't' "q'h' u'g'ew't'k'v' { 0 D'cu'g'f' "q'p' 'y' g' t'g'eq't'f' . "y' g' eq'p'en'v'f' g'v'j' g' v't'k'cn'eqwtv'f' k'f' 'p'q'v'c'd'w'ug' ku'f' k'uet'g'v'k'q'p' q't' "f' g'r' t'k'x'g' "y' g'f' g'g'p'f' cp'v'q'h'f' v'g'r' t'q'g'uu' q'h' 'n'cy' k'p' 't'g'i' w'v'v'k'p'i "y' g' p'w'o' d'g't' "q'h' u'g'ew't'k'v' "r' g't'g'p'p'g'n'r' t'g'ug'p'v'lp' "y' g' eq'w't'v'q'q'o' 0

14. Conditions of confinement

*53c-+F' g'g'p'f' cp'v'eq'p'v'g'p'f' u' 'y' cv' p'w'o' g't'q'w'v' c'f' x'g't'ug' eq'p'f' k'k'q'p'u' q'h' eq'p'h'k'p'g'o' g'p'v'd'g'h'q't'g' c'p'f' "f' w't'k'p'i "y' g' i' w'k'u' r' j' cu'g' "q'h' 'y' g' v't'k'cn' ew'o' w'v'c'v'g' "v'q' "k'o' r' c'k't' "j' ku' c'd'k'k'v' { "v'q' "cu'ku'v'lp' "j' ku'f' g'g'p'ug' "c'p'f' v'q' "f' g'g'p'f' "j' ko' u'g'r'h'lp' "x'k'q'v'v'k'p' "q'h' 'y' g' "U'k'z'v' "c'p'f' "H'q'w'v'g'g'p'v'j' Co' g'p'f' o' g'p'w' "q'h' 'y' g' "W'p'k'g'f' "U'c'v'g'u' Eq'p'u'k'w'k'q'p' "c'p'f' "c't'v'k'eng' K' u'g'ew't'k'v' "37." q'h' 'y' g' "E'c'n'k'k'p'k'c' Eq'p'u'k'w'k'q'p' 0'J' g' cu'g't'v'u' 'y' cv' y' j' g'ug' "x'k'q'v'v'k'p'u' k'p'en'v'f' g'f' "j' ku' t'k'i' j' v' 'v' 'q' "f' w'g' "r' t'q'g'uu' "q'h' 'n'cy' . v'q' "cu'ku'v'lp' "j' ku' q'y' p' "f' g'g'p'ug' . "v'q' "y' g' g' h'g'v'k'x'g' "cu'ku'v'c'p'eg' "q'h' eq'w'p'ug'n' "v'q' "d'g' "r' t'g'ug'p'v' d'q'v' "r' j' { u'k'ec'm' { "c'p'f' "o' g'p'v'c'm' { "cv' c'm' r' t'q'g'g'f' k'p'i "u'c'i' c'k'p'v'j' ko . "c'p'f' "o'p'q'v'v'q' "d'g' "eq'o' r' g'n'g'f' "v'q' "u'c'p'f' v't'k'cn' g'z'eg'r' v' 'y' j' g'p' "c'd'g' "v'q' "o' g'c'p'k'p'i h'w'n'f' "cu'ku'v'j' ku' eq'w'p'ug'n'f'0

Ugctej gu'qh'j ku'egm'y gtg'iko kqf . "d { "qtf gt "qh'j g'eqwtv"vq vj qug'pgeguukcvgf 'd { 'ugewtkf 'eqpegtpu .cpf 'vj g'eqwtv'qf gtgf vj cv'vj g'eqpvgpv'qhf ghgpf cpv'u'igi crhk'g'pqv'dg'f'kw'w' gf 'vq'vj g r tqegewkqp'0'Ugg'People'v. Hardy'*3; ; 4+'4'Ecrf6j ' : 8.'3: 3']7 Ecrf'r u0f'9; 8.' : 47'R0f'9: 3_]r'gi kko cvg'ugewtkf 'eqpegtpu o c { "qwy gli j 'r tgvtkn'f g'ckp'gg'u'r t'kx'ce { 'tki j u_0'F ghgpf cpv j cf 'ht'gs wgpv'ceegu'v'v'j g'rcy 'tkdtct { 0^43 'Vj g'tgeqtf 'lpf lecvgu vj cv'f ghgpf cpv'eqp'hto gf 'j' g'j cf 'eqpuw'ngf 'y kj 'eqwpugn'q'p'c f ckn' 'dcuku'f v'kpi 'v'kcn'Vj g'tgeqtf 'cnuq'lpf lecvgu'f ghgpf cpv y cu'gzegr vkp'cm' 'y g'mlr tgr ctgf 'hqt'v'kcn'hqt'eqwpugn'cuugt'vf cu'b wej 'kp'v'wi kpi 'vj g'eqwtv'q'f t'cpv'vj g'Faretta'b qv'kqp'b cf g d { 'f ghgpf cpv'q'p'vj g'g'x'g'q'h'v'kcn'F ghgpf cpv.'vq'q. 'cuugt'vf 'cv'vj g j gctkpi 'qp'vj g'Faretta'o qv'kqp'vj cv'j g'y cu'y g'mlr tgr ctgf 'cpf cu'hpqy r'gf i g'cdng'cdq'w'vj g'ecug'cu'f ghg'pug'eqwpugn'ucv'kpi < 0'k'g'dggp'w' 'kp'vj g't'q'0'f g't'0' qf w'g'hqt'vj g'icuv'3: 'b qp'vj u'0'k'o cy ctg'q'h'vj g'ecug'0'k'hpqy 'vj g'ecug'1'wuv'cu'i qqf 'cu'cp { q'p'g'0'0'0

43 F ghgpf cpv' uwi i guu'vj cv'lpvgt'o kv'gpv'lpv'gt'tw'vkqp qh'j ku'rdtct { 'r t'k'k'gi gu'ct'k'k'pi 'ht'qo 'f'k'ue'k' r'k'p'ct { uc'p'ev'k'p'u' eq'p'u'k'w'g'f " c " f w'g' r t'q'eg'u' x'l'q'r'v'k'p'p. t'g'n' k'p'i "w' r'q'p' "Hewitt. Helms"*3; ; 9+'6: 4" WU0977]329" UEx'0'4894." ; 8" NCGf 04f "876_" c'p'f "Meachum v. Fano"*3; 98+'649" WU0'437"] ; 8" UEx'0'4754." 6; NCGf 04f "673_0'Vj g'ek'ev'k'p'u' ct'g' r w' | r'k'p'i =Hewitt j q'f u'v'j cv'c' r'qu'eq'p'x'v'k'p' r' t'k'q'p' 'l'p'o cv'g'y cu'p'q'v c' r' t'g'x'c'k'k'p'i " r' ct'v' " hqt " vj g' r' w'r' q'ug' qh' q'd'v'c'k'p'k'p'i cv'q't'p'g { 'h'g'u'lp'c' 'ek'k'k'k'k'k' j u'v'c'ev'k'p' 'd't'q'w' i v'w'p'f gt 64" W'p'k'g'f " U'c'v'g'u' E'q'f'g' u'g'ev'k'p' " 3; : 5." d'g'ec'w'ug g'x'g'p' vj q'w' i j " vj g' E'q'w't'v' qh' C'r'r' g'c'u' o c { " j c'x'g eq'p'ev'w'f g'f 'vj g' l'p'o cv'g'u' r' qu'eq'p'x'v'k'p' f' k'ue'k'r' r'k'p'ct { r t'q'eg'g'f k'p'i " j cf " x'l'q'r'v'g'f " j ku' eq'p'u'k'w'k'q'p'ev'k'p' t'k' i j u d { 'eq'p'x'v'k'p'i " j ko " qh' o' k'ue'q'p'f w'ev' u'q'r'g'n { "w' r'q'p' vj g d'cuku'q'h'j g'ctuc { . "p'q' t'g'r'k'h'y cu'c'h'q'f g'f 'vj g' l'p'o cv'g cr' ct'v'ht'qo " vj g' o' q'ten'uc'w'k'v'c'ev'k'p' qh' n'p'q'y k'p'i " vj cv c' h'g'f g'ten'eq'w't'v' j cf " eq'p'ev'w'f g'f " j ku' t'k' i j u' j cf " d'ggp x'l'q'r'v'g'f 0' Meachum" j g'f " vj cv'cp' l'p'o cv'g' j cf " p'q' f' w'g r t'q'eg'u' t'k' i j v'v'q' c' j g'ct'k'p'i " d'g'h'q't'g' t'c'p'u'h'g't' d'g'w' g'g'p r t'k'q'p'u' 0' Y g' q'd'ug't'x'g' p'q' f' w'g' r t'q'eg'u' x'l'q'r'v'k'p' " k'p y j cv' y g't'g' " cv' o' q'u'v' q'ec'c'u'k'q'p'ev'k'p' k'p'v'g't'tw' v'k'p'u' qh r'k't'ct { " r t'k'k'gi gu. " r ct'v'k'w'c't'n' " y j g'p' " k'v'ku' g'x'k'f g'p'v f ghgpf cpv'j cf " u'w'h'k'k'g'p'v'ceegu'v'q' d'g'y g'mlr tgr ctgf hqt'v'k'cn'0

F ghgpf cpv' cnuq' eq'p'vg'p'f u' vj cv' vj g' ek'tewo u'c'p'egu' qh eq'p'h'k'p'g'o g'p'v'x'l'q'r'v'g'f " j ku'cuugt'vf 'tki j v'0'p'q'v'q' d'g'eqo r g'm'g'f vq' u'c'p'f " v'k'cn' g'z'egr v' y j g'p' c'd'ng' vq' o g'ep'k'p'i h'm'n { " cuuk'v eq'w'p'ugn'0' Q'h'eq'w't'ug. " f w'g' r t'q'eg'u' q'h'rcy " r t'q'j k'd'ku'v'j g'v'k'cn'q'h cp' l'p'eqo r g'v'g'p'v'f ghgpf cpv'v'j q' ku' u'q' o g'p'v'c'm { " ko r c'k'g'f " cu'v'q d'g' *1002 " w'p'c'd'ng' vq' eq'p'u'w'v'c'v'k'p'cm' " y kj " eq'w'p'ugn' *Dusky

v. United States'*3; 82+'584' WU0624"] ; 2' UEx'09: : . '6' NCGf 04f : 46_+ " q't. " w'p'f g't' vj g' E'c'r'k'h'q't'p'k'c' u'c'p'f c't'f . " u'q' ko r c'k'g'f " cu'v'q' d'g w'p'c'd'ng' vq' 0'cu'k'v'v'eq'w'p'ugn' l'p' " vj g' eq'p'f w'ev' q'h'c' f ghg'p'ug' l'p' c t'ev'k'p'ev'k'p' o c'p'p'g't'0' *E'3589. " u'w'd'f 0' *c' -0' F ghgpf cpv' j q'y g'x'g't. o c'n'g'u' p'q' c'w'g'o r v'v'q' g'u'c'd'k'k'j " vj cv'j g'y cu' l'p'eqo r g'v'g'p'v'q u'c'p'f " v'k'cn'f w'u'w'c'p'v'v'q' vj g' c'd'q'x'g' u'c'p'f c't'f u. " p'q't' f' q'g'u' j g'cuugt'v vj cv'eq'w'p'ugn'o q'x'g'f " h'q't' c'p' g'z'c'o k'p'c'v'k'p' q'h'j ku'eqo r g'v'g'p'e { . " q't vj cv'v'j g'v'k'cn'eq'w't'v'uj q'w'f " j c'x'g' f' q'w'd'v'g'f " j ku'eqo r g'v'g'p'e { " c'p'f q't'f g't'g'f " c'j g'ct'k'p'i " q'p' vj g' k'u'w'g'0' Ugg' E'358: =People'v. Davis, supra, "32' Ecrf'6j " cv'r 0749 =People'v. Price, supra, "3' Ecrf'6j cv'r 05; 8/5; 90-

U'q'o g'eq'w't'v'j c'x'g' t'g'eq'i p'k' g'f . " l'p' vj g' eq'p'v'z'v' q'h' ek'k'k'k'k'k' i j u c'ev'k'p'u' d't'q'w' i v'd { " r t'g't'k'cn'f g'v'c'k'p'gg'u. " vj cv'eg't'v'c'k'p' eq'p'f k'k'q'p'u qh' eq'p'h'k'p'g'o g'p'v' o c { " u'q' ko r c'k' " vj g' f ghgpf cpv'u' c'd'k'k'v { " vq eq'o o w'p'lec'v'g' y kj " eq'w'p'ugn' q't' q'v' g't'y k'ug' r ct'v'k'ek' cv'g' l'p' vj g f ghg'p'ug' " vj cv' c' " f w'g' r t'q'eg'u' x'l'q'r'v'k'p' " q't' c'p' " k'p'h'k'p'i go g'p'v qh' vj g' t'k' i j v'v'q' " g'h'g'ev'k'x'g' cu'k'v'c'p'eg' qh' eq'w'p'ugn' t'g'u'w'u'0' *Ugg Johnson-El' v. Schoemel" * vj " Ek'0' 3; ; + : 9: " H0f " 3265. 3273" j q'd'ug't' x'l'p'i " vj cv'r t'g't'k'cn'f g'v'c'k'p'gg'u' j c'x'g' c' u'w'd'v'c'p'v'c'cn'f w'g r t'q'eg'u' l'p'v'g't'g'u'v'k'p' g'h'g'ev'k'x'g' eq'o o w'p'lec'v'k'p' y kj " eq'w'p'ugn' c'p'f vj cv'k'h'v'j ku' l'p'v'g't'g'u'v' k'u' t'g'ur g'ev'g'f " l'p'c'f g's w'ev'g'n' . " vj g' h'c'k'p'g'u' qh v'k'cn' o c { " d'g' eq'o r t'q'o k'ug'f = Campbell" v. McGruder" * F 0 E0 Ek'0' 3; 9: + 7: 2" H0f " 743. " 753/754"]3: : " C'r'r' 0' E0' 47: _] u'c'v'k'p'i " vj cv' eq'p'f k'k'q'p'u' qh' eq'p'h'k'p'g'o g'p'v' cr' ct'v'ht'qo " vj g' h'ev qh' eq'p'h'k'p'g'o g'p'v' k'ug'h' " vj cv' ko r g'f g' c' " f ghgpf cpv'u' c'd'k'k'v { " vq r t'g'r' ct'g' c' f ghg'p'ug' q't' f' co' c'i g' vj g' f ghgpf cpv'u' o g'p'v'c'nc'g't' v'p'g'u' cv' v'k'cn' ct'g' 0' eq'p'u'k'w'k'q'p'cm' " u'w'v' g'ev'o' c'p'f " o w'u'v' d'g' l'w'v'h'k'g'f d { " eq'o r g'm'k'p'i " p'g'eg'u'k'v { = Jones" v. City and County of San Francisco" * P 0 Ecrf'0'3; ; 9+; 98" H0w' r 0' : ; 8." ; 35"] r'ev'n' q'h r t'k'x'ce { " h'q't' r t'g't'k'cn'f g'v'c'k'p'gg'u' eq'p'u'w'v'c'v'k'p' y kj " eq'w'p'ugn'o c { ko r n'ec'v'g' H'q'w'v'g'g'p'v' " c'p'f " U'k'z'v' " Co' g'p'f o g'p'v' k'h' cv'q't'p'g { u c'd'k'k'v { " c'f g's w'ev'g'n' " vq' r t'g'r' ct'g' c' f ghg'p'ug' ku' ko r c'k'g'f = Dillard v. Pitchess" * E 0 Ecrf'0'3; 97+5; ; " H0w' r 0' 3447. " 3458"] u'ng'g'r f'gr t'k'c'v'k'p' f' w'g' vq' t'c'p'ur q't'v'c'v'k'p' u'ej' g'f w'g' d'g'w' g'g'p' l'c'k'i' c'p'f eq'w't'v' q'w'ug' o c { " x'l'q'r'v'g' f w'g' r t'q'eg'u' qh' r'ey " d { " c'h'g'ev'k'p'i f ghgpf cpv'u' c'd'k'k'v { " vq' " cu'k'v' eq'w'p'ugn' 0' Q'p' " vj g' q'v' g't' j c'p'f . eq'p'f k'k'q'p'u' qh' eq'p'h'k'p'g'o g'p'v' vj cv'j c'x'g' p'q'v' c'ew'c'm { " c'h'g'ev'g'f vj g' f ghgpf cpv' c'f x'g't'ug'n' { " ct'g' p'q'v' i t'q'w'p' u' h'q't' t'g'x'g't'uc'n' qh' c eq'p'x'v'k'p' = cu' y g' j c'x'g' f g'v'g't'o l'p'g'f . " c' f ghgpf cpv' y j q' y cu t'g'r' t'g'ug'v'k'p'i " j ko u'g'h' j cu' p'q' t'k' i j v'v'q' c' " eq'p'v'p'w'c'p'eg' " q'p' " vj g i t'q'w'p' " j g' j cf " p'q'v' t'g'eg'k'x'g'f " g'k' i v'j q'w't'u' qh' u'ng'g'r " vj g' p'k' i j v d'g'h'q't'g' vj g' r t'q'eg'g'f k'p'i . " y j g'p' p'q'v' k'j u'c'p'f k'p'i " vj ku' c'f x'g't'ug eq'p'f k'k'q'p' qh' eq'p'h'k'p'g'o g'p'v' vj g' t'g'eq't'f " l'p'f lecv'g'f " vj g' f ghgpf cpv y cu' cy c'ng' c'p'f " e'c'r' c'd'ng' q'h' r ct'v'k'ek' v'k'p'i " l'p' vj g' r t'q'eg'g'f k'p'i u'0 *People'v. Smith"*3; ; 7+5: " Ecrf'6f " ; 67. ; 75"] 438" Ecrf'r u'0 ; ; . " 924" R0f " 3: 2_ = ugg' cnuq' " People" v. Davis" *3; ; 9+3: ; Ecrf'Cr r 0' f " 3399. " 33; 9"] 456" Ecrf'r u'0' : 7; _] p'q' l'p'f lecv'k'p f ghgpf cpv'u' r g'h'q't'o c'p'eg' cu' r t'q' ug' eq'w'p'ugn' y cu' c'h'g'ev'g'f

cf xgtugn d{ 'lungr f gr tkxcvqp . f kucr r tqxgf 'qp'bpqj gt 'r qlpv
kp "People v. "Snow" *3; : 9+66"Ecrf" 438."447"464"Ecrf" r v0
699."968"R0f "674_0-

Vj g" tgeqt f "lp" vj g" r tguqpv" ecug" f qgu" pqv" kpf kecvg" vj cv' vj g
eqpf kkpqu'qh'f ghgpf cpv'u'eqphkpgo gpv'uq' kpvgtgtgf "y kj" j ku
cdkkrv{ "v"eqo o wplecvg'y kj " *1003 "eqwpugn'qt"cuukv'lp"vj g
f ghgpeg"cu"v"eqpukwvg" c"xlqrvcqp"qh'f ghgpf cpv'u'tki j u"v
f vg" r tqeguu"qt" vj g" ghgpeg" cuukvpeg" qh'eqwpugn'Y g" ctg
r gtuwcf gf "vj cv'vj g'ektewo ucpegu'f gnetkdgf "d{ "f ghgpf cpv'j cf
pq" r tglwf lekcn'ghgev"qp" j ku" cdkkrv{ "v"cuukv'lp" j ku'f ghgpeg
qt" qp"eqwpugn'u" cdkkrv{ "v" f ghgpf "j ko O'Y kj "tgr gev"v" vj g
eqpf kkpqu'qh'f ghgpf cpv'u'eqphkpgo gpv'dghqt g'v' g'gxkf gpvkt {
r qtvcqp'qh'v' g'i wkn'r j cug'qh'v' g'v'kteveqo o gpegf . 'k'ku'gxkf gpv
eqwpugn'j cf "eqphgtgf "emugn' "y kj "f ghgpf cpv'v' tqwi j qw'vj g
r tqeggf kpi u0'Vj g"eqwtv'y cu'ucnekqwu'tgi ct f kpi "f ghgpf cpv'u
eqo r rkpva . 'tgs wgvw' "eqpvcvki "lckl'cwj qtkkku'cpf "j qif kpi
j gctkpi u'v"cwgo r v'v' "tguqrkg'r tqdrgo u . 'cpf "qt f gctkpi "vj cv'pq
ugctej gu'qh'f ghgpf cpv'u'egm'dg"eqpf wevgf "gzegr v'htq "ugewtkv'
tgcuppu'Cu"tgr qpf gpv' qdugt xgu . "pq" o cvgtkcn' qdugt xgf "d{
uj gthhu" f gr wkuu" f wtkpi " c" ugctej "qh' f ghgpf cpv'u' egm' y cu
kpv'qf wegf "cv' v'kten' qt" wugf " d{ " vj g" r tqgewkqp" v" f g'xgmr
ku" ecug" ci ckpuv' j ko . "cpf " f ghgpf cpv'u' cdkkrv{ "v" ckf "lp" j ku
f ghgpeg" y cu"pqv' ko r cktgf "d{ " vj g" m'uu' qh' cp{ " etk'kten' rgi cn
o cvgtkcn'lp" j ku' r quugukp0" *Ugg" "People v. Stansbury" *3; ; 5+
6" Ecrf vj "3239."3269/326: "j39" Ecrf r v0f "396." : 68" R0f
978_ " txf'0' qp" qv' gt" i tqwpf u" lp" Stansbury v. California
*3; ; 6+733" WLU 53: "j336" UE v' 3748."34: "NGf 0f "4; 5_0-
F ghgpf cpv' kpewtgf "f kuer rkpct { "ucpev'kpu"lp" lckn' dw' g'xgp
f ghgpeg"eqwpugn'eqpegf gf "vj cv'f ghgpf cpv'p'ggf gf "v" ko r tqxg
j ku' dgj c'xkqt "lp" qtf gt "v" c'xkqf "uwej "ucpev'kpu"lp" vj g' h'w'w'g0
k'p'w'k'g'u' l'p'hr'evgf "d{ "q'v' gt "l'po cv'v'y gt g'o k'p'q' c'eeqt f kpi "v" c'
r j { u'ekcp' y j q' "guk'k'gf "cv'c'j gctkpi "qp" vj g'b' cwgt . 'cpf "f ghgpeg
eqwpugn'eqpegf gf "cu'o wej 0

O quv'ki p'k'kecpw' . 'cu'pqvgf . 'vj g'eqo o gpv'qh'f ghgpeg'eqwpugn
cpf 'qh'f ghgpf cpv'j ko ugrh'qp'v' g'gxg'qh'v' g'gxkf gpvkt { 'r qtvcqp
qh'v' g'v'kten'gucdkuj "ergctn' "vj cv'f ghgpf cpv'y cu'pqv'r tglwf legf
d{ "cf xgtug'ektewo ucpegu'qh'eqphkpgo gpv'dw'qp' vj g'eqpvtct { .
j cf "dggp" c'nrq" v" "vng" cf xcpvci g" qh' cf gs wcvg" qr r qtwpk'k'gu
v" cuukv' lp" j ku' qy p" f ghgpeg' Y j gp" f ghgpf cpv' o cf g" j ku
ugeqpf "Faretta" o q'v'k'p . "eqwpugn'cuugtvgf "vj cv'f ghgpf cpv'y cu
y gm' r tgr ctgf " cpf "lp" c" i q'qf " r qukkqp" v" f ghgpf " j ko ugrh
y kj qw'cp { "eqpvcvki . "d'gecwug'qh'v' ku'gzegm'gpv'hpqy rgi i g
qh' vj g" ecug" cpf "lp'v'ko cvg" h'co k'ktk'k' "y kj " vj g" rgi cn' kuugv
k'p'x'k'g'f O' Eqwpugn' ej ctcevgtk' gf " f ghgpf cpv' cu" ogo k'p'gpv'
s w'k'k'k'gf "00" v" j cpf ng" vj ku" ecug . o" p'v'k'pi " f ghgpf cpv'u" r tkqt
cuukvpeg" v" eqwpugn' cpf " eqpen'f kpi " vj cv'f ghgpf cpv' n'p'gy
vj g" ecug" cu" y gm' cu' qt" r g' tr cu' dgwgt " vj cp" eqwpugn' Eqwpugn

ucv'gf " j g" j cf " i k'xgp" f ghgpf cpv' vj g" gpv'kt g" ecug" h'kg . " cpf
o'j g" j cu" y q'ntngf " vj g" ecug . " cpf " j g" n'p'qy u" vj g" ecug" xgt {
xgt { "y gm'0'J g" r tqdcdn' " n'p'qy u" vj ku" ecug" dgwgt " vj cp" o cp {
o cp { "r'xy { gtu'y q'w'f " n'p'qy " k'k'k'v' g { "y g'g' t'gr t'gug'v'k'pi " j ko O
Vj g" f ghgpf cpv' j cu" 00' dggp" i k'xgp" r tq0' r g'0' r tk'k'k'gi gu . "v'q'qm
vj g" o quv' qh' vj go " cpf " o cf g" vj g" o quv' qh' vj go 0" Eqwpugn
tghgtgf "cf o k'k'pi n' "v' cp' cp'cn' uku'f ghgpf cpv'j cf "t'gr ctgf "qh'c
y k'p'guu'v'gu'ko qp { . 'y kj "ekcv'k'p'u'v' vj g' t'geqt f "cp' h'q'v'p'q'v'g'u .
cpf "qdugt xgf " vj cv'f ghgpf cpv'j cf "rgctpgf "t'qo "eqwpugn'u" cpf
vj g' r tqegw'q' t'v' b' q'v'k'p'u'j qy "v' g'zr' t'guu'j ko ugrh'lp' c'rcy { g'nr'
u'f r'g'0'F ghgpf cpv' v'q' . 'ucv'gf "cv'v'j ku'j gctkpi "vj cv'j g'y cu't'gcf {
v" *1004 " r tqeggf "cu'j ku'qy p' eqwpugn'qp' vj g' xgt { "f c { "qh'j ku
o q'v'k'p . 'y kj qw'cp { "eqpvcvki o'F ghgpf cpv'cuugtvgf "vj cv'j g
y cu' y gm' r tgr ctgf " cpf " cu" n'p'qy rgi i g'cd'p' cd'q'w' vj g' ecug" cu
eqwpugn' cpf " eqwpugn'cuugtvgf " vj cv'f ghgpf cpv'j cf " dggp" xgt {
j gr h'w'k'p "cuukv'k'pi "v" r tgr ctgf "v' g' f ghgpeg'0'Vj g'ug' u'cv'go gpv
ctg' s' w'kg' k'p'eqpuk'v'p'v' y kj " vj g' eqpvcvki vj cv'v' g' eqpf kkpqu
qh' f ghgpf cpv'u' eqphkpgo gpv' u'w'ucv'k'cm' " j cf " ko r cktgf " j ku
cdkkrv{ "v" cuukv'lp" j ku' f ghgpeg" qt" j ku' cdkkrv{ "v" eqo o wplecvg
y kj "eqwpugn'0

Y kj "tgr gev"v' u'w'dugs w'gpv'r tqeggf kpi u'f wtkpi "vj g'i wkn'r j cug
qh'v' g'v'kten' vj g' t'geqt f "cuu' f q'gu'p'q'v'lw' r qt'v'v' g'eqpvcvki vj cv
vj g' eqpf kkpqu'qh'eqphkpgo gpv'ecwugf "f ghgpf cpv'v' dg'w'p'cd'rg
v' eqo o wplecvg' cf gs w'cv'k' "y kj "eqwpugn'qt" r ct'v'k' cv'g'lp' vj g
f ghgpeg'0'Q'p' vj g' eqpvtct { . "f ghgpeg" eqwpugn'ucv'gf "cv' xctk'q'wu
r q'k'p'u" lp" vj g" v'kten' vj cv' f ghgpf cpv' j cf " f'q'pg" c" v'go g'p' q'wu
co q'w'p' qh' y q'ni'qp' vj g' ecug" cpf " j cf " dggp" qh' x'k'cn' cuukvpeg
v" eqwpugn' cpf " vj cv' f ghgpf cpv' cpf " eqwpugn' y g'g' lp" emug
eqo o wplecvk'p'0'Vj g' eqwt'v'eqo o gpv'gf " vj cv'v' g'c'w'q'p'g' / er'k'p'v
t'g'v'k'p'uj k' r " j cf " dggp" y q'ntkpi " y gm' cpf " vj cv'f ghgpf cpv' / cpf
eqwpugn' eqphgtgf " tgi w'ctn' 0'Vj g' v'kten' eqwt'v' k'p'v'g'x'p'gf " y kj
lckl'cwj qtkkku" v" g'p'w'g" vj cv'f ghgpf cpv' y q'w'f " j c'x'g' ceeguu
v" j ku" rgi cn' o cvgtkcn . " cpf " cuu' " eqpvcvki " lckl'cwj qtkkku" v'
ctt'cpi g . "v' vj g'z'v'p'v'r quuk'rg . " vj cv'f k'uek' r'k'p' h'qt " f ghgpf cpv'u
lckl'k'p'ht'cev'k'p'u' y q'w'f " p'q'v' k'p'v'gt'gt'g' y kj " f ghgpf cpv'u' cdkkrv{ "v"
r ct'v'k' cv'g'lp" vj g' r tqeggf kpi u' d{ " r'g'c'x'k'pi " j ko "v'q'j" w'pi t { "qt
v'k'gf 0'Vj g' eqwt'v' t'geguugf " g'ctn' "v" c'eeqo o qf cv'g' f ghgpf cpv'u
p'ggf " v" eqpuw' " j ku" h'kgu . " cpf " k'p'x'k'g'f " eqwpugn' v" t'gecm
c" y k'p'guu' eqpegtp'k'pi " y j qo " f ghgpf cpv' er'ko gf " v" j c'x'g
dggp" w'p' r tgr ctgf " v" cuukv' h'qto w'cv'k'pi " et'quu' g'z'co k'p'cv'k'p'0
Vj g' eqwt'v' eqo o gpv'gf . " j qy g'x'gt . " vj cv'ku' cdkkrv{ "v" k'p'v'g'x'p'g
y cu' rko k'g'f "lp" r ctv' d'gecwug" f ghgpf cpv' dt'qwi j v' t'g'ut'k'v'k'g
f k'uek' r'k'p'g'qp" j ko ugrh'v' tqwi j " eqo dc'v'k'g' dgj c'x'k'qt "lp" lckl'0

F k'k'k'ew'k'gu" y kj " tgr gev" v" f ghgpf cpv'u" v'cpur qt'cv'k'p'p
uej gf w'g' cpf " y kj " vj cem'k'pi "lp" vj g'j q'f k'pi " egm'r tkqt "v" eqwt'
r tqeggf kpi u' t'gewt'gf " r g'k'q'f k'ecm' . " cpf " vj g' eqwt'v' t'g'ur q'p' gf "v"
g'cej "qh'f ghgpf cpv'u' eqo r r'kp'v'u' d{ " eqpvcvki " vj g' t'gr qp'uk'rg

uj gthhu" f gr ctvo gpv' r gtuqppgn' qt" dckkhh' kp" cp" ghqtv' vq co grkqtcvg" vj g' ukwcvkqp" d{ "ugewtkpi "f ghgpf cpv' c" r mceg" qp cp" gctrktg" dwu" qt" gpuwtkpi "vj cv' j ku" y tkkpi "j cpf" tgo clpgf wpuj cemgf "kp" vj g' j qrf kpi "egm' Cn' j qwi j "vj gug" ghqtu' y gte pqv' c' u' uweegulm' y g' bqvg' vj cv' xgp' f ghgpg' eqwpugn' tgy y gct { "qh' f ghgpf cpv' u' eqo r rckpw' cpf' ej cvkugf "f ghgpf cpv' hqt lckkpi "vq" tgeqi pk' g' vj cv' vj g' eqwtv' j cf "f qpg" gxt { vj kpi "kp ku" r qy gt "vq" co grkqtcvg" vj g' eqpf kkp' u' qh' j ku' eqphkgo gpv' Vj g' eqwtv' ucvgf "kv' j cf "eqpvcvgf "vj g' lckl' qp" gxt { "qecukqp y j gp' f ghgpf cpv' eqo r rckpgf "qh' t' gwtpkpi "r' v' g' vj" ku' egm' l' t' go eqwtv' "cpf" "pgct" vj g' eqpenwkqp" qh' vj g' r tqeggf kpi u' f ghgpg eqwpugn' ucvgf "vj cv' f ghgpf cpv' u' t' cpur qt' v' kqp" r tqdrgo u' j cf dggp' cwpgf gf "vq" cpf "vj cv' r tqdrgo u' t' grv' kpi "vq" eqpf kkp' u' qh' eqphkgo gpv' y gte' dgkpi "v' cngp" ectg' qh' cu' vj g' { "eco g' w' r0 *1005

Eqpegtpu" tgi ctf kpi " r tkcvg" ur ceg" hqt" cwqtpg { /erkgpv k' v' g' x' l' g' y u' y g' t' g' u' a' r' k' g' f "ur g' g' f k' l' . "cpf "u' d' u' c' p' v' k' n' i' c' w' q' t' p' g' { / erkgpv' eqpvcvg' cu' g' puwt' g' f 0Vj g' eqwtv' b' q' v' g' f vj cv' f ghgpf cpv' b' p' f eqwpugn' eqphgt' g' f "tgi w' c' t' n' l' "k' p' vj g' eqwtv' q' qo "k' p' vj g' o' q' t' p' k' i' c' p' f "c' v' t' g' e' g' u' u' . "cpf "f ghgpf cpv' ucvgf "j g' j cf "dggp' eqphgt' kpi y kj "eqwpugn' y q' t' vj tgg' v' k' o' g' u' c' f c' { "ukpeg' vj g' v' t' k' n' i' d' e' i' c' p' 0 F ghgpf cpv' u' ucvg' o' g' pu' v' q' vj g' eqwtv' t' g' i' c' t' f' k' p' i' "eqpf kkp' u' qh' eqphkgo gpv' y gte' eqj g' t' gpv' b' p' f "g' x' g' p' k' p' e' k' u' k' x' g' . "f go q' p' u' t' c' v' k' p' i' p' q' u' i' p' qh' o' g' p' v' c' n' i' eqphwkqp' 0F ghgpf cpv' / c' p' f "eqwpugn' i' c' i' t' g' g' f vj cv' f ghgpf cpv' j cf "dggp' c' d' r' g' v' q' t' r' g' t' g' c' f' c' k' l' { "c' p' c' n' l' u' k' u' qh' vj g' r tqeggf kpi u' y kj "u' w' i' g' u' n' g' f "s' w' g' u' k' p' u' h' q' t' "eqwpugn' v' q' "w' u' g' "k' p' g' z' c' o' k' p' k' p' i' "y' k' p' g' u' g' u' 0

Cu' pqvgf . "eqwpugn' o' cf g' p' q' "erko "f v' t' k' p' i' " vj ku' r g' t' k' q' f " vj cv vj g' cumulative" d' w' t' f' g' p' qh' c' f' x' e' t' u' g' eqpf kkp' u' qh' eqphkgo gpv eqpukwgf "c" U' k' z' vj "q' t' "H' q' w' t' v' g' g' p' j "C' o' g' p' f' o' g' p' v' x' l' q' r' v' k' p' . "p' q' t' f' l' j' "g' o' c' n' g' "c' o' q' v' k' p' "h' q' t' o' k' u' t' k' r' i' q' p' " vj ku' d' c' u' k' o' P' q' "c' d' w' u' g' "q' h' f' l' u' e' t' g' v' k' p' "c' r' r' g' c' t' u' "k' p' vj g' v' t' k' n' i' e' q' w' t' v' u' j' c' p' f' r' k' p' i' "q' h' f' ghgpf cpv' u' eqo r rckpw' . "p' q' t' "f' q' u' v' j' g' t' g' e' q' t' f' "q' p' "c' r' r' g' e' n' f' g' o' q' p' u' t' c' v' g' " vj cv f ghgpf cpv' y cu' w' p' c' d' r' g' " vq" r' c' t' v' e' k' r' c' v' g' "k' p' vj g' r' tqeggf kpi u' q' t' eqphgt' "c' r' r' t' q' r' t' k' v' g' n' l' "y' k' j' "eqwpugn' q' t' " vj cv' j' ku' c' d' k' k' v' l' "v' q' "c' u' u' k' v' k' p' j' ku' f' ghgpg' y' cu' lo' r' c' k' t' g' f' "w' p' e' q' p' u' k' w' k' p' c' m' { 0

Y kj "t' g' u' r' g' e' v' "v' q' "f' ghgpf cpv' u' "eqpvcvgf" vj cv' j' g' u' w' t' g' t' g' f' "c' x' l' q' r' v' k' p' "q' h' j' ku' t' k' i' j' v' v' q' "d' g' "r' t' g' u' g' p' v' c' v' t' k' n' "y' g' q' d' u' g' t' x' g' " vj cv g' z' e' g' r' v' j' g' p' j' g' e' j' q' u' g' "v' q' "c' d' u' g' p' v' j' k' o' u' g' h' "h' t' q' o' " vj g' v' t' k' n' i' c' p' f' t' g' o' c' l' p' "k' p' vj g' j' q' r' f' k' p' i' "c' p' m' "f' ghgpf cpv' y' cu' r' t' g' u' g' p' v' c' v' t' k' n' r' tqeggf kpi u' vj cv' r' u' e' u' g' f' "h' q' t' " o' c' p' { "o' q' p' v' u' "c' p' f' "k' p' "y' j' k' e' j' "j' g' e' r' g' e' t' n' l' "y' cu' c' d' r' g' "v' q' "c' u' u' k' v' "e' q' w' p' u' g' n' l' k' p' " o' q' w' v' k' p' i' "c' "x' l' i' q' t' q' u' w' f' ghgpg' 0H' w' t' g' t' . "f' ghgpf cpv' f' q' u' v' p' q' v' t' g' h' t' "v' q' "c' p' { "c' w' j' q' t' k' v' g' u' c' d' r' i' k' j' k' p' i' "k' p' "y' j' c' v' t' g' u' r' g' e' v' c' o' g' p' v' c' m' { "e' q' o' r' g' v' g' p' v' f' ghgpf cpv' j' cu' c' "h' w' t' v' j' g' t' "t' k' i' j' v' v' q' "d' g' o' g' p' v' c' m' { "r' t' g' u' g' p' v' c' v' j' g' r' tqeggf kpi u' 0 Y g' p' q' v' g' vj cv' v' t' k' n' i' e' q' w' p' u' g' n' l' k' f' "p' q' v' c' u' u' g' t' v' v' j' c' v' f' ghgpf cpv' y' cu

l' p' e' q' o' r' g' v' g' p' v' q' "u' c' p' f' "v' t' k' n' i' 0F ghgpf cpv' y' cu' p' q' v' k' p' " vj g' r' q' u' k' k' q' p' qh' c' r' g' t' u' q' p' "y' j' q' u' g' "r' j' { u' k' e' c' n' i' f' k' u' c' d' k' k' v' l' . "u' w' e' j' "c' u' "f' g' c' h' p' g' u' u' . "ku u' w' e' j' "c' u' "v' q' "l' o' r' q' u' g' "w' r' q' p' "v' j' g' e' q' w' t' v' j' g' f' w' l' "v' q' "b' o' c' n' g' "t' g' c' u' q' p' c' d' r' g' r' t' q' x' k' u' k' p' u' "v' q' "c' k' f' "v' j' g' f' ghgpf cpv' u' q' "c' u' "v' q' "g' p' u' w' t' g' v' j' c' v' j' ku' q' t' "j' g' t' r' t' g' u' g' p' e' g' "c' v' t' k' n' i' k' u' b' o' g' c' p' k' p' i' h' w' r' 0"U' g' g' . "g' d' 0" People v. Freeman *3; 6-: "E' c' i' r' 6' vj "672. '69: /69; "J56" E' c' i' r' v' t' 0' f' 77: .: : 4" R' 0' f' 46; . "53" C' O' N' O' T' 0' vj " : : : _ "] p' q' v' k' p' i' " f' w' l' " q' h' " e' q' w' t' v' " v' q' " r' t' q' x' k' f' g' t' g' c' u' q' p' c' d' r' g' " h' e' k' k' k' l' g' u' " h' q' t' " c' " j' g' e' t' k' p' i' " l' o' r' c' k' t' g' f' " f' ghgpf cpv' 0" C' u' y' g' " j' c' x' g' " q' d' u' g' t' x' g' f' . " o'] g' _ x' g' p' " v' q' v' c' i' r' j' { u' k' e' c' n' i' c' d' u' g' p' e' g' " h' t' q' o' " c' j' g' e' t' k' p' i' " k' u' " p' q' v' t' g' x' t' u' k' d' r' g' " w' p' r' g' u' u' " vj g' f' ghgpf cpv' u' " r' t' g' u' g' p' e' g' d' g' e' t' u' c' " t' g' c' u' q' p' c' d' n' l' " u' w' d' u' c' p' v' k' n' i' t' g' r' v' k' p' " v' q' " vj g' " h' w' m' p' g' u' u' " q' h' vj g' f' ghgpf cpv' u' " q' r' r' q' t' w' p' k' v' l' " v' q' " f' ghgpf " c' i' c' k' p' u' v' j' g' e' j' c' t' i' g' u' 0" *I' d. c' v' r' 0' 69; = u' g' g' " c' n' u' q' " People v. Medina " *3; ; 2- " 73" E' c' i' r' 6' f' " : 92. ; 24; 25"] 496" E' c' i' r' v' t' 0' : 6; . "9; ; " R' 0' f' " 34: 4 _ " c' h' f' 0' s' u' b' n' o' m' . Medina v. " California " *3; ; 4- " 727" W' L' U' 659"] 334 " U' E' : 04794. 342" N' G' f' 0' f' " 575 _] p' q' v' k' p' i' ' b' c' p' { " e' c' u' g' u' k' p' y' j' k' e' j' " vj g' f' ghgpf cpv' u' c' d' u' g' p' e' g' " h' t' q' o' " e' g' t' v' c' k' p' r' t' q' e' g' g' f' k' p' i' u' y' c' u' f' g' g' o' g' f' " p' q' p' r' t' g' l' w' f' k' e' k' n' k' p' " h' i' j' v' q' h' vj g' f' ghgpf cpv' u' " q' x' g' t' m' l' c' d' k' k' v' l' { " v' q' " f' ghgpf " c' i' c' k' p' u' v' j' g' e' j' c' t' i' g' 0" *K' p' c' p' { " g' x' g' p' v' c' u' y' g' " *1006 " j' c' x' g' f' g' o' q' p' u' t' c' v' g' f' . " vj g' t' g' e' q' t' f' " q' u' v' b' q' v' l' w' r' r' q' t' v' f' ghgpf cpv' u' " e' q' w' p' v' g' v' k' p' " vj cv' j' g' y' c' u' b' p' q' v' o' g' p' v' c' m' { " r' t' g' u' g' p' v' o' c' v' j' ku' v' t' k' n' i' 44

44 Vq" vj g' g' z' v' g' p' v' f' ghgpf cpv' eqpvcvgf u' vj cv' vj g' eqpf kkp' u' qh' j' ku' eqphkgo gpv' eqpukwgf "c" f' gpken qh' hwpf co gpv' f' v' g' r' tqeguu' qh' r' y' "k' p' vj cv' vj g' { eqpukwgf " r' w' p' k' u' j' o' g' p' v' k' p' " c' f' x' c' p' e' g' " q' h' l' w' f' i' o' g' p' v' *ugg" Bellv. Wolfish " *3; 9; + " 663" W' L' U' 742. " 756. 769/76: "] ; ; " U' E' v' 0' 3: 83. " 3: 93. " 3: 9: /3: 9; . " 82 N' G' f' 0' f' " 669 _ + " y' g' p' q' v' g' vj cv' c' v' t' k' n' i' e' q' w' t' v' r' t' q' r' g' t' n' l' f' g' h' g' t' u' " v' q' " c' " i' t' g' c' v' g' z' v' g' p' v' " v' q' " vj g' l' w' f' i' o' g' p' v' q' h' l' c' k' n' c' w' j' q' t' k' l' g' u' " t' g' i' c' t' f' k' p' i' " vj g' " e' q' p' f' k' k' p' u' " q' h' c' " r' t' g' v' t' k' n' f' g' v' c' l' p' g' g' u' " e' q' p' h' k' g' o' g' p' v' 0 *I' d. " c' v' r' r' 0' 762. " h' p' 0' 45. 769/76: "] ; ; " U' E' v' 0' c' v' r' r' 0' 3: 97. " 3: 9: /3: 9; _ 0- Vj g' eqwtv' i' g' p' g' t' c' m' { " f' g' h' g' t' u' " v' q' " u' w' e' j' " c' w' j' q' t' k' l' g' u' t' g' i' c' t' f' k' p' i' " t' g' u' t' c' l' p' u' " q' p' " vj g' f' ghgpf cpv' u' " h' d' g' t' v' l' k' l' " vj g' u' g' " t' g' u' t' c' l' p' u' " c' t' g' " t' g' c' u' q' p' c' d' n' l' " t' g' r' v' g' f' " v' q' " c' r' e' i' k' l' o' c' v' g' " i' q' x' g' t' p' o' g' p' v' r' w' r' q' u' g' / u' w' e' j' " c' u' " v' q' " g' p' u' w' t' g' vj g' f' ghgpf cpv' u' " r' t' g' u' g' p' e' g' " c' v' " v' t' k' n' i' " q' t' " v' q' " o' g' g' v' k' p' u' k' w' w' k' p' c' n' i' g' e' w' t' k' v' l' " p' g' g' f' u' c' p' f' " vj g' p' g' g' f' h' q' t' k' p' v' t' p' c' n' q' t' f' g' t' " c' p' f' " f' k' u' e' k' r' i' k' p' g' " *I' d. " c' v' r' r' 0' 758/762. " 769/76:] ; ; " U' E' v' 0' c' v' r' r' 0' 3: 94/3: 96. " 3: 9: /3: 9; _ + w' p' r' g' u' u' vj g' t' g' " ku' u' w' d' u' c' p' v' k' n' i' g' x' l' f' g' p' e' g' " k' p' " vj g' t' g' e' q' t' f' " v' q' k' p' f' l' e' c' v' g' " vj cv' u' w' e' j' " e' q' p' f' k' k' p' u' " l' o' r' q' u' g' " t' g' u' t' c' l' p' u' vj cv' c' t' g' " g' z' e' g' u' k' x' g' " t' g' r' v' k' x' g' " v' q' " vj g' " r' e' i' k' l' o' c' v' g' i' q' x' g' t' p' o' g' p' v' c' n' i' r' w' r' q' u' g' 0 *I' d. " c' v' r' 0' 76: "] ; ; " U' E' v' 0' c' v' r' 0' 3: 9; _ 0" Vj g' t' g' e' q' t' f' " u' w' i' i' g' u' w' " u' t' q' p' i' n' l' " vj cv vj g' eqpf kkp' u' l' o' r' q' u' g' f' " w' r' q' p' " f' ghgpf cpv' t' g' r' v' g' f' " v' q' r' e' i' k' l' o' c' v' g' i' q' x' g' t' p' o' g' p' v' c' n' i' r' w' r' q' u' g' . " c' p' f' " k' p' " c' p' { " g' x' g' p' v' j' ku' e' r' k' o' " j' cu' r' k' w' g' " v' q' " f' q' " y' k' j' " vj g' " x' c' r' i' f' k' v' l' " q' h' vj g

lwf i o gpv'gpvgtgf "ci kpuv'j ko "kh'j ku'tki j v'vq" c"hc k
vkrnlqy gty kug'y cu'qdugtxgf 0

15. Testimony of Arvie Carroll

*55c+ F ghgpf cpv' eqpvpgf u" Ctxlg" Ecttqm) vgu ko qp{
tgeqwpvki "f ghgpf cpvu'lckj qwug'cf o kulkqp"vj cv'j g'o wtf gtgf
F gyevkxg"Y krko u'y cu'cf o kvgf "kp"xlqrkvqp"qh'f ghgpf cpvu
Ukz vj "Co gpf o gpv'tki j v'vq"eqwpugr0*Ugg"Massiah"v. United
States"3; 86+599"WO0423."427": 6"UE v033; ; "3424/3425.
34" NCGf 0f " 468_0" Kp" cf f kkkp." f ghgpf cpv' eqpvpgf u" vj g
vguko qp{ "y cu'vq" wptgrkcdng"v"ucvuh{ "o kpo wo "f go cpf u
qh'f wg" r tqegu" qh' r y . " vj cv'k' y cu' o qtg" r tglwf lekn' vj cp
r tqdckxg"cpf "vj gtgd{ "r tqr gtn{ "uwdlgev"v" gzenwukp" wpf gt
Gxkf gpeg"Eqf g"ugevqp"574."cpf "vj cv'k'y cu'v'j g'r tqf wev'qh
o" ucvg/qtej gmtcvgf "kphqto cpv'uej go g"y j lej . "r tqugewqtu
mpgy . "y cu'rkngn{ "v"i gpgtcvg"r gtlw{ "cpf "xlqrkv" f ghgpf cpvu
Ukz vj "Co gpf o gpv'tki j v'vq" Hkpcn{ . "f ghgpf cpv'eqpvpgf u" vj g
vkrnlqwtv'gtgf "d{ "f gp{ kpi "j ko "cp"gxkf gpvkt{ "j gctkpi "qp" j ku
o qv'kqp"v" gzenw' g'v'j g'vguko qp{ "qh'v'j ku'y kpguu0

Eqpvtct{ "v" f ghgpf cpvu"eqpvpgv'kqp." vj g"vkrnl' eqwtv' f kf "pqv
f gp{ "f ghgpf cpv' cp" gxkf gpvkt{ "j gctkpi "qp" j ku" o qv'kqp" vj
gzenw' g'v'j g'vguko qp{ "qh' Ctxlg" Ecttqm) Vj g'tgeqtf "gucdrkuj gu
vj cv' f ghgpf cpv' hkrf "c" o qv'kqp" vj "gzenw' g'v'j g'vguko qp{ "qh
cm'lckj qwug" kphqto cpvu" cpf "hqt" cp" gxkf gpvkt{ "j gctkpi . "dw
vj cv'y j gp" vj g"eqwtv'ecngf "vj g" o qv'kqp" hqt" j gctkpi . "eqwpugn
uwo kvgf "vj g'o cvgt' qp" vj g'r rcf kpi u0Vj gtg'ku'pq' uwi i gukqp
vj cv'eqwpugn' ukn' f guktgf "cp" gxkf gpvkt{ "j gctkpi "qt" vj cv'v'j g
eqwtv'tglgevgf "c" f go cpf "hqt" uwej "c" j gctkpi 0

Kp" cf f kkkp." vj g" o qv'kqp" f kf "pqv'eqpvpgf " rtko ctkn{ " vj cv'v'j g
vguko qp{ "qh' vj g" kphqto cpvu" uq qwf " dg" gzenw' gf " dgecwug
qh' cp{ "xlqrkvqp" qh' f ghgpf cpvu" Ukz vj "Co gpf o gpv'tki j v'vq
eqwpugn0Kpf gfg . "vj g" o qv'kqp" tghgtgf "v" uwej "c" erko "qpn{ "kp
c" hqvpqvg" vj cv'ucvug<0Vj gtg'ku" uqo g" kpf lecvkqp" vj cv'egtckp
kphqto gtu" o c{ "j cxg" cevfg "cu" cp" ci gpv'qh' vj g" r rkeg" cv'v'j g
vko g"qh' vj g" f ghgpf cpvu" *1007 "cngi gf "ucvgo gpw0Kc'v'v'j g
gxkf gpvkt{ "j gctkpi "k' ku" f vgtgo kpgf " vj cv' vj ku" ku" vj g" ecug.
f ghgpf cpv'v' kno qxg"v' f kuo ku' hqt' xlqrkvqp" qh' vj g' f ghgpf cpvu
Ukz vj "Co gpf o gpv'tki j v'vq" eqwpugn0Tcvj gt. " vj g" o qv'kqp
eqpvpgf gf "vj cv'vguko qp{ "qh'lckj qwug" kphqto cpvu" uq qwf " dg
gzenw' gf "qp" vj g' i tqwpf "vj cv' uwej "kphqto cpv'vguko qp{ "oku" uq
kpi gt gpw{ "wptgrkcdng" vj cv'k' ecppqv' eqpukwkwqpcn{ "uwr r qtv
c" ecr kcn' o wtf gt "xgtf lev' qt" f gcvj "ugpvpeg"= cpf " vj cv' uwej
kphqto gt'vguko qp{ "ku" uq' r tglwf lekn' vj cv'wpf gt "Gxkf gpeg" Eqf g
Jugevqp_574" cp{ " r tqdckxg' xcnw' ku' uducpv' km{ "qwy gli j gf
d{ "ku" r tglwf lekn' ko r cev0

Kp" cf f kkkp" vj g' tghgtkpi "v" vj g' cu'ugtvgf "kpi gt gpv'wptgrkcdng{ "qh
kphqto cpv'vguko qp{ . "vj g" o qv'kqp" ucvgf . "y k'j qwt'ghgtgpeg" vj
vguko qv'kcrn' f qewo gpvt{ "gxkf gpeg" vj cv'v'j g' h'cew' eqpv'kpgf
kp" vj g" kphqto cpvu" ucvgo gpw' y gtg' r wdrke" npqy rgi f g . "cpf
o'v' gug" kphqto gtu" j cxg" c" j kuvt{ "qh' ugnkpi "vguko qp{ "v" vj g
r rkeg" kp" qtf gt "v" gxcf g" r tqugew' kqp" qp" vj gk' qy p' etko kpcn
ej cti gu" qt" v" q" qdckp" c" dgwgt "f gcn' Uqo g" qh' vj g" kphqto gtu
j cxg" c" tgr wcvkqp" hqt' wptv' wj hwp' gu' Uqo g" qh' vj g" kphqto gtu
kphqto cv'kqp" j cu' dggp" tghwgf " d{ " qv' gt" lckj qwug" kpo cvgu0
Kp" eqpenwukp . " vj g" o qv'kqp" ucvgf " vj cv' vj vj g" gxkf gpvkt{
j gctkpi . " r ctvewrct" ekewo ucpegu" uq qy kpi " vj g" wptgrkcdng{
qh' vj g" kphqto gtu" kp" vj g" r tgu'gpv' ecug" y qwf " dg" uq qy p0 Cv
vj g" j gctkpi . " j qy gxgt . " f ghgpf cpv' r tgu'gpv' gf "pq" gxkf gpeg" cpf
f kf "pqv' eqpvpgf " vj cv' cp{ " Ukz vj "Co gpf o gpv' xlqrkvqp" j cf
qewt' gf 0

Cuuwo kpi . "y k'j qwf gekf kpi . " vj cv'v'j ku' Ukz vj "Co gpf o gpv'kuwug
o c{ "pqpgvj grgu' dg' tckugf "qp" er r gcn' y g' h'kpf "k' qdckw' vj cv
f ghgpf cpv' hkrf "v" ectt{ "j ku' dwtf gp" qh' f go qpvtcvkpi "uwej
c" xlqrkvqp" cv' vj g" j gctkpi "qp" vj g" o qv'kqp0 Kp" qtf gt "v" o cng
qwf vj g" Ukz vj "Co gpf o gpv'erko . " f ghgpf cpv' j cf " vj g' dwtf gp
qh' of go qpvtcv' kpi _" vj cv'v'j g' r rkeg" cpf " vj gk' kphqto cpv' v' qm
uqo g" cev'kqp . " dg{ qpf " o gtn{ " rku' gkpi . " vj cv' vj cu' f guki pgf
f grkdtcv' n{ "v" grkels' kpetko kpcv' kpi "tgo ctmu0" *Kuhlmann" v.
Wilson" 3; : 8+ 699" WO0658." 67; "J328" UE v04838." 4852.
; 3" NCGf 0f "586_0" F ghgpf cpv' o cf g" pq" cvgo r v'v'q" o ggv' vj ku
dwtf gp" kp" vj g" vkrnl' eqwtv'0 F ghgpf cpvu" tghgtgpegu" qp" er r gcn
v' vj g" v'cpuetk' v' qh' vj g" i tcpf " lwt{ "tgr qtv' tgi ctf kpi " vj g" wug
qh' kpo cvgu" vj g' ugewt" kpetko kpcv' kpi "ucvgo gpw' h' qto " r gtu'ppu
tgr tgu'gpv' gf "d{ "eqwpugn' ctg" wpcxckkpi 0Vj ku' tgeqtf "y cu' pqv
dghgtg" vj g" vkrnl' eqwtv . " cpf " y g" j cxg" f ger' kpgf " f ghgpf cpvu
tgs wgu' vj cv' y g' v'cng" lwf lekn' pqv' g' qh' k0Vj g' tgeqtf "dghgtg
vj g" vkrnl' eqwtv' f kf "pqv' uwr r qtv' f ghgpf cpvu" eqpv' kqp" vj cv' j ku
ucvgo gpv' vj " Ctxlg" Ecttqm) y cu' v'cng' kp' xlqrkvqp" qh' j ku' Ukz vj
Co gpf o gpv'tki j v'vq' eqwpugn' cpf "y g' tglgevj ku' eqpv' kqp" vj cv
vj g' vkrnl' eqwtv' gtgf "kp" f gp{ kpi "vj g" o qv'kqp" qp" vj cv' i tqwpf 0⁴⁵

45 F ghgpf cpvu" tgrkpeg" wr qp" gxkf gpeg" r tgu'gpv' gf
f wtkpi " vj g" gxkf gpvkt{ " r qv'kqp" qh' vj g" vkrnl' ku
wpcxckkpi 0 J g' uwi i guw' vj cv' vkrnl' tghgtgpegu" vj
Ecttqm) ghgtv' vj g' eqpcev' lckl' cwj qtklgu . " cmppi
y k'j " kphgtgpegu" f tcy p' h' qto " vj g" i tcpf " lwt{ "tgr qtv
y k'j " tgr gev' vj " lckl' cwj qtklgu" npqy kpi " wug" qh
kphqto cpvu" kp" vj g" Nqu" Cpi grgu' Eqwv{ " lckl' o ggv
vj g" uc'pf ctf " gucdrkuj gf " kp" Kuhlmann v. Wilson,
supra . " 699" WO06580 Cu' g' r r' kpgf . " f ghgpf cpv' o c{
pqv' tgn{ "wr qp" vj g" i tcpf " lwt{ "tgr qtv' vj ku" er r gcn
cpf " vj g" gxkf gpeg" tge' kxgf " cv' vkrnl' h' ku" vj g' gucdrkuj
vj cv' lckl' cwj qtklgu" f kf " cp{ vj kpi " dg{ qpf " o gtn{

rkungplpi 'vq'Ecttqm'ij cv'oy cu'f guki pgf 'f grkdgtcvgnf vq'gnkvlkpetko lpcvpi 'tgo ctmu0*'Id.'cv'r 067;]328 UEv0'cv'r 0'4852_0*'k'p'cf f kkkqp."y g'pqvg"vj cv'vj g vlcni'gxf gpeg"tgrkgf "wr qp"d{ "f ghgpf cpv'y cu'pqv dghqtg"vj g'vlcni'eqwtv'y j gp'k'twrgf "qp'vj g'o qvkkp vq'gzenwf g'Ecttqm'u'vguko qp{0F ghgpf cpv'f qgu'pqv eqpvpgf "vj cv'vj gtg'y cu'cp{ "rcvgt"o qvkkp"vq'utknng Ecttqm'u'vguko qp{ 'qp'Ukzj 'Co gpf o gpvi tqwpf u0

F ghgpf cpv'u'eqpvpgvkkp'vj cv'Ctxkg'Ecttqm'u'vguko qp{ 'y cu'luq wptgrkdng"vj cv'vj g'vlcni'eqwtv'uj qwf "j cxg"fgvgtto kpgf "vj cv ku"cf o kuukqp"y qwf "eqpukwvg"cx'xkqrkvkqp"qh'f wg"rtqeguu qh'rcy "cnuq"ku'tglgevgf 0F ghgpf cpv'u'eqpvpgvkkp" *1008 "vj cv Ecttqm'u'vguko qp{ 'y cu'wptgrkdng'cpf 'uwdlgev'q'gzenwukqp'qp f wg"rtqeguu'i tqwpf u'htq"vj g'uco g'tgcuqp"vj cv'eqwt'u'gzenwf g gxf gpeg'r tqf wegf "d{ 'vclpvgf 'kf gp'v'k'ecvkkp'r tqegf vtgu"ugg. g0 0'Manson'v. Brathwaite"*3; 99+654"WLUJ; : .335/336"]; 9 UEv0'4465."4474/4475."75"NGGf 0f"362_+"ku" wpr gtuwckxg. dgecwug'k'f gr gpf u'wr qp'cp'wpuwducpvkvvgf 'hcewcn'cuugtkvqp vj cv'Ecttqm'u'vguko qp{ 'y cu'vclpvgf "d{ 'ko r tqrgt"r tqegf vtgu htq"ugewtkpi "lckj qwug"lphqto cpv'vguko qp{0'Erclo u'vj cv'vj g vguiko qp{ "o wu'vj cxg'dggp"vptgrkdng"qt"r tglwtkwu'dgecwug qh'vj g"lphqto cpv' u'wgo "lp"vj g"Nqu" Cpi grgu"Eqwvq' "lckn ctg"ur gawvckxg"qp"vj ku'tgeqtf 0'Vj g"tgeqtf "dghqtg"vj g'vclcn eqwtv'f k'f "pqv'f go qpuvckv"vj cv'Ecttqm'u'vguko qp{ "y cu."kp hcev."vptgrkdng0 k'p'cf f kkkqp."y g'eqpukvpgv"j cxg'tglgevgf vj g'eqpvpgvkkp."o cf g'lp'eqppgcvkqp"y kj 'ecr kcn'rc r gcu."vj cv lphqto cpv'vguko qp{ "ku'inherently"vptgrkdng0*Ugg"People"v. Ramos, supra, 37'Ecn0fj 'cv'r 03387=People'v. Turner, supra, ' Ecn0fj 'cv'r r 0423/4240" F ghgpf cpv'j cf "co r ng'qr r qtwpkv{ "vq etquu/gzco kpg'Ecttqm'vq'gzr qug'vq"vj g'lw{ "cp{ "vptgrkdng' k'p'j ku'vguko qp{ .cp'qr r qtwpkv{ 'j g'gzr mqkvgf 'hwm{0

56+Hkpcmf. 'y kj 'tgur gev'vq'vj g'eqpvpgvkkp"vj cv'vj g'gxf gpeg uj qwf " j cxg" dggp" gzenwf gf " r wtuwcpv' vq" Gxf gpeg" Eqf g ugevkqp'574. "0j y j gp'cp'qdlgevkkp'vq'gxf gpeg'ku'tckvgf "wfp gt Gxf gpeg" Eqf g" ugevkqp" 574. "vj g'vlcni' eqwtv'ku'tgs vktgf "vq y gki j "vj g'gxf gpeg'u'r tqdckxg'xcnwg"ci clpuv'vj g'f cpi gtu'qh r tglwf leg."eqphwukp."cpf "wfp wg"vko g'eqpuwo r vkqp0'Wprguu vj gug" f cpi gtu"juwduwcpvckm{ "qwy gki j"r tqdckxg'xcnwg."vj g qdlgevkkp'o wu'dg'q'xgtt wrgf 0J'Ekcvkqp0'Qp'cr r gcn'vj g'twvki ku'tgxlgx gf "htq'cdwug'qh'f kuetgkqp0"People v. Cudjo"*3; ; 5+ 8"Ecn0fj "7: 7."82; "j47"Ecn0fj r v0f "5; 2.": 85"R0f "857_0"* 55d+Vj g'r tqdckxg'htqeg'qh'vj g'gxf gpeg'tgrvki "f ghgpf cpv'u cf o kuukqp'vj cv'j g'hknngf "F ggevckxg'Y knico u'ku'qdxkqwu0Vj gtg y cu'pq'f cpi gt'qh'wfp wg'eqpuwo r vkqp'qh'vko g'qt'qh'eqphwukqp qh'vj g"kuwgu0 Vj g' gxf gpeg" y cu'pqv' qh' c" uqtv' rknngf "vq r tqxqng"go qvkkpcn'dlcu'ci clpuv'c"r ctv{ "qt"vq"ecwug"vj g'lw{ vq"r tglwf i g'vj g"kuwgu"wr qp"vj g'dcuku'qh'gz'vcpvgqu' hcevtu0 *Ugg"People v. Minifie"*3; ; 8+35"Ecn0fj "3277."3292/3293

]78"Ecn0fj r v0f "355."; 42"R0f "3559."77"CON0f0'vj ": 57_"]kp vj g'eqpvzv'qh'Gxf gpeg"Eqf g'ugevkqp'574."wfp wv{ "r tglwf lekn gxf gpeg"ku" gxf gpeg"vj cv'y qwf "gxqng"cp"go qvkkpcn'dlcu ci clpuv'ppg'r ctv{ _=People v. Zapien"*3; ; 5+6"Ecn0fj "; 4; .: 7:]39"Ecn0fj r v0f "344.": 68"R0f "926_"]0r tglwf lego"cu'wugf "kp Gxf gpeg"Eqf g'ugevkqp'574"tghgtu"vq"vj g'j cto "qh'r tglwf i kpi qp"vj g'dcuku'qh'gz'vcpvgqu' hcevtu0" F ghgpf cpv'u'erclo "vj cv vj g' gxf gpeg" y cu'wfp wv{ "r tglwf lekn'qt" *1009 "rcenlpi "kp r tqdckxg'xcnwg"y cu'dcuqf "wr qp"j ku'cuwo r vkqp"vj cv'k'y cu wptgrkdng=ij cv'cuwo r vkqp'y cu'ur gawvckxg.'cpf 'vj g'vclcn'eqwtv y cu'gpvkkvgf "vq'tglgevko0*Ugg"People v. Cudjo, supra.'8'Ecn0fj cv'r 0'832"]f qvdu"tgi ctv kpi "vj g'etgf kdkkv{ "qh'c"y kpguu'f q pqv'co qwpv'vq"r tglwf leg"wpf gt"Gxf gpeg"Eqf g'ugevkqp'574= etgf kdkkv{ "qh'y kpguu'ku'vj g'r tqxkpeg'qh'vj g'lw{ _=ugg'cnuq People v. Ramos, supra."37"Ecn0fj 'cv'r 0'3387"]lphqto cpv vguiko qp{ "ku'pqv'k'j gtgpv{ "wptgrkdng_0"Vj g'eqwtv'y cu'y gm y kj kp"ku" f kuetgkqp"kp" f gp{ kpi "vj g'o qvkkp"vq'gzenwf g'vj ku gxf gpeg'r wtuwcpv'vq'Gxf gpeg"Eqf g'ugevkqp'574."eqpukf gt kpi vj g'hcev'dghqtg'k'cv'vj g'vko g'qh'vj g'o qvkkp0

16. Accomplice testimony

*57+ F ghgpf cpv' eqpvpgf u' vj g' vlcni' eqwtv' gttgf "lp" f gp{ kpi j ku"o qvkkp"vq' gzenwf g'vj g'vguko qp{ "qh'hqwt"ceeqo r rlegu y j q"vgukhkgf "htq"vj g'r tqegewkkp<C'rcf tqp"J wvgt."Lgftg{ Dt{ cpv.V{ tqpg"J kenu.'cpf "F cxfk" Dgpvrg{0J g'wv'ku'vj cv'vj gkt vguiko qp{ "y cu'vq"vptgrkdng"vj cv'ku"cf o kuukqp'xkqrvgf "j ku tki j v'vq" f wg"rtqeguu'qh'rcy 0

Cv' vlcni' f ghgpf cpv' o qxgf "vq" gzenwf g'vj g'vguko qp{ "qh J wvgt."Dt{ cpv."J kenu.'cpf "Dgpvrg{ "qp"vj g'i tqwpf "vj cv'gcej 0ceeqo r rleg'lkphqto gt"y kn'ko r tqrgtn{ "ungy "j ku'vguko qp{ ci clpuv'vj g'f ghgpf cpv'lp'qt f gt"vq"qdvclp"vj g'dgpghk'qh'cp wpequwo o cvgf "r rgc"dicti clp0"kp"vj g'cngtpevckxg."f ghgpf cpv tgs wguvgf "vj cv'vj g'vlcni' dg"uc{ gf "wvki' gcej "ceeqo r rleg j cf "dggp" ugpvpegf " r wtuwcpv' vq" j ku' r rgc" ci tgggo gpv0 k'p uwr r qtv."j g'o clpvc'kpgf "vj cv'vj g'vguko qp{ "qh'cp'ceeqo r rleg'ku k'j gtgpv{ "vptgrkdng"y j gp'k'tguwuu'htqo "c'r rgc"ci tgggo gpv. cpf "eqpvpgf gf "vj cv'uwej "vguko qp{ "uj qwf "pqv'dg"r gto kwgf kp" c"ecr kcn'rcuq" dgecwug"ku' wfp gto kpgu"vj g'tgrkdng{ "qh vj g'hcev'k'p kpi "r tqeguu0J g'tgrkgf "wr qp"qw'qh'ucv'g'cwj qtkv{ j qrf kpi "vj cv."cu"o" cwgt"qh'f wg"rtqeguu'qh'rcy ."ceeqo r rleg vguiko qp{ "uj qwf "dg" gzenwf gf "pqv' qpn{ "y j gp" ko o wvkv{ g'zr tguu{ "ku'eqpf kkkpgf "wr qp"ur gekke"vguko qp{ ."dw'cnuq y j gp"vj g'ekewo ucpegu'qh'vj g'r rgc"ci tgggo gpv'tgcuqpcdn{ y qwf 'ecwug'vj g'cngi gf "ceeqo r rleg"vq'dgrgkxg'j g'o wu'vgukh{ kp" c"r ct'vkwrt'hcuj kqp0F ghgpf cpv'tgrkgu "htq"gzco r rg"wr qp Franklin v. State"*3; 9; +"; 6"P gx0'442"]799"R0f "82.": 84_ y j lej "j cu" dggp" qxgtt wrgf 0' *Sheriff, Humboldt County v. Acuna"*3; ; 3+329'P gx0886"]; 3; R0f "3; 9.'3; : /422.'('hp06_0

F ghepf cpv'u o qvkqp"eqpvpgf gf "y cv'j g"hwat"y kpguugu"j cf dggp"clhtqf gf "ko o wplk{ "lp'tgwtp'ht'j gk't'vgnko qp{. "cu'y gm cu'ngpkpe{ "kp'r gpf kpi "ecugu'cpf 'r tqdcvkqp'xkqrkvqp'o cwgut0 J g"eqpenmf gf "y cv'lp" c"ecr kcn'tkcn"cp"cee qo r rieg'lkphqto gt o wuv'dg"ugpvpgpf "r tkqt"vq"vgnkh{ kpi "kp"qt f gt"vq"grko kpcvg yj g"eqo r wnikqp"vq"vgnkh{ 'hcnrnf "kp" c'hcuj kqp'hcxqtcdrng"vq" yj g r tqugewkqp0Vj g"eqvtf'vfglgr "y g'o qvkqp0

F ghepf cpv' cr r gctu"vq" tggpy " yj g" erko " yj cv' y kj " t gur gev vq" yj g" hwat" ceeqo r rieg. " yj g" gzkngpeg" qh' ko o wplk{ ci tgggo gpv'cpf 'r tqo kugu'qhl'hcxqtcdrng'tgcvo gpv'qp'wptgrcvf r gpf kpi "ecugu/tgcvo gpv' yj cv'y cu'f gr gpf gpv' *1010 "wr qp yj g" ceeqo r rieg)u' tkcn' vgnko qp{/y gtg" ekewo ucpegu" yj cv tgpf gtgf "yj g"cee qo r rieg)u'tkcn'vgnko qp{ 'wptgricdrng0

Y g"j cxg"tglevgf "yj g"eqpvpgvqp" yj cv' yj g" vgnko qp{ "qh"cp ko o wplk{ gf "cee qo r rieg"pgeguactkn{ "ku" wptgricdrng"cpf "uwdlgev vq" gzenwukqp0 *People v. Allen" *3; : 8+ 64" Ecrf5f " 3444. 3473/3474"("lp07"j454"Ecrf0r u0: 6; ."94; "R0f"337 _=ugg cnuq"U.S."v. Singleton"*32y "Ek03; ; ; +387"H5f "34; 9."3523]0")p_q"r tceveg"ku"o qtg" kpi tckpgf "kp"qwt"etko kpcn'lwuleg u{ ugo "yj cp"yj g'r tceveg"qh'yj g'i qxgtpo gpv'ecmkpi "c"y kpguu y j q"ku'cp"ceeguqt{ "vq"yj g'etko g"hwat"y j lej "yj g'f ghepf cpv'ku ej cti gf "cpf"j cxkpi "yj cv'y kpguu'vgnkh{ 'wptgf" c'r rnc"dicti clp yj cv'r tqo kugu'j ko "c'tgf wegf 'ugpvpgf'0_0'Uko krcn{. 'y g'j cxg tglevgf "yj g"eqpvpgvqp"yj cv' yj g"vgnko qp{ "qh"cp"cee qo r rieg y j q'j cu'tgegkxgf "c'hcxqtcdrng'r rnc"ci tgggo gpv'lp'tgwtp'ht'j ku qt"j gt"vgnko qp{ "ku'lpj gtgpv{ 'wptgricdrng0*People v. Andrews *3; ; ; +6; Ecrf5f "422."453"j482"Ecrf0r u07: 5."998"R0f "4: 7 _=ugg"cnuq"People v. Pinholster."supra."3"Ecrf6y "cv'r 0; 5; 0+Y g f genkpg'f ghepf cpv'u'lpkxkvqp"vq'tgeqpukf gt" yj g'ug'r qlpvu0

Ko o wplk{ "qt"r rnc"ci tgggo gpv'u o c{ "pqv'r tqr gtn{ "r rncg" yj g ceeqo r rieg'wptgf c'ltqpi 'eqo r wnikqp"vq"vgnkh{ "lp" c'r ctvewrt o cppgt/c'tgs wktgo gpv' yj cv'j g"qt"uj g"vgnkh{ "lp"eqphqto kv y kj "cp" gctrngt" ucvggo gpv' vq" yj g" r qnreg." hqt" gzc o r rg." qt yj cv' yj g"vgnko qp{ "tguwn"lp" f ghepf cpv'u"eqpxkvqp." y qwf r rncg" yj g" y kpguu'wptgf" eqo r wnikqp" kpeqpukvpgv' y kj " yj g f ghepf cpv'u"tki j v'vq" hct" tkcn'0 *People v. Allen."supra."64 Ecrf5f "3444."3473/34740:Cnj qwi j "y g'j cxg'tgeqi pl{ gf "yj cv yj gtg"ku"uqo g"eqo r wnikqp"lpj gtgpv'lp"cp{ "r rnc"ci tgggo gpv qt"i tcpv'qh'ko o wplk{. "y g'j cxg"eqpenmf gf "yj cv'ok'ku"erget yj cv'cp"ci tgggo gpv' tgs wktkpi "qpn{ " yj cv' yj g" y kpguu' vgnkh{ hwn{ "cpf" vwj hwn{ "ku" xcnf 06" *Id." cv' r 0' 3474"= ugg" cnuq People v. Pinholster."supra."3"Ecrf6y "cv'r 0; 5; ." People v. Sully"*3; ; 3+75"Ecrf5f "33; 7."3439"j4: 5"Ecrf0r u0'366." : 34 R0f "385_0+Uwej "c"r rnc"ci tgggo gpv."gxgp"kh'k'ku"erget" yj g r tqugewqt'dgnxgu"yj g'y kpguu'u'r tkqt'ucvggo gpv'vq" yj g'r qnreg

ku'yj g"v wj . "cpf "f gxkvkqp"htqo "yj cv'ucvgo gpv'lp"vgnko qp{ o c{ "tguwn"lp" yj g" y kj f tcy cni'qh' yj g" r rnc" qhgt. "f qgu"pqv r rncg"uwej "eqo r wnikqp"wr qp" yj g" y kpguu"cu"vq" xkqrkv" yj g f ghepf cpv'u"tki j v'vq" c" hct" tkcn'0 *People v. Allen."supra."64 Ecrf5f "cv'r 0' 34740" Kp" cf f kkvqp." yj g" vgnko qp{ "qh"r gtuqpu y j q'b c{ "dg'wldlgev'vq'r tqugewkqp"cu'ceeguqt'kgu'wprguu"yj g{ oeqqr gtcvg0" y kj "yj g" r qnreg"ku"pqv'kpcf o kuukdrng"cu'eqgtegf wprguu"uqo g'v kpi "o qtg" yj cp" yj g" yj gtcv'qh"r tqugewkqp"ku uj qy p0*People v. Daniels, supra,"74"Ecrf5f "cv'r 0: 84/: 850-

Qwt"ecugu"tgs wktg"yj cv'y g"tgxky "yj g"tgeqtf "cpf"tgej "cp kpf gr gpf gpv'lwfi o gpv'y j g'v gt" yj g"ci tgggo gpv'wptgf"y j lej yj g" y kpguu'vgnkh{gf "y cu'eqgtekg"cpf "y j g'v gt" f ghepf cpv y cu" f gr tkxgf "qh" c" hct" tkcn' d{ " yj g" kptqf wvkwqp" qh' yj g vgnko qp{. "nng r kpi "kp"o kpf "yj cv'i gpgtcm{ "y g'tguukg'hcwcn eqphkew"lp"hcxqt"qh'yj g'lwfi o gpv'dngy 0* *1011 "People v. Badgett."supra."32"Ecrf6y "cv'r 0572."5740+Wt qp"yj ku'tgeqtf . y g"ecppqv'eqpenmf g"yj cv'cp{ "qh" yj g"hwat" ceeqo r rieg)u"y cu wptgf"utqpi "eqo r wnikqp"vq"vgnkh{ "eqpukvpgv{ "y kj "gctrngt ucvggo gpv'ut'lp" c'r ctvewrt 'b cppgt. "uwej "yj cv'y g'kptqf wvkwqp qh'yj gk't'vgnko qp{ "eqpukwv{ "c"xkqrkvqp"qh'f ghepf cpv'u"tki j v vq" c' hct" tkcn'

Vj g" tgeqtf " kpf kcvgu" yj cv' dghqtg" yj g" gxlk'gpvct{ "r qt'vqp qh' yj g" i wkn' r j cug" dgi cp. "yj g" r tqugewqt" f kuenugf" y j lej r tqugewkqp"y kpguu"j cf "dggp"r tqxkf gf "y kj "ko o wplk{ "qt r rnc"ci tgggo gpv'lp'tgwtp'ht'j yj gk't'vgnko qp{. "cpf" yj g'pcwtg'qh yj g'lpf wego gpv'gcej "tgegkxgf "hwat"vgnkh{ kpi 0Y kpguu'Dgpv{ j cf "dggp"r tqo kugf "f kuo kuacn'qh' yj g" ej cti gu"ci clp"j ko "kp yj g" r tggpv'ecug"cpf "ko o wplk{ "hwat"j ku"vgnko qp{ 0'Dgecvug qh'ej cti gu' hkrf "ci clpv"j ko "kp" yj g" r tggpv'ecug." Dgpv{ cnuq"y cu" hckpi "c"r tqdcvkqp'xkqrkvqp" yj cv' yj g" r tqugewkqp kpf kcvgf "otgo clpv"j cpi kpi "lp" yj g'dcncpeg'wvki'cpf "y j gp"j g vgnkh{gu0Y kpguu'J kenu'tgegkxgf "ko o wplk{ "hwat"j ku"vgnko qp{ "lp" yj g" r tggpv'ecug"cpf "y cu'qhgtgf "opq" f gcnu0"lp"eqppgevkqp y kj "c"r gpf kpi "r tqdcvkqp'xkqrkvqp"qt" y kj "ugpvpgkpi" qp cpqy gt'eqpxkvkqp0Y kpguu'J wvgt'tgegkxgf "ko o wplk{ "hwat"j ku vgnko qp{ "lp" yj g" r tggpv'ecug"cpf "j cf "c'r gpf kpi "b kuf go gcpqt o cwtg"lp" y j lej " yj g" r tqugewqt" cttepi gf "hwat" yj g"ugpvpgv vq"dg"ugt xgf "lp" r tqvexkg"ewuqf { 0'Lghtgf "Dt { cpv'tgegkxgf ko o wplk{ "cu"vq"dqy "yj g" Ectr gpvgt"uj qqkpi "cpf" yj g"o wtf gt qh'F gvexkg"Y knko u0Dt { cpv'tgegkxgf "dgpghku"uwej "cu" yj g utknkpi "qh"cp"cto kpi "gpj cpego gpv'lp"y q"ugr ctcvg"tqddgt { ecugu'cpf "c'ugpvpgv'vq'eqvwp' lckit'cy gt" yj cp'r tkuq0k'q'p'p'q'qh yj g'ug'ecugu." yj g'ugpvpgkpi "eqv'v'lpf kcvgf "k'y qwf "tggpvpgv Dt { cpv'vq'r tkuq'kh'j g' hckrgf "vq"vgnkh{ "lp" yj g" r tggpv'ecug0Vj g r tqugewkqp"r tqr qugf "cunkpi "yj g"eqv'v'lp" c'r gpf kpi "r tqdcvkqp o cwtg"pqv'vq"ugpvpgv"Dt { cpv'vq"cf f kkvpcn'ko r tkuqo gpv0

Dt { cpv' lphqto gf "vj g'r tqugewkqp" qh'c" pwo dgt" qh'j ku" qvj gt qh'gpgu. "dw'pq' r' tqugewkqp" y' cu' r' ppgf 0

Eqpvtct { 'q'f ghgpf cpv'u' eqpvvkvqp' y' cv'j g'y kpguugu' tgegkxgf ko o wplk' "wr qp" eqpf kklqp" y' g { "hqmny "c" r' tqugewkqp" uetkr v qh' y' gk' "vguko qp {." y' g' v'kcn' "vguko qp { "qh' gcej" "qh' y' g hqwt" ceeqo r' rieg' u' kpf' kcv'gu' y' cv' y' gk' ko o wplk' "cpf" r' r' gci tggo g'p'u' y' g' t'p'q'v' d'cu'g' "wr qp" y' g' eqpf kklqp' y' cv'j g' { "vgukh' k'c' r' ct'v'w'ct' o' c'ppgt' cv'v'kcn'qt' y' cv'j g' { "vgukh' { "eqpukngpv' y' kj' r' t'k'q' t' u'c'v'go g'p'u' y' g' r' q'k'g' 0'k' f'c'ev' f' ghgpf cpv'y' cu' d'ng vq' ko r' gcej' "y' g' y' kpguugu' y' kj' "k'p'eqpukngpv' k'g' u' d'g'w' g'p' y' gk' v'kcn' "vguko qp { "cpf" y' gk' r' t'g'v'kcn' u'c'v'go g'p'u' "c" e'k'ewo u'c'p'eg y' cv' k'p'f' k'c'v'gu' y' cv' p'q' u'etkr v' y' cu' hq'ny g' f' 0' k' f' k'k'qp. " y' g' v'guko qp { "qh' y' g' ko o wplk' g' f' y' kpguugu' y' cu' eqttq' d'q'c'v'g' d' { y' g' v'guko qp { "qh' y' g' t' y' kpguugu' u'we'j' "cu' I' g'qti g' Ectr' g'p'v'g't. C'rk' Y' q'q'f' u'q'p. " G'rk' w'g' D't'q'q'o h'g'f' ". c'p'f' " C't'x'k'g' E'c't't'q'm" c'p'f' d' { "q'j' g't' " g'x'k'f' g'p'eg" u'we'j' "cu' v'g'ng' r' j' p'g'g' c'p'f' " o' q'v'g'i' d'w'k'p'g'u' t'g'e'q't'f' u' f' ghgpf cpv'u' r' g't'u' f' k'ur' r' { k'p'i' "c'eeqo r' rieg' p'co' g'u' c'p'f' v'g'ng' r' j' p'g'g' p'wo d'g'tu. " c'p'f' y' g' v'guko qp { "qh' c' " d'c'm'k'u' u' " g'z'r' g't'v'0 *Ugg' People' v. Sully. 'supra.' 75' Ect'f'f' "cv' r' 03439/343: 0-

F ghgpf cpv' eqpvvkvqp' u' k' ecp' dg' uggp' y' cv' y' g' v'guko qp { "qh gcej" ceeqo r' rieg' y' cu' v'p't'g'k'c'd'ng' d'gecwug' k' y' cu' k'p'v'g't'p'c'm' { k'p'eqpukngpv' c'p'f' "k'p'eqpukngpv' y' kj' " *1012 "q'j' g't' "g'x'k'f' g'p'eg r' t'g'g'p'v'g'f' "k'p' y' g' "e'cu'g' 0' V'j' g' f' ghg'p'ug. " j' q'y' g'x'g't. " j' c'f' " c' " h'w'n c'p'f' 'h'c'k' q'r' r' q't'w'p'k'v' "h'q't' e't'q'u' / g'z'c'o' k'p'v'k'p' q'h' y' g' c'eeqo r' rieg' y' k'p'g'u'g'u. " y' j' q'o " y' j' g' { " s' v'g'u'k'p'g'g'f' " h'q't' u'g'x'g't'c'n' f' c' { u'0 *Ugg' People' v. Sully. 'supra.' 75' Ect'f'f' "cv' r' 03439/343: "u'gg' c'n'q' People' v. DeSantis" 3; ; 4+4' Ect'f'f' "33; ; : '3442"; Ect'f' r' v'0'f' 84: .: 53' R'0'f' "3432_0' V'j' g' l'w' { "y' w' y' cu' d'ng' v'q' g'x'c'w'c'v'g' y' gk' e't'g'f' k'k'k'v' { 0'Y' g' e'q'p'e'n'f' g' y' cv'j' g' t'g'e'q't'f' f' q'u' b'q'v'g'u'c'd'r'k'uj' y' cv' f' ghgpf cpv'y' cu' f' g'p'k'f' c' 'h'c'k' 'v'k'c'i'0

F ghgpf cpv'u' eqpvvkvqp' y' cv'j g' r' tqugewkqp' t' c'k' y' g' y' kpguugu' c' "h'g'g' h'q't" y' gk' "vguko qp { "o' k'ue'j' c't'c'ev'g't'k' g'u' y' g' t'g'e'q't'f' 0' V'j' g' y' kpguugu' j' c'f' "d'ggp' r' rieg'f' "k'p' y' kpgu' r' t'q'v'g'v'k'p' r' t'q'i' t'c'o' u. c'p'f' " y' g' r' tqugewkqp" g'z'r' g'p'f' g'f' " y' g' t'g'h'g't'g'p'eg'f' " u'w'o' u' h'q't' r' t'q'v'g'v'k'x'g' g' j' q'w'k'p'i' "c'p'f' "h'q'q'f' "h'q't" y' g' y' kpguugu' r' g'p'f' k'p'i' " y' gk' v'guko qp { 0'f' ghgpf cpv' u'w'i' i' g'u'w' y' cv'j' g' r' tqugewkqp' 'h'c'k'g'f' "v'q' f' k'ue'ng' u'g' y' g' d'g'p'g'h'k'u' y' g' y' kpguugu' t'gegkxgf' v'p'f' g't' y' g' y' kpgu' r' t'q'v'g'v'k'p' r' t'q'i' t'c'o' . " c'p'f' " y' cv' y' g' v'kcn' e'q'v'v' r' t'g'x'g'p'v'g'f' " y' g' f' ghg'p'ug' h'q'o " e't'q'u' / g'z'c'o' k'p'k'p'i' " y' g'o " q'p' " y' k'u' r' q'k'p'v'0' V'j' g' u'g' u'w'i' i' g'u'k'q'u' c't'g' d'ng'g'f' d' { " y' g' t'g'e'q't'f' . y' j' k'ej' 'k'p'f' k'c'v'gu' y' cv'j' g' e'q'v'v'f' g'v'g't'o' k'p'g'f' " y' cv'j' g' v'q'c'n' u'w'o' u' g'z'r' g'p'f' g'f' " q'p' y' kpguugu' k'p' y' g' y' kpgu' r' t'q'v'g'v'k'p' r' t'q'i' t'c'o' y' q'w'f' "d'g' f' k'ue'ng' u'g'f' "v'q' y' g' f' ghg'p'ug. " c'p'f' " c'n'q' " t'g'x'g'c'u' " y' cv' f' ghg'p'ug' e'q'v'p'ug'n' e'q'p'k'f' g't'g'f' e't'q'u' / g'z'c'o' k'p'k'p'i' " y' g' y' kpguugu' q'p' " y' k'u' r' q'k'p'v' d'w' h'c'g'f' " y' g' v'p'y' g'r'eq'o' g' r' t'q'u'r' g'ev' q'h' q'r' g'p'k'p'i' " y' g' f' q'q't' " v'q' r' tqugewkqp' g'x'k'f' g'p'eg' g'z'r' r'c'k'p'k'p'i' " y' cv' y' g' y' kpguugu' y' g't'g' "k'p' y' g' y' kpgu' u

r' t'q'v'g'v'k'p' r' t'q'i' t'c'o' "p'q'v' d'g'ec'w'ug' y' gk' "v'g'u'k'o' q'p { "y' cu' d'g'k'p'i' r' w'ej' c'ug'f' "dw' k'p' q't'f' g't' "v'q' r' t'q'v'g'ev' y' g'o " h'q'o " f' ghg'p'f' cpv'u' t'g't'k'd'w'k'x'g' "x'k'q'ng'p'eg' 0' f' ghg'p'f' cpv'u' e'q'p'v'g'v'k'p' y' cv' y' g' e'q'w't'v' g't'g'f' " k'p' h'c'k'k'p'i' " v'q' r' g't'o' k'v' k'o' r' g'cej' o' g'p'v' q'h' Dt { cpv' y' k'j' g'x'k'f' g'p'eg' q'h' d'g'p'g'h'k'u' j' g' t'g'eg'k'x'g'f' "k'p' e'q'p'p'g'ev'k'p' y' k'j' "c' d'c'k'n' h'q't'g'k'w't'g' c'p'f' " c'p' c'f' f' k'k'q'p'c'n' f' t'w'i' " q'h'g'p'ug' c't'g' " w'p'c'x'c'k'k'p'i' = y' g' e'q'w't'v'f' g'v'g't'o' k'p'g'f' " y' g' d'c'k'i' o' c'w'g't' y' cu' e'q'm'v'g't'c'n' c'p'f' "k'p' c'p { "g'x'g'p'v' y' g' l'w' { "y' cu' y' g'm'c'y' c't'g' y' cv'j' g' r' tqugewkqp' j' c'f' r' t'q'o' k'ug'f' " Dt { cpv' ko o wplk' " h'q't' u'g't'k'q'u' w'p'ej' c't'i' g'f' " x'k'q'ng'p'v' q'h'g'p'ug' u' k'p' t'g'w'p' h'q't' j' k'u' v'g'u'k'o' q'p { 'c'i' c'k'p'u'v'f' ghg'p'f' cp'v'0

F ghgpf cpv'u' eqpvvkvqp' y' cv'j' g' "o'y' k'p'g'u'g'u' h'q'm'y' g'f' "c' u'etkr v' v'q' u'w' r' q't'v' Q'h'eg't' Q'v'u' O' c't'ng'y' u' x'g't'k'q'p' q'h' y' g' e'cu'g' y' t'k'w'g'p' f' v'k'p'i' j' k'u' k'p'v'g't'x'k'g'y' y' k'j' " C'm'f' t'q'p' J' v'p'v'g't'o' k'u' v'f' r' k'ec'n' q'h' y' g' d'c'f' " c'ee'w'v'k'p'u. " w'p'u'w' r' q't'v'g'f' d' { " t'g'e'q't'f' " e'k'c'v'k'p'. " y' cv' c't'g' e'q'p'v'k'p'g'f' "k'p' f' ghg'p'f' cpv'u' d't'k'g'f' 0' f' ghg'p'f' cpv'u' g'h'q't' u'v'q' u'w' r' q't'v' y' j' k'u' e'q'p'v'g'v'k'p' c't'g' d'cu'g'f' " q'p' u'r' g'ew'v'k'p' c'p'f' " k'p'w'g'p'f' q'0' f' ghg'p'f' cpv'u' eqpvvkvqp' y' cv'j' g' l'c'k'j' q'w'ug' k'p'h'q't'o' c'p'v'u' { u'g'o' 'k'p' y' g' N'q'u' C'p'i' g'ng'u' E'q'w'p'v'f' l'c'k'i'l'u'q'o' g'j' q'y' "c'h'g'ev'g'f' y' g' y' k'p'g'u'g'u' v'g'u'k'o' q'p { " c'p'f' " u'j' q'w'f' " j' c'x'g' " d'ggp' f' k'ue'ng' u'g'f' " v'q' y' g' f' ghg'p'ug' k'u' g's' w'c'm' { " f' g'x'q'k'f' " q'h' u'w' r' q't'v' k'p' y' g' t'g'e'q't'f' 0' J' k'u' e'q'p'v'g'v'k'p' y' cv'j' g' v'kcn' e'q'w't'v' u'j' q'w'f' " j' c'x'g' j' g'f' " c'p' g'x'k'f' g'p'v'c't' { " j' g'c't'k'p'i' k'p' y' j' k'ej' " y' g' r' tqugewkqp' y' q'w'f' " j' c'x'g' y' g' d'w'f' g'p' q'h' r' t'q'x'k'p'i' y' cv'j' g' y' k'p'g'u'g'u' v'g'u'k'o' q'p { 'y' q'w'f' d'g' t'g'k'c'd'ng' k'u' k'p'eqpukngpv' y' k'j' " u'g'w'ng'f' " r'ey' r' r' c'k'p'i' " w'r' q'p' y' g' f' ghg'p'f' cpv' y' g' q'd'r'k'i' c'v'k'p' q'h' t'c'k'k'p'i' " y' g' k'u'w'g' q'h' y' g' t'g'k'c'd'k'k'v' " q'h' y' g' v'g'u'k'o' q'p { " q'h' k'o' o' w'p'k' g'f' y' k'p'g'u'g'u' c'p'f' " e'c't't' { k'p'i' y' g' d'w'f' g'p' q'h' r' t'q'q'h' c'v'j' g' v'kcn' " *1013 " r'g'x'g'f' 0' *People' v. Badgett. 'supra.' 32' Ect'f'f' "cv' r' 0'56: " People' v. Morris" 3; ; 3+75' Ect'f'f' 0'374. "3; 2"]49; Ect'f' r' v'0942. " : 29' R'0'f' " ; 6; _0-

Y' g't'g'g'ev'j' g' e'q'p'v'g'v'k'p' y' cv'j' g' v'g'u'k'o' q'p { "q'h' y' g' c'eeqo r' rieg' u'j' q'w'f' j' c'x'g' d'ggp' g'z'ev'ng'f' g'f' t' w' u'w'c'p'v'q' G'x'k'f' g'p'eg' E'q'f' g' u'g'ev'k'p' 574. " d'ge'c'w'ug' " p'q' " c'd'w'ug' " q'h' f' k'ue't'g'v'k'p' " k'u' c'r' r' c't'g'p'v'0' *People v. Cudjo. 'supra.' 8' Ect'f'f' "cv' r' 0'82; 0' V'j' k'u' v'g'u'k'o' q'p { "y' cu' r' t'q'd'c'v'k'g' = y' g't'g' y' cu' b'q' f' c'p'i' g't' q'h' v'p'f' w'g' e'q'p'u'w'o' r' v'k'p' q'h' v'k'o' g' q't' q'h' e'q'p'h'w'k'p' q'h' y' g' k'u'w'g'u. c'p'f' y' g' v'g'u'k'o' q'p { 'y' cu' b'q'v'f'k'ng'n' { v'q' r' t'q'x'q'ng' go' q'v'k'p'c'n' d'k'u' c'i' c'k'p'u'v'c' r' c't'v'f' "q't' v'q' e'c'w'ug' y' g' l'w' { v'q' r' t'g'l'w'f' i' g' y' g' k'u'w'g'u' q'p' y' g' d'c'u'k'u' q'h' g'z' v'c'p'g'q'w' h'c'ev'q't'u'0' *Ugg' People' v. Minifie. 'supra.' 35' Ect'f'f' "cv' r' 03292/3293 = People v. Zapien, supra. " 6' Ect'f'f' "cv' r' 0' ; 7; 0' f' ghg'p'f' cpv'u' e'rc'k'o' y' cv'j' g' g'x'k'f' g'p'eg' y' cu' r' t'g'l'w'f' k'ek'n'q't' r' e'ng'f' " r' t'q'd'c'v'k'g' x'c'w'ng' y' cu' d'cu'g'f' " w'r' q'p' j' k'u' c'u'w'o' r' v'k'p' y' cv' k' y' cu' v'p't'g'k'c'd'ng' = y' cv' c'u'w'o' r' v'k'p' y' cu' r' g'ew'v'k'x'g' . c'p'f' " y' g' v'kcn' e'q'w't'v' y' cu' g'p'v'k'ng'f' v'q' t'g'l'g'ev' k'0' *Ugg' People v. Cudjo, supra. " 8' Ect'f'f' "cv' r' 0'832]f' q'v'd'w' t'g'i' c't'f' k'p'i' " e't'g'f' k'k'k'v' { " q'h' c' y' k'p'g'u' u' f' q' p'q'v' c'o' q'w'p'v' v'q' r' t'g'l'w'f' k'eg' " w'p'f' g't' " G'x'k'f' g'p'eg' E'q'f' g' u'g'ev'k'p' 574 = e't'g'f' k'k'k'v' { " q'h' y' k'p'g'u'g'u' k'u' y' k'j' k'p' y' g' r' t'q'x'k'p'eg' q'h' y' g' l'w' { _ = u'gg' c'n'q' " People

v. Ramos."supra."37"Ecr06j "cv'r 03387"]lphqto cpv'vguko qp{ ku'pqv'lpj gt gpv'f "wptgricdng_0-

Vq'vj g"gzv'p'f ghgpf cpv'eqv'p'f u'vj cv'vj g"v'kri'eqwv'uj qwr' j cxg"gzem'f gf "vj g"vguko qp{ "qh'vj g"ceeqo r rlegu"dgecwug"kv y cu'wptgricdng'f w'v'q'f twi "qt"creqj qn'cdwug."vj cv'eqv'p'v'kqp y cu'pqv'r tgutxgf "hqt"cr r gcn"*People v. Morris."supra."75 Ecr05f "cv'r 03; 2+"cpf "lp"cp{"gxgpv'vj tqwi j "ugctej lpi "etquu/ gzc0 kpcv'qp." yj g"lwt {"y cu"o cf g"cy ctg" qh' vj ku" r qv'p'kcn f ghlel'p'e {"lp'vj g'y kpguugu'cdk'k'k' {"v'q'dugt'xg'cpf "tgeqng'ev0

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*58+"F ghgpf cpv'eqv'p'f u'vj cv'vj g"eqwv'gttgf "lp"r tgxgp'kpi j ko "Itqo "r tgugp'kpi "gxkf gpeg"tgr'v'kpi "v'vj g"ektewo ucpegu w'p'f gt" y j lej " c" r rleg" qh'leg"t" ugew'gf " c" ucwgo gpv' Itqo lckj qwug"lphqto cpv'Uwwqp/c" r gt'v'p' y j q'f k' "pqv'vgukh{" cv f ghgpf cpv'u'v'kri'cpf "y j qug"ucwgo gpv'v'q'vj g"r rleg"y cu'pqv' k'v'q'f w'eg' "ci k'p'v'f ghgpf cpv'0'Ceet'f kpi "v'vj g"r rlego k'p'ct {" j gct'kpi "vguko qp{"qh'Ugti gcpv'Rgucp'v'q'h'vj g"Nqu"Cpi g'ru R'q'leg" F gr ctwo gpv" Uwwqp" i cxg" c" ucwgo gpv' vq" Rgucp'v'g k'p'k'ev'kpi " yj cv'f ghgpf cpv'r r'p'p'gf "v'q"nkn'c"tqddgt {" x'k'v'ko y j q'y cu'v'q'vgukh{"ci k'p'v'j ko "lp"vj g"tqddgt {" r tq'gew'k'p'0 D {"vj g"v'ko g'qh'vj g"r rlego k'p'ct {" j gct'kpi . "Uwwqp"j cf "tgecp'v'f . v'gukh{"kpi " cv' vj cv' j gct'kpi " vj cv' j g" j cf " pqv' i k'xgp" uwej " c ucwgo gpv'v'q'Rgucp'v'0'Vj cv'Uwwqp"j cf . "lp"hev"o cf g"uwej "c ucwgo gpv'v'q'Rgucp'v'g . y cu'eqtt'q'd'q'v'f "d {"F gv'ev'x'g"Urcem y j q' v'gukh'f " vj cv' Rgucp'v'g" j cf " tgr {" gf " Uwwqp'u" ucwgo gpv' v'q" j ko . " cpf " vj cv' Urcem' j cf " tgr {" gf " vj g" ucwgo gpv' v'q F gv'ev'x'g"Tkuegpu."qh'vj g"Nqu"Cpi g'ru'R'q'leg" F gr ctwo gpv'0 *Tkuegpu." j qy gxgt. " f g'p'g'f " tgegl'k'p' i " vj ku" eqo o w'p'k'v'k'p' Itqo " Urcem'0" Rgucp'v'g'u" ceeq'w'p'v' cnuq" y cu' eqtt'q'd'q'v'f " d {" Uwwqp'u" ucwgo gpv' v'q" q'v' gt" qh'legtu" ch'gt" vj g" Ectr gpv't' u'j q'v'k'p' . "lp" y j lej " *1014 "Uwwqp"eq'p'ht' o gf "np'qy kpi "qh f ghgpf cpv'u" r r'p' v'q" o w'f gt " Ectr gpv't" cpf " j cxkpi " o cf g" c ucwgo gpv' v'q" vj cv' gh'gev' v'q" Rgucp'v'g." cpf " lp" y j lej " Uwwqp ucw'f " vj cv'j g" y q'w'f "pqv'vgukh{"ci k'p'v'f ghgpf cpv'dgecwug j g'h'gct'gf " j ko 0'c" r rleg" f gr ctwo gpv'lp'v't'p'c'n'ch'k'k'u"l'p's w'k' {" j cf "dggp"eq'p'f w'eg'f "t'gi ctf kpi "y j g'v' gt "Uwwqp'u"ucwgo gpv'j cf dggp"eq'p'x'g'f "d {" "Urcem'v'q"Tkuegpu'0'k'p" vj g"eq'p'v'z'v'q'h'vj g lp'v't'p'c'n'ch'k'k'u'l'p'x'g'u'k'v'k'p' . Tkuegpu'f g'p'g'f "tgegl'k'p' i " Urcem'u eqo o w'p'k'v'k'p'0'c'v'ucwng'lp' vj g'lp'v't'p'c'n'ch'k'k'u"l'p'x'g'u'k'v'k'p' y cu' vj g" s'w'g'u'k'p' y j g'v' gt " vj g" r rleg" j cf " h'k'g'f " vq" y ctp Ectr gpv't' q'h'vj g"r r'p'p'gf "u'j q'v'k'p' "qt" r tq'v'ev'j ko "ci k'p'v'k'v' p'q'v' j g'v' gt "Rgucp'v'g"j cf "cwgo r v'g'f "v'q"o cpw'k'ev'w'g"gxkf gpeg ci k'p'v'f ghgpf cpv' d {" eq'p'ev'k'p' i " c" ucwgo gpv' cpf " h'cn'g'f cv'k'd'w'k'p' i "k'v'q"Uwwqp0

Cv't'kcn'vj g'r tq'gew'k'p' o cf g" c" o q'v'k'p' v'q" g'z'em'f g" gxkf gpeg vj cv'vj g"r rleg"j cf "tgegl'k'g'f "cf x'c'p'eg"y ctp'kpi "qh'vj g"vj t'g'cv

vq" Ectr gpv't'u" uch'v {" dw" h'k'g'f " vq" y ctp" j ko 0' F ghgpf cpv' eq'p'v'p'f gf " cv' v'k'cn' vj cv' vj ku" gxkf gpeg" y cu' tgr'x'c'p'v' vq f go q'p'v'c'v'g" vj cv' vj g" r rleg" j cf " o cpw'k'ev'w'g'f " gxkf gpeg ci k'p'v' j ko 0' J ku" vj g'q' {" y cu' vj cv' Rgucp'v'g" j cf " r'k'g'f " cdq'w tgegl'k'p' i " c" ucwgo gpv' Itqo " Uwwqp." vj cv' vj g" q'v' gt" qh'legtu eq'm'f gf "lp" vj ku' r'g'g' . cpf " vj cv' vj g' t'g'q'g' o w'ej "qh'vj g" gxkf gpeg eq'm'g'ev'f " d {" " vj g" r rleg" eq'w'f " j cxg" dggp" o cpw'k'ev'w'g'f " d {" vj go 0

Uqo g"qh'vj g" f kur w'g'f "gxkf gpeg"t'gi ctf kpi "vj g"ektewo ucpegu w'p'f gt' y j lej "Uwwqp'u"ucwgo gpv'v' cu'q'd'v'k'p'g'f "o ki j v'j cxg'dggp tgr'x'c'p'v'q' ko r g'cej "Rgucp'v'g'u"vguko qp {" j cf " j "vgukh'f 0J g f k'f "pqv'0'Uwwqp" f k'f "pqv'vgukh {" g'k'v' gt'0'P q'p'g' q'h'vj g" gxkf gpeg vj cv'v'qto gf "vj g'd'c'k'u' h'q't' vj g'lp'v't'p'c'n'ch'k'k'u'l'p'x'g'u'k'v'k'p' y cu tgr'x'c'p'v'q' vj g" r tgugp'v'ecug'0'k'f k'f "pqv'f go q'p'v'c'v'g' q't" gxgp uwi i guv'v' cv'vj g" r rleg" j cf " o cpw'k'ev'w'g'f " gxkf gpeg" vj cv' y cu cf o k'w'g'f "ci k'p'v'f ghgpf cpv'v'c'v'j g' k'v'f go q'p'v'c'v'g'f " vj cv' r rleg eqo o w'p'k'v'k'p'u" j cf " h'k'g'f . " t'g'u'w'k'p' i " lp" c" h'k'w'g'f " vq" y ctp qt" r tq'v'ev'f ghgpf cpv'u' x'k'v'ko . " Ectr gpv't'0'Vj g' lp'v't'p'c'n'ch'k'k'u l'p'x'g'u'k'v'k'p' k'p'f k'ev'g'f " vj cv' q'p'g' q'h'vj g" r rleg" qh'legtu" o c {" j cxg' r'k'g'f " f'v'k'p' i " vj g' l'p'x'g'u'k'v'k'p' cdq'w'v' j g'v' gt " p'q'v'k'k'ev'k'p' q'h' Uwwqp'u" ucwgo gpv' j cf " dggp" ku'w'g'f " q't" tgegl'k'g'f " d {" vj g r rleg." dw" vj ku" ektewo ucpeg" f k'f " pqv' k'p' k'ev'g'f " vj cv' vj g r rleg" j cf " h'c'd'k'ev'g'f " cp {" gxkf gpeg" ci k'p'v'f "defendant"0'Uwej s'w'g'u'k'p'u"cu' y j g'v' gt "Rgucp'v'g" q't" q'v' gt" qh'legtu" v'q'q'm' q't" n'gr v p'q'v'u" q'h' tgr'x'c'p'v'lp'v't'x'k'g'v' u't'gi ctf kpi "vj g"Uwwqp" v'k' . " q't" vj g r t'g'ev'g'f cv'g'u' y j gp' vj g'lp'v't'x'k'g'v' u'v'q'q'm' r'ev'g' . y g'g' eq'v'c'v'g't'cn v'q" cp {" ku'w'g' cv' v'k'cn'0' Vj g" v'k'cn' eq'w'v' y cu' y k'v' k'p' ku" dt'q'cf f k'et'g'v'k'p' "lp" f g'v'g'to k'p'kpi " vj cv' vj g" gxkf gpeg" y q'w'f " eq'p'w'o g cp" w'p'f w'g' co q'w'p'v' q'h' v'ko g'lp" tgr'v'k'p' v'q" ku" r tq'd'ev'k'g' x'c'w'g' cpf " vj cv' k'v'j g' t'g'q'g' v'j q'w'f " dg' g'z'em'f gf 0* G'x'k'f 0'E'q'f g. 'E'574=ugg" People v. Rodrigues" *3; ; 6-": "Ecr06j "3282."3346/3347]58" Ecr07r v'0'4f "457." : : 7" R0'f "3_0" Dgecwug" vj g" gxkf gpeg j cf " uq" r'k'w'g' r tq'd'ev'k'g' x'c'w'g." y g" cnuq" t'g'ev'f f ghgpf cpv'u' er'k'ko " vj cv' vj g" g'z'em'k'p' q'h' vj ku" gxkf gpeg" x'k'q'v'g'f " j ku" ucw'g q't" h'g'f g'c'n' eq'p'v'k'w'k'p'c'n' t'k'v' v' v'q" r tgugp'v' c" f gh'p'ug" *ugg Crane v. Kentucky" *3; ; 8+698" W'U'0'8: 5. '8; 2/8; 3"]328" U'E'0 4364." 4368/4369." ; 2" N'G'f 0'4f " 858_ = In re Martin" *3; ; 9+ 66" Ecr05f " 3. " 52" *1015 "]463" Ecr07r v'0' 485." 966" R0'f 596_ . " q't" vj g" r tq'x'k'k'p' q'h' vj g" E'c'r'k'q't'p'k' " E'q'p'v'k'w'k'p' vj cv 0't' g'x'c'p'v' gxkf gpeg" u'j c'n' p'q'v' dg" g'z'em'f gf "lp" cp {" et'ko k'p'cn r tq'gew'k'p'0" *Ecr0Eq'p'u'0'ct'0'k'k'k' . : . u'w'd'f 0'f' +0-

18. Introduction of Bentley's testimony regarding Cooper's statement

*59+" Vj g" r tq'gew'k'p' k'p'v'q'f w'eg'f " gxkf gpeg" k'p'v'p'f gf " vq f go q'p'v'c'v'g' vj cv' D'g'p'v'g' {" . c' r tq'gew'k'p' y k'p'g'u' . cpf " E'q'q'r gt. y j q' y cu' l'q'k'p'v' " e'j c'ti gf " dw'v'k'g'f " u'g' r c't'ev'g'f " Itqo " f ghgpf cpv' cpf " f k'f "pqv'vgukh {" cv'f ghgpf cpv'u'v'k'cn' j cf "dggp" t'g'et'v'k'g'f " d {"

eqwrf "dg'g'zr nkgf "d { 'y' g'f ghpf cpv'j g'eqwv'kputwvfg "y' g r tqugewqt "pqv'q'wug'vj g'g'xkf gpeg'kp'cti wo gpv'q'vj g'lwt {0

ku' cr r gctu' f ghpf cpv' f kf "pqv' o cnq" c" wko gn' "qdlgevqp" vj yj g'cf o kuukqp' qh'vj g'g'xkf gpeg'cv'vj g'wko g'O lej cgn'V0'htuv ucwgf "j" g'j'cf "uggp'dm'qf "qp'vj g'xlewo' u'uq'p. "uq'vj g'erclo o c { "dg'f ggo gf "y clxgf O'Ugg' "People" v. Mickey. "supra." 76 Ecn'f' "c'v'r O'88; O'Gxgp' "h'vj g'kuuwg'j cu'dggp'r tguq'xgf "d { f ghpf cpv'u' vtf { "qdlgevqp" cpf "j ku'uwdugs vgpv' o q'v'qp" hqt o kuukq' "q'vj g'i' tqwpf "y cv'vj g'cf o kuukqp'qh'vj g'g'xkf gpeg'y' cu vj g'tguwv' "qh'r tqugewqt'kcn' o kuqpf wv." cpf "g'xgp" cuwo kpi vj g'f qwd'v'w'r tqr quukqp'vj cv'k'y cu'cp'cdwug'qh'f ku'et'g'v'qp' vj cf o k'y'vj g'g'xkf gpeg'qt' vj "h'ck'v'q'kputwv'g' lwt { "v'f' kut'gi' ctf k'cp { "gttq' "qdxkqum' "y cu'j cto' r'guu'Vj g'lwt { "j cf "dgh'gt'g'kv vj g'u'r w'v'k'p' "y cv'vj g'ej k'f' u' o q'j'gt' "y qw'f "v'gukh' { "j" g'y cu pqv'kplwt'gf. "uq'vj g'r' tqd'cv'xg' "xcnw'g'qh'O lej cgn'V0'u' "eqpwct { v'guko qp { "y cu' o l'pko c'f'F ghpf cpv'cr r' ct'gpw' "dg'rt'x'g'u' yj g'g'xkf gpeg'y' cu' r' tglw'f' lekcn'k'p' "y cv'k'y qw'f "g'rt'ek'v'u' o r'cvj { "hqt vj g'xlewo' u'uq'p'cpf "i' k'xg' "t'kug' "v'q' vj g'lph'co o cvqt { "l'ph'gt'gpeg vj cv'f' ghpf cpv'gpf cpi'gt'gf "y vj g'u'q'p' u' "uch'v'f' "v'q'v'gt' "g'xkf gpeg vj cv'f' ghpf cpv'i' wppgf "f' q'v' p' vj g' "h'cv'j'gt' "l'p'c'ur' t'c' { "qh'd'w'ng'u' cu' "h'cv'j'gt' "cpf "u'q'p' cr r' tqcej'gf "v'j' g't' "x'g'j' k'eng' "y qw'f "i' k'xg' "t'kug' vq' vj g' uco' g' u' o r'cvj { "cpf " u'w'r' q't'v' vj g' uco' g' k'ph'gt'gpeg'0 Vj g'eq'v'p'k'p' vj cv'vj g'r' tqugewqt' "k'v'g'p'v'k'p'cm' "r' t'g'v'p'g'f' qt' "h'ck'gf "v'q' eq'vt'g'v' o k'ung'cf' k'pi' "g'xkf gpeg'qt' "g'pe'q'w'c'i' gf "y' g' i' k'k'p'i' "qh' o k'uc'ng'p' "cpf "l'ph'co o cvqt { "v'guko qp { "ku'y' k'j' q'w' o g'tk'v'j' g't'g'ku'w'duc'p'k'v'k'g'xkf gpeg'lw'r' r'qt'v'k'pi' "y' g' "v'k'cn'leq'w'v'u' f'v'g'to' k'pc'v'k'p' "y' cv'vj g'r' tqugewqt' "f'kf' "p'q'v' "mp'q'y' "y' g'y' k'p'g'u' y' qw'f "v'gukh' { "cu'j' g'f' k'f' . "cpf "y' g'r' tqugewqt' "f'kf' "p'q'v'g'z'r' n'k'v'j' g' v'guko qp { "y' j' k'ej' "j' g' "h'cv'g't' "eq'p'w'f' gf "y' cu' r' tqd'cdn' "o' k'uc'ng'p'0 Cu'v'j' g' "v'k'cn'leq'w'v'u' d'ug't'x'g'f' . k'v'ku'p'q'v'w'p'j' g'ct'f' "qh'v'j' cv'c'y' k'p'g'u' o c { "dg'v' o' k'uc'ng'p' "k'p'j' ku'q't'j' g't'v'guko qp { "k'v'ku'v'j' g'r' w'r' qug' "q' h' et'q'u' / g'z'c'o' k'pc'v'k'p' "v'q' g'rt'ek'v'j' g't'w'j' "h'q't'v'j' g'lwt {0

F ghpf cpv'cuq' "eq'v'p'f' u' vj g'eqw'v'k'o r' tqr' gtn' "q'x'g't'w'g'f' "j' ku qdl'gevqp' vj g'cf o kuukqp' qh'g'xkf gpeg'uj' qy' kpi' "y' cv'uo' g' qh' vj g' d'w'ng'u' "h't'gf' "d { "f ghpf cpv' f'w'k'pi' "y' g' "h'w'k'rt'cf' g' "qp' F g'v'g'v'x'g' "Y' k'rt'ko' u' "n'f'i' g'f' "k'p' "y' g' y' cml' q'h'c' "erc'ut'qq'o' "k'p' vj g' "h'ck'v' "D'cr' v'ku'v' "E'j' w'ej' "U'ej' q'q'r'0'F ghpf cpv' "eq'v'p'f' u' vj' ku g'xkf gpeg' "y' cu' "l't' g'ng'x'p'v' "cpf "w'p'f' w'v' "r' t'glw'f' lekcn' "dw'k'v' y' cu' pqv' "y' g' "p'wo' d'gt' "q'h' u'j' q'u' "h't'gf' "cpf "y' g' "ek'te'wo' uc'p'eg' "y' cv' vj g'uj' q'u'ur' t'c' { gf "q'x'g't' "c' "t'g'r'v'x'g'gn' "d't'q'cf' "c't'g'c' "y' g't'g't'g'ng'x'p'v' vq' "f' go' q'p'ut'cv'g' "f' ghpf cpv'u' "f'v'g't'o' k'pc'v'k'p' "v'q' "n'kn'F' g'v'g'v'x'g' "Y' k'rt'ko' u' / "l'p' "g'u'ng'p'eg' . "y' cv'j' g'o' q'y' g'f' "v'j' g' "q'h'f'eg't' "f' q'y' p'0'Vj' ku y' cu' "t'g'ng'x'p'v' "v'q' "r' tq'x'g' "o' c'r'ie'g' "ch'q't'g'v'j' q'w'j' v'0'Vj' g' g'xkf gpeg' y' cu' "p'q'v' "w'p'f' w'v' "r' t'glw'f' lekcn' "p'q't' "y' cu' "k'v' r' t'g'ug'p'v'g'f' "k'p' "c'p' l'ph'co o cvqt { "o' c'p'p'gt'0'C'n'j' q'w'j' "f' ghpf cpv' *1018' "eq'v'p'f' u' vj' cv'vj' ku' "g'xkf gpeg' "y' cu' "l't'g'ng'x'p'v' "cpf "w'p'f' w'v' "r' t'glw'f' lekcn' "k' h' eq'p'uk'f' g't'gf' "d { "y' g' "lwt { "cv'vj' g'r' "g'p'cn'f' "r'j' cug' "q'h'v'j' g' "v'k'cn' "k'v

qdxkqum' "y cu't'g'ng'x'p'v'cu'c'ek'te'wo uc'p'eg'qh'v'j g'et'ko g'qh yj'k'ej' "f ghpf cpv'y cu'eq'p'x'k'ev'g'0*E3; 20. 'h'cv'q't' "c'0-

20. **Applicability of section 190.2, subdivision (a)(10)**
*5; "F ghpf cpv'eq'v'p'f' u'v'j' g'eqw'v'uj' qw'f' "j' c'x'g'i' "t'c'p'v'g'f' "j' ku o q'v'k'p' "v'q' u't'k'ng' "y' g' "ur' gek'cn' ek'te'wo uc'p'eg' "cm'g'i' c'v'k'p' "y' cv' f' ghpf cpv' n'k'ng'f' "F' g'v'g'v'x'g' "Y' k'rt'ko' u' "l'p' "t'g'c'r'ic'v'k'p' "h'q't' "j' ku v'guko qp { "l'p'c'et'ko k'pc'n'r' tq'eg'gf' k'pi' 0*E3; 20. "u'wdf' 0*c' "32+0- J' g'eq'v'p'f' u'v'j' cv'vj' ku'ur' gek'cn'ek'te'wo uc'p'eg' "c'r' r' n'g'u' "q'p'p'f' "y' j' g'p' vj' g'xlewo' "y' cu'c'r' g't'ek'r' k'ep'v'y' k'p'g'u'u'q'h'v'j' g'et'ko g'v'q'y' j' k'ej' "j' ku v'guko qp { "t'g'r'v'g'u'0'Y' g' "j' c'x'g' "t'g'l'g'ev'g'f' "f' ghpf cpv'u' "eq'v'p'v'k'p'p'0 *People'v. Jones" *3; ; 8+35'Ecn'f' "757." 772 "J76'Ecn'f' r' v'0'f' 64." ; 39'R0'f' "3387_0-

F ghpf cpv' cuq' " cr r' ct'gpw' " eq'v'p'f' u' vj' cv' vj' g' ur' gek'cn' ek'te'wo uc'p'eg' "f' gh'p'g'f' "k'p' "u'g'v'k'p' "3; 20. "u'wdf' k'k'k'k'p' "c' "32+ y' cu' k'pc'r'r' r'ie'cd'ng' "k'p' "j' ku' ecug' d'ge'cw'ug' "y' g' r' i'q'v' "v'q' "n'kn' F' g'v'g'v'x'g' "Y' k'rt'ko' u' "eq'o' o' g'peg'f' "d'gh'q't'g' "Y' k'rt'ko' u' "v'g'uk'h'g'f' "cv' vj' g' "E'ct'r' g'p'v'g't' "t'q'd'd'g't' { "v'k'cn' "cpf' "cv'c' "w'ko' g' "y' j' g'p' "k'y' y' cu' "p'q'v' er'g't' "j' g' "g'x'g't' "y' qw'f' "v'g'uk'h' { "c'i' c'k'p'u'f' f' ghpf cpv'v' cv' vj' cv' "v'k'cn'0 k'p' "c'f' f' k'k'p' . "f' ghpf cpv' "eq'v'p'f' u' "F' g'v'g'v'x'g' "Y' k'rt'ko' u' y' cu' "p'q'v' c'p' "k'o' r' q't'cv'p'v'y' k'p'g'u'u' "k'p' "v'j' g'et'ko k'pc'n'r' tq'eg'gf' k'pi' 0'Vj' ku' "erc'ko' ku' y' k'j' q'w' "o' g't'k'0'Vj' g't'g' "y' cu' "g'xkf gpeg' "v'q' "f' go' q'p'ut'cv'g' "y' cv' vj' g'r' n'q'v' "v'q' "n'kn'F' g'v'g'v'x'g' "Y' k'rt'ko' u' y' cu' "w'p'f' g't'v'ng'p' "y' k'j' "v'j' g' r' w'r' qug' "q'h'r' t'g'x'g'p'k'pi' "j' ku' v'guko qp { . "v'j' w'u' "h'cn'k'pi' "y' k'j' k'p' "v'j' g' co' d'k'v'q'h'v'j' g'ur' gek'cn'ek'te'wo uc'p'eg' "cu'f' g'h'p'g'f' "d { "u'g'v'k'p' "3; 20. "u'wdf' k'k'k'k'p' "c' "32+0*Ugg' "People'v. Weidert" *3; : 7+5; "Ecn'f' : 58." ; 75/ : 76 "J43: "Ecn'f' r' v'0'79." 927'R0'f' "5: 2_"u'g'v'k'p' "3; 20. "u'wdf' 0*c' "32+"ku' "cr r' r'ie'cd'ng' "k'h'f' ghpf cpv' "believes" "v'j' g' "xlewo' y' k'n'f' "d'g'c' "y' k'p'g'u'u' "k'p'c'et'ko k'pc'n'r' tq'ugew'k'p' . "y' j' g'v'j' g't' "p'q'v' u'we'j' "c' "r' tq'eg'gf' k'pi' "ku' r' g'p'f' k'pi' "qt' "cd'q'w' "v'q' "d'g' "l'p'k'c'v'g'f' _0' "k'v' ku' "p'q' "f' gh'p'ug' "v'q' "v'j' g' "ur' gek'cn' ek'te'wo uc'p'eg' "cm'g'i' c'v'k'p' "y' cv' vj' g' "xlewo' "y' cu' "p'q'v' "c'p' "k'o' r' q't'cv'p'v'y' k'p'g'u'u' "k'p' "v'j' g'et'ko k'pc'n'r' tq'eg'gf' k'pi' . "u'q' "n'p'i' "cu' "q'p'g' "q'h'v'j' g'f' ghpf cpv'u' r' w'r' qugu' y' cu' v'q'r' t'g'x'g'p'v'j' g'y' k'p'g'u'u' "h'q'o' "v'g'uk'h' { k'pi' 0*Ugg' "People'v. Stanley *3; ; 7+32'Ecn'f' "v'j' '986." 22/ : 23 "J64'Ecn'f' r' v'0'f' "765." ; 9'R0'f' 6: 3_ "ur' gek'cn'ek'te'wo uc'p'eg' "c'r' r' n'g'u' "y' j' g'p' "o' w'nk'rt'g' "r' w'r' qugu' o' q'v'k'c'v'g'f' "f' ghpf cpv' "cu' "n'p'i' "cu' "q'p'g' "q'h'v'j' go' "y' cu' "v'q'r' t'g'x'g'p'v' vj' g' y' k'p'g'u'u' "v'guko qp { _0' "O' q't'g'x'g't' . "g'x'g'p' "cu'wo' k'pi' "g't'q't' . vj' g' "lwt { "h'q'w'p'f' "y' ku' "ur' gek'cn'ek'te'wo uc'p'eg' "cm'g'i' c'v'k'p' "p'q'v'v'w'g' . cpf "f' ghpf cpv'u' "erc'ko' "y' cv'j' g'y' cu' r' t'glw'f' leg'f' "d { "c'p' "k'o' r' t'qr' g't' o'k'p' "h'v'k'p'o' "q'h'v'j' g' "p'wo' d'gt' "q'h'ur' gek'cn'ek'te'wo uc'p'eg' "cm'g'i' c'v'k'p'u' ku' "p'q'v'r' g't'u'w'c'uk'x'g' 0*Ugg' . "g'f' 0' "People v. Clark, supra." 5'Ecn'f' "v'j' r' 0389/38: 0-

21. **Section 190.2, subdivision (a)(7)**
*62+ "F ghpf cpv' t'clugu' u'g'x'g't'cn' eq'v'p'v'k'p'u' "t'gi' c'tf' k'pi' "v'j' g' ur' gek'cn'ek'te'wo uc'p'eg' "h'k'p'f' k'pi' "v'j' cv'j' g' "h'k'ng'f' "F' g'v'g'v'x'g' "Y' k'rt'ko' u'

kp'tgvrckvqp'hqt'vj cv' *1019 "qHhlegt)u'gzgtekg'qh'j ku'qHhlekcn f wkgu'J g'eqpvpgf u'hktu'vj cv'vj g'v'krci'eqwtv'o kulpwtvevfg vj g'lwt {"tgi ctf lpi "vj g'grgo gpw'qh'vj g'ur gekri'ektewo ucpeg' J g'eqpvpgf u'vj g'eqwtv'o kurgf "vj g'lwt {"d {"eqpxg{lpi "vj g ko r tguakqp "vj cv' f ghgpf cpv'u' uwdlgevkg" xky "tgi ctf lpi "vj g rcy hwpguu'qh'F gvevkg'Y knko u'u'eqpf wevy cu'ktgrxcpv'0

Ugevqpp' 3; 20f. " uwdf kxkukqp " *c-#9+ " f ghkgu" vj g" cr r rkecdrg ur gekri'ektewo ucpeg"cu'hqny u<δVj g"xlevo "y cu"r gceg qHhlegt"cu'f ghkgf "00y j q. "y j kg'gpi ci gf "lp'vj g'eqwtug'qh'vj g r gthqto cpeg'qh'j ku'qt'j gt'f wkgu."y cu'kpvpgv'kpcmf "nkrgf . 'cpf vj g'f ghgpf cpv'npqy . "qt'tgcuqpcdnf "uj qwf "j cxg'npqy p. "vj cv vj g'xlevo "y cu'c'r gceg'qHhlegt"gpi ci gf "lp'vj g'r gthqto cpeg'qh j ku'qt'j gt'f wkgu="qt'vj g'xlevo "y cu'c'r gceg'qHhlegt"cu'f ghkgf "00 cpf "y cu'kpvpgv'kpcmf "nkrgf "lp'tgvrckvqp'hqt'vj g'r gthqto cpeg qh'j ku'qt'j gt'qHhlekcnf wkgu'0

Kl'y cu'cmgi gf "vj cv'f ghgpf cpv'kpvpgv'kpcmf "nkrgf "F gvevkg Y knko u' lp" tgvrcv'kqp" hqt" vj g" qHhlegt)u' r gthqto cpeg" qh j ku' qHhlekcn' f wkgu" y kj lp" vj g" o gcplpi " qh' ugevqpp' 3; 20f. uwdf kxkukqp " *c-#9+δVj g'eqwtv'kpwv'v'v' "vj g'lwt {"cu'hqny u<δVq "hpf "vj cv'vj g'ur gekri'ektewo ucpeg"tghgtgf "v'lp'vj g'ug kpwv'v'v'cu' o wtf gt'qh'c'r gceg'qHhlegt"ku'twg'gcej "qh'vj g hqny lpi "hew"o wu' dg" r txfgf <"] _ " Qpg. "vj cv'vj g" r gtuqp o wtf gtgf "y cu"r gceg' qHhlegt'0] _ " Cpf. "w q. "vj cv'vj g"y cu kpvpgv'kpcmf "nkrgf "lp'tgvrckvqp" hqt'vj g'r gthqto cpeg'qh'j ku qHhlekcn' f wkgu'0] _ " Cpf. "vj tgg. "vj cv'vj g'f ghgpf cpv'npqy "qt tgcucpdcnf "uj qwf "j cxg'npqy p"vj cv'vj g'r gtuqp"nkrgf "y cu'c r gceg'qHhlegt'gpi ci gf "lp'vj g'r gthqto cpeg'qh'j ku'f wkgu'0"Ugg ECNLE'P q0: 0 300"K'cf f kkp. "vj g'eqwtv'kpwv'v'v' "vj g'lwt { < δHqt'vj g'r wtr qug'qh'vj g'ug'kpwv'v'v'cu'c'Nqu'cpi grgu'Rqikg F gvevkg'ku'c'r gceg'qHhlegt'0] _ "Vj g'r j tcug'lp'vj g'r gthqto cpeg qh'j ku'f wkgu'cu'wug' "lp'vj g'ug'kpwv'v'v'cu' gcpu'cp {"rcy hwn cev'qt'eqpf wevy j kg'gpi ci gf "lp'vj g'b' kpvpgcpeg'qh'vj g'r gceg cpf "ugewkq' "qh'vj g'eqo o wpk {"qt"lp'vj g'kpxguk' cvkqp"qt r tfgxgpv'kqp'qh'etko g0"Ugg'ECNLE'P q0: 0 30 0-

F ghgpf cpv'eqpvpgf u'vj g'eqwtv'krgf "v'kpwv'v'v' g'lwt {"vj cv lp'qt'f gt'v'k'lp'vj g'cmgi cvkqp'twg. 'k'o wu'hkpf "vj cv'f ghgpf cpv tgvrcv'kqf "ci kpwv' vj g' qHhlegt" y kj "vj g" uwdlgevkg" kpvpgv' v' gzcce'v' tfgxgpi g' hqt" vj g' qHhlegt)u' lawful" r gthqto cpeg" qh' j ku f wkgu'J g'eqpvpgf u'vj cv'lp'hcev'vj g'ōmpgy "qt'uj qwf "j cxg npqy pō'rcpi wci g'f guetkdkpi "vj g'vj kf "hcewrcikuug'r tfgpvgf d {"vj g'kpwv'v'v'cu'cv'kgnf "o kurgf "vj g'lwt {"qp'vj ku'r klp'0Cp kpvpgv'v'v'k'gvrckv'q' hqt'vj g' qHhlegt)u'eqpf wevy v'v'vj g'f ghgpf cpv uwdlgevkg'nf "dgrkxgf "y cu' unlawful" y qwf "pqv." ceeqtf lpi v'q'f ghgpf cpv."eqpvkwwg"vj g'kpvpgv'pgeguuct {"v'uw r qtv'vj ku ur gekri'ektewo ucpeg" hpf lpi 0'F ghgpf cpv'eqpvpgf u'vj cv'vj ku cmgi gf "o kulpwtvev'kqp/qt'cv'rgcu'vj g'eqwtv'krgf "v'kpwv'v'v' g'ertkhf

k/v' cu' r tglwf lekcn' dgecvug" vj g'g" y cu' uwdlgev'kcn' g'xkf gpeg vj cv'f ghgpf cpv'nkrgf "F gvevkg'Y knko u'lp" tgvrcv'kqp" hqt y j cv'f ghgpf cpv'dgrkxgf "y cu'vj g' qHhlegt)u'wprcy hwi' *1020 eqpf wev'k'rc'ko lpi 'j ko 'hqt'vj g'Ectr gpvgt'qddgt {0K'cf f kkp. j g'cr r ctgpv' "eqpvpgf u'vj cv'g'xgp'k'cp' qdlgevkg" ucpf ctf y g'g'cr r rkecdrg. "vj g'eqwtv'krgf "v'q'f ghkg'cf gs wev' {"y j cv eqpvkwwg' "cp" qHhlegt)u' rcy hwi' r gthqto cpeg" qh' j ku' qt" j gt f wkgu'0 K' f ghgpf cpv'u' xky . "vj g' lwt {"uj qwf "j cxg" dggp kpwv'v'v' "vj cv'vj g'qHhlegt'y qwf "pqv'dgr' gthqto lpi 'j ku'qHhlekcn f wkgu'k'j g'y g'g'o cpw'cew'kpi "c'ecug'ci kpwv'f ghgpf cpv'lp vj g'tqddgt {"r tqugewkqp'0

Ur gekhlec'nf . " f ghgpf cpv' eqpvpgf u' qp" cr r gcn' vj cv' vj g' v'kcn eqwtv' uj qwf "j cxg" kpwv'v'v' "vj g' lwt {" uwc" ur qpv'g' δK' f gvgto klpki "y j g'vj gt" vj g' xlevo "y cu' nkrgf "lp" tgvrcv'kqp hqt'vj g'r gthqto cpeg'qh'j ku' qHhlekcn' f wkgu. {"q'w'o wu'xky vj g' tgvrcv'kqf /ci kpwv'eqpf wev'cu'k'v' cu' w'f gtuq'qf "d {"vj g' f ghgpf cpv'0K'vj g'f ghgpf cpv'dgrkxgf "vj g'xlevo "o cpw'cew'g' g'xkf gpeg" ci kpwv' j ko . "cpf " tgvrcv'kqf " hqt" vj cv' r gtekg'g' eqpf wev' vj g' xlevo "y cu' p'q'v' nkrgf "lp" tgvrcv'kqp" hqt" vj g' r gthqto cpeg'qh'j ku' qHhlekcn' f wkgu'0'F ghgpf cpv'eqpvpgf u'vj g eqwtv'u' h'w'nf "qt" kpeqo r rvg'kpwv'v'v'k'x'k'v'g' "j ku'tki j v'v'q f w'r t qegu'qh'rcy . "v'k'k' "pqv'g' "v'v'k'cnf {"lwt {"cpf "v'q'k'k' cpf "tgrkcdrg" f gvgto kpv'kqp'qh'j ku' h'w'qh'ecr kcn'0 w'f g'0

Vq'vj g' g'z'v'p'f ghgpf cpv'u' erko "ku'vj cv'vj g'eqwtv'krgf "v'q i k'g'ertkh{lpi "qt'co r rkh{lpi "kpwv'v'v'cu'v' g'erc'ko "ku'y c'k'g'f dgecvug'f ghgpf cpv'f k' "pqv't'gs wgu'v'we'j "ertk'k'ecv'kqp'dgrny 0 *People'v. Sully. "supra."75'Ecrtf' cv'r 0343: 0#Vq'vj g'g'z'v'p'v j ku'erc'ko "ku'vj cv'vj g'eqwtv'0 kurgf "vj g'lwt {"tgi ctf lpi "vj g'ur gekcn ekewo ucpeg"cmgi cvkqp."qt" h'krgf "v'q'kpwv'v'v'cu'c'f ghg'pug uwr r qtv'g' "d {"vj g'g'xkf gpeg. "vj g'erc'ko "ku'tglgev'g'f . "cu'y g'uj cm g'zr r'k'p'0

K' o cnkpi " j ku' erko . " f ghgpf cpv' tgrku' w'qp" vj g' y gm' gucdnkj gf 'twg'vj cv'j j gp'c'bc'w'g'o cnguk'c'etko g'v'q'eqo o kv cp {"cev'ci kpwv'c'r gceg'qHhlegt'gpi ci gf "lp'vj g'r gthqto cpeg'qh j ku'qt'j gt'f wkgu."r ctv'qh'vj g'eqtr wu'f g'v'k'qh'vj g'qHhleg'pug'ku vj cv'vj g'qHhlegt'y cu'cev'kpi "rcy hwnf "cv'vj g'v'ko g'vj g'qHhleg'pug'y cu eqo o kv'g' 0#In re Manuel G. *3; ; 9+38'Ecrtf'vj : 27. : 37'J88 Ecrtf' r v'0f "923. : 63'RF : : 2 _=People'v. Gonzalez" *3; ; 2+ 73'Ecrtf' 339; . "3439"J497'Ecrtf' r v'0'94; . : 22'RF "337; _]cr r n{lpi 'twg'v'q'ugevqpp' 3; 20f. uwdf kxkukqp " *c-#9+0'F kur w'g'f hcew'tg'rcv'kpi "v'q'vj g's wgu'kqp"y j g'vj gt' vj g'qHhlegt'y cu'cev'kpi rcy hwnf "ctg'hqt'vj g'lwt {"v'q'f gvgto kpg'y j gp'uwe'j "cp'qHhleg'pug'ku ej cti gf 0#People'v. Gonzalez. "supra."73'Ecrtf' cv'r 034390-

Vj g' twg' f ghgpf cpv' tgrku' w'qp" tgs w'k'gu' vj cv'vj g' qHhlegt)u rcy hwi'eqpf wev' dg' gucdnkj gf "cu'cp' qdlgevkg' hcev'k'f' qgu

pqv'gucdrkuj "cp{ 'tgs wktgo gpv'y kj 'tgur gev'v'j g'f ghgpf cpv'u o gpu' tgc0' Tcvj gt. " vj g' twrg' ku' dcugf " wr qp" vj g' ucwwtq { f ghpkkqp' qh' vj g'etko g. "cpf "0hry u'ltqo " vj g'r tgo kug" vj cv dgecwug'cp'qhhegt'j cu'pq'f wv' 'v'vcng'knzi cr'cev'v'p. 'j g'qt'lj g ku'pqv'gpi ci gf "lp'f wkgu.'hqt' r wtr qugu'qh'cp'qhhegt'f ghgpf kp'uwej "vgo u. kh'y g'qhhegt'u'eqpf wev'ku'wpry hwi0006* *1021 *People v. Gonzalez*.^{supra}. "73'Ecrf6f 'cv'r 034390' Ceeqtf lpi n. vj g'f ghgpf cpv'u' uwdlgev'xg' wvf gtucv'p lpi " vj cv' vj g' qhhegt'u eqpf wev'y cu'rcy hwi'ku'pqv'cp'grgo gpv'qh'r tqql0F ghgpf cpv'ku wpcdr'g'v' r qkpv'v'cp { 'rcpi vci g'lp'ugev'v'p'3; 204. "uwdf kxkukp *c-#9+ vj cv'y qwf "uwr r qtv'c'eqvtct { "eqpenwukp0'Y' g'qdu'g'xg vj cv'lp' vj g'htuv' r ctv'qh' vj g' uwdf kxkukp " f ghpkpi " vj g'ur gekn ekteu ucpeg" qh' nkrkpi " c" r gceg" qhhegt" gpi ci gf " lp" vj g r gthqto cpeg"qh'j ku'qt'j g' f wkgu. "vj g'ucwug'f qgu'eqv'v'p'c npqy rgi i g'eqo r qpgpv'tgs wkt'pi " vj cv'y g'f ghgpf cpv'npqy " vj g kf gpv'v' { "qh' vj g' xlewo " cu" c" r gceg" qhhegt0⁴⁶ " k'p' vj g'ugeqpf r ctv. " pq" npqy rgi i g' tgs wktgo gpv' cr r gctu0' Vj ku' qo kxkukp r tguwo cdr' { "qeev'v'g'f dgecwug' vj g'f ghgpf cpv'u' npqy rgi i g' qh vj g' xlewo " u' kf gpv'v' " cu" c" r gceg" qhhegt' ku' gucdrkuj gf " d { " vj g lwt { " u' f v'gto kpcv'v'p' vj cv'y g'f ghgpf cpv'cev'v'f " y kj " vj g' r wtr qug qh' t'g'v'v'v'p' " hqt' vj g' qhhegt' u' eqpf wev' qh' j ku' qt' j g' qhhekn f wkgu0E g'v'v'p' { " vj g' g' ku' pq' dcuku' hqt' kp'v'v'v'p' " vj g' r' q'v'v'p' qh' vj g' ur gekn' ekteu ucpeg' t'g'v'v'p' " vj g' v'v'v'v'p' " vj g' tgs wkt g vj cv'y g'f ghgpf cpv'j cxg' c' uwdlgev'xg' d'g'v'v'p' vj cv'y g' qhhegt' y cu cev'v'p' " rcy hwn { " y j gp' j g' qt' lj g' r gthqto gf " vj g' f wkgu' hqt' y j lej f ghgpf cpv' u' wj j v' v' g' t'g'v'v'v'p' Uwej " cp' kp'v'v'v'p' y qwf dg' k'p'eqv'v'p' vj kj " vj g' r wtr qug' qh' vj g' ur gekn' ekteu ucpeg v' q' ch' hqt' " ur gekn' r' t'g'v'v'p' " vj g' qhhegt' u' j q' t'ku' vj g' k' r' x' g' u' v' r' t'g'v'v'p' vj g' eqo o w'v'v'p' . " cpf " qd'x'k'w'v'v'p' " y qwf " w'v'v'p' gto k'p' vj g' f v'g'v'v'p' gh'v'v'p' qh' vj g' ur gekn' ekteu ucpeg0' *Ugg' *People v. Rodriguez* *3; : 8+64'Ecrf6f '952. '9: 3'j452'Ecrf0' r v0889. '948 R0f '335_0+

46 Vj g'eqv'v'p'v'v'p' wev'v'f " vj g' lwt { " v' w'v'v'p' v'v'p' vj ku' d'npqy qt' " u' j qwf " j cxg' npqy p0' uc'v'v'p' ctf " lp" vj g' r t'g'v'v'p' ecug' c'p { " g'v'v'p' " lp' f' q'v'v'p' " u' q'v'v'p' " ec'v'v'p' " j cxg' k'p'w'v'v'p' " vj g' f ghgpf cpv'u' d'g'p'ghk0

F ghgpf cpv' t'g'v'v'p' w' r qp' *People v. Weidert, supra*. "5; "Ecrf6f : 58. "lp' uwr r qtv' qh' c' eqvtct { " eqpenwukp0' k'p' vj cv' ecug' y g j g'v' " vj cv' y j gp' " k' ku' cngi gf " vj cv' vj g' f ghgpf cpv' n'kn'gf " c y k'p'guu' v' r t'g'v'v'p' vj ku' qt' j g' v'g'v'v'p' q'p' . " k' ku' vj g' f ghgpf cpv'u subjective" r wtr qug' v' r t'g'v'v'p' vj g' y k'p'guu' h'qo " v'g'v'v'p' lpi vj cv' o w'v'v'p' r' t'g'v'v'p' 0' k' ku' p'v'v'p' et'k'v'v'p' " y g' u'ck' . " y j g'v'v'p' vj g' y k'p'guu' g'x'g' j cf " d'g'v'v'p' ec'v'v'p' w' r qp' v' v'g'v'v'p' 0' *Id. " cv' r 0: 750- Vj ku' ecug' ku' pq' v' j g' r hwi' v' f ghgpf cpv' 0' C' n' j q' vj " vj g' ur gekn ekteu ucpeg' c'v' k' u' w'v'v'p' vj g' r t'g'v'v'p' v' ecug' t'gs wkt' g' u' c' u' w' d' l' g' e' v' x' g' r wtr qug' v' t'g'v'v'p' " hqt' r gthqto cpeg' qh' qhhekn' f wkgu' cpf vj cv' r gthqto cpeg' o w'v'v'p' " h'cev' vj cxg' d'g'v'v'p' r' y hwi' vj g' ur gekn

ekteu ucpeg' f qgu' p'v'v'p' t'gs wkt' g' c' u' w' d' l' g' e' v' x' g' c' y c' t' g' p' g' u' u' q' p' v' j g' r c' t' v' q' h' v' j g' f ghgpf cpv' vj cv' vj g' qhhegt' j cf "cev'v'p' r'cy hwn { "lp r gthqto lpi " vj qug' qhhekn' f wkgu0

F ghgpf cpv'u' c' f k' k' p' c' n' e' q' p' v' g' p' v' k' p' v' j v' cv' vj g' eqv'v'p' vj qwf " j cxg g'zr cpf gf " w' r qp" vj g' f ghpkkqp' qh' 0' r gthqto cpeg' qh' qhhekn f wkgu0' d { " g'zr r' k' p' lpi " v' v' j g' lwt { " vj cv' cp' qhhegt' y j q' c' w' g' o r w' v' q' h' t' c' o g' f ghgpf cpv' hqt' c' etko g' ku' p' q' v' r gthqto lpi " j ku' qt' j g' qhhekn' f wkgu' ku' y c' k' x' g' f . " dgecwug' f ghgpf cpv' f k' " p' q' v' t' g' s w' g' u' v' e' j " c' e' r' t' k' h' e' c' v' k' p' d' g' n' y 0' * *People v. Sully*.^{supra}. "75'Ecrf6f cv'r 0343: 0' H'v' vj g' . " g' x' g' p' h' y g' y g' t' g' v' q' t' g' e' j " vj g' o g' t' k' u' . y g' d' g' r' e' x' g' k' y q' w' f " d' g' q' d' x' k' w' u' v' q' v' j g' lwt { " w' p' f g' t' v' j g' f ghpkkqp uwr r r' g' f " d { " vj g' eqv'v'p' vj cv' uwej " g' i t' g' i k' w' u' o k' e' a' p' f w' e' v' q' p' v' j g' r c' t' v' q' h' c' p' qhhegt' y qwf " p' q' v' e' q' p' u' k' w' g' o' c' p' f " *1022 "lawful cev'v'p' eqpf wev'y j k'g' g'pi ci gf "lp' vj g' o' c' k' p' v' p' e' p' e' g' qh' vj g' r' g' c' e' g' c' p' f " u' g' e' w' t' k' f { " qh' vj g' eqo o w'v'v'p' { " q' t' " lp" vj g' " k' p' x' g' u' k' i c' v' k' p' " q' t' r t' g' x' g' v' k' p' " qh' e' t' k' o g' 0' * *ECNLKE " P q0: 0 30* . " k' c' r' e' u' c' f f g' f = u' g' g' *People v. Hardy, supra*, "4'Ecrf6f vj cv'r 0375" j w' t' q' u' c' t' g' r t' g' u' o g' f " v' q' r q' u' g' u' u' q' t' f k' p' c' t { " k' p' v' n' k' i g' p' e' g' c' p' f " v' q' d' g' c' d' r' g' v' q' w' p' f g' t' u' c' p' f " vj g' o' g' c' p' lpi " qh' y q' t' f u' l' p' " vj g' k' " e' q' o q' p' c' p' f q' t' f k' p' c' t { " c' r' r' n' e' c' v' k' p' _ 0+

Vj g' g' ku' pq' o g' t' k' p' f ghgpf cpv'u' eqv'v'p' vj cv' v' k' n' e' q' w' p' u' g' n' y cu' k' p' e' q' o r g' v' g' p' v' k' p' " h' c' k' i' p' i " v' q' t' g' s w' g' u' v' ur gekn' k' p' u' t' w' e' k' v' p' u' u' i g' u' k' p' i " vj cv' f ghgpf cpv' o c { j cxg' h' k' n' g' f ' F g' v' e' v' x' g' Y k' n' i' c' o u w' p' f g' t' v' j g' k' o r t' g' u' k' p' v' j v' v' j g' f g' v' e' v' x' g' j cf " h' t' c' o g' f " j k' " h' q' t' vj g' E' c' t' r g' p' v' t' t' q' d' d' g' t { 0' * Ugg' *Strickland v. Washington* *3; : 6+688" WLU088: "j326" UEv04274. " : 2" N' G' f' Q' f " 896_0' E' q' w' p' u' g' n' e' q' w' f " p' q' v' r q' u' i' d' n' f " j cxg' d' g' g' p' k' p' e' q' o r g' v' g' p' v' k' p' vj ku' t' g' u' r g' e' v' d' g' e' c' w' u' g' f ghgpf cpv'u' uwdlgev'xg' cy c' t' g' p' g' u' u' q' h' v' j g' r' g' i c' i' k' f { " qh vj g' f g' v' e' v' x' g' u' " e' q' p' f w' e' v' k' p' " r w' t' u' w' k' p' i " j k' u' f w' k' g' u' y cu' p' q' v' c' v k' u' w' g' 0' Y k' j " t' g' u' r g' e' v' v' q' e' q' w' p' u' g' n' u' h' c' k' n' t' g' v' q' t' g' s w' g' u' v' k' p' u' t' w' e' k' v' p' u' k' p' h' q' t' o l' p' i " vj g' lwt { " vj cv' k' i' F g' v' e' v' x' g' Y k' n' i' c' o u " j cf " h' t' c' o g' f f ghgpf cpv' hqt' " vj g' E' c' t' r g' p' v' t' t' q' d' d' g' t { . " vj g' f g' v' e' v' x' g' j cf " p' q' v r' y hwn { " r gthqto gf " j ku' qhhekn' f wkgu. " vj g' t' g' e' q' t' f " u' j g' f u' p' q r' i j v' q' p' y j { " e' q' w' p' u' g' n' h' c' k' n' g' f " v' q' t' g' s w' g' u' v' e' n' t' k' h' l' p' i " q' t' c' o r r' k' h' l' p' i k' p' u' t' w' e' k' v' p' u' 0' E' q' w' p' u' g' n' y cu' p' q' v' c' u' n' g' f " h' q' t' c' p' g' z' r r' e' p' c' v' k' p' . " p' q' t' k' u' k' v' j g' e' c' u' g' vj cv' vj g' t' g' e' q' w' f " d' g' p' q' u' c' v' u' h' e' v' q' t { " g' z' r r' e' p' c' v' k' p' h' q' t' " e' q' w' p' u' g' n' u' r g' t' h' q' t' o c' p' e' g' 0' Vj g' r q' l' p' v' y cu' q' d' x' k' w' u' w' p' f g' t' vj g' k' p' u' t' w' e' k' v' p' u' i k' x' g' p' . " c' p' f " l' p' c' p' { " g' x' g' p' v' e' q' w' p' u' g' n' o' c { " j cxg j cf " c' " c' e' v' e' c' r' i' t' g' c' u' q' p' " p' q' v' v' q' g' o r j c' u' k' g' f f ghgpf cpv'u' r q' u' i' d' n' g' o v' k' x' g' h' q' t' n' k' r' k' p' i " vj g' f g' v' e' v' x' g' u' k' p' e' g' v' j g' f ghgpf vj g' q' t' { " y cu vj cv' f ghgpf cpv' j cf " p' q' v' e' q' o o k' w' g' f " vj g' e' t' k' o g' 0' E' q' w' p' u' g' n' o' c { j cxg' r t' g' h' g' t' g' f " v' q' " e' q' v' g' p' f " vj cv' vj g' c' e' w' i' c' p' f " q' o k' u' k' p' u' q' h vj g' r q' r' e' g' vj t' q' w' j q' w' vj g' k' p' x' g' u' k' i c' v' k' p' " qh' c' m' vj g' e' j c' t' i g' f e' t' k' o g' u' l' f g' o q' p' u' t' c' v' g' f " vj cv' vj g' t' q' r' e' g' vj g' t' g' l' p' v' g' p' v' w' r q' p' u' g' e' w' t' l' p' i f ghgpf cpv'u' e' q' p' x' k' e' v' k' p' " vj t' q' w' j " h' c' k' " o g' c' p' u' q' t' " h' q' w' n' " vj wu c' w' g' o r v' k' p' i " v' q' v' j t' q' y " F q' w' d' v' q' p' c' n' i' q' h' v' j g' t' t' q' u' g' e' w' k' p' u' i' x' k' f g' p' e' g' 0' k' p' " x' l' g' y " qh' vj g' u' c' v' g' qh' vj g' t' g' e' q' t' f . " y g' t' g' l' g' e' v' v' j k' u' e' r' k' o " q' p

cr r gcrf *People v. Smithey* 3; ; +42" Ecrf6j "; 58." ; : 8"] : 8 EcrfTr r0f "465."; 9: "R0f "3393_0

Vj gtg" cnuq" ku" pq" o gtkv" kp" f ghgpf cpvu" hpcn' eqpvvkvqp vj cv' kpuwhtekgpv' gxf gpeg" uwr r qtvgf " vj g" lwt { u' hpf kpi " vj cv f ghgpf cpv' nkrngf " F gvgevxg" Y knko u" kp" tgvrcvkqp" hqt" j ku rny hmf gthqto cpeg'qhj ku' qhtekcnf wku0Uwduvpcvkn' gxf gpeg uwr r qtvgf " vj ku' hpf kpi 0' *Ugg" People" v. Mayfield, supra, 36" Ecrf6j " cv" r r 0' 9; 2/9; 3"] cr r n' kpi " uwdvpcvkn' gxf gpeg vguv' vq" r tqqh" qh' vj ku" ur gekcn' ekewo ucpeg 0" Vj gtg" y cu uwdvpcvkn' gxf gpeg" vj cv' vj g" qhteg" y cu" gpi ci gf" kp" vj g lawful" r gthqto cpeg'qhj ku' f wku' kp' lpxguki cvki 'cpf' cuukvki kp" vj g" r tqugewkqp" qh' f ghgpf cpv' hqt" vj g" Ectr gpvt' tqddgt { . ukpeg" vj g" xlvko " i cxg" vj g" r qnleg" c" xgj keng" nkgpug" pwo dgt qh' vj g" xgj keng" wugf " kp" vj g" tqddgt { . y j lej " y cu" tcegf " vq f ghgpf cpv" cpf " vj gtg" y cu" gxf gpeg" vj g" xlvko " r qukkxgn' kf gpv' kkgf " f ghgpf cpv' cv' vj g" r tgrko kpct { " j gctkpi " cu" qpg" qh' vj g tqddgtu0Vj gtg' y cu' uwdvpcvkn' gxf gpeg" vj cv' f ghgpf cpv' nkrngf F gvgevxg" Y knko u" kp" tgvrcvkqp" hqt" vj g" f gvgevxg" u" r ctv' kp vj g" Ectr gpvt' r tqugewkqp. " dgecwug" vj gtg' y cu" gxf gpeg" vj cv f ghgpf cpv' vqr' Ctxkg' Ecttqm' cpf " Gkj wg' Dtqqo hgrf " cu' o wej 0 *1023

22. Prosecutorial misconduct

*63+ " F ghgpf cpv' eqpvvkvqp" vj g" r tqugewqt" eqo o kwgf o kaeqpf wev' tgs wtkpi ' tgxgtucnlp' hckkpi ' vq' kphqto ' vj g' f ghgpg. dghqtg" vj g' r tgrko kpct { " j gctkpi . " qh' Ctxkg' Ecttqm' u" ucvgv gpv vq" vj g" r qnleg. " cpf " kp" hckkpi " vq" kphqto " vj g' f ghgpg" qh' vj g u' vgo ' wugf ' kp' vj g' Nqu' Cpi grnu' Eqwpv' lckn' vq' go r m' { ' kpo cvgu vq" ugewtg" vptgrkcdng" ucvgv gpv" hqto " pqv' tkqwu" f ghgpf cpv' u0 Vj gug" eqpvvkvqpu" ctg" tguvcgo gpv" qh' cti wo gpv" tglgevgf cdqvg" cpf " ctg" pq" o qtg" r gtuwcvkxg" kp" vj ku' pgy " hqto cv' Vj g f grc { ' kp' r tqxfk' kpi " vj g' f ghgpg" vj kj " Ctxkg' Ecttqm' u" ucvgv gpv y cu' pqv' r tglw' lekcn' cpf " vj gtg' ku' pq' gxf gpeg" kp" vj g" cr r gncvg tgeqtf " uwr r qtvpki " vj g" ugeqpf " eqpvvkvqp 0' K' cf f u" pqv' kpi qh' uwdvpcvkn' vq" f ghgpf cpv' u" ercko " vq" tghgt " vq" Ecttqm' u" v' kcn vguvko qp { " vj cv' Ecttqm' y cu" y gm' xgtugf " o' kp" vj g" kptlecelegu qh' hckkpi " kpuv' g" lcku. o' vj cv' Ecttqm' n' pgy " qv' gt' kpo cvgu" y j q y gtg' kphqto cpw. " vj cv' j g' y cu' c' v' wuv' " y j q' ur gpv' uwdvpcvkn vko g' y kj " f ghgpf cpv' cpf " cevgf " cu" f ghgpf cpv' u" eqpvvkvqp" vj kj vj g' q' wukf g' y qtrf . " cpf " vj cv' Ecttqm' q' hgtgf " kphqto cvkqp" vq" vj g cwj qtkkgu. " cpf " q' hgtgf " vq" kphqto " vj go " qh' cp { " tgeqmgvkvqpu vj cv' qeewt' gf " vq" j ko " tgi ctf kpi " f ghgpf cpv' u" ucvgv gpv' vq" j ko 0

F ghgpf cpv' cnuq" eqpvvkvqp" vj g" r tqugewqt" eqo o kwgf o kaeqpf wev' kp" ucvkpi " kp" emukpi " cti wo gpv' vj cv' o' vj g r tqugewkqp" j cu' i kxgp'] Ctxkg' Ecttqm' " pqv' kpi " cpf " j g" cungf hqt" pqv' kpi 0' F ghgpf cpv' cnuq" eqo r nckpu" vj cv' vj g" r tqugewqt kphqto gf " vj g" lwt { " vj cv' Ecttqm' u" vguvko qp { " eqpvvkvqp

eqttqddt cvkqp" qh' vj g" vguvko qp { " qh' f ghgpf cpv' u" ceeqo r nlegu0 P q" qdlgevkvqp" cr r gctu" kp" vj g' tgeqtf . " j qy gxgt. " cpf " vj wu" vj g ercko " ku" y ckgf 0' *Ugg" People" v. Millwee, supra, " 3: " Ecrf6j cv" r 0' 36; = " People" v. Benson" *3; ; 2+ 74" Ecrf6f " 976." 9; 6] 498" EcrfTr r0f " 49." : 24" R0f " 552_0" Y g" tglgev' f ghgpf cpv' u eqpvvkvqp" vj cv' j ku' hckkwt g' vq' qdlgev' vj qwf " dg' g' zewugf " dgecwug j g' j cf " dggp' r tgenw' gf " cv' v' kcn' hqto " guv' dckuj kpi " vj g' g' z' kngpeg qh' vj g" lckj qwug" kphqto cpv' u' vgo . " dgecwug" vj ku" ercko " ku pqv' uwr r qtvgf " d { " vj g" tgeqtf 0' kp" cp { " gxgpv' pq" o kaeqpf wev cr r gctu. " dgecwug" vj g' r tqugewqt" u" ucvgv gpv' ctg" eqpvvkvqp y kj " vguvko qp { " q' hgtgf " cv' v' kcn' 0' F ghgpf cpv' u" eqpvvkvqp" vj cv vj g" ewo wrcvxg" ghgevg' qh' xctkqwu" kpuv' pegu" qh' r tqugewqt kcn o kaeqpf wev' f gr tkgf " j ko " qh' f wgr' tqeguu' qh' rny " hcku. " dgecwug j g' j cu' pqv' guv' dckuj gf " vj cv' r tqugewqt kcn' o kaeqpf wev' qeewt' gf qt " *kp" vj g" ecug" qh' vj g" ercko " qh' f grc { gf " f kaeqvgf { + vj cv' cp { o kaeqpf wev' y cu' r tglw' lekcn' 0

23. Jury instructions

a. Instruction on liability as an aider and abettor

*64+ " F ghgpf cpv' eqpvvkvqp" vj g" eqwtv' gttgf " kp" kpuv' wevkpi vj g" lwt { " vj cv' f ghgpf cpv' eqwv' " dg" hqwpf " i wku" { " qh' o wtf gt gkj gt" cu" c" f kgevg' r gtr gvcvqt" qt" cu" *1024 " cp" c' k' gt" cpf cdgwt. " dgecwug" vj g' r tqugewqt" j cf " eqpvvkvqp" gf " vj tqwi j qw' vj g r tqeggf kpi u' vj cv' f ghgpf cpv' vj cu' vj g' t' gtuq' vj j q' vj qv' F gvgevxg Y knko u0Cm' qwi j ' f ghgpf cpv' f qgu' pqv' eqpvvkvqp" vj cv' vj g' y cu kpuwhtekgpv' gxf gpeg" w' qp" y j lej " vj g' lwt { " eqwv" " j cxg" hqwpf j ko " i wku" { " cu' cp' c' k' gt' ' cpf " cdgwt. " j g' eqpvvkvqp" vj g' kpuv' wevkqp xkqrcvgf " j ku' tki j v' vq' pqv' leg' qh' vj g' f ghgpgu" j g' u' j qwf " r t' gupv. kp' xkqrcvkqp" qh' vj g' eqpvvkvkvqp' cni' wctcpvgg' qh' f wgr' tqeguu' qh rny 0

Cu" y g" j cxg" g' z' rckpgf " kp" gctn' g' ecugu. " o' cp" ceewucvt { r r' gcf kpi " ej cti kpi " c' f ghgpf cpv' vj kj " o wtf gt " pggf " pqv' ur gekh { vj g" vj g' q' t { " qh' o wtf gt" qp" y j lej " vj g" r tqugewkqp" kp' v' p' f u vq" tgn { 0' *People" v. Diaz" *3; ; 4+ 5" Ecrf6j " 6; 7. " 779"] 33 EcrfTr r0f " 575." : 56" R0f " 3393_ " cpf " ecugu' ekvgf 0' P qto cm' . o' vj g' ceewugf " y kn' t' gegkxg' cf gs wcv' g' pqv' leg' qh' vj g' r tqugewkqp" u vj g' q' t { " qh' vj g" ecug" hqto " vj g" vguvko qp { " r t' gupv' v' cv' vj g r tgrko kpct { " j gctkpi (000) *Ibid. + kp' vj g' r t' gupv' v' ecug. " y g' d' g' r' g' xg vj cv' f ghgpf cpv' u' cu' w' qp' ceewucvt' pqv' leg' vj tqwi j " vj g' eqpur k' ce { ej cti g' vj g' vj g' eqwv' " dg' u' v' d' l' gev' v' ceeqo r nleg' h' c' d' k' k' v' " hqt" vj g o wtf gt " qh' f gvgevxg" Y knko u0' Ugg " People" v. Garceau" *3; ; 5+ 8" Ecrf6j " 362. " 3: 5"] 46" EcrfTr r0f " 886." : 84" R0f " 886_ "] cp ceeqo r nleg' ku' p' g' vj j q' g' k' j gt' c' k' u' c' p' f " cdg' u' v' kp' vj g' e' qo o k' u' k' qp qh' vj g' q' h' g' p' u' g' t' " eqpur k' gu' v' q' eqo o k' v' vj g' q' h' g' p' u' g' = 3 " Y kn' k' p (" Gr' u' g' k' p. " Ecrf0' Etko k' p' c' n' Ncy " *4f " gf 03; : : + kp' v' q' f wevkqp" vq Etko gu. " E": 7. " r r 0' 322/323"] c' k' f kpi " cpf " cdg' w' k' pi " h' c' d' k' k' v' " o c { dg' d' cu' g' f " w' qp' g' x' f g' p' e' g' qh' eqpur k' ce { _0

b. Unanimity instruction

*65+ F ghgpf cpv' cnuq' eqpvpgf u' v' cv' dgecwug' v' g' lwt { " y cu kputwevgf "qp'ceeao r rieg'hcdkrlk' 'cu'y gm'cu'qp'r tgo gf kcvgf o wtf gt. " ucvg' cpf " hgf gtcn' eqpukwkpqr' r tlekr ngu' qh' f wg r tqeguu' qh' rny " cpf " v' j g' tki j v' v' q' c' " wpcplo qwu' lwt { " xgtf lev tgs wktgf " v' j g' v' tcn' eqwtv' v' kputwev' v' g' lwt { " qp' v' j g' pggf " hqt wpcplo k' " cu' v' j g' hcevu' vr qp' y j lej " cp { " eqpxkewqp' hqt v' j g' etlo g' qh' o wtf gt' y cu' dcugf 0J g' cempqy ngf i gu' y g' j c xg j grf " v' j cv' v' j g' t' ku' pq' tgs wktgo gpv' v' j cv' v' j g' lwt { " wpcplo qwu' ci tgg' wr qp' v' j g' v' j g' q' { " qh' v' j g' f ghgpf cpv' u' ewr cdkrlk' . " cpf " v' j cv v' j ku' twg' j cu' dggp' cr r rieg' " v' j g' q' t' ku' qh' i v' k' r tgo kugf " wr qp c' k' lpi " cpf " cdgwki " cpf " f k' gev' ewr cdkrlk' (0' P qpv' j gruu. " j g eqpvpgf u' v' j cv' v' j g' v' w' w' c' n' f' e' k' t' ewo ucpegu' qh' j ku' ecug. lwtqtu y j q' h' q' w' f' j' k' o " i v' k' m' " cu' cp' c' k' f' gt " cpf " cdgwqt " y q' w' f' j' c' x' g' v' q' h' k' p' f' " c' u' g' v' qh' h' ceu' v' q' d' g' gu' c' d' r' k' u' j' g' f' " gp' v' t' g' n' " f' h' h' g' t' gp' v' l' t' q' o v' j g' h' ceu' v' j cv' l' w' t' q' t' u' y' q' w' f' " t' g' n' " w' r' q' p' v' q' h' k' p' f' j' k' o " i v' k' m' " cu' c' f' k' t' gev' r' g' r' g' t' c' v' q' t' 0' W' p' f' g' t' v' j g' u' g' " e' k' t' ewo ucpegu. " j' g' e' r' c' k' o u' v' j g' e' j' q' l' e' g' d' g' y' g' g' p' c' k' f' lpi " cpf " cdgwki " cpf " f' k' t' gev' ewr cdkrlk' ' y cu guugpvkm' " h' ceu' w' c' r' l' w' t' q' t' u' c' t' g' t' s' w' k' t' g' f' . " j' g' e' q' p' v' p' g' f' u' v' q' t' g' e' j' c' " wpcplo qwu' xgtf lev' cu' v' j g' h' ceu' w' c' r' l' w' t' q' t' u' h' q' t' v' j g' k' t' xgtf lev' 0' W' p' f' g' t' v' j g' r' g' e' w' i' c' t' " e' k' t' ewo ucpegu' qh' j' ku' ecug. " j' g' e' q' p' e' n' f' g' u. v' j g' wpcplo k' l' k' p' u' t' w' e' v' q' p' v' j q' w' f' j' c' x' g' d' g' g' p' i' k' x' g' p' 0

Y g' f' k' u' c' i' t' g' g' 0' Y g' j' c' x' g' " ucvgf < 0' k' l' u' u' g' w' g' f' " v' j cv' cu' n' p' i' cu' g' e' j' " l' w' t' q' t' " ku' e' q' p' x' k' e' g' f' " d' g' { q' p' f' " c' " t' g' c' u' q' p' c' d' r' g' " f' q' w' d' v' j' cv' f' ghgpf cpv' ku' i v' k' m' " qh' o wtf gt' cu' * 1025 " v' j cv' q' h' g' p' u' g' ku' f' ghgpf " d' { " ucw' w' g' . " k' p' g' g' f' " p' q' v' f' g' e' k' f' g' w' p' c' p' l' o' q' w' u' n' " d' { " y j lej v' j g' q' t' { " j' g' " ku' i v' k' m' (0' j' E' k' c' v' k' p' u' 0 " O' q' t' g' " u' r' g' e' k' h' e' c' m' . " v' j g' l' w' t' { p' g' g' f' " p' q' v' f' g' e' k' f' g' w' p' c' p' l' o' q' w' u' n' " y j g' v' j g' t' " f' ghgpf cpv' y cu' i v' k' m' cu' v' j g' c' k' f' gt " cpf " cdgwqt " q' t' " cu' v' j g' f' k' t' gev' r' g' r' g' t' c' v' q' t' (000)] " _ (00)] " _ P' q' v' p' n' { " ku' v' j g' t' g' p' q' " wpcplo k' l' " t' g' s' w' k' t' g' o' g' p' v' cu' v' q' v' j g' v' j g' q' t' { " qh' i v' k' m' " v' j g' l' p' f' k' k' f' w' c' n' l' w' t' q' t' u' v' j g' o' u' g' r' k' u' g' p' g' g' f' " p' q' v' e' j' q' q' u' g' " c' o' q' p' i' " v' j g' v' j g' q' t' k' u' " u' q' " n' p' i' " cu' g' e' j' " ku' e' q' p' x' k' e' g' f' " qh' i v' k' m' 0' u' q' o' g' k' o' g' u' . " cu' r' t' q' d' c' d' n' " q' e' e' w' t' g' f' " j' g' t' g' . " v' j g' l' w' t' { " u' k' o' r' n' f' e' c' p' p' q' v' f' g' e' k' f' g' d' g' { q' p' f' " c' " t' g' c' u' q' p' c' d' r' g' " f' q' w' d' v' g' z' c' e' v' n' " y j q' f' k' f' y j c' v' 0' V' j g' t' g' o' c' { " d' g' " c' " t' g' c' u' q' p' c' d' r' g' " f' q' w' d' v' j' cv' v' j g' f' ghgpf cpv' y cu' v' j g' f' k' t' gev' r' g' r' g' t' c' v' q' t' . " cpf " c' " u' k' o' k' c' t' " f' q' w' d' v' j' cv' j' g' y' cu' v' j g' c' k' f' gt " cpf " cdgwqt . " d' w' " p' q' " u' e' j' " f' q' w' d' v' j' cv' j' g' y' cu' " q' p' g' q' t' " v' j g' v' j g' q' v' g' t' 0' * " P' e' o' p' l' e' " v . " S' a' n' t' a' m' a' r' i' a' " * 3 ; ; 6 + : " E' c' r' i' 0' 6' j' " ; 25 . ; 3 ; / ; 3 ; " j' 57 " E' c' r' i' 0' r' v' t' 0' f' " 846 . " : ; 6 " R' 0' f' " : 3 _ = u' g' g' c' n' u' q' " P' e' o' p' l' e' v . " B' e' a' r' d' s' l' e' e' " * 3 ; ; 3 + 75 " E' c' r' i' 0' f' " 8 : . ; 4 " j' 49 ; " E' c' r' i' 0' r' v' t' 0' 498 . " : 28 R' 0' f' " 3533 _ 0 " F' ghgpf cpv' eqpvpgf u' v' j cv' f' h' h' g' t' gp' v' h' ceu' y q' w' f' u' w' r' q' t' v' c' k' f' lpi " cpf " cdgwki " h' c' d' k' r' l' k' v' " c' p' f' " h' c' d' k' r' l' k' v' " cu' c' f' k' t' gev' r' g' r' g' t' c' v' q' t' . " d' w' " cu' y' g' j' c' x' g' " g' z' r' n' c' k' p' g' f' . " v' j g' l' w' t' { " p' g' g' f' " p' q' v' w' p' c' p' l' o' q' w' u' n' " ci tgg' " 0' q' p' " v' j g' r' t' g' e' k' u' g' " h' ceu' w' c' n' f' g' v' c' k' u' q' h' j' q' y " c' n' k' n' k' p' i " w' p' f' g' t' " q' p' g' " q' t' " v' j g' v' j g' q' v' g' t' " v' j g' q' t' { " q' e' e' w' t' g' f' " l' p' " q' t' f' g' t' " v' q' e' q' p' x' k' e' v' f' ghgpf cpv' qh' h' k' u' v' f' g' i' t' g' g' o' w' t' f' g' t' 0' * " P' e' o' p' l' e' " v . " P' r' i' d' e , s' u' p' r' a , " 5 " E' c' r' i' 0' 6' j' " c' v' r' 0' 4720 " P' c' w' t' c' m' . " l' p' " q' t' f' g' t' " v' q' " t' g' w' t' p' " c

i v' k' m' " xgtf lev' v' j g' lwt { " o wu' ci tgg' wpcplo qwu' v' j cv' g' e' e' j' g' r' g' o' g' p' v' qh' v' j g' e' j' c' t' i' g' f' " e' t' l' o' g' j' c' u' d' g' g' p' r' t' q' x' g' f' . " d' w' v' j g' h' ceu' v' t' u' v' j cv' gu' c' d' r' k' u' j' " c' k' f' lpi " c' p' f' " c' d' g' w' k' i' " h' c' d' k' r' l' k' v' " c' t' g' " p' q' v' l' p' e' n' f' g' f' " cu' g' r' g' o' g' p' w' qh' v' j g' e' t' l' o' g' qh' o' w' t' f' g' t' 0' * " P' e' o' p' l' e' " v . " P' r' e' t' t' y' m' a' n' " * 3 ; ; 8 + 36 " E' c' r' i' 0' 6' j' " 46 : . " 493 " j' 7 : " E' c' r' i' 0' r' v' t' 0' f' " : 49 . ; 48 " R' 0' f' " 3235 _ 0

Vj g' Wp' k' g' f' " U' c' v' u' U' w' r' t' g' o' g' E' q' w' v' c' n' u' q' j' c' u' g' z' r' n' c' k' p' g' f' " v' j cv' v' j g' lwt { " p' g' g' f' " p' q' v' c' i' t' g' g' " q' p' v' j g' o' g' e' p' u' d' { " y j lej " c' " e' t' l' o' g' j' c' u' d' g' g' p' e' q' o' k' w' g' f' . " u' c' v' k' i' " v' j cv' k' u' c' r' r' t' q' r' t' k' e' v' j' c' v' 0' " f' h' h' g' t' g' p' v' l' w' t' q' t' u' o' c' { " d' g' r' g' t' u' w' c' f' g' f' " d' { " f' h' h' g' t' g' p' v' r' l' e' g' u' e' q' h' g' x' k' f' g' p' e' g' . " g' x' g' p' y' j' g' p' v' j g' l' " c' i' t' g' g' " w' r' q' p' v' j g' d' q' w' o' " h' k' p' g' 0' R' c' k' l' p' n' { " v' j g' t' g' " k' u' " p' q' " i' g' p' g' t' c' n' t' g' s' w' k' t' g' o' g' p' v' j' c' v' v' j g' l' w' t' { " t' g' e' j' " c' i' t' g' g' o' g' p' v' q' p' v' j g' r' t' g' r' k' o' l' p' c' t' { " h' c' e' w' c' r' i' k' u' u' w' u' y' j' l' e' j' " w' p' f' g' t' r' k' e' v' j' g' x' g' t' f' l' e' v' 0' " * " S' c' h' a' d' " v . " A' r' i' z' o' n' a " * 3 ; ; 3 + 723 " W' U' 0' 846 . " 853 / 854 " j' 333 " U' E' v' 0' 46 ; 3 . " 46 ; 9 . " 337 N' G' f' 0' f' " 777 _ 0

F ghgpf cpv' eqpvpgf u' v' j cv' v' j g' e' k' t' ewo ucpegu' l' p' u' w' r' q' t' v' qh' j' ku' r' q' v' p' v' c' n' c' e' e' q' o' r' r' i' e' g' " h' c' d' k' r' l' k' v' / v' j cv' j' g' y' c' u' h' c' t' " h' t' q' o' " v' j g' u' e' g' p' g' y' j' g' p' v' j g' o' w' t' f' g' t' q' e' e' w' t' g' f' " d' w' j' c' f' " c' k' f' g' f' " c' p' f' " c' d' g' w' g' f' " l' p' k' v' y' g' t' g' u' q' f' k' u' k' p' e' v' h' t' q' o' " v' j g' e' k' t' ewo ucpegu' l' p' u' w' r' q' t' v' qh' j' ku' r' q' v' p' v' c' n' f' k' t' g' e' v' r' h' c' d' k' r' l' k' v' / v' j cv' j' g' j' c' f' " d' g' g' p' " c' v' v' j g' u' e' g' p' g' " c' p' f' " j' c' f' " r' w' n' g' f' v' j g' " v' k' i' i' g' t' / c' u' " v' q' " e' q' p' u' k' w' w' g' " y' q' " o' f' k' u' e' t' g' v' g' " e' t' l' o' l' p' c' n' " g' x' g' p' w' o' t' g' s' w' k' t' k' p' i' " v' j g' w' p' c' p' l' o' k' l' " k' p' u' t' w' e' v' q' p' 0' J' g' t' g' r' k' u' w' r' q' p' " c' w' j' q' t' k' l' k' p' f' l' e' c' v' k' p' i' " v' j cv' v' j g' w' p' c' p' l' o' k' l' " k' p' u' t' w' e' v' q' p' " k' u' t' g' s' w' k' t' g' f' " h' i' v' j' g' t' g' c' t' g' " o' w' n' k' r' g' " c' e' u' " u' j' q' y' p' " v' j cv' e' q' w' f' " j' c' x' g' " d' g' g' p' " e' j' c' t' i' g' f' " cu' u' g' r' c' t' e' v' g' q' h' h' e' p' u' g' u' 0' * " U' g' g' " P' e' o' p' l' e' " v . " B' e' a' r' d' s' l' e' e' . " s' u' p' r' a . " 75 " E' c' r' i' 0' f' c' v' t' 0 ; 4 " j' 0' C' t' g' s' w' k' t' g' o' g' p' v' qh' l' w' t' { " w' p' c' p' l' o' k' l' " v' l' r' l' e' c' m' f' " c' r' r' i' k' u' v' q' c' e' u' v' j' c' v' e' q' w' f' " j' c' x' g' " d' g' g' p' " e' j' c' t' i' g' f' " cu' u' g' r' c' t' e' v' g' q' h' h' e' p' u' g' u' 0' " k' p' v' j g' r' t' g' u' g' p' v' e' c' u' g' . " f' ghgpf cpv' u' e' q' p' f' w' e' v' cu' cp' c' k' f' gt " cpf " cdgwqt q' t' " cu' c' f' k' t' g' e' v' r' g' r' g' t' c' v' q' t' " e' q' w' f' " t' g' u' w' n' q' p' n' { " l' p' " q' p' g' e' t' l' o' l' p' c' r' i' c' e' v' c' p' f' " q' p' g' e' j' c' t' i' g' 0' W' p' f' g' t' v' j g' u' g' " * 1026 " e' k' t' ewo ucpegu. " 0'] l' w' t' q' t' u' p' g' g' f' " p' q' v' w' p' c' p' l' o' q' w' u' n' " c' i' t' g' g' " q' p' v' j' g' v' j g' t' v' j g' f' ghgpf cpv' ku' cp' c' k' f' gt " cpf " cdgwqt " q' t' " c' r' t' l' e' k' r' c' r' i' g' x' g' p' y' j' g' p' f' h' h' g' t' g' p' v' g' x' k' f' g' p' e' g' c' p' f' " h' ceu' u' w' r' r' q' t' v' g' e' j' " e' q' p' e' n' u' k' a' p' 0' * " P' e' o' p' l' e' " v . " D' a' v' i' s' " * 3 ; ; 4 + : " E' c' r' i' 0' r' v' t' 0' 6' j' " 4 : . " 67 " j' 32 " E' c' r' i' 0' r' v' t' 0' f' " 5 : 3 _ = u' g' g' c' n' u' q' " P' e' o' p' l' e' " v . " S' a' n' t' a' m' a' r' i' a . " s' u' p' r' a . " : " E' c' r' i' 0' 6' j' " c' v' t' 0 ; 3 ; 0

24. Deliberations-reading of transcripts to the jury

*66+ F ghgpf cpv' eqpvpgf u' v' j g' v' t' c' n' l' e' q' w' t' v' g' t' t' g' f' " l' p' " r' g' t' o' k' v' k' p' i' e' g' t' v' e' l' p' v' g' u' n' k' o' q' p' { " v' q' d' g' t' g' e' f' " v' q' v' j g' l' w' t' { " f' w' t' k' p' i' " k' u' l' f' g' r' i' d' g' t' c' v' k' p' u' y' k' j' q' w' b' q' w' h' l' p' i' " e' q' v' p' u' g' n' q' h' v' j g' l' w' t' { " u' t' g' s' w' g' u' h' q' t' " v' j g' t' g' e' f' l' p' i' qh' v' j' k' u' v' g' u' n' k' o' q' p' { 0' C' n' j' q' w' i' j' " f' ghgpf cpv' b' q' v' e' u' v' j' c' v' v' j' k' u' q' o' k' u' k' q' p' q' e' e' w' t' g' f' " q' p' " o' q' t' g' " v' j' c' p' " q' p' g' " q' e' e' c' u' k' a' p' . " j' g' e' q' p' v' p' g' f' u' v' j g' e' q' w' t' g' t' t' g' f' " r' t' g' l' w' f' l' e' k' e' m' { " l' p' " t' g' e' f' l' p' i' " v' j g' v' g' u' n' k' o' q' p' { " qh' r' t' q' u' e' w' e' k' q' p' y' l' p' k' p' u' g' u' d' D' t' q' q' o' h' g' r' i' f' " c' p' f' " D' e' g' p' a' g' { 0

Ugevkpp"335: " r' t' q' x' k' f' g' u' v' j' c' v' c' " f' g' r' i' d' g' t' c' v' k' p' i' " l' w' t' { " g' z' r' g' t' k' e' p' e' l' p' i' f' k' u' c' i' t' g' g' o' g' p' v' t' g' i' c' t' f' l' p' i' " v' g' u' n' k' o' q' p' { " q' t' " f' g' u' k' t' l' p' i' " v' q' " d' g' " l' p' h' q' t' o' g' f' q' p' " c' p' { " r' q' l' p' v' qh' r' e' y' " o' c' { " r' q' u' g' " s' w' g' u' k' a' p' u' v' q' " v' j g' e' q' w' t' v' " c' p' f

ō|w_r qp"dgkpi "dtqwi j v'kpvq"eqwtv."yj g"lphqto cvkqp"tgs vktgf o wuv"dg"i kxgp"kp"vj g"r tgugpeg"qh"qt"chgt"pqvleg"vq."yj g r tqugewkpi 'čvqtpgf. 'čpf"vj g'f ghgpf cpvqt'j ku'eqwupgn'qt'čhgt vj g{'j' cxg'dggp'ecmgf ō

Kp"vj g"r tgugpv'ecug."f wtkpi "i wkn'r j cug"f grkdgcvkpu."cpf "kp vj g'wkr wcvgf "cdugpeg'qh'eqwupgn"vj g'lw{ 'tgs wguvf "vq"j cxg tgc f'dcenl'kv'j g'vgnko qp{ 'qh'Dtqo hgrf 'cpf "Dgpvrg{ 'ltqo r ctvewt' f cvgu'qh'vj g'vkn'cpf "vj ku'tgs wguv' y cu"i tcvpf 0 Y j gp" f ghgpg"eqwupgn'ngctpgf "qh'vj ku'qeevttpeg"vy q'f c{ u r vgt."j g'qdlgev'vq"vj g'tgcf kpi "qh'vgnko qp{ 'y kj qw'pqvleg vq'j ko "cpf"o qxgf "hqt" c'o kntkcn'J g'pqv'vj cv'vj g'vgnko qp{ tgs wguvf "kpenf gf "qpn' f k gev'gzco kpcvkp."cpf "eqv'pf gf vj cv'vj g"lw{ "o c{ "j cxg"y cpv'vq"j gct" f k gev'gzco kpcvkp cpf "etquw/gzco kpcvkp"cu"vq" c" r ctvewt" r qlpv."dw"pqv'vj g gpv'g" f k gev'gzco kpcvkp" hqt" cp" gpv'g" f c{ '0' J g'vni gf "vj cv y j gp" f k gev'vgnko qp{ "ku'tgcf "vq" c"lw{."etquw/gzco kpcvkp pqtto cm{ "uj qwf "dg'tgcf "cu'y gm'J g'cnuq'eqv'p'gf "vj cv'vj g tgr qtvg"o k j v'j cxg'tgcf "ukf gdct" f k uewuikpu" d{ "o kvcng"kp eqwupgn'u'cdugpeg'0'V'c"j gctkpi "qp"vj g"o qv'kp" hqt"o kntkcn j grf "ppg" y ggn' chgt "vj g" vgnko qp{ "y cu'tgcf "vq" vj g"lw{. k'cr r gctgf "vj cv'vj g" eqwt' cpf "f ghgpg"eqwupgn'j cf "y kf gr f k hgtkpi "kpvtg tgv'kpu'qh'cp" gctrtgt "ukf gdct" f k uewuikpu" cv y j k j "k'y cu'ci tggf "vj cv'eqwupgn'cpf "vj g'eqwt'v'j qwf "pqv'dg r tgugpv'f wtkpi "vj g'tgr qtvg'v'j tgc f kpi "qh'vgnko qp{ "vq"vj g'lw{ 0 Vj g'eqwt'v'cr r ctgvn' "vj qwi j v'eqwupgn'j cf "y ckgf "pqv'k'cvkqp qh'lw{ "tgs wguv' hqt"vj g'tgcf kpi "qh'vgnko qp{."y j kg"eqwupgn dgrkxgf "j g'j cf "y ckgf "qpn' "j ku'r tgugpeg"kp"vj g'eqwt'v'qo y j kg"ci tggf/wr qp"vgnko qp{ "y cu'tgcf 0'Vj g'eqwt'v'eqpegf gf vj cv'eqwupgn'j cf "tgekgxgf "pq'pqv'k'cvkqp'qh'vj g'lw{ }u'tgs wguv y kj "tgr ge'v'vq"vj g'tgcf kpi "qh'vj g"vgnko qp{ "qh'Dtqo hgrf cpf "Dgpvrg{0'V'c'j qwi j "k'f gpl'gf"vj g"o qv'kp" hqt"o kntkcn'kv ugp'v'cp"lps vkt { "vq"vj g'lw{ "vq" f gv'to kpg" *1027 "y j gvj gt"vj g tgc f kpi "qh'cf f k kqpcn' r qt'v'p'u'qh'vj g'vgnko qp{ 'qh'Dgpvrg{ 'cpf Dtqo hgrf . kpenf kpi "etquw/gzco kpcvkp."y qwf "dg'wughw'v k'0'K'cnuq"lps vkt gf "y j gvj gt"vj g'lw{ "y kuj gf "vq"j cxg'tgcf "vq k'cf f k kqpcn'vgnko qp{ 'qh'cp{ "qj' gt"y kpguu'y j qug'vgnko qp{ r tgv'kwun' "j cf "dggp'tgcf "dcenl'v'k'0'Vj g'lw{ "f gen'p'gf "dqj qh'gtu'0'Vj g"eqwt'v'cnuq"qh'gt gf "vq"eqwupgn'vq"j cxg'Dgpvrg{ }u cpf "Dtqo hgrf }u'vgnko qp{ 'tgc f "vq"vj g'lw{ 'ci ckp'kp'eqwupgn' r tgugpeg."uq"j g'eqwf "dg'egt'v'kp"vj g'tgr qtvg" f k' "pqv'wpf w' go r j cuk' g'egt'v'kp"vgnko qp{ "qt'tgcf "vj g'uk' gdct" f k uewuikpu'0 Vj ku'qh'gt "y cu'f gen'p'gf "d{ "eqwupgn'}

K'f qgu'pqv'cr r gct"qp"vj ku'tgeqt' "vj cv'vkn'eqwupgn'y ckgf vj g" ucvwqt { "tki j v'vq" dg"pqv'k'gf "qh'lw{ "tgs wguv' hqt" vj g tgc f kpi "qh'vgnko qp{ "Ugg'Ē335: }ugg'cnuq" *People v. Jennings, supra.* "75" Ecrf 5f "cv'r 0'5; 3+ "uq" y g"j cxg"pq" qeekukp" vq eqpuk'gt" y j gvj gt" uwej "pqv'k'cvkqp" o c{ "dg" y ckgf "wpf gt

vj gug'ektewo ucpegu'0P qpgvj gruu."ō|c_'eqpx'evkqp'y kn'pqv'dg tgv'gtuf "hqt" c"xkq'cvkqp'qh'uge'v'kp"335: "wpguu"r tglw'leg"ku uj qy pō"**People v. Frye*"*3; ; : +3: "Ecrf 5j " : ; 6."3229"J99 Ecrf 0'r v'0'f "47."; 7; "R0'f "3: 5_0"Vj g"eqwt'v'gttqt"kp' hckkpi vq"pqv'k' "eqwupgn'vj cv'vj g"lw{ "j cf "tgs wguvf "vj g"tgc f kpi qh'egt'v'kp" vgnko qp{ "qh'Dgpvrg{ "cpf "Dtqo hgrf ."vj gtd{ f gr tkkpi "eqwupgn'qh'cp"qr r qt'w'p'k' "vq"qdlgev'qt"dg"r tgugpv. y cu'j cto rgu'0'Ugg" k'0'cv'r r 0'3229/322: "Jpqv'kpi "vj cv'ecugu j cxg'cr r r'kgf "xct{ kpi "ucpf ctf u'qh'tg'k'gy "vq"en'ko u'qh'gttqt wpf gt "uge'v'kp"335: .uqo g'cr r n' kpi "vj g'ucpf ctf "qh'tg'k'gy "hqt hgf gtcn'eqpuk'w'k'p'cn'gttqt"kp'x'q'k'kpi "f gpl'cn'qh'eqwupgn'cv'c etk'k'cn'l'v'ci g'cpf "uqo g'c' hqy gt "ucpf ctf "hqt"pq'p'eqpuk'w'k'p'cn gttqt }ugg'cnuq"*People v. Jennings, supra.*"75" Ecrf 5f "cv'r 05: 60- Eqwupgn'uj qwf "dg'pqv'k'gf "kp'qt'f gt "vq"gp'uw'g'vj cv'eqwupgn'j cu cp'qr r qt'w'p'k' "vq"qdlgev'vq"vj g'eqwt'v'qh'cv'k'p'wpf gt v'cng'p'd{ vj g'eqwt'v'q' lw' i gu'v'p'cn'gt'p'cv'k'g'eqwt'v'ugg"*People v. Wright* *3; ; 2+74" Ecrf 5f "589."624"J498" Ecrf 0'r v'0'553.: "24"R0'f "443 + dw'vj g'r tko ct{ "i qcn'ugt'xgf "d{ "uge'v'kp"335: "ku'v' r tq'k'f g'vj g lw{ "y kj "vj g"ex'k'f gpeg'k'p'ggf u'hqt"ku'f grkdgcvkpu'0"*People v. Frye, supra.*"3: "Ecrf 5j "cv'r 032290-

Kp"vj g"r tgugpv'ecug."vj g"lw{ "o cf g" k' ergt "kp"ku" qtki kpcn tgs wguv'vj cv'k'y cu'kp'v'g'v'gf "kp"j gctkpi "qpn' "vj g"vgnko qp{ qh' Dtqo hgrf " cpf " Dgpvrg{ " ltqo " ur gek'k'gf " f cvgu" y j gp i kxgp"cp"qr r qt'w'p'k' "vq"j gct"vj g'etquw/gzco kpcvkp"qh'vj gug y kpguuu."k'f gen'p'gf "vj g'eqwt'v'kp'x'k'cvkqp'0'Vj g'vkn'eqwt'v' qdugt'xgf "vj cv'vj g"eqwt'v'gr qtvg"ewu'qo ctkn{ "f qgu'pqv'tgcf ukf gdct" eqo o gpv'ct{ "y j gp" tgc f kpi "dcenl' vgnko qp{ "vq" c lw{0' *Ugg "*People*" v. *Wader*" *3; ; 5+ 7" Ecrf 5j " 832." 883 J42" Ecrf 0'r v'0'f "9: . : " 76"R0'f " 2_"Jcr r n' kpi " r tguwo r v'kp vj cv' qh'k'k'cn' f w' " j cu' dggp" tgi wr'cn' " r gthqto gf " vq" eqwt'v' tgr qtvg'v' tgc f kpi "qh'vgnko qp{ "cu'tgs wguvf "d{ "lw{ _0"Y g pqv' "vj cv'vj g"lw{ "cungf "hqt" vj g"tgc f kpi "qh'vgnko qp{ "qp o wkn' r g'q'ecuk'p'u'vj tqwi j qw'ku'ngpi vj { "f grkdgcvkpu."cpf cr r gct'v'vq"j cxg'dggp'xgt{ "o g'k'ew'w'kp' tgs wguv'kpi "vj cv'qpn' ur gek'k' r qt'v'kpu' qh'vgnko qp{ /uqo g'ko gu' kpenf kpi "etquw/gzco kpcvkp/dg'tgcf 0'Vj g'eqwt'v'v'k'ps vkt { "y j gvj gt"vj g'tgcf kpi qh'cf f k kqpcn'vgnko qp{ "y cu'pggf gf "qeevttgf" *1028 "y j gp vj g'lw{ "j cf "pqv' { g'v'eqpenf gf "ku'f grkdgcvkpu'cpf "vj w'cv c"vko g'y j gp"er'ct'k'k'cvkqp'vkn'y qwf "j cxg'dggp'wughw"j cf vj g'lw{ "hgn'k'y cu'pggf gf 0'Ugg"*People v. Jennings. supra.* "75" Ecrf 5f "cv'r 05: 7"eqwt'v'gz' r ct'v'g'eqo o wplecvk'p'y kj "lw{ hq'wpf "j cto rgu'kp' r ct'v'dge'cwug"vj g'eqwt'v'qh'gt gf "vq"i kxg'vj g lw{ "cf f k kqpcn'ew'cv'k'g'cf o qpk'k'p'u_0'K'iki j v'qh'vj g'eqwt'v' ur gek'k' "lps vkt { "y j gvj gt"vj g'lw{ "y kuj gf "vq"j gct"cf f k kqpcn r qt'v'kpu'qh'vj g'vgnko qp{ "qh'Dgpvrg{ "cpf "Dtqo hgrf "cpf "vj g lw{ }u'tgr apug."cpf "vj g'ektewo ucpeg'vj cv'vj g'vgnko qp{ "vj cv y cu'tgcf "vq"vj g'lw{ "er'gctn' "y cu'cf o ku'kdng'cpf "o gv'vj g'lw{ }u r tgekug'tgs wguv'vj g'v'ctf { "pqv'k'cvkqp'qh'eqwupgn'cpf "eqwupgn'u

cdugpeg"ltqo "vj g"tgcflpi "qh"vj g"vgnko qp{"ecppqv"j cxg"j cf cp {"ghgevw'r qp"vj g"xtgf lev

B. Penalty Phase Issues

1. Notice of evidence in aggravation

*67+"F ghgpf cpv'eqpv'gpf u"vj cv"j g"tgegkxgf "kpcf gs wcvg"pqvleg qh" gxlk gpeg" vj g" r tqugewklp" y cu" r gto kwgf " vq" r tgu'gpv" kp ci i txcv'klp. "kp"xlkq'vklp"qh"ugevklp"3; 200J g"cnu"eqpv'gpf u vj g"vtkn'eqwtv'gtt'gf "kp"hc'kklpi "vq"i tcpv"j ko "c"eqpv'wpcpeg"vq r tgr ctg"vq"o ggv'vj ku"gxlf gpeg

Dghqtg"vtkn"vj g" r tqugewklp" hkgf "pqvleg" qh" vj g" gxlk gpeg"kv k'p'v'gpf gf "vq" r tgu'gpv"kp"ci i txcv'klp"cv"vj g" r gpcn' "r j cu'g'0V'j g pqvleg"ucv'g" vj cv"vj g"R'gqr ng"y qwr' "r tgu'gpv"o'cten'vgnko qp{. f qewo g'pvt{" gxlk gpeg."cpf "cp{"qv"j g"t"eqpegkxcdng" gxlk gpeg y kj "t'gur gev"vq"()()cevu."cttgua. "kpe'k' gpvu."cpf "ekewo uncpegu uwtqtwpf lpi o' rku'gf "kpe'k' gpvu. "kpen'f lpi "ugxg'ctn" wpej cti gf tqd'gd'tkgu"cpf "c"3; 9: "eqpv'k'vklp" hq" cuucwn" y kj "c" f gcf n' y gcr qp"eqo o kwgf "ci clpv" J qtceg" O qptqg. "Li0Cv" c" r tgv'kcn j gct'kpi "qp" c" f gh'g'pug' b qv'klp" vq"vtkn'ng" vj g'pqvleg" qp" vj g' i tqwpf k'y cu'v'wko gn' "cpf "xc' i vq. "vj g" r tqugewklp"ci tggf "vq" f g'ng'v vj g" wpej cti gf "tqddgt'kgu"ltqo "vj g" rku'v' qh" kpe'k' gpvu."cpf "vj g eqvtv'f g'pk'gf "vj g" o q'vklp"vq"vtkn'ng

Chgt" g'pvt{" qh" vj g" i wkn' r j cu'g" xgtf lev." vj g" r tqugewklp r tqr qugf "vq"ecm'y k'pgu'gu'y j q"y qwr' "vgnkh" "p'q'v'q'pn' "cu"vq vj g"ekewo uncpegu"qh"vj g" cuucwn" w'r qp" J qtceg" O qptqg. "Li0 cu"vq"y j lej "f gh'g'p'f cpv"j cf "r r'gcf gf "i wkn'. "dw"cnu"cu"vq"vj g ekewo uncpegu"qh" c" t'gr'v'g'f "cuucwn" qp" J qtceg" O qptqg. "U0 vj g" h'q'ny lpi "f c" (0D'qy "cuucwn" j cf "dggp" ej cti gf "lp" vj g uco g' lph'qto cv'klp. "dw"vj g"ugeqpf "ej cti g'y cu'f' tqr r gf "c'nc'p' i y kj "cp'qy g't'ej cti g+r wtu'wcp'vq" c' t'ng'c' i t'ggo g'p'0F gh'g'p'f cpv *vj tqwi j "eqwpugn" qd'lg'evgf "vj cv"j g' j cf "tgegkxgf"pq"pqvleg vj cv" gxlk gpeg" qh" vj g"ugeqpf "kpe'k' gpv" y qwr' "dg" r tgu'gpv'gf. cpf "vj cv"j g'y cu'pq'v'r tgr ctgf "vq"t'gur qpf "vq"vj g" r tqugewklp"u gxlk gpeg" tgi ctf lpi "vj g"ugeqpf "cuucwn" E'qwpugn' eqpv'gpf gf j g' y qwr' "j cxg" kv'g'tx'ky gf "y k'pgu'gu" cpf "k'px'g'vki cv'gf "vj g o cv'gt" j cf "j g" t'gegkxgf "vko gn' "pqvleg" O'Chgt" eqpuk'f g'kpi "vj g *1029 "o cv'gt "h'q"t'ugxg'tcn'f c{ u"v'j g'eqwtv'f v'g'to k'pgf "vj cv"vj g gxlk gpeg" h'gm'y kj kp"vj g"pqvleg" i kxgp. "d'gecv'w" vj g" f' luo ku'gf eqwpv' eqpvuk'wgf "cp" o'ctt'guv' _ "kpe'k' gp'vj" qt _ "ekewo uncpegu _ uwtqtwpf lpi o' vj g" eqpv'k'vklp" vj cv"vj g" r tqugewklp" i cxg" pqvleg k'y qwr' "wug" lpi "ci i txcv'klp" 0P q' eqpv'wpcpeg" y cu' i tcp'v'g' 0

Vj g"vtkn'eqwtv'f k' "pq"v'cdwug" ku" f k'et g'vklp" 0P qvleg" r wtu'wcpv vq"ugevklp"3; 200" vj cv"vj g" r tqugewklp" y k'ni' r tgu'gpv" gxlk gpeg t'gr'v'kpi "vq" c' r t'kqt "etko g"qt" eqpv'k'vklp" ku" l'w'h'h'ke'lpv'vq" c'rg'tv'v'j g f gh'g'pug" vj cv" gxlk gpeg" tgi ctf lpi "wpej cti gf "etko gu"qt "qvj g't

o k'ueqpf wev'eqo o kwgf "cu" r ctv'q'h'vj g'vko g'k'p'k'f gpv'qt "eqwtug qh'eqpf wev'cu"vj g" r t'kqt "etko g"qt" eqpv'k'vklp" o c{"dg"q'h'ht'gf 0 *People"v. Arias."supra."35" Ecn'6vj "cv"r 0'388"} t'gh'g'g'peg" vq ekewo uncpegu" w'p'f g'tn' lpi "etko g" f' g'uetk'kgf "kp" r' r'qleg" t'gr' q'tv i cxg'cf gs wcv'g'pqvleg"qh"vj g' f gh'g'p'f cp'v'u'vj t'gcv'v'ch'gt' j ku'ctt'guv' = People"v. Visciotti"*3; ; 4"4" Ecn'6vj "3. '92" J' Ecn'0' r w'0'f "6; 7. : 47" R0'f "5: : _"} j'pqvleg" tgi ctf lpi "c" ur gek'le" r t'kqt "etko g" r wu eqwpugn' qp" pqvleg" tgi ctf lpi "etko gu"eqo o kwgf "cu" r ctv'q'h'vj g uco g'eqwtug"qh'eqpf wev'0"K'p' vj g't' t'gu'gpv'ecug. "vj g'v'y q" cuucwnu y g'tg" kv'gt't'gr'v'g'f "cpf "k'px'q'v'k'g' f' gh'g'p'f cp'v'u' cwgo r v" q'x'gt" c v'y q'f c{ "r g'tkqf. "vq" k'p'vko k'f cv'g'qt" t'g'v'c'v'g" ci clpv'o go dgtu qh"vj g"uco g" h'co k'v' "ch'gt" q'pg" h'co k'v' "o go dgt" j cf "k'pv'g't'ht'gf y kj "f gh'g'p'f cp'v'u' cwqo qd'k'g'0'F gh'g'p'f cpv"j cf "r t'g'v'kcn'pqvleg vj cv"vj g" r tqugewklp" k'p'v'g'p'f gf "vq" r t'gu'gpv" gxlk gpeg" qh'cevu. ctt'guu. "kpe'k'f gpvu." qt" ekewo uncpegu" uwtqtwpf lpi " vj g"3; 9: cuucwn' eqpv'k'vklp. "cpf "vj g"ugeqpf "cuucwn" eng'ctn' "eqpvuk'wgf c'ekewo uncpegu" uwtqtwpf lpi "vj g' eqpv'k'vklp" 0

Kp" cf f'k'k'q. "o'c' ewcn'pqvleg" o c{"dg" r t'q'x'k'f gf "pq"v'q'pn' "d{ vj g'v'c'w'w'q't {"pqvleg. "dw'd{" l'w'r r n'go g'v'c'n'l'p'h'qto cv'klp" l'we'j "cu r q'rt'g' t'gr' qt'v'0 *People v. Bradford, supra."37" Ecn'6vj "cv"r 0 357; 0'Cu'v'j g' r tqugewq't' p'q'v'g'f. 'f gh'g'p'f cp'v't'gegkxgf "vj g' r q'rt'g' t'gr' qt'v't' g'v'k'p' i "vq"vj g'ugeqpf "cuucwn"v'v'p' i "d'gh'g'f'v't'kcn

Kp"cp{"g'x'gpv"pq"t'g'cu'q'p'cdng" r qu'k'd'k'v'k'f {"qh" r t'g'lf' leg" cr r gct u ltqo " vj g" cu'gt'v'g'f "f gh'g'v' lpi" vj g" pqvleg" qt" vj g" f' g'p'k'n' q'h eqpv'wpcpeg'0 *Ugg" People v. Bradford, supra."37" Ecn'6vj cv"r 0'3582"} jzco k'p'kpi "t'geq'tf "h'q"t' t'g'cu'q'p'cdng" r qu'k'd'k'v'k'f {"qh r t'g'lf' leg" c't'k'k'pi "ltqo "cu'gt'v'g'f "f gh'g'v'k'g'pqvleg"0"Cu"p'q'v'g'f . f gh'g'p'f cp'v't'gegkxgf "vj g" r q'rt'g' t'gr' qt'v't'g'i ctf lpi "dq'v'j "cuucwnu f w'k'p' i "r t'g'v'kcn'f k'ue'q'x'g't{. "vj wu'c'h'q't'f lpi "j ko "cp" q' r r q't'w'p'k'f v'q' r' g't'q'to "cp{"p'gegu'c't{"k'px'g'vki cv'klp. "cpf "vj g' r q'rt'g'v'g' q'h'leg't y j q' r t'gr' ctgf "vj g"etko g' t'gr' qt'v't'g'i ctf lpi "vj g'ugeqpf "kpe'k'f gpv y cu" r t'gu'gpv' lpi" eqwtv' cpf "c'x'k'c'v'ng" h'qt" gzco k'p'cv'klp" 0 Kp' cf f'k'k'q. "f gh'g'p'f cpv" *vj j q" d{" vj ku" vko g" y cu" t'gr' t'gu'gpv'k'p' j ko u'gr'h" y cu" c'v'ng"vq" gzco k'p'g" vj g'y k'p'gu'gu"vq" vj g"ugeqpf cuucwn" s'w'k'g" gh'g'v'k'x'gn' 0' J ku" gzco k'p'cv'klp" f go q'p'ut'cv'gf f'g'v'k'g'f "h'co k'k'c't'k'f " y kj " vj g" y k'p'gu'gu") unc'v'go g'p'vu"vq" vj g r q'rt'g'v'g"cv"vj g"vko g" q'h'vj g"etko g"cpf "y kj "vj g't"vgnko qp{"cv vj g"vtkn'qh'cp" c'ee'qo r r'leg'0'J g"uw'ee'g'u'w'w'v' "ko r g'cej gf "vj go d{"r q'l'v'k'p' "q'w"i t'qui "k'p'eqpv'k'v'k'p'k'g'u'd'g'v'y g'g'p"v'j g't' ew't'g'pv vgnko qp{"cpf "dq'v'j "vj g't" vgnko qp{"k'p'v'j g't' g'x'k'v'w't' t'q'eg'gf lpi cpf "vj g' r q'rt'g' t'gr' qt'v'0 *1030

F gh'g'p'f cp'v'u' eqpv'g'p'vklp" vj cv'y kj "g'c't'ng't' p'q'vleg. 'j g'eqw'f' 'j cxg eqpv'cv'gf "vj g" q'v' g't' u'w'r g'ew'f' g'uetk'kgf "kp" vj g' r q'rt'g' t'gr' qt'v'ku w'p'c'x'k'k'p' 0V'j g't'gr' qt'v'eqpv'k'p'g'f "p'q" p'co gu'qt" em'w'cu"vq" vj g k'f gp'v'k'f "qh'v'y g't' u'w'r g'ew' c'p'f l'p'f g'gf "vj g't' u'w'r r qu'gf "r t'gu'g'peg y cu'eqp'v'f' lev'gf "d{"vj g'y k'p'gu'gu"cv"vj g' r g'p'c'n'f "r j cu'g. "y j q

uncvqf 'vj cv'qpn' f ghgpf cpv'cpf 'j ku'cee qo r nleg'Crk'Dt { cpv'j cf dggp'lpqxqk'gf O'P qt'eqwrf 'rcvg'pqv'kg'qh'vj g'ugeqpf 'cuucwv j cxg'ch'gevgf 'vj g'f ghgpug' utcvgi { "cf xgtugr'."dgecwug"vj ku utcvgi { "ctt'gcf { "y qwrf "j cxg'vcn'gp'kp'q'cee'qwpv'vj g'emugrf tgrv'gf "cuucwv' eqpx'lev'k'p' O'Kp' hcev." eqwpugr' uncvgf "vj cv'vj g f ghgpug'v'gco "j cf "dggp'ect'ghw'lp" eqp'ut'w'ekpi "vj g'r gpcn' r j cug'f ghgpug'p'qv'v'q'g'lek'g'x'k'f gpeg'q'h'f ghgpf cpv'u'r gcegcdr'g pcwt'g'qt'rcen'q'h'j quw'k'k'f. 'lp'qt'f gt 'v'q'cx'q'k'f 'qr g'p'k'pi "vj g'f'q'qt v'q'hw'vj gt'g'x'k'f gpeg'q'h'f tk'qt'o k'ue'q'pf w'v'o'Ugg E3; 260+

2. Allegation that the penalty phase was a "sham"

F ghgpf cpv'eq'p'v'p'f u'vj cv'q'ht'bg'x'g'c'nt'g'cu'q'pu'vj g'r gpcn'f 'r j cug q'h'vj g'v'k'cn'y cu'c'ou'j co o'c'p'f 'vj cv'vj g'r gpcn'f 'x'g'f'lev'uj q'w'f dg't'g'x'g'ug'f O'J g'cu'ug'w'v'j cv'vj g'v'k'cn'le'q'w't'p'qv'v'q'pn'f 'cd'w'ug'f 'ku f'k'ue't'g'v'k'p'lp'x'ct'k'w'u't'g'ur g'ev'u."dw'c'nu'q'vj cv'vj g'r t'q'eg'g'f'k'pi u x'k'q'rc'v'g'f 'j ku't'ki j v'v'q'f'w'r' t'q'eg'uu'q'h'ic'y .j ku'U'k'j 'Co g'p'f'o g'p'v t'ki j w'u'v'q' t'g'r t'g'ug'p'v'j ko u'g'h' "v'q" eq'w'p'ug'n' c'p'f "v'q" r t'g'ug'p'v' c f ghgpug. 'c'p'f 'j ku'G'ki j v'j 'Co g'p'f'o g'p'v't'ki j v'v'q'c'h'ck'c'p'f 't'g'ic'k'd'ng r gpcn'f 'f'g'v't'o k'p'c'v'k'p'o

F ghgpf cpv' p'q'v'u' v'j cv'vj g'r gpcn'f "r j cug" q'h' c' ecr k'cn' v'k'cn p'ge'g'u'c't'k'n'f "t'g's w'k't'g'u'v'o g'hw'f'r t'g'r c't'c'v'k'p'o'J g'q'd'ug't'x'g'u"vj cv k'p' j ku' ecug." v'j g' v'k'cn' eq'w't'v' k'ug'h' cu'w't'g'f "j ko " cv' v'j g eq'o o g'p'eg'o g'p'v' q'h' v'j g' v'k'cn' v'j cv' v'j g't'g' y q'w'f "dg" v'o g' h'q't r gpcn'f "r j cug" r t'g'r c't'c'v'k'p'o dg'y g'g'p' v'j g'i w'k'n' r j cug' c'p'f "v'j g r gpcn'f "r j cug. "c'p'f "p'q'v'g'f "v'j cv'vj g'p'q't'o c'n'r g't'k'q'f "dg'y g'g'p' v'j g y q'r j cug'u'y cu'v'y q'y g'g'm'o'F ghgpf cpv't'g'r t'g'ug'p'v'f 'j ko u'g'h'c'v v'j g'r gpcn'f "r j cug" c'p'f "eq'p'v'p'f u'vj cv'c'n'j q'w'i j "j g'eq'p'eg'f'g'f n'f ko r g'f'g'f "j ku'eq'w'p'ug'n'u'r gpcn'f "r j cug" r t'g'r c't'c'v'k'p'o'f w'k'p'i "v'j g i w'k'n' r j cug." j g' f'k'k'i g'p'v'f "r t'g'r c't'g'f "h'q't" v'j g'r gpcn'f "r j cug cu" u'q'p'p' cu" j g' ce'j k'g'x'g'f "eq'eq'w'p'ug'n' unc'w'u'o' J g' eq'o r r'ck'p'u v'j cv'eq'w'p'ug'n' gh'g'ev'k'x'g'n'f "y k'j f t'g'y "cv'vj ku'r q'k'p'v' r'g'c'x'k'p'i "j ko eq'o r r'g'v'g'n' "q'p'j ku'q'y p'v'q'r t'g'r c't'g'o'J g'eq'p'v'p'f u'vj cv'vj g'eq'w't'v v'g'c'v'g'f "j ko " o q't'g'j c't'uj n'f "v'j c'p'k'y q'w'f "j cx'g" v'g'c'v'g'f "c'p'f eq'w'p'ug'n'q't'c'p'f { 'q'v'j g't'r t'q'ug'f' ghgpf cpv' r c't'v'w'c't'n'f 'lp'f' g'p'f { k'pi t'g's w'g'u'u' h'q't' u'j q't'v' eq'p'v'k'p'c'p'eg'u'v'q' r t'g'r c't'g'f "j ku'f ghgpug' c'p'f v'q' r t'g'r c't'g'f "v'q" o g'g'v' w'p'g'z'r g'ev'g'f "g'x'k'f g'peg" r t'g'ug'p'v'g'f "d { "v'j g r t'q'ug'ew'k'p'o'J g'c'nu'q' eq'p'v'p'f u'vj cv'c'h'g't' "j g'y cu'i' t'c'p'v'g'f "h'w'n r t'q' u'g" unc'w'u. "v'j g' eq'w't'q'q'o "d'c'k'k'h'h' k'p'h'q't'o g'f "j ko " v'j cv'j g y q'w'f "p'q'v'd'g'r' g't'o k'w'g'f "v'q'ur g'eni'y k'j "c'p'f 'r' q'v'p'v'k'cn'y k'p'g'u'u'k'p v'j g'eq'w't'v'j q'w'g'o'f g'y cu'w'p'c'd'ng. j g'g'erc'lo u. 'v'q'eq'p'v'ce'v'y k'p'g'u'gu h'q'o "v'j g'l'c'k'n'c'h'g't' "eq'w't'v'ug'u'k'p'pu." d'g'ec'w'ug"j ku'w'c'p'ur q't'v'y cu u'q' f'g'r'c'f { "v'j cv'j g' c't't'k'x'g'f "cv' v'j g' l'c'k'n' c'h'g't' "v'j g' c'w'q't'p'g'f x'k'k'k'p'i 't'q'q'o 'y cu'len'q'ug'f "c'p'f "v'j g'v'g'r'j q'p'g'y cu'q'h'h'k'o ku' O'J g eq'p'v'p'f u'vj cv'j g'y cu'p'q'v't' g't'o k'w'g'f "v'q'b' g'g'v'y k'j "j ku'g'p'v'g'p'el'p'i eq'p'u'u'w'c'p'v'k'p'eq'w't'v'c'p'f "v'j cv'j g'y cu'ew'v'q'h'h' h'q'o "c'p'f "eq'p'v'ce'v y k'j "j ku'k'p'x'g'u'k'i c'v'q't' O'J g' *1031 "c'nu'q'c'm'g'i gu'j g'y cu'hw'q't'eg'f v'q" o c'n'g' v'g'r'g'r j q'p'g' ec'm'u' cv'j ku' q'y p' g'z'r g'p'ug. "v'j cv'j g'y cu h'q't'eg'f "v'q" r t'q'eg'g'f "y k'j "v'j g'ec'ug'f y j k'g'k'm'c'p'f "v'j cv'j g'y cu'p'q'v

cm'q'y g'f "v'q" r r'c'eg'g'z'j k'd'ku'q'p'v'j g'd'm'end'q'ct'f "q't" c'r r t'q'ce'j "v'j g l'w't { "f w'k'p'i "em'uk'p'i "c'ti w'o g'p'v'o'J g'c'm'g'i gu'v'j cv'vj g'v'k'cn'le'q'w't'v f g'g'i c'v'g'f "v'q'v'j g'v'j g't'k'h'u'f g'r c't'w'o g'p'v'k'u'c'w'j q't'k'f { 'q'x'g't' g'ev'w't'k'f cv'vj g'r g'p'c'n'f "r j cug. "c'p'f "c'd'c'p'f q'p'g'f "ku'f'w'w'f "v'q" r t'g'u'k'f g'q'x'g't c'p'k'o r c't'v'k'cn'r t'q'eg'g'f k'pi O'J g'hw'v'j g't'c'm'g'i gu'v'j cv'r t'q'ug'ew'q't'k'cn o k'ue'q'p'f w'ev'q'ee'w't'g'f "f w'k'p'i "em'uk'p'i "c'ti w'o g'p'v'c'p'f "v'j cv'vj g eq'w't'v'k'o r t'q'r g't'n'f "r'ko k'g'f "j ku'q'y p' "em'uk'p'i "c'ti w'o g'p'v'o'V'j g'ug eq'p'ut'c'k'p'u'c'p'f 'x'k'q'rc'v'k'p'u. j g'eq'p'v'p'f u'v'k'o r c'k't'g'f "q't'f'g'w'v'q'f { g'f j ku'c'd'k'k'k'f { 'v'q' r t'g'ug'p'v'c'f' ghgpug'o

F ghgpf cpv' r c'k'p'u'c' r k'ew't'g' q'h'c' eq'w't'v' v'j cv't'c'p' t'q'w'i j u'j q'f q'x'g't' j ko . "h'q't'el'k'p'i "j ko " v'q" r t'q'eg'g'f "r t'q' u'g" v'q" v'j g'r gpcn'f r j cug" ko o g'f k'c'v'g'n'f "c'h'g't" v'j g'i w'k'n' x'g't'f'lev'c'n'j q'w'i j "j g'y cu eq'o r r'g'v'g'n'f "w'p'r t'g'r c't'g'f'o'J g' cu'ug't'v' v'j cv' v'j g' eq'w't'v' t'g'hw'ug'f v'q" cm'q'y "j ko " c'p'f { "v'o g' h'q't" r t'g'r c't'c'v'k'p'o' c'p'f "eq'w'p'v'g'p'c'p'eg'f u'g'ew't'k'f "o g'cu'w'g'u'v'j cv'o c'f g'k'v'k'o r q'u'k'k'ng' h'q't' j ko "v'q' eq'p'v'ce'v j ku'y k'p'g'u'gu. "r t'g'r c't'g'f'v'j go "v'q" v'g'u'k'h'f. "q't. "k'p'f g'g'f. "f'g'v't'o k'p'g y j cv'vj g'f { "y q'w'f "uc'f'o'Q'w't'ect'ghw'v'g'z'co k'p'c'v'k'p'o'q'h'v'j g't'g'eq't'f r'g'c'f u'w'u'v'q" eq'p'en'f'g' v'j cv'o c'p'f "q'h'f ghgpf cpv'u' eq'p'v'p'v'k'p'u c't'g'p'q'v'w'ur r q't'v'g'f "d { "v'j g't'g'eq't'f. "c'p'f "v'j cv'vj g'v'k'cn'le'q'w't'v'f k'f p'q'v'c'd'w'ug'ku'f'k'ue't'g'v'k'p'o'q't'x'k'q'rc'v'g'f' ghgpf cpv'u' eq'p'uk'w'w'k'p'c'n t'ki j w'u'k'p' t'w'k'p'i "q'p" f ghgpf cpv'u' o q'v'k'p'u' q't' k'p' ku' eq'p'f w'ev q'h'v'j g'r gpcn'f "r j cug'o'k'p' v'j g'r'ko k'g'f "k'p'v'c'p'eg'u'k'p" y j k'ej "v'j g r t'q'eg'f w'g'u'h'q'm'q'y g'f "d { "v'j g'v'k'cn'le'q'w't'v'c'r r g'c't'v'g'w'g'u'k'p'c'd'ng. 'p'q r t'g'l'w'f k'eg'c'r r g'c't'u'o

a. Factual background

Vj g' t'g'eq't'f "f k'ue'n'q'ug'u" v'j cv' l'w't { "u'g'r'ev'k'p'o" eq'o o g'p'eg'f " k'p Q'ev'q'd'g't'3; : 9."c'p'f "v'j cv'vj g'l'w't { "t'g'w't'p'g'f "c"x'g't'f'lev'q'h'i w'k'n'v q'p'L'w'f'49."3; : : o'Q'p'v'j g'r'ev'g't'f'c'v'g. "v'j g'r c't'v'k'u'c'i t'g'g'f "v'j cv v'j g'r gpcn'f "r j cug'q'h'v'j g'v'k'cn'y q'w'f "eq'o o g'p'eg'q'p'c'w'i w'u'v' : . 3; : : o'V'j ku'c'h'q'f'g'f "f ghgpf cpv'y j q' u'k'n'k'y cu't'g'r t'g'ug'p'v'g'f "d { eq'w'p'ug'n'34'f'c { u'hw'v'j g't'r t'g'r c't'c'v'k'p'o

Q'p'c'w'i w'u'v'3."3; : : . "f ghgpf cpv't'g's w'g'u'v'g'f "v'q" r t'q'eg'g'f "r t'q' u'g'o Eq'w'p'ug'n'k'p'h'q't'o g'f "v'j g'eq'w't'v'j cv'g'c't'n'f 'k'p'eq'w'p'ug'n'u'r t'g'r c't'c'v'k'p'o h'q't' f ghgpf cpv'u' v'k'cn' f ghgpf cpv'j c'f "k'p'ut'w'ev'g'f "h'co k'k'f "c'p'f h't'g'p'f u'p'q'v'v'q'ur g'c'm'v'q'eq'w'p'ug'n'q't'v'j g'f ghgpug'k'p'x'g'u'k'i c'v'q't t'g'i c't'f'k'p'i "r gpcn'f "r j cug"ku'w'g'u."c'p'f "v'j cv'f ghgpf cpv't'g'hw'ug'f v'q'ec'm'u'w'ej "r g't'u'q'p'u'cu'y k'p'g'u'gu'cv'vj g'r gpcn'f "r j cug'w'p'g'u'u j g' t'g'r t'g'ug'p'v'g'f "j ko u'g'h'o'F ghgpf cpv'j ko u'g'h' g'z'r r'ck'p'g'f "v'j cv c'n'j q'w'i j " k'p" v'j g' g'c't'n'f " u'nci gu' q'h' v'j g' ecug" j g' j c'f " ur q'n'g'p t'g'r g'ev'g'f n'f "v'q" y k'p'g'u'gu" y j q'y q'w'f "dg'w'ug'h'w'v'q" j ko "cv'vj g r gpcn'f "r j cug. "v'j g'ug" r g't'u'q'p'u" y k'j g'f "q'p'n'f "v'q"ur g'c'm'v'q" j ko c'p'f "y g't'g'g'z'v't'g'o g'n'f "t'g'n'w'c'p'v'v'q'ur g'c'm'v'q" j ku'c'w'q't'p'g'f { "q't"v'q j ku'k'p'x'g'u'k'i c'v'q't. "d'q'y "q'h'y j q'o "v'j g'f { "h'q'w'p'f "k'p'o'k'f c'v'k'p'i O'J g g'z'r r'ck'p'g'f "v'j cv'vj g'y k'p'g'u'gu" y q'w'f "r g't'h'q't'o "d'g'w'g't'w'p'f g't'j ku f'k't'g'ev'g'z'co k'p'c'v'k'p'o'v'j c'p'w'p'f g't'eq'w'p'ug'n'u'o'Eq'w'p'ug'n'g'z'r r'ck'p'g'f v'j cv'vj g'ug'y k'p'g'u'gu. "q'h'y j q'ug'k'f g'p'v'k'f "c'p'f "r q'v'p'v'k'cn'f " *1032

vguko qp{ 'eqwpugn'uggo gf 'y gmi'cy ctg.'y qwf 'qwe'j 'qp'ho kñ o cvgtu'cpf 'go qv'kpcn'kuu'gu.'cpf 'y qwf 'r gthqto 'dgu'w'p'f gt f ghgpf cpv'u'gzco kpcv'kq0Vj g'eqwv'uwi i guvgf 'y cv'f ghgpf cpv uj qwf 'cev'cu'eqeqwpugn'cpf 'eqpf wev'y'j g'f k'gev'gzco kpcv'kq qh'j ku'y kpguugu'0Vj g'o cvgt 'y cu'pqv'tgu'x'g'f 0

Qp" Cwi wuv' 6." 3; : . ." f ghgpf cpv' r tqr qugf " vq" ceegr v' yj g eqwt'u'eqo r tqo kug'ctt'cpi go gpv'y kj 't'gur gev'q'j ku'ucwu'cu eqeqwpugn'dw'eqwpugn'o qxgf "hqt" c" y q/y ggn'eqv'k'p'w'c'p'eg vq'eqp'cev'y kpguugu'cpf 'eqpf wev'k'p'x'g'uni cv'k'p'0K'f'eqpp'ge'v'k'p' y kj " yj g" t'gs wgu' hqt" c" eqv'k'p'w'c'p'eg." yj g" eqwt'v' j gctf " yj g v'guko qp{ 'qh'f t'0Dcm'p.'y j q'j cf 'cev'f 'cu'f ghgpf cpv'u'f gpcn'f r j cug" eqpu'w'nc'p'v'uk'peg'nc'g'k'p'3; : 80'Uj g'ucv'g'f 'y cv'k'p'y cu j gt'f w'f "v'q'q'dv'k'p" c" h'm'ni'j k'ni'qt { "qh'f ghgpf cpv.'v'q'k'p'v'x'k'g'y h'co kñ." h'k'p'f u." go r m'q' { gtu." eqy q'tngtu." cpf "k'p'f k'k'f w'cu'y j q j cf "np'qy p" f ghgpf cpv'k'p'uej qqn'dw'y cv'f ghgpf cpv'j cf "pqv' eqqr gtc'v'g'f "y kj " j gt'0' Y j gp" gct'ri'kt" k'p" v'j g" r tqeg'g'f k'p'i u' u'j g cv'go r v'g'f "v'q" eqp'cev' h'co kñ " cpf "h'k'p'f u" qp" j gt" qy p." v'j g'f t'ghw'g'f "v'q" f k'ue'wu' f ghgpf cpv'u' j k'ni'qt { ." uc'v'k'p'i " yj g'f " y g'g' cev'k'p'i "qp" j ku'k'p'ut'we'v'k'p'u'0F ghgpf cpv'eq'p'h'ko gf "y cv'j g'j cf k'p'ut'we'v'g'f " j ku' h'co kñ " cpf "h'k'p'f u" pqv'v'q" ur g'cni'v'q" eqwpugn v'j g' f ghg'p'ug' k'p'x'g'uni cv'qt. " qt " v'j g" r gpcn'f " r j cug" eqpu'w'nc'p'0 F ghgpf cpv't'ge'g'p'w'f " j cf 'ej cpi gf " j ku' b' k'p'f 'c'p'f 'r tqf we'g'f "c'k'hu'v qh'33"qt'34" h'k'p'f u'cpf "t'g'nc'x'g'u'y j q'uj qwf "dg'k'p'v'x'k'g'y gf . k'p'nc'f k'p'i "y q'dt'q'y gtu." c' h'k'p'f "y j q'j cf "q'dug't'x'g'f " j ku'g'h'q't'u v'q'uc'x'g'v'j g' h'k'g'q'h'c" ut'cpi gt. " cpf " j ku'c'w'p'0J g'j cf "ej cpi gf j ku' b' k'p'f 'd'ge'c'w'g'v'j g'eqw't'v' t'qr qugf "v'q' r gto k'j' ko "v'q'eq'p'f we'v f k'gev'gzco kpcv'kq'q'h'j ku'y kpguugu'0J g'zr r'k'p'g'f "v'j cv'j g'j cf np'qy p'c'm'ic'p'i "v'j cv'k'h'j g't'g'y g't'g'c' r gpcn'f " r j cug." j g'y qwf r t'gug'p'v'j ku'qy p'ecug'0

Vj g'eqwt'v'f g'p'g'f "v'j g" o q'v'k'p' "hqt" c" y q/y ggn'eqv'k'p'w'c'p'eg. q'dug't'x'k'p'i " v'j cv' v'j g" ecug" k'p" o k'ki cv'k'p' " y qwf " pqv' v'cng" c i t'g'c'v'f g'cni'q'h' r t'g'r c't'v'k'p' d'ge'c'w'g' q'h'f ghgpf cpv'u' h'co k'ri'ct'k'f y kj " y j cv' j ku' y kpguugu" y qwf " v'g'uk'h'f " v'q" eq'p'eg't'p'k'i " j ku d'ceni t'q'w'p'f'0 Vj g' eqwt'v' uc'v'g'f < ð J g' cf o ku' j g" np'qy u" v'j g y kpguugu'cpf "v'j g" cur'ge'u'q'h'j ku'ej c't'cev't'g'cpf " j k'ni'qt { "v'j cv v'j g'f "y qwf "v'g'uk'h'f "v'q'0'Vj g'eqwt'v'c'emp'qy ng'f i gf "v'j cv'v'j g'ecug y cu" c" x'g't { " u'g't'k'q'wu" q'p'g." dw' q'dug't'x'g'f " v'j cv' l'w't { " u'g'r'ev'k'p' j cf "eqo o g'p'eg'f "v'j g" r t'g'x'k'q'w" Q'ev'q'dgt. " v'j cv'f ghgpf cpv'j cf h'k'k'g'f "v'q" eq'qr g't'c'v'g'f "k'p" r t'g'r c't'k'p'i "hqt" v'j g" r gpcn'f " r j cug." v'j cv c" eqv'k'p'w'c'p'eg" y qwf "dg" c'p' "k'p'eq'p'x'g'p'k'g'p'eg" hqt" v'j g" R'g'qr ng'u y kpguugu" y j q" y g't'g" c'it'g'c'f { " w'p'f gt" u'w'dr q'g'p'c" r w'tu'w'c'p'v' v'q eq'w'p'ug'n'u" g'ct'ri'kt" ci t'g'go gpv' v'j cv' v'j g" r gpcn'f " r j cug" y qwf eqo o g'p'eg" qp" Cwi wuv' : . " 3; : . ." cpf " v'j cv' c" eqv'k'p'w'c'p'eg y qwf "r t'gug'p'v'c" i t'g'c'v'k'p'eq'p'x'g'p'k'g'p'eg" v'q'v'j g' l'w't'q't'u'0Vj g'eqwt'v' eq'p'nc'f gf "v'j cv'v'j g'ug" eq'p'uk'f g't'c'v'k'p'u' q'w'y g'k'i j gf "v'j g'd'g'p'g'h'v v'q'dg" i c'k'p'g'f "d { "c" eqv'k'p'w'c'p'eg" cpf "v'j g'p'g'g'f f ghgpf cpv'j cf cv'go r v'g'f "v'q" gu'c'd'ri'k'j "k'p" u'w'r q't'v' q'h'j ku' o q'v'k'p'0Vj g'eqwt'v

r q'k'p'v'g'f "q'w'v'j cv'v'j g' R'g'qr ng'u' ecug" y qwf "v'cng" v'ko g. "c'p'f "v'j cv f ghgpf cpv'eq'w'f "eqo o g'p'eg" y kj " j ku' m'ec'n'y k'p'g'uu'g'u. " i k'k'k'p'i v'ko g" hqt" q'w'q'h'v'q'y p" y k'p'g'uu'g'u" v'q' h'f "k'p'0'E'q'w'p'ug'n'q'd'lg'ev'g'f . uc'v'k'p'i "v'j cv'k'p'v'x'k'g'y u'y kj "g'z'k'k'p'i "y k'p'g'uu'g'u' o k'i j v'r tqf we'g q'v'j gt" g'x'k'f g'p'eg" v'j cv'v'j qwf "p'g'eg'uu'k'c'v'g" h'w't'v'j gt" k'p'x'g'uni cv'k'p'0 J g" *1033 "t'g'k'g't'c'v'g'f " j ku't'g's w'gu'v'ht' c'v' y q/y ggn'eqv'k'p'w'c'p'eg cpf "v'j gp" c'ung'f "hqt" q'p'g' y ggn'0Vj g'eqwt'v't'ghw'g'f . 'uwi i g'uk'p'i v'j g'f ghg'p'ug' u'c't'v'y kj "m'ec'n'y k'p'g'uu'g'u. "v'j gp" o cng'c'p' q'h'gt'q'h r t'q'q'h'cu'v'q" y j gp" q'v'j gt" y k'p'g'uu'g'u' eq'w'f "dg" o c'f g'c'x'k'c'rd'ng'0 E'q'w'p'ug'n'eqo r r'k'p'g'f "ci c'k'p. "uc'v'k'p'i "v'j cv'j ku'k'p'x'g'uni cv'qt" y cu q'w'q'h'v'q'y p. "v'j cv'eq'w'p'ug'n'y cu" q'ee'w' k'g'f "y kj "c'p'q'v'j gt" ecug qp" v'j g' h'q'm'y k'p'i "f'c { ." cpf "v'j cv'v'j g'f "p'g'g'f gf "v'ko g'v'q" k'p'v'x'k'g'y y k'p'g'uu'g'u'cpf "h'q'm'y "w' r'g'c'f u'0Vj g'eqwt'v'k'p'ut'we'v'g'f "eq'w'p'ug'n v'j cv'k'h'j g'p'g'g'f gf "d't'g'c'm'i" k'p" v'j g' r t'gug'p'v'k'p' q'h' g'x'k'f g'p'eg" v'q q'd'v'k'p'v'j g' r t'gug'p'eg' q'h'y k'p'g'uu'g'u. " j g'uj qwf "k'p'ht'o "v'j g'eqwt'v'0

Qp" Cwi wuv' : . " 3; : . ." eq'w'p'ug'n' g'zr r'k'p'g'f "v'j cv'v'j g't'g'j cf "d'g'g'p c'p'k't'g'o gf k'c'd'ng' d't'g'c'n'f q'y p'k'p'v'j g'c'v'w'q't'p'g'f /e'k'g'p'v't'g'nc'v'k'p'uj k . cpf "v'j cv'f ghgpf cpv'k'p'uk'v'g'f "qp" t'g'ri'k'ki cv'k'p'i " i w'k'n'r j cug" ku'w'gu cpf " j cf "v'q'f "eq'w'p'ug'n' v'j cv'k'h'f ghgpf cpv'y g't'g' p'q'v' r g'to k'w'g'f v'q" eq'p'f we'v'v'j g'ecug" j ku" q'y p" y c { ." j g'y qwf "p'q'v' r c't'v'k'c'v'g' cpf "y qwf "f'k'gev'j ku'y kpguugu'pq'v'v'q" j qp'q't'c'p { "u'w'dr q'g'p'cu'0 F ghgpf cpv't'g's w'gu'v'g'f "v'q" r t'q'eg'g'f "r tq'ug." uc'v'k'p'i "v'j cv'eq'w'p'ug'n j cf "t'k'eng'f " j ko 0J g' l'c'k'f < ð I am prepared and I know the issues of what to ask the witnesses, my witnesses that I will call. I am prepared for that. I worked all weekend on this "]T_o hear"]counsel_ "tell me that I am not prepared to do the direct examination on my own witnesses ... that is absurd00

E'q'w'p'ug'n' t'g'p'g'y gf "v'j g" o q'v'k'p' "hqt" eq'v'k'p'w'c'p'eg." uc'v'k'p'i "v'j g't'g y cu" eqo r g'ni'k'p'i " o k'ki cv'k'p'i " g'x'k'f g'p'eg" v'j cv'v'j cu' p'q'v' t'g'c'f k'f c'x'k'c'rd'ng'0J g' r tqf we'g'f "v'j g' eq'p'w'nc'p'v' F t'0Dcm'p.'y j q' u'c'k'f v'j cv'uj g'j cf "d'g'g'p'w'p'c'd'ng" v'q' t'g'c'ej "e't'w'k'c'n'y k'p'g'uu'g'u'cpf "v'j cv h'co kñ " y k'p'g'uu'g'u" u'j qwf "dg" r tqf we'g'f "v'q" v'g'uk'h'f " t'g'i c't'f k'p'i f ghgpf cpv'u' d'ceni t'q'w'p'f "c'p'f "v'j g't'k'q'x'g' hqt" j ko . " j ku' o q'v'j g't'u o g'p'w'c'j g'c'n'j " r t'q'd'ng'o u." cpf " j ku' g'zr g't'k'p'eg" k'p" h'q'u'v'g't' e'c't'g'0 Uj g'uc'v'g'f f ghgpf cpv'j cf "y q'dt'q'y gtu'k'p" M'c'p'uc'u' E'k'f " y j q y g't'g' l'nc'd'ng' c'p'f 'h'cy 'c'd'k'f k'p'i 'c'p'f 'h'j qwf "d'g' e'c'm'g'f "cu'y k'p'g'uu'g'u'0 E'q'w'p'ug'n' r'k'ug'f " 35" ng'f " y k'p'g'uu'g'u' o qu'v' q'h' y j q'o " c'ew'c'm'f v'g'uk'h'g'f " cv' v'j g" r gpcn'f " r j cug." cu' k'w' w't'p'g'f "q'w'0'Vj g' eqwt'v r q'k'p'v'g'f "q'w'v'j cv'v'j o c'p { " q'h'v'j g" y k'p'g'uu'g'u' r'k'x'g'f " m'ec'n'f . " cpf v'j cv'v'j g' r t'q'ug'ew'q't'u' ecug" cpf "v'j g' m'ec'n'y k'p'g'uu'g'u' v'g'uko qp { y qwf "v'cng" h'q'p'i "g'p'q'w' i "v'q' r t'q'x'k'f g'v'ko g'v'q' eq'p'cev'c'p'f 'u'g'ew't'g v'j g" r t'gug'p'eg' q'h' q'w'q'h'v'q'y p" y k'p'g'uu'g'u'0 Vj g' eqwt'v' cu'w't'gf eq'w'p'ug'n' v'j cv'v'j g' r gpcn'f " r j cug" y qwf "r t'q'eg'g'f "c'v'c' r'g'k'w't'g'n'f r c'eg. " r q'k'p'v'g'f "q'w'f'c { u'q'p" y j k'ej "v'j g' eqwt'v' y qwf "p'q'v' dg" k'p u'g'u'k'q'p. " cpf "u'c'k'f "v'j g't'g'y cu'p'q'f g'c'f r'k'p'g'd'f " y j k'ej "f ghgpf cpv y qwf "j c'x'g'v'q" eqo r r'ng'v'v'j g'f ghg'p'ug' ecug'0K'f' eqo o g'p'v'g'f "v'j cv f k'h'le'w'k'g'u' f ghgpf cpv' o k'i j v'z'r g't'k'p'eg" k'p" k'p'v'x'k'g'y k'p'i "v'j g

y kpguugu'y gtg'r ctv'qh'y g'f krgo o c"qh'r tqeggf kpi 'r tq'ug'OK
cnuq' r klpv'f 'q'w'v'j cv'khi tcv'kpi 'f ghgpf cpv'u' b qv'kp'v'q'f tqeggf
r tq'ug'tgs vktgf "c'eqp'v'w'cpeg."y' cv'y qwf "dg'qpg'i tqwpf "pqv
v'q'i tcv'v'y g'o qv'kp'0

Vj g'eqw'v'y gp'gzco kpgf "f ghgpf cpv'y j q'cempqy ngf i gf "y' cv
j g'y qwf "tgegkx'p'q'cf f kkp'cni'v'ko g'qt'ugt'x'legu'dg' qpf "y j cv
y gtg'ch'htf gf "v'eqw'pugn'cpf "i tcv'v'f "y' g'o qv'kp'v'q'f tqeggf
r tq'ug'0Eqw'pugn'itgo klp'gf "cu'bf xkuqt { " *1034 'eqw'pugn'ucv'kpi
y' cv'j g'y cu" y k'kpi "v'q' j cpf ng' ngi' cni' o cv'gtu' uwe'j "cu" lwt {
k'p'ut'v'ek'p'u. 'dw'v'j cv'j g'y qwf "dg'v'pcdr'g'v'j' cpf ng'v'x'k'f gp'v'ct {
o cv'gtu'⁴⁷ 'Eqw'pugn'ici clp'cung'f 'h'qt'c'eqp'v'w'cpeg.'ucv'kpi 'y' cv
f ghgpf cpv'y cu'p'q'v'r tgr ctgf "v'q' r tqeggf 0Vj g'eqw'v't'g'k'v'c'v'g'f
y' cv'f ghgpf cpv'y qwf "pq'v'pggf "v'q' r tq'f weg'c" y kpguu' v'p'v'k
Cwi wuv'37."cpf "y' cv'f ghgpf cpv'y cf "npqy p'y j q' j ku" r gpcn'f
r j cug'y kpguugu'y qwf "dg'cm'cm'p'pi 0

47 F ghgpf cpv'u' ugeqpf " eqw'pugn' cnuq' ugt'x'g'f " k'p' cp
cf xkuqt { "ecr'cek'f 0

Vj g'r tqegw'k'p' r t'gug'p'v'f "ku" g'x'k'f g'peg' "k'p' ci i t'c'x'c'v'k'p' q'p
Cwi wuv': "cpf"; .3; : : 0'Q'p' Cwi wuv'; .3; : : .f ghg'pug'eqw'pugn
u'k'n'ugt'x'k'p' "k'p'cp'cf xkuqt { "ecr'cek'f.'tgs w'g'v'g'f "y' cv'y g'eqw'v'
cnuq' 'F t'0'Dcm'ep'v'q' b cng'c'ucv'go gp'v'0Uj g'ucv'g'f "y' cv'v'j g'y cu
w'p'cd'g'v'q' r g'ht'q'to "j g't'f w'k'u'y' k'j qw'v'j g'g'k'p'x'q'k'go gp'v'q'h'c
n'cy { g't'c'p'f "y' k'j q'w'b q't'g'v'ko g'v'q' r t'g'r ctg'0Vj g'eqw'v't'go k'p'f g'f
j g't'v'j cv'f ghgpf cpv'y cf "g'ng'v'g'f "v'q' r tqeggf "y' k'j qw'v'eqw'pugn'0
F t'0'Dcm'ep'eqo r k'k'p'g'f "y' cv'v'j g'y cu'w'p'cd'g'v'q' "eq'p'ht' "y' k'j
f ghgpf cpv'y j k'g'eqw'v'y cu'k'p' u'g'u'k'p' d'g'ec'w'ug' p'q' "h'c'ek'k'k'g'u
g'z'k'v'g'f "k'p'v'j g'eqw'v'y q'w'g'v'q' r g'to k'v'j ku."cpf "y' g'eqw'v'c'f x'k'g'f
j g't'v'q' "eq'p'u'w'v' y' k'j "j ko "cv'v'j g'eqw'v'f "l'c'k'v'j g'g'p'p'v'j k'p'i "f c'0
Uj g't'g'r r'g'f "u'j g'y cu' d'w'u' { "q'p'cp'q'y g't' o cv'gt' "y' g'g'p'p'v'j k'p'i
f c'0Vj g'eqw'v'ucv'g'f "y' g'eqw'f "eq'p'ht' "y' k'j "j ko "d't'k'g'n'f "k'p'v'j g'
eqw'v't'q'qo 0Uj g'ucv'g'f "h'j g'p'g'g'f g'f "v'q' r g'c'n'y k'j "j ko "h'qt' b' cp'f
j q'w'u. "y' cv'v'j g't'g'y g't'g'47/62' y' k'p'g'u'g'u'v'q' "eq'x'g't. "y' cv'v'j g'j' cf
v'q' k'p'v't'x'k'g'y "y' g'ug' r' g'tu'q'p'u. 'cpf "y' cv'f ghgpf cpv'p'g'g'f g'f "v'q' h'p'q'y
y j cv'v'q' c'u'v'j go 0C'f xkuqt { "eqw'pugn'ici t'g'g'f "y' cv'v'j g't'g'j' cf "d'g'g'p
k'p'u'v'h'k'ep'v'v'ko g'v'q' r t'g'r ctg'0

Y j gp'v'j g'r tqegw'k'p' t'g'v'g'f "q'p' Cwi wuv'; .3; : : . "y' g'eqw'v'
k'p's v'k'g'f "y' j g'v' g't'f ghgpf cpv'y cf "y' k'p'g'u'g'u'g'c'f { "h'qt' Vj w'v'f c'f.
Cwi wuv' 33." 3; : : 0'F ghgpf cpv' ucv'g'f "j g'p'g'g'f g'f "v'q' eq'p'u'w'v'
cf xkuqt { "eqw'pugn' d'w'eqw'pugn'q'd'lg'ev'g'f "y' cv'j g'f'k'f "p'q'v'np'q'y
y j cv'v' cu" i q'k'p'i "q'p'cp'f "y' cf "p'q' t'g'ur q'p'k'd'k'k'f { "h'qt' u'g'w'k'p'i
y k'p'g'u'g'u'0

Qp' Vj w'v'f c'f. " Cwi wuv' 33." 3; : : . "f ghgpf cpv' t'g's w'g'v'g'f " c
eq'p'v'w'c'p'eg' "v'q' n'ec'v'g' q'v' g't' u'w'ur g'ew'v' y j q' c' r q'r'k'eg' t'g'r q'tv
k'p'f k'ec'v'g'f " o k'j v'j' c'x'g' d'g'g'p' k'p'x'q'k'g'f " k'p' q'p'g' q'h' "y' g' r t'k'q't

etko k'p'c'n'c'ev'u't'g'k'g'f "w' q'p'd' { "y' g'r tqegw'k'p' "k'p'ci i t'c'x'c'v'k'p'0
Vj g'eqw'v'f g'p'k'g'f "y' g'o q'v'k'p'. "ucv'k'p'i "y' cv'v'j g'r q'r'k'eg' q'h'k'eg't
y j q' j' cf "r t'g'r ctg'f "y' g' t'g'r q't'v'y cu' r t'g'ug'p'v' cpf "c'x'c'k'c'd'g'v'q
v'g'u'k'h'f. " cpf "r q'k'p'v'k'p'i "q'w'v'j cv'f ghgpf cpv'j cf "t'g'eg'k'x'g'f "y' g'
r q'r'k'eg' t'g'r q't'v' k'p' f k'ue'q'x'g't { " c' { g'c't' d'g'h'q't'g'0'F ghgpf cpv' y' gp
ucv'g'f "j ku'g'z'r g't'v'y k'p'g'u'u' h'q'o 'H'q'k'f c'y q'w'f "p'q'v'eqo g'w'p'g'u'u
eq'w'p'u'g'n' eq'p'v'c'v'g'f "j ko . " y j k'ej " eq'w'p'u'g'n' ci t'g'g'f "v'q' f q'0 Vj g'
eqw'v' ucv'g'f "y' cv'f ghgpf cpv' y cu' p'q'v' t'g's v'k'g'f "v'q' eqo r n'g'v'
y' g'f ghg'pug' "ecug' d' { "g'c't'n'f "y' g' h'q'm'y k'p'i "y' g'g'm' d'w' k'p'v'g'c'f
y' cv'v'j g't'g'y cu' o'c'd'u'q'n'w'g'n' "p'q' v'ko k'v'q'p' { "q'w'v' g'x'k'f g'peg
k'p' o k'k'i c'v'k'p'0' 'Eqw'pugn' ucv'g'f "j g'y q'w'f "p'q'v'j g'r " eq'p'v'c'v'
y k'p'g'u'g'u. " cr ctv' h'q'o "y' g' t'g'ec'r'k'c'p'v' g'z'r g't'v. "dw'v'j cv'v'j g'
f ghg'pug' k'p'x'g'u'k'i c'v'q't. "T'q'j o cp. "y' q'w'f "f q'v'k'0Vj g'eqw'v'c'f x'k'g'f
f ghgpf cpv'v'q' o c'ng'v'w'g'v'q'h'v'j g'f ghg'pug' " *1035 'k'p'x'g'u'k'i c'v'q't' k'p'
eq'p'v'c'v'k'p'i "cpf "k'p'v't'x'k'g'y k'p'i "y' k'p'g'u'g'u. "cpf "r q'k'p'v'g'f "q'w'v'j cv'
f ghgpf cpv'j ko u'g'h'y q'w'f "d'g'c'd'g'v'q' eq'p'v'c'v'y k'p'g'u'g'u'v'x'g't'v'j g'
y' g'ng'p'f 0Vj g'eqw'v'q't'f g't'g'f "y' cv'f ghgpf cpv'd'g'v' k'g'p'c'ee'g'u'v'q'
y' g'v'g'r'j q'p'g'c'v'v'j g'l'c'k'0Vj g'd'c'k'k'h'h'c'p'p'q'w'p'eg'f "y' cv'f ghgpf cpv'
y q'w'f "d'g'v'pcdr'g'v'q' k'p'v't'x'k'g'y "y' k'p'g'u'g'u'v'v'j g'eqw'v'y q'w'g. 'cpf
y q'w'f "j c'x'g'v'q' k'p'v't'x'k'g'y "y' go "cv'v'j g'l'c'k'0

Eqw'pugn'v'j gp' c'p'p'q'w'p'eg'f "y' cv'F t'0'Dcm'ep' y cu'y k'j f t'cy k'p'i
h'q'o " j g't' f w'k'u'0' J g' h'k'g'f " c' o q'v'k'p' "h'q' c' " eq'p'v'w'c'p'eg
d'c'v'g'f "w' q'p' "Dcm'ep'u'f g'ec'r'c'v'k'p'v'j cv'v'j g'p'g'g'f g'f "o q't'g'v'ko g'
h'q't' "k'p'x'g'u'k'i c'v'k'p' q'h' g'z'k'v'k'p'i "y' k'p'g'u'g'u' cpf "r q'v'g'p'v'c'n' q'v' g't
y k'p'g'u'g'u'0Eqw'pugn'ucv'g'f "y' g'eq'p'u'w'c'p'v'y cu'w'p'cd'g'v'q' ur g'cm
v'q'f ghgpf cpv'v'j cv'v'j g'l'c'k'v' d'g'ec'w'ug'v'j g'c'w'q't'p'g' { "x'k'k'k'p'i "t'q'qo
y cu'eq'ug'f "q'p'v'j g'y g'ng'p'f . "f ghgpf cpv't'g'w'p'g'f "v'q'v'j g'l'c'k'v'
u'q' r'v'g'q'p' eqw'v'f c' { u'v'j cv'x'k'k'k'p'i "j q'w'u'v' g't'g'q'x'g't. "cpf "h'j g'
y cu'p'q'v'r g'to k'w'g'f "v'q' ur g'c'n'y k'j "f ghgpf cpv'v'v'j g'eqw'v'y q'w'g'0
Y j gp'v'j g'r tqegw'q't' r q'k'p'v'g'f "q'w'v'j cv'v'j g't'g'j' cf "d'g'g'p'p'q' eqw'v'
u'g'u'k'p'v'j g'f c' { "d'g'h'q't'g' cpf "y' cv'v'j g't'g'y q'w'f "dg'p'p'g'v'j g'
h'q'm'y k'p'i "f c'f. "h'k'f c'f. "k'v'c'r r g'c't'g'f "y' cv'v'j g'eq'p'u'w'c'p'v'y cu'p'q'v'
c'x'c'k'c'd'g'v'q'p'g'k'j g't' q'h'v'j q'ug'f c' { u'0Vj g'eqw'v'q'd'ug't'x'g'f "y' cv'v'j g'
eq'p'u'w'c'p'v'j cf "p'q'v'ucv'g'f "j q'y "o w'ej "o q't'g'v'ko g'y cu'p'g'g'f g'f .
y' cv'f ghgpf cpv'j cf "ci t'g'g'f "cv'v'j g'v'ko g'q'h'v'j g'i v'k'n' x'g't'f l'ev
y' cv'v'j g'r g'p'c'n'f "r j cug'y q'w'f "eqo o g'peg'q'p' Cwi wuv': . "y' cv'
f ghgpf cpv'v'j gp'c'ung'f "h'qt'eq'p'v'w'c'p'eg'v'p'v'k'i Cwi wuv'44. "q't'cv'
n'g'c'u'v' Cwi wuv'37. "cpf "y' cv'p'q'y "y' cv'f ghgpf cpv'eq'w'f "eqo o g'peg
y' g'o c'k'p' r ctv'q'h'j ku'ecug'q'p' Cwi wuv'37. "j g'ucv'g'f "y' cv'v'j g'
p'g'g'f g'f "w'p'ur g'ek'h'g'f "cf f k'k'p'c'n'v'ko g'k'p'q't'f g't'v'q' r t'g'r ctg'0Vj g'
eqw'v'q't'f g't'g'f "y' cv'f ghgpf cpv'd'g'ch'htf gf "w'p'riko k'g'f "x'k'k'k'p'i
v'ko g'cv'v'j g'l'c'k'v'cp'f "y' cv'v'j g'c'w'q't'p'g'f "x'k'k'k'p'i "t'q'qo "dg'o cf g'
c'x'c'k'c'd'g'v'q'v'j g'eq'p'u'w'c'p'v' k'p'c'n'f k'p'i "f w'k'p'i "y' g'ng'p'f "j q'w'u'0

F ghgpf cpv'v'j gp' r tqeggf g'f "y' k'j "y' g'f ghg'pug' "ecug' "ec'n'k'p'i
y' q'y k'p'g'u'g'u'0Vj g'o cv'gt' y cu'cf l'q'w't'p'g'f "w'p'v'k'v'j g'h'q'm'y k'p'i
0 q'p'f c'f. "Cwi wuv'37." 3; : : 0

v. Mickey, supra, "76'Ecnf" cv'r 0882="People"v. Grant"3; : : + 67'Ecnf" : 4; .: 66"46: 'Ecnf r v0666.'977'R0f" : ; 6.0"Y j gp c'eqpvkwpceg'ku'uqwi j v'q'ugewt'g'y g'cwgp cpeg'qh'c'y kpguu. vj g'f ghepf cpv'o wuv'gucdrkuj "oj g'j cf "gz gteku f'f wg'f kki gpeg vq'ugewt'g'y g'y kpguu'u'cwgp cpeg. 'vj cv'j g'y kpguu'u'gzr gev f vgu ko qp{ 'y cu'b cvgtknc'p'p'qv'ewo wv'kxg.'vj cv'j g'y vgu ko qp{ eqwf 'dg'qdvckpgf 'y kj kp'c'tgcupcdrg'vko g.'cpf 'vj cv'j g'hcwu vq'y j lej "vj g'y kpguu'y qwf "vgukh{ "eqwf "pqv'qv gty kug'dg r tqxgp0"*People v. Howard, supra, "3"Ecnf"j cv'r 0'33930+ Vj g'eqwt'v'eqpukf gtu'o"pqv'qpn' 'vj g'dgpgk'y j lej "vj g'o qxkpi r ctv' 'cpv'ekr cvu'dw'cnuq'vj g'rkngkj qqf 'vj cv'uwej "dgpghk'y kn tguwv'vj g'dwtf gp'qp'qy gt'y kpguugu.'lwtqtu'c'p'f 'vj g'eqwt'v'c'p'f. cdq'xg'cm'y j gvj gt'uwduv'p'v'cn'l'wv'k'eg'y knidg'ceeqo r rkuj gf 'qt f ghecv'f "d{ "c"i tcv'kpi "qh'vj g'o qv'kp0'o"*People v. Zapfen, supra, "6'Ecnf"j cv'r 0; 940+Vj g'v'knc'leqwt'v'f g'p'knc'qh'c'b qv'kq hq't'eqpvkwpceg'ku'tgxky gf "hq't'cdwug'qh'f kuetg'v'kp0"*People v. Mickey, supra, "76'Ecnf" cv'r 08820+

*69c+"Vj g'v'knc'leqwt'v'f k'f "pqv'cdwug'ku'f kuetg'v'kp"kp" f gp{ kpi f ghepf cpv'u't'gs wguu'hq't'eqpvkwpceg0Y j gp.'cu'lp'vj g'r tgu'p'v ecug."vj g' cuugt'v'f "pggf "hq't' eqpvkwpceg"ku' ecwug'f "d{ "vj g f ghepf cpv'u'r gtu'kugpv'hc'kwt'g'kp'vj g'r g'k'qf "rg'cf kpi "w'v'q'vj g r gpcn'f "r j cug'v'q'eqqr gtcv'g'y kj "eqwpugn'c'p'f "j ku'of g'rkidgt'cv'g *1038 "qdut'wv'kq'qh'j ku'qy p'eqwpugn'u'tgcupcdrg'c'wgo r wv vq'f g'v'gto kpg'vj g'pcwt'g'qh'j g'r tqr qu'gf 'y kpguugu'v'gu ko qp{. vj g' f g'p'knc' qh' c" eqpvkwpceg"]ku" p'gk'j gt" ctdktct{ " pqt" c x'k'q'v'kq'qh'f w'g'r t'q'eguu0"*People v. Grant."supra."67'Ecnf" cv'r 0: 660" k'p'cf f k'kq'p."v'q'vj g'gz'v'p'v'f ghepf cpv'eqpv'p'f u'c eqpvkwpceg'uj qwf "j cxg'dggp"i tcv'p'f "v'q'r gto k'j ku'r gpcn'f r j cug'eqpuw'nc'p'v'q'w'p'f g'v'c'ng'cp"qr gp/gp'gf "k'p'x'g'v'ki cv'kq'p qh' j ku' ej ctcev't" c'p'f "dceni tqwpf."vj g' eqwt'v' y cu' y kj kp ku' f kuetg'v'kp"kp" t'ghw'kpi "v'q"i tcv'p'c"eqpvkwpceg."d'gecwug f ghepf cpv'j cf "pqv'f go qp'ut'cv'gf "vj cv'c"eqpvkwpceg"y qwf dg'w'ughw'i'lp'r tqf w'ekpi "ur gek'he't'gr'x'cp'v'o k'ki cv'kpi "g'x'k'f gpeg y kj kp" c" tgcupcdrg' vko g0"Ugg "People" v. Beeler, supra, "; Ecnf"j cv'r 03225/3226"j c'eqpvkwpceg'r tqr gtn' 'y cu'f g'p'k'gf y j gp'vj g'f ghepf cpv'u't'gs wguv'y cu'd'cug'f "w'qp'p'gy 'g'x'k'f gpeg'q'h ur gew'v'k'x'g'x'c'ng' 0" C'nj qwi j "k'v'c'r r gct'gf "vj cv'j g'eqpuw'nc'p v y cu' f g'v'gto kpg'f "v'q" k'p'x'g'v'ki cv'g' f ghepf cpv'u' ecug' cv' c" r ceg uv'k'gf "v'q"j gt" q'v'j gt" eqo o ko gp'u."f gur k'g'vj g'nc'v'g' u'ci g'qh vj g'r t'q'eg'gf kpi u.'vj g'eqwt'v'r tqr gtn' "eqwf "eqpuk'f gt'vj g'dwt'f gp uwej "c'r ceg'y qwf "r nc'eg'w'qp'y kpguugu.'lwtqtu.'c'p'f 'vj g'eqwt'v k'p'cf f k'kq'p."vj g'v'knc'leqwt'v'r tqr gtn' "eqwf "h'p'f 'vj cv'f ghepf cpv j cf "pqv'et'gf k'knc' "uj qy p" c" p'ggf "hq't" c" eqpvkwpceg."d'gecwug f ghepf cpv'j cf "ucv'gf "j g'y cu'r tgr ct'gf "hq't" vj g'r gpcn'f "r j cug c'p'f "j cf "eqpuw'ng'f "y kj "j ku'r t'qur g'v'k'x'g"y kpguugu0" k'p'f g'gf . y j gp' f ghepf cpv' u'qwi j v'r tq" ug" ucw'u."j g' c'p'i t'knc' "t'gl'ge'v'gf eqwpugn'u' er'ko "vj cv'j g'y cu' w'p'r tgr ct'gf 0" Hwt'v'j gt."vj g' eqwt'v

y ctp'gf "f ghepf cpv' vj cv'c" tgs wguv' hqt" c" eqpvkwpceg"y qwf eqpvkwpceg'c'd'cu'ku'hq't' f gp{ kpi 'j ku'b qv'kq'v'q't'gr t'gug'p'v'j ko ugrh c'p'f "f ghepf cpv'ce'egr v'gf "t'q'ug'v'c'w'u'q'p'vj g'w'p'f gtu'c'p'f kpi 'vj cv' p'q'cf f k'k'q'p'c'n'v'ko g'y qwf "dg'i tcv'p'f 0

Hwt'v'j gt." cu' vj g' eqwt'v' qdugt'x'gf." cnj qwi j " eqwpugn' ucv'gf f ghepf cpv' p'ggf gf " o qt'g' vko g' vq" eqpv'cev' c'p'f " k'p'v'g't'x'k'y y kpguugu."vj g' y kpguugu' r'kug'f "d{ "eqwpugn' cv' vj g' vko g' qh vj g' h'k'uv'o qv'kq'p' hqt' eqpvkwpceg" y g'g' h'k'ep'f u' c'p'f " h'co k'k'f y j q'ug' n'p'qy r'gf i g' qh'f ghepf cpv'u' ej ctcev't' c'p'f "dceni tqwpf y g'g' h'co k'k'ct" v'q' f ghepf cpv'0'Cu'p'q'v'gf . "o quv'q'h'vj g'y kpguugu y j q" y g'g' q'p' vj g' r'ku' c'm'f g'f " vq" d{ " eqwpugn' d'gh'q'g' vj g eqo o g'p'ego gp'v'q'h'vj g'r g'p'c'n'f "r j cug'c'ew'w'c'm'f "f k'f "vgukh{ 0'Vj g eqwt'v' y cu' l'w'uk'h'k'gf "k'p'd'g'rk'x'k'p'i "vj cv'vj g'o k'ui'kpi "y kpguugu. k'p'c'n'f kpi "r qv'p'v'k'c'n'r u'f e'j k'v'k'le" g'zr g't'u' y j q" o k'j j' d'g' c'drg v'q' f g'uet'k'ld'g'f ghepf cpv'u" o q'v'j g't'u' eqp'f k'k'q'p." y qwf "r t'q'x'k'f g v'gu ko qp{ "vj cv'j cu' r'c't'i g'n' "ewo w'v'k'x'g"v'q" u'ko k'k'ct "c'x'c'k'c'd'rg v'gu ko qp{ 0

H'p'c'm'f. "vj g' eqwt'v' y cu' y kj kp"ku' f kuetg'v'kp"kp" f gp{ kpi "vj g t'gs w'gu'v'f "eqpvkwpcegu"qp'vj g'i t'q'wp'f "vj g' eqwt'v' t'gcu'p'cd'nc'f d'g'rk'x'g'f "vj g' t'gs w'gu'u' y g'g' d'cug'f "w'qp" c' f g'uk'g'v'q' f g'rc' "vj g r t'q'eg'gf kpi u'lp'c'p'g'h'q't'v'q'c'h'g'ev'v'j g'eqo r q'uk'k'q'p' q'h'vj g' lwt { qt"v'q'ecwug" c"o k'ut'k'c'n'0"Ugg "People v. Pride, supra, "5'Ecnf"j cv'r 04770+

F ghepf cpv'eqpv'p'f u'vj cv'q'peg'vj g' eqwt'v'i tcv'p'f "j ku'o qv'kq v'q'r t'q'eg'gf "r tq'ug.'vj g'f g'p'knc'qh'c' tgcupcdrg'eqpvkwpceg' hqt r tgr ct'cv'kq'p' f gr t'k'x'gf "j ko "qh'f w'g'r t'q'eguu'qh'h'cy 0" *1039

*6: c+" k'p' "People" v. Bigelow" *3; : 6+" 59" Ecnf" "953"]42; Ecnf r v0'54: ."8; 3"R0f" ; ; 6."86" C'N'0'f 0'6j "945" _ "vj ku' eqwt'v k'p'f k'ewo "ucv'gf "vj cv'vj g'f ghepf cpv'oe'q'w'f "p'qv't'gcu'p'cd'nc'f "dg g'zr gev'f "v'q'r t'q'eg'gf "v'q'v'knc'ly kj qw'c'p{ "vko g' hqt" r tgr ct'cv'kq'p. c'p'f "vj cv'k'h'vj g'v'knc'leqwt'v'f k'f "p'qv'k'p'v'p'f "v'q'f gp{ "vj g'b qv'kq'p' hqt ugrh/tgr t'gug'p'v'k'q'p' cu'w'p'v'ko g'n' "00'k'v'uj qwf "j cxg'eqpuk'f g'g'f i tcv'kpi "c" eqpvkwpceg0" *Id." cv'r 0'963." h'p'0' 50" Y g' ek'x'gf c'p'g'ct'r'k'g't "E'qwt'v'q'h' C'r r g'c'n'q'r k'p'k'q'p' e'j ctcev't'k' k'p'i "t'c'k'w'g'v'q r t'q'x'k'f g'c'p'cf g'w'cv'g'eqpvkwpceg'kp'vj g'ug'ek't'ewo uc'p'egu'cu'c' f g'p'knc'qh'f w'g'r t'q'eguu'qh'h'cy 0" *Ibid. +Y g'q'dugt'x'gf "kp" "People" v. Clark, supra, "5'Ecnf"j "63."vj cv'd'c'p'gegu'ct { 'eqpvkwpceg'b wuv dg'i tcv'p'f "h'c'f'o qv'kq'p' hqt' ugrh't'gr t'gug'p'v'k'q'p' ku'i tcv'p'f 0" *Id. cv'r 0'3320" Q'p' vj g' q'v'j g't' j c'p'f . "kp" vj g' "Clark" ecug" y g' c'nuq ucv'gf "vj cv'd'k'c'nuq' ku'g'uc'd'rk'uj gf "vj cv'c'b k'f v'knc'f'are'tta" b qv'kq'p o c{ "dg" f'g'p'k'gf "qp" vj g' i t'q'wp'f "vj cv'f g'rc' { "qt" c" eqpvkwpceg y qwf "dg't'gs w'k'gf .o" c'p'f "uc'p'v'k'p'g'f "vj g'v'knc'leqwt'v'f g'ek'uk'q'p v'q'eqp'f k'k'q'p' vj g'i tcv'kpi "qh'vj g't'k'j j v'q'h'ug'rh't'gr t'gug'p'v'k'q'p' q'p f ghepf cpv'u'y c'k'x'gt'q'h'c'eqpvkwpceg0" *Ibid. +

*69d+ "Kp" yj g'r t'gugpv'ecug. "lp" t'wkp' qp" f'ghgpf cpv'u" o kf vt'kcn o qv'kqp" vq" t'gr t'gugpv'j ko ugrh" yj g"eqwtv'eqt'gevm" p'qvgf" yj cv k'j cf" cwj qtk' {"vq" f'gp {"yj g" o qv'kqp" kh" ugrh't'gr t'gugpv'kqp t'gs vkt'gf" c"eqp'kpcpeg."cpf."kp" cf xkukpi" yj g" f'ghgpf cpv' qh yj g'r g'tku" qh'ugr'h't'gr t'gugpv'kqp. "k'cungf" f'ghgpf cpv'y j g'j gt j g"wpf g'tuqqf."co qpi" q'y gt" yj kpi u."yj cv'j g"y qwf" t'geg'kxg opq" gz'tc" vko g" hqt" r t'gr ct'v'kqp" F'ghgpf cpv' kpf k'ecvgf" j g w'pf g'tuqqf O'k' cf f'k'kqp."y j gp" f'ghgpf cpv'u'gewt'gf" r'gt ko k'ukqp vq" r t'qeggf" r t'q"ug."yj g"eqwtv'ct'gcf {"j cf" f'g'plgf" eqwpugnu t'gs w'guv' hqt" c" eqp'kpcpeg" hqt" h'wt'j gt" k'pxguki cv'kqp" cpf r t'gr ct'v'kqp" hqt" yj g'r g'pcn' {"r j cug'qh'yj g'v'tkcn' F'ghgpf cpv'y cu pq" o qt'g'gp'k'xgf" vq" c"eqp'kpcpeg" y j gp" j g'dgeco g'j ku"qy p eqwpugni' yj cp" j g"y cu" gp'k'xgf" vq" c" eqp'kpcpeg" cv' h'qto gt eqwpugnu" t'gs w'guv' Vj ku"y cu" gur gekm' {"v'w'g"y j gp."cu"kp" yj g r t'gugpv'ecug. f'ghgpf cpv'oj cf "dggp" ch'q'gf gf' t'gugctej "h'ek'k'kgu hqt" o cp' {"o q'py u."uq" yj cv'j g'j cf "b' h'w'nr q'r qt'w'p'k' {"vq" r t'gr ct'g k'p' gr g'p' g'p'v' {"hqt" v'tkcn' g'xgp" y j k'g" j g"y cu" t'gr t'gugpv'gf" d'f eqwpugnu" *People v. Clark, supra."5" Ecr'6j "cv'r 0332/333 O' k'p' g'gf. "f'ghgpf cpv'p'q'v'q'pn' {"j cf "ceeguu" vq" t'gugctej "h'ek'k'kgu dw'cu'ug'v'gf" yj cv'j g'j cf "np'qy p'cni'c'upi" yj cv'k'h'yj g't'g'y g't'g'c r g'pcn' {"r j cug'qh'yj g'v'tkcn' j g'y qwf" eq'p'f v'ev'k'v'cpf" yj cv'j g'j cf eqp'cevgf" j ku'y k'p'guugu'cpf" y cu't'gcf {"vq" r t'qeggf O

P q" f'g'p'kcn' qh' f'w'g" r t'qeguu" cr r g'ctu" kp" yj g"eqwt'v'u" t'ghw'cn' vq i t'cp'v'f'ghgpf cpv'u" o qv'kqp" hqt" eqp'kpcpeg O' *6: d+o' K'v'ku' p'qv g'xgt {"f'g'p'kcn' qh' c" t'gs w'guv' hqt" o qt'g" vko g" yj cv' x'k'q'v'gu" f'w'g r t'qeguu" g'xgp" k'h'yj g'r ct'v'f' h'cku" vq' q'h'gt' g'x'k'f' g'peg' q't' ku'eqo r g'ngf vq" f'ghgpf" y k'j q'w' eqwpugnu" *Ungar" v. Sarafite" *3; 86+598 WLU0797. 7; ; j: 6'UE'0: 63. 6; .33" NCG' 04f; 43_0' k'p'ugcf. o'j vj g" cpuy gt" o w'w' dg" h'q'w'p'f "kp" yj g"ektewo ucpegu" r t'gugpv k'p" g'xgt {"ecug. "r ct'v'w'ctn' {"kp" yj g" t'gcu'qu" r t'gugpv'gf" vq" yj g v'tkcn' l'w'f i g' (000) *Ibid." j: 6'UE'0'cv'r 0: 72_0' G'xgp" kp" c" ecr k'cn ecug. "kh" yj g' f'ghgpf cpv' ecpp'q'v' u'j qy "j g" q't' u'j g' j cu" *1040 dggp" f'k'k' g'p'v' k'p' u'gewt'kpi" yj g'cw'g'p'f' c'peg' q'h'y k'p'guugu. "qt" yj cv ur gek'k'le" y k'p'guugu' g'z'k'v'y j q'y qwf" r t'gugpv'o cv't'kcn' g'x'k'f' g'peg. o'j i k'xgp" yj g' f'gh'gt' g'peg" p'geguuct'k' {"f'w'g" c" uc'v'g' v'tkcn' l'w'f i g' kp t'gi ct'f "vq" yj g' f'g'p'kcn' q't' i t'cp'kpi" qh' eqp'kpcpegu. o'v'j g'eqwt'v'u t'w'kpi" f'gp' {"kpi" c' eqp'kpcpeg' f'q'p'v'w'ur r q't'v'c' e'rc'ko "q'h'gt'qt w'p'f gt" yj g' h'f' g'tcn' E'q'p'k'w'k'p'p' O' *Id. "cv'r 07; 3 j: 6'UE'0'cv'r 0 : 72_ugg" People v. Howard. supra."3" Ecr'6j "cv'r 033940-

c. Limitation on resources available to defendant

*6; c+ "F'ghgpf cpv' p'gz'v' eqp'v'p'f u" yj cv'j g"y cu" r'gh'v' d'gt'gh' qh cni'cu'k'v'c'peg' cpf "w'p'cd'ng" vq" eqp'v'ev'cpf "k'p'v'g'k'g'y" k'p'guugu f'w'g" vq" t'g'u'v'k'x'g" eqp'f k'k'q'p'u" qh' eq'p'h'k'p'go g'p'v' cv' yj g" eq'w'p'v' l'ckn' cpf" t'g'u'v'k'x'g" u'gewt'k'f" o g'cu'w'gu" kp" yj g" eq'w't'q'qo . r k'p'v'kpi" vq" h'f' g'tcn' ecugu" g'uc'd'k'uj kpi" yj cv' k'ku" c" x'k'v'k'v'k'p' qh' yj g" eq'p'k'w'k'p'p'cn' t'k' j v' qh' ugr'h' t'gr t'gugpv'k'p' vq" f' g' t'k'x'g c" f'ghgpf cpv' qh' cni' o g'cpu' qh' r t'gugpv'kpi" c" f'ghg'pug' O' *72+

K' ku" egt'v'k'pn' "v'w'g" yj cv' c" f'ghgpf cpv' y j q" ku" t'gr t'gugpv'kpi j ko ugr'h' q't" j g'tugr'h' o c {"p'q'v' dg" r r'ec'egf" kp" yj g" r q'uk'k'q'p" qh r t'gugpv'kpi" c" f'ghg'pug" y k'j q'w' ceeguu" vq" c" v'gr'g' j q'pg." r'cy r'k'd't'c't {"t'w'p'p'g't. "k'p'x'g'uki cv'qt."cf x'k'k'q' {"eq'w'p'ug'n" q't" cp {"q'y gt o g'cpu' q'h'f' g'x'g'n'r kpi" c' f'ghg'pug' *Milton. supra."989 H04f "cv'r 0 3667/3668+."dw'v'j ku"i' g'p'g't'c'n'r t'q'r q'uk'k'q'p" f'q'p'v'p'q'v'f' k'v'w'g' yj g t'g'u'w't'eg'u" yj cv' o w'w' dg" c'x'k'c'rd'ng" vq" f'ghgpf cp'w' O' k'p'k'w'k'q'p'cn cpf "u'gewt'k'f" eq'p'eg't'p'u" q'h' r t'g't'k'c'n' f' g'v'p'v'k'p' "h'ek'k'k'kgu" o c {"dg eq'p'k'f' g't'g'f" k'p'f' g'v'g'to k'p'kpi" y j cv'o g'cpu'y k'ni'd'g' ce'eq't'gf" vq' yj g f'ghgpf cpv'v'q" r t'gr ct'g' j ku" q't" j g' f'ghg'pug' O' *Id. "cv'r 03668=U.S. v. Sarno, supra."95" H05f "cv'r 036; 3=U.S. v. Robinson, supra. ; 35" H04f "cv'r 0939=State v. Drobel, supra.". 37" R04f "cv'r 0958. h'p'0450+ Y j gp" yj g' f'ghgpf cpv'j cu' c' r'cy {"gt' c'ev'kpi" cu' cf x'k'k'q' {" eq'w'p'ug'n" j ku" q't" j g't' k'j w' ct'g' cf g'v'w'g'n' {"r t'q'v'ev'gf O' *Milton, supra."989 H04f "cv'r 03668=United States" v. Wilson, supra,"8; 2 H04f "cv'r 03493/3494=State" v. Henry, supra,". 85" R04f "cv'r 0 : 980-

*6; d+ "Vj g" t'geq'tf" f'g' q'p'ut'c'v'u" yj cv'f'ghgpf cpv'u" k'p'x'g'uki cv'qt cpf" j ku" u'g'p'v'p'el'pi" eq'p'u'w'nc'p'v' u'qo g'ko gu" j cf "f' k'h'le'w'w' {"kp u'gewt'kpi" cf g'v'w'g' q'r r q't' w'p'k'k'kgu" vq' ur g'cni'y k'j "f'ghgpf cpv' yj cv yj g" eq'w't'v'q'qo "d'ck'k'h'r" t'q' k'k'k'g'f" f'ghgpf cpv' h'q'qo "ur g'cni'kpi" vq j ku" cu'k'v'c'p'w' q't" j ku" y k'p'guugu" cv' yj g" eq'w't'v' q'w'g." cpf " yj cv f'ghgpf cpv' t'g'w't'p'g'f" vq" yj g' eq'w'p'v'f' "l'ckn' v'q' r'v'g' q'p' u'qo g' eq'w't'v f c {"u'v'q' v'gr'g' j q'pg' y k'p'guugu" q't" o g'g'v' y k'j "j ku" k'p'x'g'uki cv'qt" q't j ku" eq'p'u'w'nc'p'v' O' Y g' f' q' p'q'v' d'g'k'x'g'f' f'ghgpf cpv' y cu'f' gr t'k'x'g'f" q'h yj g' c'd'k'k'k' {"vq" c'ev'cu'j" ku" q'y p' eq'w'p'ug'n' i'cpf "vq" r t'gugpv' c' f'ghg'pug' O' Vj g' eq'w't'v' q't'f g't'g'f" yj cv'f'ghgpf cpv' dg' i' k'x'gp" w'p'k'ko k'g'f' ceeguu vq" yj g' v'gr'g' j q'pg' q'peg" f'ghgpf cpv'u" f' k'h'le'w'w'kgu" y g't'g' d't'q'w' j v vq' yj g' eq'w't'v' u'c'w'g'p'v'k'p'p'."cpf "uko k'c't'n' {"q't'f g't'g'f" yj cv'v'j g' eq'w'p'v' l'ckn' o c'n'g' yj g' cv'q't'p'g' {"x'k'k'k'pi" t'q'qo "c'x'k'c'rd'ng" vq" f'ghgpf cpv q'x'g't" yj g" y g'g'n'g'p'f" vq" r g'to k'p' h'w'v'j gt" eq'p'u'w'nc'v'k'p' y k'j "j ku cu'k'v'c'p'w' O' Vj g' t'geq'tf "c'ni'q" g'uc'd'k'uj gu' yj cv'f'ghgpf cpv'y q't'ng'f cu'k'f' v'q'w'w' {"kp" yj g' eq'w'p'v'f' "l'ckn' r'cy" h'd't'c't {"cpf" y q't'ng'f "eq'ug'n'f y k'j "eq'w'p'ug'n' f' w'kpi" yj g'z'v'p'f' gf' i' w'k'n' r j cug' q'h' yj g' v'tkcn' cpf yj cv' eq'w'p'ug'n' cu'ug't'gf" *1041 "yj cv'f'ghgpf cpv' n'p'gy "yj g' h'evu cpf "ku'w'gu" kp" yj g' ecug' dg'w'gt' yj cp' o qu'v'c'w'q't'p'g'f u'y q'w'f O' Vj g cf g'v'w'c' {"q'h'yj g' t'g'u'w't'eg'u' o cf g' c'x'k'c'rd'ng" vq" f'ghgpf cpv' c'ni'q' ku f' go q'p'ut'c'v'g'f' d' {"v'j g' e'ktewo uc'peg' yj cv' d'gh'q'g' w'p'f g't'v'k'p'i" r t'q ug' uc'w'w'." f'ghgpf cpv' uc'v'g'f" j g' j cf "eq'p'cevgf" j ku' r t'q'ur g'v'k'x'g r g'pcn' {"r j cug' y k'p'guugu" t'gr g'c'v'g'f' n' {"f' w'kpi" yj g' i' w'k'n' r j cug' O' Y j gp" j g" u'q'w' j v' r t'q" ug' uc'w'w'." j g' t'g'k'g't'c'v'g'f" yj cv' j g' j cf eq'p'cevgf" j ku" y k'p'guugu." n'p'gy "y j cv' yj g' f' y q'w'f" uc'f." cpf y cu' r t'gr ct'g'f "vq" i' q' h'q'ty ct'f O' J g' yj g't'g'c'h'g't" y cu' c'd'ng' r g't'j cr u qp" c" r'ko k'g'f" d'cu'k'v'q" o g'g'v' y k'j "j ku" k'p'x'g'uki cv'qt" cpf" j ku eq'p'u'w'nc'p'v'." cpf "k'v'c'r r g'ctu" yj cv' eq'w'p'ug'n' cpf "yj g" k'p'x'g'uki cv'qt f' k'f "eq'p'v'c'v' u'qo g" y k'p'guugu O' K' c'ni'q" cr r g'ctu" yj cv'f'ghgpf cpv r t'gh'g't'g'f "vq" ur g'cni'q' y k'p'guugu" j ko ugr'h' cpf" j cf "ceeguu" vq" c' v'gr'g' j q'pg' kp" yj g' eq'w'p'v'f' "l'ckn' yj cv' u'g'x'g't'c'n' q'h' yj g' f' c' {"u' d'g'w' g'gp

vj cv'f ghgpf cpv'uj qwf "pqv'dg'r gto kwgf "vq"o qxg"cdqvw'y g eqwtvqqo " f wtkpi " vj g" r gpcnm{ " r j cug" qh' vj g" vtkrf0 Cu' hqt f ghgpf cpv'u' wug" qh' gzj kdku" qp" vj g" drcndqctf . " vj g" eqwtv qdugt xgf "vj cv'cf xluqt { 'eqwpugnleqwf 't rceg'vj g'gzj kdku'qp'vj g drcndqctf . kh'f ghgpf cpv'y kuj gf 0

f. Defendant's illness during the penalty phase

*75+"F ghgpf cpv'eqpvpgf u"vj cv'j g"y cu'hqtegf "vq"r tqeggf "cv vj g" r gpcnm{ " r j cug" cmj qwi j " j g" y cu' ugtkqwn{ " km" dw" vj g tgeqtf "f qgu'pqv'wv' r qt v'vj ku'eqpvpgkqp0'Vj g"tgeqtf "tghgeu vj cv'vj g"eqwtv'pqvlegf "qp" Cwi wuv'33. "3; : . "vj cv'f ghgpf cpv j cf "rct { pi kku0Cv'f ghgpf cpv'u'tgs wguv"vj g"eqwtv'qtf gtgf "vj cv f ghgpf cpv'tgegkxg" o gf lecn'cvpgv'kqp0'Cr r ctgpm{ . "f ghgpf cpv tgegkxgf "vtgcvo gpv"cpf "j g"cr r gctgf "vj g"hmjy kpi "f c{ "cpf eqpvkpwgf "vq'tgr tgujpv'j ko ugrh'y kj qw'cp{ 'kpf lecvkqp'vj cv'j g y cu'vq'km'vq'r tqeggf 0

g. Prosecutorial misconduct

*76+"F ghgpf cpv'cmj'eqpvpgf u"vj cv'vj g"r tqugewqt "eqo o kwgf o kueqpf wev'lp"enjukpi "cti wo gpv"dw"vj ku'ercko "ku'y ckgf dgecwug" f ghgpf cpv'f kf "pqv'qdlgev'dgrny "vq"cp{ "qh'vj g"vj tgg cuugt vgf "kpucpegu"qh'r tqugewqt kcn'o kueqpf wev'0*Ugg"*People v. Millwee.*"supra."3: "Ecnf6j "cv'r 0'36; 0" k{ cp{ "gxgpv"pq gttqt'er r gtu0k{ "vj hktuv'eqo o gpv"vj g"r tqugewqt "uvi i guvgf vj cv'f ghgpf cpv'j cf "f gutq { gf "ugxgtcn'rkxu" kpenf kpi "vj qug qh' vj g"eqf ghgpf cpv" vj cv'j g"pqy "y cpvgf "hqt kxgpgu." dw vj cv'j g"pgxgt" j cf "cf o kwgf "j g" j cf "f ppg"cp{ vj kpi "vgttkdrg cpf "vj cv'0lj _g" j cu'pq"eqo r cuukqp"cpf "j g" j cu'pq"uqwi"000 Ncen'qh'gxkf gpeg"qh'tgo qtug." j qy gxgt."ku" c" r tqr gt"uwdlgev hqt "eqpukf gtcv'kqp"cv'vj g"r gpcnm{ "r j cug0*Ugg"*People v. Ervin* *4222+"44"Ecnf6j "6: ."325"; 3" Ecnf0r v0f "845." ; ; 2" R0f 728 = "*People*"v. *Carrera*"*3; ; +6; "Ecnf5 "4; 3."55; "J483 Ecnf0r v056: ."999"R0f "343_0"Vj g'r tqugewqt u'eqo o gpv'vj cv f ghgpf cpv'j cf 'ej kf tgp'd { 'f hktgtpv'y qo gp. 'bapg'qh'y j qo 'j g j cf "o cttkfg . 'y cu'dcugf "wr qp"vj g"gxkf gpeg"cpf 'y cu'c" r tqr gt tgur qpug'vq" f ghgpf cpv'u'gxkf gpeg'lp"o kki cvkqp'vj cv'j g"y cu'c i qqf 'hco k{ 'o cp'cpf 'gzegngpv'hc'v gt0Hkpcnm{ . 'vj g'r tqugewqt u eqo o gpv'vj cv'j g'j cf 'j gctf 'uqo qpgp'vcnkpi 'cdqvw'vj g't tgujpv ecug'cpf 'uc { kpi 'vj cv'0vj g'f 'wugf 'c"o cej kpg'1 wp'lp'vj g'uj cf qy qh'c"etquu.0" *1044 "y j kg"r gtj cr u"wpf w{ "o gmf tco cve. r tqr gtn{ "tghgtgf "vq" gxkf gpeg"guvcdkuj kpi "vj cv'vj g"o wtf gt qh'F gvgevxg"Y knko u'qeewtgf "kp"htqp'v'qh'c'ej wtej "f c{ ectg epgvt0

h. Limitations on closing argument

*77+"F ghgpf cpv'eqpvpgf u"vj g" eqwtv'ko r tqr gtn{ "rko kgf "j ku enjukpi "cti wo gpv'vj vj g'lw { 'y j gp'kv'wucv'kpgf 'vj g'r tqugewqt u

qdlgev'kqp" vq" j ku' ucvgo gpv'vj cv'vj g" r qrlieg" cpf " vj g" f kvtklev cwqtpg{ "j cf "eqphgtgf "cpf "f gvgo kpgf "vj cv'vj g'f "y gtg"pqv r rncugf "y kj " V{ tqpg" J lemu" ucvgo gpv" vq" vj g" r qrlieg0 k{ uwucv'kpi "vj g'qdlgev'kqp. 'vj g'eqwtv'ucv'gf "0Ky qwf "cum{ qw'vq r rncug'pqv'ej ctcevgtk g0Lwuv'wuo o ct k' g'vj g'gxkf gpeg0

K' y cu" r tqr gt "vq" uwucv'kpi " vj g" r tqugewqt u' qdlgev'kqp" y j gp f ghgpf cpv' dgi cp" eqo o gpv'kpi " qp" o cvgtu' pqv' y kj k{ vj g gxkf gpeg." uwej " cu" vj g" o qv'xv'kqp" qh' vj g" r tqugewqt" cpf vj g" r qrlieg" f wtkpi " kvgtxlgv u' qh' V{ tqpg" J lemu' Cmj qwi j f ghgpf cpv'egt'v'kpn{ 'y cu'gp'v'krgf "vq"v'ti g'j ku'kv'vtr tgv'kqp"qh vj g" gxkf gpeg. "j g"y cu'pqv' gp'v'krgf "vq" cuugt'v'cu'hev"o cvgtu cu'vq"y j lej "pq"gxkf gpeg"j cf "dggp"r tgujpv'gf 0'k{ "vj g'eqpv'z v qh'f ghgpf cpv'u'cti wo gpv"vj g"eqwtv'u'cf o qpkkqp"cf gs wcv'gn{ eqpvxg { gf 'vj ku' r qkv' 'cpf 'kv'egt'v'kpn{ 'f kf 'pqv' r tgv'v'f ghgpf cpv htqo "eqpv'kpi "vq"v'ti g'j ku'kv'vtr tgv'kqp"qh'gxgpv'wv qp"vj g lw { 0

i. Alleged Eighth Amendment violation

*78+" F ghgpf cpv' j cu' hckrgf " vq" f go qpucv'g" vj cv' vj g ekewo ucpegu'wpf gt'y j lej "vj g'r gpcnm{ "r j cug'y cu'eqpf wevgf xkqv'v'g" j ku' tki j v'wpf gt" vj g" Gki j vj "Co gpf o gpv' vq" c" hck cpf "tgricdrg"r gpcnm{ "f gvgo kv'v'kqp0Cu'y g'j cxg"gzr rckp'f <0)j g'tgs wktgf "tgricdkv{ "ku'cv'kpgf "y j gp" vj g"r tqugewkqp" j cu f k'ej cti gf "ku'dw'f gp'qh'r tqh'cv'vj g'i wkn'cpf "r gpcnm{ "r j cugu r wuvcv'vq"vj g'twgu'qh'gxkf gpeg"cpf "y kj k{ vj g"i w'f grkpgu qh'c"eqpv'kpv'kpcn'f gc'v' r gpcnm{ "ucv'wg. 'vj g'f gc'v' "xgtf lev'j cu dggp"t'gwtpgf "wpf gt"r tqr gt "kv'v'w'kqp"cpf "r tqegf w'gu."cpf vj g'v'tgt'qh'r gpcnm{ j cu'f w{ 'eqpukf gtgf "vj g'tgngxcpv'0 kki cvkpi gxkf gpeg. kh'cp { . 'y j lej "vj g'f ghgpf cpv'j cu'ej qugp'vq'r tgujpv'0C lwf i o gpv'qh'f gc'v' "gpv'gtgf "kp"eqphqto k{ 'y kj "vj g'ug'tki qtqwu ucpf ctf u'f qgu'pqv'xkqv'v'g"vj g'Gki j vj "Co gpf o gpv'tg'icdkv{ tgs wktgo gpv'00"0**People*"v. *Clark.*"supra."5"Ecnf6j "cv'r 0'32; 0- Qw'eqpukf gtcv'kqp"qh'vj g'ercko u'tgxlgv gf 'cdqvg'f go qpucv'gu vj cv'f ghgpf cpv'j cu'hckrgf "vq"guvcdkuj 'cp{ 'tki p'k'ecpv'xkqv'v'kqp qh'r tqr gt "r tqegf w'g'cv'vj g'r gpcnm{ "r j cug'qh'vj g'v'kcn'cpf "vj g r gpcnm{ "xgtf lev'eqphqto u'y kj "vj g"ucv'f ctf u'tgs wktgf "d { "vj g Gki j vj "Co gpf o gpv'0

3. Asserted jury misconduct during penalty phase deliberations

F ghgpf cpv'eqpvpgf u"vj cv'ekewo ucpegu'vj cv'qeewtgf "f wtkpi r gpcnm{ "r j cug" f grkdgt'v'kqp"tgs wktgf t'gxgtucn'dqj "qh'vj g'i wkn' cpf "vj g'r gpcnm{ "xgtf lew0J g" *1045 "eqpv'v'f u'kv'v'v'j cv'vj gtg y gtg'kpf lecv'kqp" f wtkpi "r gpcnm{ "r j cug" f grkdgt'v'kqp"vj cv'qpg qh'vj g'lw'qtu"j cf "pqv'tgcej gf "cp" kpf gr gpf gpv'xgtf lev'cv'vj g i wkn'r j cug. "cpf "vj cv'vj g"eqwtv'eqo o kwgf "t'gxgtukdrg"gttqt "kp hckkpi "vq" lps wktg'lpv'vj ku'lw'qt u'ucv'g'qh'o kpf "vq" f gvgo kpg

y j gj gt "f ghgpf cpv" eqpukwkwkpcn/cpf "ucwwqt { "tki j v"v"cp kpf gr gpf gpvf gekukqp/d { "gcej "lwtqt" j cf "dggp"xlkrcvfg 0

F ghgpf cpv" cuuq" cuugt u" y cv' ocu" k' pqy "ucpf u." y j g" tgeqtf tghgevu" cp" grxgp/r gtuqp" xgtf lev" cv' y j g" i wkn" r j cug{ J g eqpwpf u" y j cv' dgecwug" y j g" ku" pq" xcrlf " i wkn" lwf i o gpv." cpf dgecwug" y j g' ekte wo ucpegu" f go qput cvg" y j g' lwt { u' wphkpguu" vq ugtxg. " y j g' r gpcn { " xgtf lev" o wu' dg' t g xgtugf 0

Hpcn { . " f ghgpf cpv" cuugt u" y j cv' kphco o cvqt { " r wdrlkx/ r tglwf kckm { " chgevgf " y j g' r gpcn { " r j cug" f grkdtcvkpu 0

a. Claims relating to the guilt verdict

*79+Qw "gzco kpcvqp"qh" y j g' tgeqtf f kuenugu" y j cv' qpg" o qtpkpi f wtkpi " r gpcn { " r j cug" f grkdtcvkpu. " y j g' eqwt v' tgegkxgf " c" pqvg htqo " y j g' lwt { " hqtr gtuqp" cunhpi " y j gj gt " y j g' lwt { " o wu' dg wpcpk o qwu" k" qtf gt " v" tgwtp" c" xgtf lev" qh' rtkg" ko r tkuqpo gpv y kj qw" y j g' r quakdkkx/ " qh' r ctqrqo" Vj g" eqwt v' tgr rkgf " kp" y j g' chkt o cvkxg' k" y j g' chqtpqqp" qh' y j g" uco g' f c { . " y j g" eqwt v' tgegkxgf " cpqy j gt " pqvg" htqo " y j g' hqtr gtuqp" ucvkpi < o Qpg" lwtqt j cu" kphqto gf " wu" y j cv' j g' hqtr g' xqvgf " y j kj " y j g" o clqtkx/ " kp" y j g' r tkqt " r tqeggf kpi " kpuvcf " qh' tgecj kpi " cp" kpf gr gpf gpvf gekukqp qh' i wkn" qt " kppqegpeg" } _ O vej " f kuewukqp" j cu' luj qy p" y j ku' lwtqt f qgu' pqv' qt " ku" pqv' ecr cdrq" qh' wpf gtucpf kpi " y j g' tgs wkt go gpwu qh' y j g' lwf kckn" t qeguu" } _ Y j cv' f q' y g' f q' a6

F wtkpi " y j g" kp" eco gtc" j gctkpi " y j cv' gpuwgf . " y j g' wtkn" eqwtv f ktgevgf " y j cv' cp { " o qvqp" vq" ko r gcej " y j g' i wkn" xgtf lev" u j qwrf dg" o cf g" kp" y j g" eqpvgz" qh' c" o qvqp" hqt" pgy " wtkn" pqv f wtkpi " r gpcn { " r j cug" f grkdtcvkpu 0 *Ugg" E" 33: 3" lujwki " qw cr r tqr tkcvg" i tqwpf u" hqt" o qvqp" hqt" pgy " wtkn" = ugg" cuuq" *In re Stankewitz* *3; ; 7+ 62" Ecrf" 5; 3. " 5; 5" J442" Ecrf" r w 0 5: 4. " 92: " R0f" 3482_ } o qvqp" hqt" pgy " wtkn" ku" y j g" wuwn o gj qf " hqt" tckkpi " y j g" kuwg" qh' o kueqpf wev" d { " c" lwtqt f wtkpi " f grkdtcvkpu 0 + Chgt" j gctkpi " gzvgpf gf " cti wo gpv' htqo eqwpugn" y j g' eqwt v' gzco kpgf " y j g' hqtr gtuqp" cv' uqo g" rpi y j . rko kkpki " ku" kps wkt { " v" y j g' lwt { u' r gpcn { " r j cug" f grkdtcvkpu. kp" qtf gt " v" f gvgto kpg" y j g" dcuku" hqt" j ku" cuugt vq" y j cv' y j g" wpkf gpv' hkgf " lwtqt" y cu" kpecr cdrq" qh' f grkdtcvkpu 0 Vj g hqtr gtuqp" r tqxkf gf " xci w' epuy gtu' tgi ctf kpi " y j g' d' cuku" hqt" j ku qr kpkp" y j cv' y j g' lwtqt" y cu" wpcdrq" vq" wpf gtucpf " y j g' lwf kckn r tqeguu" = k' r r gctgf " y j cv' y j g' hqtr gtuqp" hcti gn' y cu' eqpegtpgf y j cv' y j g" wpkf gpv' hkgf " lwtqt" tgecmgf " y j g" gxkf gpeg" f khtgtpv' htqo " y j g" tguv' qh' y j g' lwt { 0 Chgt" y j cv' *1046 " gzco kpcvqp. f ghgpg" eqwpugn⁴⁸ " eqpenf gf " y j g" wpkf gpv' hkgf " lwtqt" y cu" y j g uqrg' qrf qwlp' hcxqt " qh' c' l' g' p' g' p' ege' h' g' u' y j cp' f gcv' 0 k' t' g' ur q' pug vq" y j g' t' q' egewqt u' eqpvgp vq" y j cv' y j g' lwtqt" luj qwrf " dg' gzewugf . f ghgpg" eqwpugn" cti wgf " y j cv' y j g' y cu' pq" gxkf gpeg" kpf kcvkpi

y j g' lwtqt" y cu" tghwukpi " v" qd { " y j g' rny . " cpf " kp" j gcvf " vgt o u ceewugf " y j g' eqwt v' cpf " y j g' r t' q' egewqt " qh' cwgo r wki " v" q' g' puwt g c" xgtf lev" qh' f gcv' " d { " tgo qxkpi " y j g' lwtqt 0 Vj g' lwtqt" y cu" p' qv gzewugf 0

48 Cnj qwi j " f ghgpf cpv" y cu" i tcpvgf " y j g" tki j v" vq tgr t' g' ugv' j ko ugrh' cv' y j g" r gpcn { " r j cug" qh' y j g' wtkn" j ku" eqwpugn" ukn' ugtxgf " cu" eqeqwpugn" cpf cf xkuqt { " eqwpugn" cpf " tgr t' g' ugv' j ko " qp" rgi cn o cvgtu. " kpenf kpi " s wkuqpu" htqo " y j g' lwt { " f wtkpi f grkdtcvkpu 0

F ghgpg" eqwpugn" ucvf " y j cv' j g' y cu' p' qv' cwgo r wki " v" ko r gcej y j g' i wkn" xgtf lev' f wtkpi " y j g" o k' / r gpcn { " f grkdtcvkpu" j gctkpi j grf " v" eqpukf gt " y j g' lwt { " hqtr gtuqp" u' p' qvg' Y g' p' qvg" y j cv' cnj qwi j " f ghgpg" eqwpugn" f k' " tgs wguv' hwt y j gt " kps wkt { " kp" vq y j g" wpkf gpv' hkgf " lwtqt" u' eqpf wev" f wtkpi " y j g" i wkn" r j cug f grkdtcvkpu. " j g" ucvf " j g" y cu" p' qv' o ctkpi " c" o qvqp" vq ko r gcej " y j g" i wkn" xgtf lev' dw' y kuj gf " v" ugewt g" c" dgwgt wpf gtucpf kpi " qh' y j g' lwtqt u' c' d' k' k' x/ " v" q' ugtxgf wtkpi " y j g' r gpcn { r j cug" f grkdtcvkpu 0 Eqwpugn" y j g' q' k' gf " y j cv' y j g' lwtqt" y cu" y j g' o j q' q' w' lwtqt 0 y j q' y cu' do g' tgn' " x' v' k' pi " j ku' eqpuek' p' eg' o' cpf q' r' k' pf " y j cv' y j ku' lwtqt" j cf " k' pi g' t' k' pi " f q' w' d' u' y j kj " t' g' ur g' ev' v' q' y j g' i wkn" xgtf lev' 0

F ghgpf cpv" y j g' t' g' chgt " o cf g" c" o qvqp" hqt" pgy " wtkn" d' cuvgf " kp r ct' v' r' qp" y j g' cuugt vq" y j cv' y j g' i wkn" xgtf lev' f k' " p' qv' t' g' t' g' ugv' y j g' q' r' k' p' k' p' qh' g' cej " lwtqt " ocu" k' p' f' k' ecvfg " d { " y j g' hqtr gtuqp" u' p' qvg ucvkpi " y j cv' p' q' g' lwtqt " f k' " p' qv' x' q' v' j' kulj gt " qy p" k' p' f' gr g' p' f' gpv o k' p' " eqpegtpkpi " i wkn" qt " kppqegpeg. " dw' o g' tgn' " y j gpv' c' n' pi y kj " y j g" o clqtkx/ (0 " J ku" o qvqp" y cu" p' qv' uwr r qt' vfg " d { " cp { chkt cxku' 0 Vj g' wtkn" eqwt v' f g' p' k' f " y j g" o qvqp. " ucvkpi " y j cv' pq" gxkf gpeg" j cf " dggp" k' p' v' q' w' egf " f go qput cvkpi " ko r tqr gt eqpf wev' qp" y j g' r' ct' v' qh' y j g' lwt { 0

K' y cu' cv' y j g' w' o g' qh' y j g' o qvqp" hqt" pgy " wtkn" cpf " p' qv' cv' y j g o k' / r gpcn { " f grkdtcvkpu" j gctkpi . " y j cv' y j g' eqwt v' f gvgto kpgf y j cv' p' q' d' cuuq" gz' k' u' g' f " v" ko r gcej " y j g' i wkn" xgtf lev' 0 F ghgpf cpv f qgu' p' qv' eqpvgpf " q' p' c' r r g' c' n' y j cv' y j g' t' k' n' eqwt v' g' t' g' f " k' p' f' gp { k' pi j ku' o qvqp" hqt" pgy " wtkn" 0

Vj g' t' g' ku' p' q' o g' t' k' p' f' ghgpf cpv" u' eqpvgp vq" y j cv' y j g' t' k' n' eqwt v' g' t' g' f " y j kj " t' g' ur g' ev' v' q' y j g' i wkn" xgtf lev' k' p' h' c' k' k' pi " v" q' gzco kpg y j g" hqtr gtuqp" tgi ctf kpi " j ku" qr kpkp" y j cv' p' q' g' lwtqt" j cf h' k' r' g' f " v" f' grkdtcvg. " dgecwug" y j g' eqwt v' f gvgto kpgf " cpf " eqwpugn eqpegf gf " y j cv' cp { " g' h' q' t' v' q' " ko r gcej " y j g' i wkn" xgtf lev' y cu" vq dg" eqpf wevgf " d { " y j c { " qh' c" o qvqp" hqt" pgy " wtkn" 0 k' p' d' t' k' pi k' pi uwej " c" o qvqp. " k' y cu" f ghgpf cpv" u' t' g' ur q' p' u' k' k' x' v' " v" q' r' t' g' ugv' cf o ku' k' drq" gxkf gpeg" vq" ko r gcej " y j g' xgtf lev' 0 *Ugg" *People v. Von Villas* *3; ; 4+ 32" Ecrf" Cr 0 6y " 423. 473" J35" Ecrf" r w 0 f

cpf "c" r gtlqf "qh'tghgevkqp" eqpenwf gf "vj cv'j g" eqwf "dg" hck. pqpgev gguu0

P q"gttqt" cr r gctu"lp"vj g"vklcn"eqwtvu" f gvgto kpcvkqp"vj cv'qpnf vj g'y q'lwqtu'uj qwf "dg" f kfej cti gf "dgecwug"qh'vj gk"gzr quwtg vq"r tglwf lekcn'r wdrlek{0'k'u'ugwgf "vj cv'k'ku"o kaeqpf wev'htq c"lwqt" vq"tgcf "qt" rkuvgp"vq" pgy u"ceeqwpu"tgrcvkpi "vq" vj g ecug"lp" y j lej "j g"qt"uj g"ku"ugtxkpi 0**People v. Hernandez* *3; ; : + "69" Ecrf 537." 55: "J475" Ecrf r v0 3; ; . "985" R0f 34; ; 0"Kp"vj g"r tguvgp"ecug."vj g"eqwtv'gzco kpgf "gcej "lwqt cpf "eqpf wevgf "c"ergetnf "cf gs wcvg"lps wkt { "kp"v"oy j gvj gt"cpf vq"y j cv'gzv'p"vj g"lw { "cu" c"y j qrg"o c { "j cxg"dgpp"chgevgf cpf "y j gvj gt"vj g"y cu"i qqf "ecwug"vq" f kfej cti g"cp { "qh"vj g lwqtu0 *1049 **Ibid.* "ugg"cmq "*People v. Burgener*." *supra*. 63" Ecrf "cv" r r 0 73; /742" lqpeg" qp" uwtkelgpv" pqlvg" vj cv c"lwqt" o c { "dg" uwdlgev"vq" ko r tqrgt "kphwpeg." vj g"eqwtv'ku vq"o cng" uwej "lps wkt { "cu" cr r gctu"tgcupcdnf "pgeguact { "vq f gvgto kpg'y j gvj gt"vj g"lwqt'uj qwf "dg" f kfej cti gf 0"Rgtuqupu y kj "f gckngf "npqy ngf i g"qh'vj g"eqpv'p"qh'vj g"pgy u'tgr qtwa y g"gf kfej cti gf "vj g"tgo clpkpi "lwqt"y j q"j cf "cp { "kf gc"qh vj g"eqpv'p"qh'vj g"pgy u'tgr qtwa"npgy "xgt { "rkwg." cuugtvgf vj cv'j g" eqwf "dg" hck" vq" f ghgpf cpv' cpf " vj cv' vj g" r wdrlek{ y qwf "pq"v'chgevg' j ko . "uggo gf "tgrkxgf "y j gp" kphqto gf "vj cv vj g"eqpv'p"qh'vj g"pgy u'tgr qtwa"y cu" hcnug." cpf "cr r gctgf" vq vj g"eqwtv'q"dg" r ctvewrtnf "eqpuekpvkqu05Y g'beege v'vj g"vklcn eqwtvu'tetgf kdkk{ f gvgto kpcvkpu'cpf hkp kpi u'qp's wguvkpu'qh j kvqt'lecn'f'cevh'lw'r r qtvgf "d { "uwducpv'kcn'gkxkf gpeg0**People v. Nesler*" *3; ; 9+38" Ecrf vj "783." 7: 4"J88" Ecrf r v0 f "676." ; 63 R0f : 9 0"Y g"ugg"pq" uwducpv'kcn'rkngkj qqf "vj cv"lwqt "Cf 0 qt"cp { "qh"vj g"vqj gt"lwqtu"y j q" dgeco g"cy ctg"vj cv'r wdrlek{ gzkngf . "y g"tg"cewcm { "dlcugf . "vj cv'ku." owpcdng"vq" r w'culf g l'j gk_ "ko r tguvkpu"qt"qr kpkpu'dcugf "w qp"vj g"gzv'clwf lekcn kphqto cvkqp"l'j g { "tgeglxgf "cpf "tgpf gt" c"xgtf lev'dcugf "uqng{ w qp" vj g" gkxkf gpeg" tgeglxgf "cv' vklcn0 **Id.*" cv' r 0 7: 50" Y g eqpenwf g"vj cv'pq" gttqt" cr r gctu"lp"vj g"eqwtvu" f gekukqp"pqv vq" f kfej cti g"cf f kkpqcn'lwqtu." cpf "vj cv'vj g" r tguwo r vkp"qh r tglwf leg" ctukpi "Hqo " vj g"lwqtu" kpcf xgtv'p'gzr quwtg"vq r wdrlek{ "y cu"tgdwgf 0*Ugg "*People v. Cummings*," *supra*, 6"Ecrf vj "cv" r 0 35540"Kp" cf f kkpq." vj g"eqwtv'y cu"wpf gt"pq qdrki cvkqp"vq" kphqto "vj g"tgo clpf gt"qh'vj g"lwqtu." y j q"y g"tg wpcy ctg"qh'vj g"eqpv'p"qh'vj g"pgy u'tgr qtwa." vj cv'vj g"tgr qtwa y g"tg" hcnug." pqt" y qwf "uwej "cp" kpuwvkqp" j cxg" dgpgkxgf f ghgpf cpv'k'xkgy "qh'vj g"lwqtu"ki pqtcepg0

F ghgpf cpv'cuugt"vj cv'uj qtwnf "chgt"vj g"eqwtv'eqpenwf gf "ku lps wkt { "tgi ctf kpi "lwqt"gzr quwtg"vq" r wdrlek{." vj g"y cu"cp cf f kkpqcn'pgy u'tgr qt'v'otgi ctf kpi "vj g" r c { o gpv'qh' &87.222 vq"eqwpugn"wpf gt"uj cf { "ektewo unpegu." cpf "cuugt"vj cv'vj g eqwtv'uj qwf "j cxg"ceegf gf "vq"eqwpu"tgs wguv'vj cv'lwqtu

dg"gzco kpgf "tgi ctf kpi "vj gk"r quukng"gzr quwtg"vq" vj ku'tgr qt'v0 P q"gttqt" cr r gctu"lp" vj g"eqwtvu"tghwcnf"vq" eqpf wev'htv'j gt lps wkt { . "dgecwug"vj g"y cu'pq"kp f kcev'p"vj g"pgy u'tgr qt'v'j cf eqo g"vq"vj g"lw { }u"cv'p'kqp." vj g"eqwtv'y cu"cy ctg"vj cv'vj g tgo clpkpi "lwqtu"j cf "qdg { gf "vj g"eqwtvu" gctnrgt"cf o qpkkqp"vq cxqkf "gzr quwtg"vq" r wdrlek{." cpf "vj g"lw { "xgt { "tgegpw { "j cf dgpp"tgo kpf gf "qh"ku"qdrki cvkqp"vq"cxqkf "gzr quwtg"vq" pgy u tgr qtwa"tgi ctf kpi "vj g"ecug 0Y g"o c { "cuwo g"vj cv'vj g"lwqtu r ckf "r ctvewrtn"cv'p'kqp"vq"vj ku'cf o qpkkqp"dgecwug"y q"qh vj gk" pwo dgt"j cf "dgpp" f kfej cti gf "hqt" hckkpi "vq" qdg { "vj g cf o qpkkqp." g'xgp"chgt"o qp'v' u'qh'ugtxk'ep"v'vj g"lw { 0

Hkpcmf. "f ghgpf cpv'erclo u'ewo wcv'xg"r tglwf leg"ctukpi "Hqo gttqtu'f wtkpi "r gpcmf "r j cug" f gkdg'cvkqu." dw'pq"gttqtu"j cxg dgpp" guv'ckkj gf "vj cv' f go qpwtcvg"ewo wcv'xg"r tglwf leg"vq f ghgpf cpv' cpf "y g'tglgev'vj ku'eqpv'p'kqp0" *1050

4. Alleged bias on the part of the trial court

*82+"F ghgpf cpv'eqpv'p' u" vj g"vklcn"eqwtv'y cu"pqv'ko r ctvkn cpf "vj ku'f gr tkxgf "j ko "qh'vj g"ucv'g"cpf "t'g' g'cn'eqpukwkwkpcn i wctcv'gg"qh' f w'g" r tqegu"qh' rcy 0J g"eqpv'p' u"vj cv'c" vklcn r t'g'k' gf "qxgt" d { " c" lwf i g" y j q" ku" pqv' hck" cpf " ko r ctvkn eqpukwgu'c'utwewt'cnf ghgevg' v'ku't'g'xgt'udng"r'gt'ug0

Vj ku' ercko "ku" o cf g" r tq" hqto c0 F ghgpf cpv' eqpegf gu" vj cv lwf lekcn'dku"cv'vj g"i wkn'r j cug"or tqdcdnf o'ecppqv'dg'uj qy p. cpf "ceeqt f kpi n { "y g" f q" pqv'eqpukf gt" vj g"eqpv'p'kqp"lp" vj g eqpv'v'qh'vj g"i wkn'r j cug 0J ku'eqpv'p'kqp"y kj "tgr gevg'v'vj g r gpcmf "r j cug"ku"qhtgtf "y kj qw'cp { "ekcvkqp"vq"vj g'tgeqtf . kp"xlqrv'kqp"qh'twrg"37*c+"qh'vj g"Ecrf hqtpk" T wgu"qh'Eqwt0 K' guvgp'kcn { "ku" c" t'guvcgo gpv'qh'vj g"eqpv'p'kqu." f kwewugf ante." vj cv'eqpf kkpqu"ko r qugf "qp" f ghgpf cpv'cv'vj g"r gpcmf r j cug"tgpf gtgf "vj cv'r tqeggf kpi "c"uj co 0Y g"j cxg"gzco kpgf vj g'tgeqtf "qh'vj g"r gpcmf "r j cug." cpf "cmj qwi j "k'f qgu'kpf kcvg vj cv'vj g'eqwtv'gzr g'k'pegef 'uqo g'lw'w'cvkqp'cv'y j cvk'd'g'kxgf vq'dg'f ghgpf cpv'u'cvgo r w'vq' b c'p'k' wcv'v'g' g'eqwtv'cpf "v'ecwug c'tkuni'q'h'o kwtkn'pqv' kpi "kp"vj g'tgeqtf "f go qpwtcvu"vj cv'vj g eqwtv'iqv'ku'ko r ctv'ckv'0

5. Constitutionality of California's death penalty statute

*83+"F ghgpf cpv'cvcem"vj g"eqpukwkwkpcnkf "qh'Ecrf hqtpk"u f gcvj "r gpcmf " ucwug"kp" c" pwo dgt"qh' tgr gevg'0 F ghgpf cpv eqpv'p' u" vj cv' ugevkqp" 3; 20" xlqrv'gu" vj g" Hk'vj . " Ukvj . Gk j vj . " cpf "Hqwtv'p'v' "Co gp'f o gpv'qh'vj g"Wpkxgf "Ucvgu Eqpukwkwkqp" dgecwug" k' cuugtvgf n { " ku" qxgt'kpenw'xg." cpf dgecwug" d { " ku" vgo u" cpf " cu" kpvgr t'vgf " d { " vj ku" eqwtvu f gekukpu." k' f qgu"pqv' o gcpkpi hwm { " p'cttqy " vj g" ercu" qh r gtuqu'uw'dlgev'vq"vj g'f gc'v' r gpcmf. "r ctvewrtnf "d { " r tqxkf kpi

vj cv'vj g'eqo o kulkqp'qh'c'lgmp{ 'o wtf gt'eqpukwv'g'u'c'ur gekn ektewo ucpegO'Y g'tglgev'vj ku'entko "kp'rti j v'qh'qwt'f gekulkpu j qif kpi " vj cv' vj g" ur gekn' ektewo ucpegu' ugv' hqt vj " kp" vj cv ucwvg' ctg' pqv' qxgt'kpenmukxg" d{ "vj gkt' pwo dgt" qt" d{ "vj gkt vgtu u. "cpf" vj cv'vj g{ "j cxg" pqv' dggp' eqput wgf "kp" cp' wpf wlf gzt cpukxg" o cpgtO' *People v. Arias. "supra." 35" Ecrf6vj " cv'r r 0 3: 8/3: 9= "People v. Ray, supra, " 35" Ecrf6vj " cv'r 0578= "People v. Crittenden" *3; ; 6+; " Ecrf6vj " : 5. " 377"] 58" Ecrf0 r v04f " 696. : : 7" R04f " : : 9_0+

*84+ F ghgpf cpv'eqpv'gpf u'ugev'kqp" 3; 205. 'hcevt' *c+ 'r gto kwpj vj g" lwt { " vq" eqpukf gt" vj g" ektewo ucpegu' qh' vj g" etko g" kp ci i txcxv'kqp. " j cu" dggp" cr r rkgf " o'lp" uwej " c" y cpv'q" cpf lrgcnkuj " o cpgt. o' y kj qw' vj g" cr r rlec'v'kqp' qh' cp { " tgcucp'cdng rko k'kpi " eqput w'ekv'p' d { " vj ku' eqwt. vj cv' k' xk' r' v'gu' vj g" Hktj . U'z vj . " Gki j vj . " cpf " Hqwt v'g'p' vj " Co gpf o g'p'w' qh' vj g" Wpk'g'f U'cv'gu' Eqpukw'kqp' O' F ghgpf cpv' eqpv'gpf u' vj g" r t'q'x'k'k'q'p" ku v'pe'q'p'uk'w'k'q'p' c' m { " xci w'g' cu' cr r rkgf . " dgecv'w'g' k'j' cu' r gto k'w'g'f r t'q'ue'w'q'tu' v'q" cti w'g" vj cv' cp { " eqpeg'k'x'cdng" ektewo ucpeg" qh c" ej cti gf " etko g" u'j' q'w'f " dg" eqpukf gtgf " kp" ci i txcxv'kqp' O' J g *1051 " r q'lp'w' q'w' vj cv' t'cvj gt" eqp'v'c'f' k'ev'q' { " ektewo ucpegu o c { " dg" eqpukf gtgf " kp" ci i txcxv'kqp" kp" f k'ht'g'p'v' ecugu. " cpf eqpv'gpf u' vj cv' r t'q'ue'w'q'tu' r' q'lp'v' v'q' ektewo ucpegu' qh' vj g' etko g vj cv' o'eq'x'g' t' vj g" g'p'k'g' ur g'ev'w' o' qh'] h'cevu' " l'p'g'x'k'cdn' " r t'g'ug'p'v' l'p' g'x'g' t' { 'j' qo k'ef' g'0' J g' w' i' gu' vj cv' vj g' r' t'q'x'k'k'q'p' ku' cr r rkgf " kp cp' t' d'k'ct { " cpf " e'cr' t'lek'w' b' o' cpgt' l'q' cu' v'q' x'k' r' v'g' vj g' h'g'f' g' t'cn i w'ct'c'p'v'g' qh' f' w'g' r' t'q'egu' qh' r'cy 0

F ghgpf cpv'u' eqpv'g'v'k'q'p" eqtt'gur' q'p'f' u' " kp" u'w' d'uc'p'eg" v'q" c eqpv'g'v'k'q'p' h'q'w'p'f' l'p' l'w'v'eg' D'rcen' o' w'p' u' f' k'ug'p'v' l'p' " Tuilaepa v. California" *3; ; 6+734" WLU; 89"] 336" UE v'04852. " 34; " NCGf 04f 972_0" Id. " cv'r r 0; ; 8/; : : "] 336" UE v'0cv'r r 04864/4865_ " *f' k' u' o' q' r' p' o' qh' D'rcen' o' w'p. " L'00' K' k' u' g' x' k' f' g' p' v' vj cv' vj ku' eqpv'g'v'k'q'p' y' cu p'q'v' r' g' t' u' w' c' u' k' g' " v'q" c' o' c' l'q' t' k' v' " qh' vj g' " W'p'k'g'f " U'c'v'gu' U'w' t'g' o' g' E'q'w'v' y' j' g'p' " k'v' f' g'v'g' t' o' l'p'g'f " vj cv' u'ge'v'k'q'p" 3; 205. " h'cevt' " *c+ " ku p'q'v' x'k' r' v'x'g' qh' vj g" Gki j vj " Co gpf o g'p'v' q'p' vj g" d'cu'k' qh xci w'g'p'gu' q' t' q'j' g' t' i' t'q'w'p'f' u' o' k'p'ung'c'f. " vj g" eqw'v'u' o' c' l'q' t' k' v' q' r' k'p'k'p' u'c'v'g'f' vj cv' o'q'w' t' e'c' r' k'c' r' i' w' t' k' u' r' t' w'f' g' p' e'g' j' cu' g' u' c' d' r' i' k' u' j' g'f vj cv' vj g' u'g'p'v'g'p' e'g' t' u'j' q'w'f' " eqpukf gt" vj g' ektewo ucpegu' qh' vj g' etko g" kp" f' g' e'k'f' k'p' i' y' j' g' vj g' t' v'q" k' o' r' q'ug' vj g' f' g' c'v' j' " r' g' p' c' m { . o' c' p' f' " vj cv' o' vj ku' E'c' r' k' t' p' k' " h'cevt' " l'p' u' t' w' e' u' v' j' g' l'w' t' { " v'q" eqpukf gt c" t'g' r' x'c'p'v' u'w' d' l'g'ev' o' c' w'g' t' " c' p' f' " f' q'g' u' u'q" l'p" w'p'f' g' t' u' c' p' f' c' d' r' g' v' g' t' o' u' o' " *Tuilaepa v. California. " supra. " 734" WLU' cv' r' 0; 98] 336" UE v'0' cv' r' 0' 4859_0" Vj g' eqw'v' q' d' u' g' t' x' g' f' " vj cv' o' vj j' g' ektewo ucpegu' qh' vj g' etko g" ctg' c" w'c' f' k'k'q'p' c' n' u' w' d' l'g'ev' h'q' t' eqpukf g' t' c' v' k' q' p' d' { " vj g' u' g' p' v' g' p' e' g' t' . " c' p' f' " c' p' l'p' u' t' w' e' v' k' p' v' q' " eqpukf gt vj g' ektewo ucpegu' ku' p'g'k'j' g' t' x'c' i' w'g' p'q' t' q' v' j' g' t' y' k' u' g' " k' o' r' t' q' r' g' t' w'p'f' g' t' q' w' " Gki j vj " Co gpf o g'p'v' l'w' k' u' r' t' w'f' g' p' e' g' o' " *Ibid. +

F ghgpf cpv'eqpv'gpf u'k'v'ecppqv'dg'cr r tqr tlc'v'g'w'p'f' g' t' vj g' Gki j vj Co gpf o g'p'v' q' t' cu' c' o' c' w'g' t' qh' f' w'g' r' t'q'egu' v'q" r' g' t' o' k'v' vj g' l'w' t' { " v'q" eqpukf gt " kp" ci i txcxv'kqp. " h'q' t' g'z'c' o' r' r' g' . " vj cv' c' " o' w' t' f' g' t' y' cu' eqo o' k'w'g'f " kp" c' e'c' r' e' w' r' v' g' f' " o' c' p' p' g' t' . " y' j' k' r' g' c' " l'w' t' { " kp cpq'v' g' t' " ecug" o' c { " dg" w' i' g' f' " v'q" eqpukf gt " kp" ci i txcxv'kqp" vj cv vj g" o' w' t' f' g' t' y' cu' eqo o' k'w'g'f " kp" c' " l'g' p' l' { " qh' x'k' r' g' p' e' g' o' K' " ku p'q'v' l'p' c' r' r' t' q' r' t' l'c' v' g' . " j' q' y' g' x' g' t' . " vj cv' c' " r' c' t' v' e' w' r' t' " ektewo ucpeg qh' c' e'c' r' k' c' r' i' e' t' k' o' g" o' c { " dg" eqpukf g' t' g' f' " ci i txcxv'k'p' i' " kp" q' p' g' ecug. " y' j' k' r' g' c' " eqp'v'c' u' k' p' i' " ektewo ucpeg" o' c { " dg" eqpukf g' t' g' f' ci i txcxv'k'p' i' " kp" cpq'v' g' t' " ecug" O' v' j' g' u' g' p' v' g' p' e' g' t' " ku' v' q' " eqpukf g' t' " vj g' f' ghgpf cpv'u' l'p'f' k'k'f' w'c' n' e'w' r' c' d' k' r' k' v' { " vj g' t' g' " ku' p' q' " eqpukw'k'q'p' c' n' t' g' s' w' k' t' g' o' g' p' v' " vj cv' vj g" u'g'p'v'g'p' e'g' t' " eqo r' c' t' g' " vj g' " f' ghgpf cpv'u' e'w' r' c' d' k' r' k' v' { " y' k' j' " vj g" e'w' r' c' d' k' r' k' v' { " qh' q' v' j' g' t' " f' ghgpf cpv'u' *Ugg People v. Crittenden. " supra. " ; " Ecrf6vj " cv'r r 0378/3790+ Vj g' h'q'ewu' ku' w' r' q'p' vj g' l'p'f' k'k'f' w'c' n' e'c' u' g' . " c' p' f' " vj g' " l'w' t' { " u' f' k' u' e' t' g' v' k' q' p' k' u' d' t' q' c' f' < o' k' p' r' t' q' x' k' f' k' p' i' " h'q' t' l'p'f' k'k'f' w'c' k'f' g' f' " u' g' p' v' g' p' e' k' p' i' . " k'v' o' w' u' v' d' g' " t' g' e' q' i' p' k' g' f' " vj cv' vj g' " U'c' v' g' u' o' c { " c' f' q' r' v' e' c' r' k' c' r' i' u' g' p' v' g' p' e' k' p' i' r' t' q' e' g' u' u' g' v' j' cv' t' g' n' { " w' r' q' p' vj g' l'w' t' { " kp" ku' u' q' w' p' f' " l'w' f' i' o' g' p' v' " v'q' g' z' g' t' e' k' u' g' y' k' f' g' f' k' u' e' t' g' v' k' q' p' o' " *Tuilaepa v. California. " supra. " 734 WLU' cv' r' 0; 96"] 336" UE v'0' cv' r' 04858_0+

Vj wu. " h'q' t' g'z'c' o' r' r' g' . " kp" Tuilaepa" vj g' j' k' i' j' " eqw'v' t' g' l'g'ev'g'f' " vj g' f' ghgpf cpv'u' e' r' c' k' o' / u' w' d' u' c' p' v' k' c' m { " k' f' g' p' v' e' c' r' i' v' q' f' ghgpf cpv'u' e' r' c' k' o' kp" vj g' r' t' g' u' g' p' v' ecug/ vj cv' *1052 " uge'v'k'q'p" 3; 205. " h'cevt' " *k+ r' g' t' o' k' w' p' j' " eqpukf g' t' c' v' k' q' p' " qh' vj g' " f' ghgpf cpv'u' " ci g. " ku' x'c' i' w'g. c' n' j' q' w' i' j' . " vj g' f' ghgpf cpv' e' r' c' k' o' g' f' . " r' t' q' u' e' w' q' t' u' v' r' l' e' c' m { " c' t' i' w' g' kp" h'c' x' q' t' " qh' vj g' " f' g' c' v' j' " r' g' p' c' m { " d' c' u' g' f' " q' p' " vj ku' h'c' e' v' t' . " p' q' o' c' w' g' t' y' j' g' vj g' t' vj g' f' ghgpf cpv' ku' q' f' " q' t' " { " q' w' p' i' O' o' k' k' u' p' g' k' j' g' t' u' w' r' t' k' u' p' i' p' q' t' l' g' o' c' t' n' e' d' r' g' vj cv' vj g' t' g' r' x' c' p' e' g' q' h' vj g' f' ghgpf cpv'u' ci g' e' c' p' " r' q' u' g' c' " f' k' r' g' o' c' " h'q' t' " vj g' u' g' p' v' g' p' e' g' t' O' D' w' f' l' h' k' e' w' m { kp" c' r' r' r' l' e' c' v' k' q' p' " ku' p' q' v' g' s' w' x' c' r' g' p' v' " v'q" x'c' i' w'g' p' g' u' o' D' q' v' j' " vj g' r' t' q' u' e' w' k' q' p' c' p' f' " vj g' f' ghg'p' u' g' o' c { " r' t' g' u' g' p' v' x' c' r' k' f' " c' t' i' w' o' g' p' u' c' u' v' q' vj g' t' u' k' i' p' k' h' e' c' p' e' g' q' h' vj g' f' ghgpf cpv'u' ci g' l'p' c' r' c' t' v' e' w' r' t' " ecug' O' E'q' o' r' g' w' k' p' i' " c' t' i' w' o' g' p' u' d' { " c' f' x' g' t' u' c' t' { " r' c' t' v' k' u' d' t' k' p' i' " r' g' t' u' r' g' e' v' k' g' v' q' " c' r' t' q' d' r' g' o' " (000) *Tuilaepa v. California. " supra. " 734" WLU' cv' r' 0; 99"] 336" UE v'0' cv' r' 04859_0+

F ghgpf cpv'eqpv'gpf u' vj cv' vj g' j' k' i' j' " eqw'v' u' f' k' u' e' w' u' k' q' p' " kp" vj g' Tuilaepa" e'c' u' g' f' q' g' u' p' q' v' f' k' u' r' q' u' g' q' h' j' k' u' e' r' c' k' o' . " d' g' e' c' w' u' g' vj g' t' g' vj g' j' k' i' j' " eqw'v' g' z' c' o' k' p' g' f' vj g' E'c' r' k' t' p' k' " u' c' w' w' g' q' p' " ku' h'c' e' g' . " y' j' k' r' g' j' g' c' u' m' i' vj cv' y' g' " g' z' c' o' k' p' g' " ku' c' n' g' i' g' f' " l'p' h' t' o' k' k' e' u' " c' u' c' r' r' r' k' g' f' O' C' u' p' q' v' g' f' . " j' g' f' t' c' y' u' q' w' t' " c' w' g' p' v' k' q' p' " v'q" x'c' t' k' q' w' " e' c' u' g' u' " l'p" y' j' l' e' j' c' r' r' c' t' g' p' v' l' " l'p' e' q' p' u' k' u' g' p' v' e' r' c' k' o' u' y' g' t' g' b' o' c' f' g' d' { " vj g' r' t' q' u' e' w' k' q' p' y' k' j' " t' g' u' r' g' e' v' v' q' vj g' t' g' r' x' c' p' e' g' q' h' e' g' t' v' c' l' p' " ektewo ucpegu' qh' vj g' e' j' c' t' i' g' f' " e' t' k' o' g' u' o' J' g' c' n' u' q' t' g' h' g' t' u' w' u' v' q' " x'c' t' k' q' w' " e' c' u' g' u' " l'p" y' j' l' e' j' . " j' g' c' n' g' i' g' u' . " r' t' q' u' e' w' q' t' u' " o' c' f' g' " d' t' q' c' f' " w' u' g' " qh' u' g' e' v' k' q' p' " 3; 205. h'cevt' " *c+ v' q' c' t' i' w' g' v' q' vj g' l'w' t' { " vj cv' h'cevu' l'p'g'x'k'cdn' " r' t'g'ug'p'v' l'p' g'x'g' t' { " j' qo k'ef' g' eqpukw'g' ektewo ucpegu' l'p" ci i txcxv'kqp' O' 49 J g' eqpv'g'p'f' u' vj cv' vj g' u' g' " e' c' u' g' u' f' g' o' q' u' i' t' c' w' g' vj cv' u' g' e' v' k' q' p' " 3; 205.

hcevt "c+ 'r gto ku'ctdktct { 'cpf 'ecr tlekwu'ko r qukkqp'qh'j g f gcj 'r gpcn' 'kp'xlqrwkp'qh'j g'f wctcpvgg'qh'f wg'r tqegu'u'qh rcy OJ g'qhtu'p'q'g'g'xcpv'cwj qtk'f 'kp'lw'r r qt'v'qh'j ku'erclo O

49 Cu'pqvf . " y g' j cxg' tglgevf " vj g' eqpvvkvq " vj cv ugekvq'3; 20# hcku'v'g' gcpkpi hwn' 'pcttqy 'vj g'ercu qh'r'gtuqu'uidlge'v'v'j g'f gcj 'r gpcn' . "cpf 'y g'f q pqv'tgeqpkf gt 'k'j' gt0

F ghgpf cpv'u'eqpvvkvq "ku'kpeqpvkvq'v'v' kj "vj g'tcvkqpcg'qh vj g' j ki j " eqwt'u' f gekukp " kp " Tuilaepa' F ghgpf cpv'u' erlko guugpvkm' " ku' vj cv' ugekvq' 3; 20# . " hcevt " c+ " ku' uq " xci wg cpf "qr gp'gp'gf " vj cv'k'j' cu'tguwngf "kp'r tqugewqtu'o cni'pi kpeqpvkvq'qt'xgt'kpenw'x'g'cti wo gpv'u' kj "t'gur'gev'v'j' g' uki pl'k'ecpeg' qh' ekewo ucpegu' qh' vj g' ej cti gf " etko g0' Vj ku tguw'ku'pq'v'ko r tqr gt 'kp'xlqy "qh'j g'ekewo ucpeg'v'j cv'hcevt "c+ 'r tqxkf gu'cf g'wcv'g' i w'kf cpeg'v'v'j g'lwt { "kp'ug'gev'v'j' g' cr r tqr tlcvg' r gpcn' (O'K'ku'pq'v'v'v' xci wg'cu'v'v'v' kum'f'o') y j qm' ctdktct { "cpf "ecr tlekwu'cev'k'p' } o' *Tuilaepa v0' California. supra. "734'WUO'cv'r 0; 95']336'UE'v'cv'r 0'4857_="vj g'lwt { ku'gpi ci gf "kp'cp'individualized'ugpvv'k'pi "r tqegu' *id. "cv'r 0 ; 94']336'UE'v'cv'r 0'4856/4857_="cpf "vj g'lwt { "cr r tqr tlcvg' j cu'xgt { "dtqcf "f kuet'g'k'p' "f v'gto k'p'pi "y j g'v'j g'f gcj r gpcn' "uj qwf "dg'ko r qugf 0' *id. "cv'r 0; 9; /; : 2']336'UE'v'cv'r 0'485: /485; 0' "C' lwt { "should' eqpkf gt "vj g'ekewo ucpegu qh'v'j g'etko g'kp'f v'gto k'p'pi "r gpcn' *id. "cv'r 0; 98']336'UE'v'cv'r 0'4859_="dw'v'j ku'ku'cp'k'p'k'k'f w'ek' gf . "pq'v'c'eqo r ctcv'xg h'p'ev'k'p'0' Vj g' lwt { "o c' " eqpen'f g' vj cv' vj g' ekewo ucpeg vj cv'c' o w'f gt "y cu'eqo o k'w'f "y kj "eqrf "r tgo gf k'c'v'k'p' ku ci i txcv'k'pi " kp' c' r c'tv'ew'rt " ecug. " y j k'g' kp' cp'v'j gt " ecug cp'v'j gt " lwt { "o c' " f v'gto k'p'g' *1053 " vj cv'v'j g' ekewo ucpeg vj cv'c' o w'f gt "y cu'eqo o k'w'f "kp'c' o w'f gt q'w' "f t'gp' { "ku'cp ci i txcv'k'pi 'hcevt 0'Vj g' b'd'k'k'f { qh'f tqugewqtu'k'p'c' dtqcf 't'cpi g qh'ecugu'v'v' t'gn' "w'qp' cr r ct'gp'w' "eqp'ct { "ekewo ucpegu'qh etko gu'kp'x'ct'kwu' ecugu'f'g'gu'pq'v'g'w'cd'k'uj "vj cv'c' jury'kp'c r c'tv'ew'rt 'ecug'cev'g' "ctdktct'k'f "cpf "ecr tlekwu' (OC'u'y kj "vj g hcevt "qh'v'j g'f ghgpf cpv'u'ci g' "vj g'cf xgtuct { "r tqegu'r gto ku vj g'f ghg'p'ug' cu'y g'm'cu'v'j g't tqugew'k'p' . "v'v'v' g'v'j g'uki pl'k'ecpeg qh'v'j g' h'ew'q'v'v'j g'ej cti gf "etko g0'F ghgpf cpv'k'ku'v'v' r gtuw'f g w'v'j cv'j gug'ekewo ucpegu'f gr t'k'g'j ko 'qh'f w'g'r tqegu'q'h'v'j 0

F ghgpf cpv'eqpvv'v' u'v'j cv'v'j g'Ecrl'k'q't'p'k'f gcj 'r gpcn' "ucw'wg xlqr'v'gu'v'j g'Gki j vj 'cpf 'Hq'w'v'g'p'v'j 'Co g'p'f o g'p'u'q'h'v'j g'W'p'k'g'f U'cv'gu'Eq'p'k'w'k'p' d'g'ecw'g'egt'v'k'p' r tqeg'f w'c'n'l'uch'i w'ct'f u'ct'g r'c'ent'k'pi < "lwt'gu' ctg' "pq'v' t'gs w'k'f g' "v' "o cng' y t'k'w'p' "h'k'f k'pi u t'gi c'tf k'pi " ekewo ucpegu' kp' " ci i txcv'k'p' . " qt' " v'q' cej k'x'g w'p'c'k'o k'f "cu'v'q'ci i txcv'k'pi "ekewo ucpegu'0'F ghgpf cpv'cnu'q cuug't'u'v'j cv'v'j g'ucw'wg'ku'eq'p'k'w'k'p'c'm' "h'cy gf "kp'v'j cv'lwt'gu ctg' "pq'v' t'gs w'k'f g' "v' "h'k'f " dg' { q'p' " c' " t'g'cu'q'p'cd'g' "f q'wd'v' vj cv ci i txcv'k'pi "ekewo ucpegu'j cxg' d'ggp' r tqx'g'f "cpf "q'w'y g'ki j

vj g'o kki cv'k'pi "ekewo ucpegu. "qt' vj cv'f gcj 'ku'v'j g'cr r tqr tlcvg ugv'v'peg'0'G'cej 'qh'v'j gug'eq'p'v'v'k'p'pu' cu'd'ggp't'gl'ge'vf . "cpf 'y g f g'ek'p'g'v'q't'ge'q'p'k'f gt 'v'j go 0' *People v. Arias, supra. '35' Ecrl'v'j cv't 03; 2=People v. Marshall, supra. '72' Ecrl'v'f 'cv'r 0; 57/; 58= People'v. Rodriguez, supra, '64' Ecrl'v'f 'cv'r 0'9990+

Cngi kpi 'vj g'uco g'eq'p'k'w'k'p'c'n'f'rcy u. "f ghg'p'f cpv'eqo r r'k'p'u vj cv' vj g' ucw'wg' ku' f gh'g'v'x'g' kp' pq'v' t'gs w'k'k'pi " k'p'v'g'ec'ug r tqr qt'v'k'p'c'k'v' " t'g'x'k'y . " cpf " kp' uwe'j " t'g'x'k'y " pq'v' d'g'k'pi r g'ht'qto g'f O'Cu' y g' eq'p'k'w'k'p'w' "j cxg'f q'p'g'kp' vj g' r cu'v' y g t'gl'ge'v' vj ku' eq'p'v'v'k'p' . " cu' y g' f q' vj g' eq'p'v'v'k'p' vj cv' vj g ecr k'c'n'ug'p'v'k'pi "uej go g' f g'p'lg'u' ecr k'c'n'f ghg'p'f cpw' g' s'w'c'n r t'q'v'g'v'k'p' q'h'v'j g'rcy u'd'g'ec'w'g'q'v' g't'eq'p'x'v'g'f 'h'g'p'u't'g'g'k'g uqo g' eqo r c'tc'v'x'g' ugv'v'peg' t'g'x'k'y " w'p'f gt " vj g' f v'g'to k'p'c'v'g ugv'v'k'pi "rcy 0' *People v. Arias, supra. "35' Ecrl'v'f 'cv'r 0 3; 4/3; 5=People'v. Marshall. "supra. "72' Ecrl'v'f 'cv'r 0'; 67= People'v. Lang' *3; ; +6; "Ecrl'v'f ; ; 3. "3265']486' Ecrl'v'f r 0 5; 8. 9; 4' R0'f "849 _=People'v. Allen, supra, '64' Ecrl'v'f 'cv'r 0 34: 8/34: : 0' "Y g' cnu'q' t'gl'ge'v' vj g' t'g'v'g'f "eq'p'v'v'k'p' vj cv' vj g h'c'k'w'g'v'q' r t'q'x'k'f g'v'j g'eqo r c'tc'v'x'g' ugv'v'peg' t'g'x'k'y "r t'q'x'k'f gf v'q'r' g'tu'q'p'u'eq'p'x'v'g'f 'q'h'p'p'ec'r k'c'n'f'g'p'p' { 'q'h'g'p'ug'u'eq'p'k'w'w'gu c'f' g'p'k'c'n'q'h' u'w'v'c'p'v'x'g' f w'g' r tqegu' qh'rcy 0' *85+ F ghg'p'f cpv eq'p'v'p'f u. y kj q'w'v'k'c'v'k'p'v'q' c'w'j q'tk'f . "vj cv'f w'g'r tqegu'q'h'v'j t'gs w'k'gu' vj cv'v'k' pl'k'ec'p'v'd'g'p'g'h'ku'pq'v'd'g' y kj j g'f "ctd'k't'c't'k'f h't'qo " k'p'f k'k'f w'c'n' qt' "erc'u'gu' qh' f ghg'p'f cpw'0' K' c't'g'c'f { "j cu d'ggp' f v'g'to k'p'g'f . "j qy g'x'g' . "vj cv'v'j g' f k'v'p'ev'k'p'kp' "v'g'c'w' g'p'v k'p'v'j ku't'gi c'tf "d'g'y g'g'p' ecr k'c'n'f ghg'p'f cpw'cpf "q'v'j g't' g'tu'q'p'u eq'p'x'v'g'f 'q'h'g'm'p'k'g'u'ku'pq'v'c't'd'k't'c't { 0' *People'v. Allen. "supra. 64' Ecrl'v'f 'cv'r 0'34: 8/34: 90+

*86+Y g'cnu'q' t'gl'ge'v'f ghg'p'f cpv'u'eq'p'v'v'k'p'v'j cv'v'j g'Ecrl'k'q't'p'k' f gcj 'r gpcn' "rcy " xlqr'v'gu' vj g' Gki j vj " cpf " Hq'w'v'g'p'v'j Co g'p'f o g'p'u' d'g'ec'w'g'v'j g' *1054 "lwt { "ku'pq'v'k'p'ust'w'eg'f "cu'v'q any' d'w'f g'p' q'h' r t'q'q'h'kp' u'g'g'ev'k'pi "vj g' r gpcn' "v'q' dg'ko r qugf 0 Cu'v'j g'j cxg' g'z'r r'k'p'g'f . "o]w'p'k'ng'v'j g'v' w'k'v'f v'g'to k'p'c'v'k'p' . "vj g ugv'v'k'pi "h'p'ev'k'p'ku'k'p'j g't'g'p'w' "o q't'c'n'cpf "p'q'to c'v'x'g' . "pq'v h'c'w'c'n']ek'c'v'k'p' _"cpf . "j g'peg . "pq'v'v'w'eg'r v'k'g'v'q'c' d'w'f g'p'q'h' r t'q'q'h's w'c'p'v'k'c'v'k'p'0' *People'v. Hawthorne' *3; ; 4+6' Ecrl'v'j 65. 9; ']36' Ecrl'v'f r 0'f '355. ' 63' R0'f '33: 0'v'j g'k'p'ust'w'eg'p'u'cu c'y j q'g'c'f g'w'c'v'g'n' 'i w'k'f g'v'j g'lwt { "kp'ec'tt { k'pi "q'w'v'j g'k'f 'o' q't'c'n cpf "p'q'to c'v'x'g'o' h'p'ev'k'p'0

F ghg'p'f cpv'eq'p'v'p'f u'v'j cv'v'j g'w'ug'q'h'g'x'k'f g'peg'q'h'w'p'c'f l'w'f k'ec'v'g'f etko k'p'c'n'c'v'k'k'v' "cu'c' ekewo ucpeg'kp'ci i txcv'k'p' r w'v'w'c'p'v'q ugekvq'3; 20# . hcevt "d+ t'g'p'f g'tu'j ku'f gcj 'ug'p'v'peg'w'p't'g'k'cd'g' cpf " xlqr'v'gu' vj g' H'k'v'j . " Uk'v'j . " Gki j vj . " cpf " Hq'w'v'g'p'v'j Co g'p'f o g'p'u' q'h'v'j g' h'g'f g't'c'n'Eq'p'k'w'k'p'0'J g'c'ep'q'y ng'f i gu vj cv'v'j g'j cxg' t'gl'ge'vf "uwe'j "eq'p'v'v'k'p'pu'kp'v'j g' r cu'v' *People v. Barnett, supra. '39' Ecrl'v'j 'cv'r 0'339: =People'v. Bradford.

supra." 37" Ecrf6j " cv' r0' 3598=" *People*" v. *Melton*" *3; : : + 66" Ecrf6 "935."978."lp0' 39" J466" Ecrf0r r0' : 89."972" R0f 963 =*People* v. *Gates*"*3; : 9+"65" Ecrf6f "338: ."3425" J462 Ecrf0r r0'888."965"R0f "523 +:"dw"cuugtu"vj cv'qwt" f gekukpu y gtg"y tqpi n{ "f gekf gf 0'Y g" f genkpg"vq" tgeqpukf gt"vj go 0'*87+ J g" cnuq" eqpvpgf u"vj cv'vj g" wug."lp" ci i txcvqkp."qh" gxfk gpeg qh' f ghgpf cpv\i" cuucwn' wr qp" O t0' O pptqg." Ut0" f gur kg" yj g ekteuo ucpeg" yj cv' yj g" ej cti g" cu" vq" yj cv' cuucwn" j cf" dggp f tqr r gf 'r wtucpv\q" c' r rgc" ci tgggo gpv' eqpukwgf "c" dtgcej "qh cp" ko r rkgf "vgo" qh' yj g" ci tgggo gpv' cu' y gni' cu" c" eqpugs wpeg qh' yj g" i wkn\ " r rgc" qh' yj j lej " j g" y cu" pqv' lphqto gf " y j gp" j g gpvgtgf " yj g" r rgc' 0' Vj g" lptqf wevkqp" qh' gxfk gpeg. " r wtucpv\q ugevkqp" 3; 205." hcevt " *d+." qh' yj g" hcevt" wpf gtn\ kpi " ej cti gu f luo kuugf " cu" r ctv' qh' c" r rgc" ci tgggo gpv' f qgu" pqv' uwhgt " yj g eqpukwqpcn\ lphkto kkgu" kf gpv\ hgf " d { " f ghgpf cpv\ **People* v. *Osband*" *3; ; 8+"35" Ecrf6j "844."933" J77" Ecrf0r r0' f "48." ; 3; R0f "862_ " Jkptqf wevkqp" qh' gxfk gpeg" qh' etko g" cu" vq" y j lej c" ej cti g" y cu" f luo kuugf " cu" r ctv' qh' c" r rgc" ci tgggo gpv' f qgu pqv' eqpukwgf " c" xkqrvkqp" qh' yj g" f qwdrg" lqqr ctf { " erwug" qh yj g" Hktj " Co gpf o gpv =*People* v. *Garceau*, *supra.*" 8" Ecrf6j cv' r 0' 3; ; " Juc o g =*People* v. *Morris*, *supra.*" 75" Ecrf6f " cv' r 0' 439" Jpq" xkqrvkqp" qh' tki j u' lp" kptqf wekpi " cuugt\ gf n\ " ucrg gxfk gpeg" qh' r tkqt" etko kpcn\ cev\ kx\ " cu" vq" y j lej " yj g" ucwug qh' rko kcvkpu" j cf " twp =*People* v. *Frank*" *3; ; 2+"73" Ecrf6f 93: ." 94: " J496" Ecrf0r r0' 594." 9; : " R0f " 3437_ " Jtglgkpi f wg" r treguu" emko " ctkkpi " htqo " kptqf wevkqp" qh' ci i txcv\ kpi gxfk gpeg" qh' ekteuo ucpegu" qh' ej cti g" f luo kuugf " r wtucpv\q c" r rgc" ci tgggo gpv =*People* v. *Melton*, *supra.*" 66" Ecrf6f " cv r r 0' 977/978." cpf " lp0' 39" Jpq" vphckpguu" lp" r gto k\ kpi " ecr kcn lwt { " vq" eqpukf gt. " lp" ci i txcv\ kpi. " gxfk gpeg" tgrv\ kpi " vq" ej cti gu f luo kuugf " r wtucpv\ vq" c" r rgc" ci tgggo gpv\ 0" O qtgqxg." cu tgur ppf gpv\ r qkpw' qww' f ghgpf cpv\ j cu' pqv' qhgtgf " cp { " uwr r qtv kp" yj g" tgeqt f " hqt" yj g" eqpv\ kqp" yj cv' j g" y cu" r tqo kuqf " yj cv gxfk gpeg" qh' yj g" cuucwn' ci kpv\ 0' t0' O pptqg. " Ut0' y qwf " pqv\ dg wugf " ci kpv\ j ko " lp" hwwt g' r tqeggf kpi u0

F gur kg" f ghgpf cpv\ i" wti kpi. " y g" f genkpg" vq" tgeqpukf gt qwt" eqpenwukqp" yj cv' o\ w\ ug" qh' yj g" y qtf u" g\ ztgo g) cpf \wducpv\ kn\ lp" ugevkqp" 3; 205." hcevtu" *f + " *1055 " cpf " *i + f qgu" pqv' ko r gto kuukdn\ " rko k' eqpukf gtcv\ kqp" qh' o kki cv\ kpi hcevtu' lp" xkqrvkqp" qh' yj g" hgf gtcn\ Eqpukwqkp0" **People* v. *Barnett*, *supra.*" 39" Ecrf6j " cv' r r 0' 339: /339; 0" *88+ F ghgpf cpv' hpcmf { " eqpv\ pf u." lp" y q" eqpenwukt { " ugpv\ pegu. yj cv' ugevkqp" 3; 205." hcevt " *h+." ko r tqr gtn\ " rko ku' eqpukf gtcv\ kqp qh' o kki cv\ kpi " hcevtu' 0' hcevt " *h+ r tqxkf gu" yj cv' yj g" lwt { " o c { eqpukf gt " oY j g\ j gt " qt " pqv' yj g" qhgtgug" y cu" eqo o kwgf " wpf gt ekteuo ucpegu" y j lej " yj g" f ghgpf cpv' tgcupcdn\ { " dgrk\ gxf " vq dg" c" o qtcn\ lwukhlec\ kqp" qt " gz\ v\ pwc\ kqp" hqt " j ku" eqpf wev\ 0' F ghgpf cpv\ o kpv\ kpu' yj g' lwt { " uj qwf " dg' r gto kwgf " vq" eqpukf gt

c' f ghgpf cpv\ i " unreasonable" dgrk\ gh" lp" yj g" gz\ k\ v\ peg" qh' uqo g o qtcn\ lwukhlec\ kqp" qt " gz\ v\ pwc\ kqp" qh' yj g" etko g' 0' k' j ku' qy p ecug. " j g" ucwgu. " yj g" lwt { " uj qwf " j cxg" dggp" r gto kwgf " vq eqpukf gt " gxgp" j ku' wpt gcuqpcdn\ dgrk\ gh' yj cv' F gvge\ xg' Y knco u j cf " ugv\ j ko " wr " hqt' r tqugewkqp" lp" yj g" Ectr gpvgt " tqddgt { " cpf cuucwn' 0' P q" ko r tqr gt " rko kcv\ kqp" qp" yj g" lwt { u) " eqpukf gtcv\ kqp qh' o kki cv\ kpi " gxfk gpeg" qeewtu' d { " xktwg" qh' yj g" y qtf kpi " qh hcevt " *h+ " yj g" o kki cv\ kpi " xcnwg" qh' f ghgpf cpv\ i " wpt gcuqpcdn\ dgrk\ gh" lp" o qtcn\ lwukhlec\ kqp" hqt. " qt " lp" gz\ v\ pwc\ kqp" qh' yj g' etko g o c { " dg" eqpukf gt gf " r wtucpv\q " ugevkqp" 3; 205." hcevt " *m+ " cpf wpf gt " yj g' kpv\ t wevkqp. " cu' i kxgp" lp" yj g' r t guggv\ ecug. " yj cv' yj g' lwt { o c { " eqpukf gt " oY } cp { " qv\ j gt " ekteuo ucpeg" y j lej " gz\ v\ pwc\ v\ yj g i txcv\ { " qh' yj g" etko g" gxgp" yj qwi j " k' ku' pqv' c' rgi cni' gzewug" hqt yj g' etko g' 0' o " **People* v. *Lang*." *supra.*" 6; ' Ecrf6f " cv' r 032590-

6. Alleged violation of international law

F ghgpf cpv' eqpv\ p f u' yj cv' yj g' xkqrvkqp' j g' j cu' cni g' f " qh' ucvg cpf hgf gtcn\ eqpukwqkp cni r\ y / r ct v\ ewcni\ { " yj g' tki j v\ q' hck\ t' kn cpf " vq" dg' ht gg' ht qo " kpxkf kqwu' f kuetko kpcv\ kqp" ko r qugf " d { " yj g ucvg" qp" yj g' dcuku' qh' t' ceg/ cnuq' eqpukwgf " xkqrvkqp' qh' i' xctkqwu kpv\ t' pcv\ kpcn\ i' t' gc\ v\ u' cpf " qv\ j gt " go dqf ko gpw' qh' i' kpv\ t' pcv\ kpcn r\ y 0' Y g' pggf " pqv' eqpukf gt " yj g" cr r r\ ecdrk\ { " qh' yj qug' t' gc\ v\ u' cpf " r\ y u' vq" yj ku' cr r gcn" dgecwug" f ghgpf cpv' j cu" hckgf " vq gucdri\ j " yj g' r tgo kuq' yj cv' j ku' t' kn\ kpxqkxgf " xkqrvkqp' qh' ucvg cpf hgf gtcn\ eqpukwqkp cni r\ y. " qt " yj cv' j ku' t' ki j u' v\ q' f wg' r treguu qh' r\ y " cpf " vq" dg' ht gg' ht qo " kpxkf kqwu' f kuetko kpcv\ kqp" qp" yj g dcuku' qh' t' ceg" j cxg" dggp " xkqrvkqp' 0' Cmj qwi j " j g" eqpv\ pf u' yj cv kpv\ t' pcv\ kpcn\ r\ y " qp" yj g' kuwg" qh' t' celn\ f kuetko kpcv\ kqp" y qwf f khtg" ht qo " qw" gs wcn' r tqv\ ekqp" cpf " Gki j y " Co gpf o gpv lwtur twf gpeg. " lp" yj cv' kpv\ t' pcv\ kpcn\ r\ y " y qwf " r gto k' yj g' wug qh' yj g' hkp' f " qh' i' uc\ v\ k\ ecni\ gxfk gpeg" t' glgevgf " d { " yj g' Wp\ ksf " Ucv\ gu Uwr tgo g" Eqwv\ lp" *McCleskey* v. *Kemp*" *3; ; 9+"6: 3" WLU049; J329" UE\ 0' 3978." ; 7" NCGf 0f " 484_ " vq" f go qpwtcv\ yj cv' yj g f gcj " r gpcn\ { " ku' ko r qugf " lp" c' t' cekm\ { " f kuetko kpcv\ t { " o c ppgt. j g" r tqxkf gu" pq" cwj qt\ k\ { " lp" uwr r qtv' qh' yj ku' r tqr qukkqp0 F ghgpf cpv' lp" qv\ j gt " tgur gew' f qgu' pqv' cr r gct " vq" eqpv\ pf " yj cv kpv\ t' pcv\ kpcn\ r\ y " y qwf " eqpf go p" c" etko kpcn\ t' kn\ yj cv' j cf dggp" eqpf wevgf " lp" c" o c ppgt " eqpukwgpv' y kj " f wg' r treguu" qh r\ y " qt " qv\ j gt " hgf gtcn\ cpf " Ecrk\ qt\ p\ k' eqpukwqkp cni r\ tqxkukpu. cpf " j g" egtv\ kn\ { " f qgu' pqv' ug' v' qw' lp" y j cv' o c ppgt " yj g' v\ y q dqf kgu' qh' r\ y " o c { " f khtg0' Ceeqt f kpi n\ . } ku' erko " ku' t' glgevgf 0 *1056

7. Alleged cumulative prejudice

F ghgpf cpv' eqpv\ p f u' yj g' ewo wv\ v\ xg' r tglw\ keln\ gh' g' ev' qh' yj g xctkqwu" gttqtu" j g" j cu" tckugf " qp" cr r gcn\ tgs vkt gu" tgxgtucn qh' yj g" i wkn\ cpf " r gpcn\ { " lwf i o gpw' 0' Y g" j cxg" tglgevgf " j ku cuuki po gpw' qh' gttqt. " y kj " rko kwgf " gzev\ v\ kpu" lp" y j lej " y g

hqwpl "vj g"gttqt "vq"dg"pqpr tglwflkelcrl'Eqpukf gtgf "vqi gjv gt. cp{ "gttqtu" y gtg" pqpr tglwflkelcrl' Eqpvtct{ "vq" f ghgpf cpvju eqpvpgvqrp."j ku"vklcrl'y cu"pqv'hwf co gpvcml{ "wphkkt."gxgp"kh y g"eqpukf gt "vj g"ewo wvkvxg"ko r cev'qh'vj g"hg'y "gttqtu"vj cv qeewtfg 0

III. Disposition

Y g'chlko 'vj g'lwfi o gpv'kp'ku'gpvktgv{0

O qum"l0"Mgppctf . "l0"Dczvgt. "l0"Y gtf gi ct. "l0"cpf "Ej kp. "l0 eqpewtfg 0

BROWN, J.,

Eqpewtkpi O'Keqpew"kp"vj g'lwfi o gpv'vq"chlko "f ghgpf cpvju eqpxlevqrp"cpf "r gpcml{0

Ky tkg'ugr ctcvgn{ 'dgecwug'Ks wguvqrp'vj g'eqpenwukrp'vj cvF kcpq Lgnkpu"j cf " cr r ctgppv'cwj qtkv{ "vq" eqpugpv'vq" c"ugctej "qh f ghgpf cpvju'dtlghecuq0"O cl0qr p0"ante."cv'r 0; 98/; : 20-

Kp"United States v. Matlock"*3; 96-#637"WLU0386"; 6"UEv0 ; : : "5; "NGf 04f"464_"*Matlock+."vj g'Wpkqgf "Ucvgu"Uwr tgo g Eqwtv'cmqy gf "vj cv'oeqpvqrp'qh'qpg'y j q'r quuguu"eqo o qp cwj qtkv{ "qxgt" r tgo kugu"qt" ghggu"ku"xcrlf "cu"ci cklpuv'vj g cdugpv."pqpeqpvqrp" r gtuqp"y kj "y j qo "vj cv'cwj qtkv{ "ku uj ctgf 0"*Id."cv'r 0'392"; 6"UEv0'cv'r 0'; ; 5_0"Ceeqtf kpi n{. vj g'r tqugewkqp"o c{ "lwukh{ "c"y cttepvrguu"ugctej "d{ "uj qy kpi 0vj cv'r gto kuukp"vq"ugctej "y cu"qdvclpgf "ltqo "c"vj kf "r ctv{ y j q'r quuguugf"eqo o qp"cwj qtkv{ "qxgt"qt"qvj gt"uwHlekgpv tgrvklpuj kr "vq"vj g'r tgo kugu'qt"ghggu"lqwi j vq'dg'kpur gevff 0 *Id."cv'r 0'393"; 6"UEv0'cv'r 0'; ; 5_0"0Vj g"cwj qtkv{ "y j lej lwukhku"vj g'vj kf/r ctv{ 'eqpugpv'f qgu'pqv'ltguv'wr qp"vj g'rcy "qh r tqr gtv{ "00]ekcvkqp_"dwt'gusu"tcy gt"qp"o wwen'wug'qh'vj g r tqr gtv{ "d{ "r gtuqpu"i gpgtcm{ "j cxkpi "lqkpv'ceeguu"qt"eqpvtqn hqt"o quv'r wtr qugu."uq"vj cv'ks'ku"tgcupcdrg"vq"tgeqi pk g"vj cv cp{ "qh'vj g'eq/kp'j cdkepvw'j cu'vj g'tki j vq'r gto kv'vj g'kpur gevqrp kp"j ku"qy p"tki j v'cpf "vj cv'vj g"qvj gtu"j cxg"cuwo gf "vj g"tkum vj cv'qpg"qh'vj gkt"pwo dgt"o ki j v'r gto kv'vj g"eqo o qp"ctgc"vq dg'ugctej gf 0"*Id."cv'r 0'394."hp09"; 5"UEv0'cv'r 0'; ; 5_0"0Vj g dwtf gp"qh'gucdrkuj kpi "vj cv'eqo o qp"cwj qtkv{ 'tguv'wr qp"vj g Ucvq0"*Illinois v. Rodriguez"*3; ; 2-#6; 9"WLU0399."3: 3"]332 UEv049; 5."49; 9."333"NGf 04f "36: 0-

Kp"Illinois v. Rodriguez."supra."6; 9"WLU0399."vj g'j ki j "eqwtv hwtvj gt'cmqy gf "vj cv'c"vj kf "r ctv{ 'eqpugpv'ugctej "ku'xcrlf "gxgp kh'vj g'vj kf "r ctv{ "f kf" *1057 "pqv'j cxg"cewcn'cwj qtkv{ "cu rqi "cu"0"vj g'hcew'cxkcrdrq"vq"vj g"qHhleg"cv'vj g"o qo gpv'00]y qwf "0y cttepv'c"o cp'qh'tgcupcdrg'ecwvqrp'kp'vj g'dgrgh'0

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Cu"vj g"j ki j "eqwtv"kp"Rodriguez"ecwvklpgf ."0]g_xgp"y j gp vj g" kpxkcvkqp"]vq" g'pvt "vj g" r tgo kugu" ku" ceeqo r cklpgf d{ "cp" g'zr rckv' cuugvklp" vj cv' vj g" r gtuqp" rkgu" vj gtg." vj g uwtqwpf kpi "ektewo ucpegu'eqwrf "eqpegkxcdn{ "dg"uwej "vj cv'c tgcupcdrg"r gtuqp"y qwf "f qwdv'ku"v wj "cpf "pqv'cev'wr qp"kv y kj qw'hwv'j gt"lps vkt {00"*Illinois v. Rodriguez."supra."6; 9 WLU0'cv'r 0'3: : "332"UEv0'cv'r 0'4: 23_0"Ceeqtf kpi n{."vj g r tqugewkqp)"dwtf gp'oeppqv'dg"o gv'k'ci gpw. hcegf "y kj "cp co dki wqwu'ukwcvkqp."pgxgtvj g'rguu"r tqeggf "y kj qw"o cnkpi hwtvj gt"lps vkt {0' K'vj g"ci gpw" f q"pqv'rgctp"gpqwi j . "k"vj g ektewo ucpegu'o cng'kv'wpergt"y j gvj gt"vj g'r tqr gtv{ "cdqvw'vq dg"ugctej gf "ku"uwdlgev'vq"o wwcrl'wug'd{ "vj g"r gtuqp"i kxkpi eqpugpv."vj gp"y cttepvrguu"gpv{ "ku"vprcy hwt'without further inquiry0]Ekcvcqp00"*United States v. Whitfield."supra."5; H0f'cv'r 03297."s vqkpi "Illinois v. Rodriguez."supra."6; 9"WLU0 cv'r 0'3: : /3: ; "332"UEv0'cv'r 0'4: 23/4: 24_0-

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no such distinction, and its “assumption of the risk” rationale is equally applicable to personal property. *1058 In fact, the court relied on *Frazier v. Cupp* (1969) 394 U.S. 731 [89 S.Ct. 1420, 22 L.Ed.2d 684] in formulating its third party consent rationale. (*Matlock, supra*, 415 U.S. at pp. 170-171 [94 S.Ct. at pp. 992-993].) *Frazier* involved a duffel bag “used jointly” by the defendant and his cousin. (*Matlock, supra*, at p. 170 [94 S.Ct. at pp. 992-993].) The cousin consented to a search, which the court upheld because “joint use of the bag rendered the cousin's authority to consent to its search clear.... By allowing the cousin the use of the bag, and by leaving it in his house, *Frazier* was held to have assumed the risk that his cousin would allow someone else to look inside. [Citation.]” (*Id.* at p. 171 [94 S.Ct. at p. 993].) If mutual use is unnecessary for a search of personal property, a court would have no basis for assessing whether the defendant assumed the risk of a third party consent. A contrary conclusion would also be inconsistent with the theory that one's reasonable expectation of privacy is diminished to the extent another has access to and authority over the property.

In the absence of any evidence defendant entrusted the briefcase to his sister, it is impossible to reasonably find he ceded any privacy interest or control over its contents. The majority's discussion as to what the officer could have inferred from the circumstances is strictly speculation. (Maj. opn., *ante*, at p. 978.) The familial connection does not, in itself, establish the “other sufficient relationship” required under *Matlock*. (*Matlock, supra*, 415 U.S. at p. 171 [94 S.Ct. at p. 993].) “Relationships which give rise to a presumption of control of property include parent-child relationships and husband-wife relationships. [Citations.] In contrast, a simple co-tenant relationship does not create a presumption of control and actual access would have to be shown. [Citations.] The difference [is that the former relationships] raise[] a presumption about the parties' reasonable expectations of privacy in relation to each other in spaces typically perceived as private in a co-tenant relationship. [Citation.]” (*U.S. v. Rith* (10th Cir. 1999) 164 F.3d 1323, 1330, fn. omitted.) Adult brothers and sisters are more akin to cotenants in this regard,

at least absent any contrary evidence. Moreover, from both his conduct and his subsequent testimony, the officer plainly did not draw any inference of common authority or mutual use from the fact Diane Jenkins retrieved defendant's briefcase. He simply asked whether any of defendant's belongings were at the residence and took the briefcase without further inquiry when she handed it to him. A finding of valid third party consent on these facts flies in the face of *Matlock* and *Rodriguez* as well as numerous federal court decisions applying their principles.

I would not, however, invalidate the search. The trial court articulated several grounds for finding the officer's actions proper, the most viable of which I find to be inevitable discovery. Indeed, but for the intervention of *1059 defendant's sister, the briefcase would have been seized and opened pursuant to the warrant issued the previous day. That warrant authorized a search of both defendant's residence and his vehicles, including the Jeep, for numerous items most of which could reasonably be located in such a container. Given that circumstance, the officer could have readily obtained a supplemental warrant and testified he would have done so had Diane Jenkins refused to surrender the briefcase. Efforts to locate the murder weapon and identify other possible coconspirators were ongoing. The facts already known clearly would have established probable cause. Thus, this was not a situation in which the police would have had to exploit Detective Holder's initial illegality in searching the briefcase without consent. (See generally *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 [83 S.Ct. 407, 417-418, 9 L.Ed.2d 441].) As the Attorney General notes, “ ‘there is not a judge in the world that would not sign a warrant with these facts.’ ” (*People v. McDowell* (1988) 46 Cal.3d 551, 564 [250 Cal.Rptr. 530, 763 P.2d 1269].)

Appellant's petition for a rehearing was denied June 28, 2000, and the opinion was modified to read as printed above.

*1060

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 14, 2020, I served the:

- **County of San Diego's Comments on the Draft Proposed Decision filed August 14, 2020**

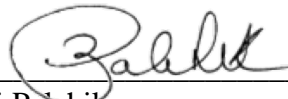
Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 14, 2020 at Sacramento, California.



Heidi Patchik

Commission on State Mandates

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Last Updated: 8/4/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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Exhibit G

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ASSISTANT AUDITOR-CONTROLLERS

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August 14, 2020

Via Drop Box

Ms. Heather Halsey
Executive Director
Commission on State Mandates
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Dear Ms. Halsey:

**RESPONSE TO THE COMMISSION ON STATE MANDATE'S
DRAFT PROPOSED DECISION ON
SB 1437 TEST CLAIM FILED ON DECEMBER 31, 2019
19-TC-02**

The County of Los Angeles ("Claimant") submits its response to the Commission on State Mandate's Draft Proposed Decision on the *SB 1437, Accomplice Liability for Felony Murder* Test Claim.

If you have any questions please call me, or your staff may contact Fernando Lemus at (213) 974-0324 or via e-mail at flemus@auditor.lacounty.gov.

Very truly yours,

Arlene Barrera
Auditor-Controller

AB:OV:CY:EB:EW:FL

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**RESPONSE TO THE COMMISSION ON STATE MANDATE'S
DRAFT PROPOSED DECISION ON
SB 1437 TEST CLAIM FILED ON DECEMBER 31, 2019
19-TC-02**

The Claimant respectfully disagrees with the Commission on State Mandate's draft proposed decision to deny Test Claim 19-TC-02. First, the Commission's assertion that the Test Claim is not reimbursable because it eliminated a crime is without merit. Senate Bill (SB) 1437 amended Penal Code sections 188 and 189 to limit the application of two legal theories, the felony-murder rule and the natural and probable consequences doctrine; it did not eliminate any crime according to Government Code section 175560(g). Furthermore, SB 1437 added Penal Code section 1170.95, which sets forth a new post-conviction proceeding that allows convicted individuals to petition the court to vacate their murder convictions and be resentenced on the remaining counts. The Commission incorrectly asserts that Penal Code section 1170.95 invokes a right to counsel, although neither case law nor the Constitution recognizes a right to counsel in post-conviction proceedings. As such, SB 1437 imposes a reimbursable State mandate on the County and, therefore, the Test Claim should be granted.

There is No Right to Counsel in the Post-Conviction Proceeding Created By Penal Code Section 1170.95.

The Commission's draft proposed decision to deny reimbursement in these post-conviction proceedings is without constitutional authority and defies precedent. The Commission's proposed decision relies on the petitioner's constitutional right to counsel in denying Los Angeles County's claim. (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815 *citing Gideon v. Wainwright* (1963) 372 U.S. 335.) Los Angeles County acknowledges the right to counsel and does not seek reimbursement for costs associated with the prosecution and defense during a case that is not yet final; in other words, a pending criminal proceeding where a person has yet to be convicted. However, the Commission arrives at the conclusion that the right to counsel applies to post-conviction proceedings under Penal Code section 1170.95 and, thus, concludes that the Test Claim fails because the Test Claim statutes do not impose additional costs within the meaning of Article XIII B, Section 6 of the California Constitution. However, the Commission fails to cite any authority for the right to counsel for individuals whose cases have long concluded and are now considered final and who choose to file a petition under Penal Code section 1170.95.

The Legislature passed SB 1437 and thereby created a post-conviction proceeding with a petition process that allows convicted individuals whose cases were long considered final to request the court to vacate the murder convictions and to resentence the petitioners on the remaining counts. Under this new petition process, a person convicted of felony murder or murder under a natural and probable consequences theory may petition the sentencing court to vacate the murder conviction and resentence the person on any remaining counts if certain conditions are met (Penal Code Section 1170.95(a)). If the petitioner makes a prima facie showing of entitlement to relief, the court must appoint counsel upon request, issue an order to show cause and, absent a waiver and

stipulation by the parties, hold a hearing to determine whether to vacate the murder conviction, recall the sentence, and resentence the petitioner. (Penal Code [§ 1170.95, subds. \(c\) & \(d\)\(1\).](#))

Los Angeles County acknowledges the right to counsel and does not seek reimbursement for costs associated with the prosecution and defense during a case that is not yet final; in other words, a pending criminal proceeding where a person has yet to be convicted. However, the Penal Code amendments from SB 1437 compel the counties to provide representation to individuals in these new post-conviction proceedings, although no such right to counsel exists. It is important to note that the changes made by SB 1437 applies to individuals whose cases are not yet final as well as to those convicted individuals whose cases have been finalized. *People v. Martinez* 31 Cal.App.5th 719, 727. The right to counsel “applies at all critical stages of a ***criminal proceeding*** (emphasis added) in which the substantial rights of a defendant are at stake.” (*Mempa v. Rhay* (1967) 389 U.S. 128, 134: and Government Code Section 27706.) Clearly, individuals whose cases are not yet final have a right to counsel as they are still engaged with the trial court in a criminal proceeding. However, those convicted individuals are in a different procedural posture where there is no Constitutional right to counsel.

Many of the petitions filed under Penal Code section 1170.95 in Los Angeles County are initiated by prisoners whose court cases have concluded. The County asserts that these costs are reimbursable since the statute has added duties beyond what is required by the Constitution, as there is no right to counsel in post-conviction proceedings. Penal Code section 1170.95 imposes costs mandated by the State since public defenders and district attorneys are now obligated under this new statute to provide post-conviction representation and a post-conviction proceeding, respectively. The U.S. Supreme Court has stated that “the right to appointed counsel extends to the first appeal of right, and no further.” *Pennsylvania v. Finley* (1987) 487 U.S. 551, 555. Most importantly, the Court declined to extend the right to counsel to post-conviction proceedings. *Id.* Criminal proceedings have concluded and convictions are final “when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.” [Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 \(1994\)](#). See also [Clay v. United States, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 \(2003\)](#).

Furthermore, a recent California Court of Appeal ruling bolsters the County’s position that the process created by Penal Code 1170.95 is in fact a post-conviction proceeding. In *People v. Johns* (2020) 50 Cal.App.5th 46, the district attorney sought to invalidate SB 1437 as violating the victim’s right to the finality of criminal convictions under Marsy’s Law. In making this argument, the district attorney was asserting that Penal Code section 1170.95 proceedings sought to revisit murder convictions and sentences and that Marsy’s Law precluded the Legislature from passing any post-conviction proceeding absent a two-thirds majority of each house of the Legislature. The *Johns* Court rejected this assertion and refused to interpret Marsy’s law so broadly as to find that voters intended to impede the Legislature from creating new *post-conviction* proceedings. *Id.* at 69. (emphasis added)

What the Commission describes as “requirements” on the County are clearly additional burdens imposed by the California Legislature on local government by imposing new duties on county district attorneys and public defenders during these post-conviction proceedings. Los Angeles County has faced significant increased burdens participating in these post-conviction hearings and seeks reimbursement for these additional costs. (See *Declaration of Brock Lunsford, Declaration of Harvey Sherman, and Declaration of Sung Lee.*)

SB 1437 Did Not Eliminate A Crime But Assuming Arguendo it Did, the Test Claim is Still An Unfunded State Mandate Under Article XIII, Section 6 of the California Constitution

Contrary to the Draft Proposed Decision, SB 1437 did not eliminate a crime or an infraction. The Test Claim statute modified Penal Code sections 188 and 189 by limiting the application of the felony-murder rule under which a defendant could be convicted of first-degree murder, and it eliminated the natural and probable consequences theory as it pertains to murder. Felony murder and natural and probable consequences are not crimes; they are theories under which a defendant could be found guilty for the crime of murder. If a theory could be deemed a crime, then jurors would have to unanimously agree on the theory – but this is not the case. “It is settled, however that ‘in a prosecution for first degree murder it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first-degree murder as that offense is defined by statute.’” (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024, internal citations omitted.) Finally, SB 1437 did not change the penalty for murder. It remains the same as it did prior to SB 1437 and is found in Penal Code section 190.

Assuming that SB 1437 eliminated a crime, which the County contends it did not, the post-conviction proceeding created in Penal Code 1170.95 does not directly relate to the enforcement of any crime. Government Code section 17556(g) provides that the Commission “shall not find costs mandated by the state” when the “statute or executive order created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction.” The Commission’s interpretation of Government Code section 17556(g) ignores the latter part of this exception, which makes clear that it is only applicable to the *portion of the statute directly relating to the enforcement of the crime or infraction*. The post-conviction proceeding created under Penal Code section 1170.95 is separate and apart from the pre-conviction enforcement for the crime of murder.

Penal Code section 1170.95 is a novel, legislatively created post-conviction remedy designed to allow defendants whose cases are final and whose appellate rights have expired to petition the court for a hearing to vacate their conviction for murder and be resentenced on any remaining counts. It is not a simple motion for resentencing, rather it is a complicated post-conviction procedure more akin to the civil commitment proceedings under the Sexually Violent Predators Act. It is a multi-stage proceeding, involving an initial review to determine the facial sufficiency of the petition and two additional court reviews before an order to show cause may issue. “The nature and scope

of section 1170.95, subdivision (c)'s second prima facie review, made following a round of briefing by the prosecutor and counsel for petitioner, is equivalent to the familiar decision-making process before issuance of an order to show cause in habeas corpus proceedings, which typically follows an informal response to the habeas petition by the Attorney General and a reply to the informal response by the petitioner.” (*People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted.) All of this amounts to a post-conviction fact-finding analysis to determine if an individual is entitled to relief. It has absolutely nothing to do with enforcement of the prohibition against murder.

CONCLUSION

The County urges the Commission to reverse its Draft Proposed Decision in light of the above-stated arguments and authority, and find that the Test Claim imposes a reimbursable State mandate on the County within the meaning of Article XIII B, section 6 of the California Constitution without exception.

DECLARATION OF BROCK LUNSFORD

IN SUPPORT OF COUNTY OF LOS ANGELES COUNTY TEST CLAIM

ACCOMPLICE LIABILITY FOR FELONY MURDER, 19-TC-02

Stats 2018 – Chapter 1015 § 4 (SB 1437)

Penal Code section 1170.95

I, BROCK LUNSFORD, declare as follows:

1. I make this declaration based upon my own personal knowledge, except for matters expressly set forth herein on information and belief, and as to those matters I believe them to be true, and if called upon to testify, I could and would competently testify to the matters set forth herein.
2. I am a member of the Bar of the State of California. I have been licensed to practice law in California since 1999.
3. I have been employed by the Law Offices of the Los Angeles County District Attorney since 2000. I am currently the Deputy-in-Charge of the Murder Resentencing Unit. I have worked as a Deputy District Attorney continuously since 2000 as a trial attorney and as a supervising attorney.
4. I have read and I am familiar with Penal Code section 1170.95 which was added to the Penal Code by SB 1437 (Stats. 2018, ch. 1015 § 4), effective January 1, 2019.
5. In December 2018, I was approached by District Attorney management to serve as our office's contact person regarding SB 1437 and Penal Code section 1170.95.
6. In December 2018, I was asked to put together several different options regarding how the District Attorney's Office could handle the likely influx of petitions filed pursuant to Penal Code section 1170.95.
7. After January 1, 2019, I was responsible for receiving and forwarding 1170.95 petitions received by our office. I also worked with a paralegal in our office to

create a database to track the 1170.95 petitions for all of Los Angeles County. That database is still for utilized for the same purpose.

8. I attended meetings with representatives from the Los Angeles County Public Defender's Office, the Los Angeles County Alternate Public Defender's Office, the Los Angeles County Bar Association I.C.D.A. Program, the Los Angeles County Superior Court, and the Los Angeles County Court Clerk's Office. These meetings were designed to address questions about the handling and processing of 1170.95 petitions.
9. I participated in organizational meetings and teleconferences within my office to develop methodologies and responses for personnel within the District Attorney's office as they handle various aspects of the 1170.95 petition process.
10. The new 1170.95 process includes receiving a petition from various sources; obtaining critical documents such as trial transcripts, jury instructions, jury verdicts, jury questions, and Court of Appeal opinions from the Superior Court, the Court of Appeal and the Attorney General's office; reviewing these critical documents which can exceed 1,000 pages for a single case; filing Responses to the petition; utilizing District Attorney Investigators to locate victim's family; utilizing District Attorney Victim Advocates to contact victim's family; meeting with victim's family to discuss this new process and explain that the murder conviction that occurred long ago could now be overturned due to the new law; litigating factual and legal issues in the Superior Court.
11. Since Penal Code section 1170.95 includes a provision in subsection (d)(3), "The prosecutor and the petition may rely on the record of conviction or offer new or additional evidence to meet their respective burdens," it is likely that the entire case may need to be reviewed and reinvestigated and a proceeding much like a new trial may be necessary.
12. This process is followed by members of the District Attorney's Office who

originally tried the murder case and are still available to handle the 1170.95 petition. This process is also followed by members of the Murder Resentencing Unit.

13. In March 2019, in response to the rapidly increasing number of 1170.95 petitions, the District Attorney's Office created the Murder Resentencing Unit to handle many of the 1170.95 petitions within our office.
14. The Murder Resentencing Unit includes one deputy in charge, six experienced deputy district attorneys, four paralegals and one LOSA II. The personnel in this unit work on 1170.95 petitions on a full-time basis.
15. In March 2019, I was named the Deputy in Charge of the Murder Resentencing Unit. In this capacity, I supervise the six attorneys in the unit while also reviewing critical documents and writing responses to certain petitions. I work closely with the two paralegals in my unit to identify cases that require critical documents and then analyze those documents to determine the merits of the petitions. I work with attorneys both in my unit and not in my unit to acquire critical documents. I consult with attorneys in my unit and not in my unit to assist them with legal and strategic issues in their petitions. I also meet with members of the Executive Management in the District Attorney's Office to provide updates on current issues surrounding 1170.95 petitions and answer any questions they may have.
16. In March 2019, I provided office-wide training regarding the 1170.95 petition process and our intended plan of action.
17. The California Department of Corrections and Rehabilitation has identified 8,445 inmates who are serving sentences for murder who were committed from Los Angeles County.
18. The California Department of Corrections and Rehabilitation has identified 1,259 parolees who have already served their sentences for murder who were committed from Los Angeles County.

19. Based on those numbers, there are potentially 9,704 petitions that could be filed in Los Angeles County Superior Court pursuant to Penal Code section 1170.95 that would be handled by attorneys employed by the District Attorney's Office.
20. As of July 2020, the Los Angeles County District Attorney's Office has already received 2,036 petitions. The new law has only been effective for nineteen months.
21. The handling of these petitions is incredibly time consuming even for a petition that does not fall within the language of the new statute and is, thus, meritless.
22. I estimate that attorneys can spend at least 20 hours per case obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time because time has resulted in loss of records that will be used to establish the firm basis for the petition. Some cases require significantly less time because the petition is facially meritless.

I have personal knowledge of the foregoing facts and information presented in this Test Claim and, if so required, I could and would testify to the statements made herein.

I declare the foregoing to be true and correct under penalty of perjury.

Executed this 29th of July 2020, at Los Angeles, California.



Brock Lunsford

SECTION 6

DECLARATION OF HARVEY SHERMAN

ACCOMPLICE LIABILITY FOR FELONY MURDER

**Senate Bill 1437: Chapter 1015, Statutes of 2018
Amending Sections 188 and 189 of the Penal Code
Adding Section 1170.95 to the Penal Code, Relating to Felony Murder**

I, HARVEY SHERMAN, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

1. I have been employed by the Law Offices of the Los Angeles County Public Defender since 1994. I served as the Deputy-in-Charge of Public Integrity Assurance Section from January 8, 2019 through May 26, 2020. The Public Integrity Assurance Section was tasked with managing and litigating all Public Defender Penal Code section 1170.95 petitions. I have worked as a Deputy Public Defender continuously since 1994 as a trial attorney, a litigation support attorney, and as a supervising attorney.
2. I have read and I am familiar with Penal Code section 1170.95, the specific section of the subject legislation containing the mandated activities. This section which was added to the Penal Code by SB 1437 (Stats. 2018, ch. 1015 § 4), became effective on January 1, 2019.
3. In October of 2018, I was approached by Public Defender management to implement a plan to identify cases and supervise a team of attorneys to handle the likely influx of cases falling within the scope of the Penal Code section 1170.95.
4. After the passage of SB 1437, I requested additional information from the California Department of Corrections and Rehabilitation for data related to sentenced and paroled individuals who were convicted of murder in the County of Los Angeles. That request was then expanded in coordination with the California Public Defenders Association to include all counties.
5. I participated in organizational meetings and teleconferences to develop methodologies and forms to assist inmates and parolees through a new petition process.
6. This new process includes filing a petition in the Superior Court, obtaining critical documents, filing replies to prosecution responses, meeting with clients who are serving life sentences in state prison, reviewing and detailing trial transcripts, jury instructions, jury verdicts, jury questions, and Court of Appeal opinions, litigating factual and legal issues in the superior court.

7. The reviewing, writing, and litigation are more closely akin to developing a writ of habeas corpus.
8. Since Penal Code section 1170.95 includes a provision in subsection (d)(3), "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens," it is likely that the entire case would need to be reinvestigated and a proceeding more like a new trial may be necessary.
9. The newly-mandated activities include:
 - a. Preparation for and attendance at the sentencing hearing by indigent defense counsel and staff. In preparing for and appearing at the sentencing hearing, counsel may now be required to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators and draft legal briefs for presentation to the court;
 - b. Assignment of investigators to locate and interview anyone that can provide new evidence not previously identified prior to the trial or plea;
 - c. Retention and utilization of experts, which may include, without limitation:
 - i. False and fabricated statement experts to provide opinion evidence regarding the coercive effect and voluntariness of statements made by petitioners in parole hearings;
 - ii. Forensic experts to test or retest physical evidence that was not tested;
 - iii. A gang expert for those clients that may be entrenched in gang life; and
 - iv. Ballistics experts to examine and/or retest gun, casing, and bullet evidence.
 - v. Psychological experts to evaluate and opine regarding the intellectual capabilities and maturity of clients in relation to the "reckless indifference" balancing to be done by the court.
 - d. Attendance and participation of counsel in training necessary or a competent representation of the clients.
10. The California Department of Corrections and Rehabilitation identified 8,445 inmates who are serving sentences for murder who were committed from Los Angeles County.
11. The California Department of Corrections and Rehabilitation identified 1,259 parolees who have already served their sentences for murder who were committed from Los Angeles County.

12. A subset of these inmates and parolees are former Public Defender clients. The number of former clients is not possible to establish with certainty due to the lack of historically accurate date, other projects undertaken by the Public Defender tend to estimate representation at about 50% to 60% of the inmate and parolee population. Data related to Public Defender representation from 1996 through present and those identified through document review have thus far identified 1,834 possible petitioner that will require some form of review. Cases tried prior to 1996, will require archive review to determine the representation type and further review to identify cases that may fall within SB 1437. The Public Defender will need to continue efforts to identify Public Defender clients and then further screen individual cases for the application of SB 1437.
13. Since SB 1437 includes a provision requiring service on the Public Defender or the trial counsel, the Public Defender has received 898 copies of petitions. The clear majority of these petitioners were not former Public Defender clients. The processing of these petitions to identify clients is time consuming even for petitioner who will not be represented by the Public Defender.
14. Since January 1, 2019, all but four petitions have been filed by inmates and parolees representing themselves.
15. The Public Defender has assigned 330 cases for review and action since January 2, 2019. Nine (9) petitions have been granted after evidentiary hearings. Forty-five (45) petitions have been denied after a *prima facie* hearing. Two (6) petitions have been denied after evidentiary hearings. One-hundred two (128) petitions have been denied summarily.
16. I estimate that attorney preparation for hearings will take at least 25 hours per case, excluding visitation with clients and additional investigation hours. Some cases will require significantly more research and development time because time has resulted in loss of records that will be used to establish the firm basis for the petition.
17. I estimate that it will likely take 4 to 5 hours of research and review of cases tried prior to 1996 to establish the attorney type and gather documents pertaining to the eligibility.
18. Public Defender's Office is not aware of any legislatively determined mandate related to SB 1437, Chapter 1015, Statutes of 2018.
19. I have examined the SB 1437 test claim prepared by the Claimant and based on my personal knowledge, information, and belief, the costs incurred in this Test Claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly computed and are "costs mandated by the State", as defined in Government Code §17514:

“ . . . any increased costs which a local agency is required to incur after July

1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution.”

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein.

I declare the foregoing to be true and correct under penalty of perjury.

Executed this 13th of August 2020, at Los Angeles, California.



Harvey Sherman

SECTION 6

DECLARATION OF SUNG LEE

ACCOMPLICE LIABILITY FOR FELONY MURDER

Senate Bill 1437: Chapter 1015, Statutes of 2018

Amending Sections 188 and 189 of the Penal Code

Adding Section 1170.95 to the Penal Code, Relating to Felony Murder

I, Sung Lee, declare under the penalty of perjury under the laws of the State of California that the following is true and correct based on my personal knowledge, information, and belief:

- 1) I am a Departmental Finance Manager, who oversees and manages the Fiscal/Budget services for the Los Angeles County Public Defender's Office. I am responsible for the complete and timely recovery of costs mandated by the State.
- 2) SB 1437, Chapter 1015, Statutes of 2018, added Penal Code Section 1170.95. specifically, Penal Code § 1170.95 (a), (b), and (c), imposed the following state mandated activities and costs on the Public Defender:
 - (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
 - (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
 - (2) The petitioner was convicted of first degree or second-degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second-degree murder.
 - (3) The petitioner could not be convicted of first or second-degree murder because of changes to Section 188 or 189 made effective January 1, 2019.
 - (b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

- (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
 - (B) The superior court case number and year of the petitioner's conviction.
 - (C) Whether the petitioner requests the appointment of counsel.
- (c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.
- (d) Preparation for and attendance at the sentencing hearing by indigent defense counsel and staff. In preparing for and appearing at the sentencing hearing, counsel may be required to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators and draft legal briefs for presentation to the court; and.
- (e) Attendance and participation of counsel in training to be able to competently represent clients. (Penal Code § 1170.95 (c))
- 3) As a result, local agencies will incur cost from the mandated activity that will exceed \$1,000¹.
- 4) As a Departmental Finance Manager, I am familiar with the new activity and cost stemming from the alleged statutory mandate in SB 1437. The costs and the activities are accurately described in sections A, B, C, D, and E. FY 2018-2019 was the fiscal year the alleged mandate in SB 1437 was implemented and the Test Claim was filed for.
- 5) I declare that I have prepared and have personal knowledge of the attached schedule of costs summarized in the attached Exhibit A. The actual cost of providing activities described in section (2) above was \$206,496 for FY 2018-19.

¹ Government Code § 17564 (a) No claim shall be made pursuant to Sections 17551, 17561, or 17573, nor shall any payment be made on claims submitted pursuant to Sections 17551 or 17561, or pursuant to a legislative determination under Section 17573, unless these claims exceed one thousand dollars (\$1,000).

- 6) Public Defender estimates that it will incur \$471,595 in increased cost of providing services to comply with the SB 1437 mandates in FY 2019-20. FY 2019-20 is the FY following the implementation of the mandate. The cost is summarized in the attached Exhibit B.

- 7) According to the Senate Committee on Appropriation: "CDCR² reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in an additional workload costs to the court of about \$7.6 million³"

Using the same terminology and number (2,177 individuals) of projected petitioners who would file a petition to the cost of representation, prosecution, and housing of the petitioners during the re-sentencing hearing, and applying the average cost per case for Public Defender, District Attorney, there would be a statewide cost estimate of \$18,153,459

- 8) Public Defender has not received any local, state, or federal funding and does not have a fee authority to offset its increased direct and indirect cost of providing mandated activities described in section (2) above in compliance with SB 1437. Public Defender has incurred actual cost of \$206,496 (Exhibit A) for FY 2018-19 and will incur an estimated cost of \$471,595 for FY 2019-2020 (Exhibit B).

- 9) Public Defender is not aware of any prior determination made by the Board of Control or the Commission on State Mandates related to this matter⁴.

- 10) Public Defender is not aware of any legislatively determined mandate related to SB 1437, Chapter 1015, Statutes of 2018⁵.

- 11) I have examined the SB 1437 Test Claim prepared by the Claimant (County of Los Angeles) and based on my personal knowledge, information, and belief, the costs incurred in this test claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly

² California Department of Correction and rehabilitation

³ SENATE COMMITTEE ON APPROPRIATION, May 14, 2018, FY 2017-2018 Regular Session, pages 4, ¶ 8

⁴ Government Code §17553(b)(2)(B).

⁵ Government Code § 17573.

computed and are "costs mandated by the State", as defined in Government Code §17514:

" . . . any increased costs which a local agency is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of § 6 of Article XIII B of the California Constitution."

I have personal knowledge of the foregoing facts and information presented in this Test Claim, and if so required, I could and would testify to the statements made herein. I declare the foregoing to be true and correct under penalty of perjury.

Executed this 13th day of August 2020 in Los Angeles, CA.



Sung Lee
Departmental Finance Manager
Law Office of Public Defender
County of Los Angeles

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 18, 2020, I served the:

- **Claimant's Comments on the Draft Proposed Decision filed August 14, 2020**

Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 18, 2020 at Sacramento, California.



Heidi Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/4/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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PUBLIC DEFENDERS

BRENDON WOODS
Public Defender
YOUSEEF ELIAS
Chief Assistant Public Defender

August 10, 2020

RECEIVED
August 17, 2020
**Commission on
State Mandates**

Ms. Keely Bosler, Chairperson
Commission on State Mandates
980 9th St., Ste. 300
Sacramento, CA

LATE FILING

Exhibit H

RE: Accomplice Liability for Felony Murder, 19-TC-02 - Support

Dear Ms. Bosler:

I submit these comments in support of test claim 19-TC-02 on behalf of the Alameda County Public Defenders Office. Alameda County is the seventh largest county in the state. In 2019 alone, our office was appointed to represent 86 habeas corpus petitioners who were seeking relief under Penal Code section 1170.95. One full time and two part time attorneys were assigned to handle these cases. They worked more than 3300 hours and, by year's end, had resolved 56 of them.

A.

The "draft proposed decision" prepared by the Commission's staff recommends denying the test claim because "the test claim statute eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine *unless* the defendant's intent to kill is proved beyond a reasonable doubt or the defendant was a major participant acting with reckless indifference to human life." (*Draft Proposed Decision*, p. 3; italics added.)

This description does not square with the conclusion that Senate Bill [SB] 1437 *eliminated* the crime of felony murder or murder based upon a natural and probable consequences theory. It acknowledges that that these two doctrines still apply if the defendant harbors either the intent to kill or a "reckless indifference to human life." (See Penal Code § 189(e).)

The truth is that SB 1437 simply modified the scope of "malice aforethought." This change is reflected in the language of Penal Code section 188 which now

reads: “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, *a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.*”

Further evidence that SB 1437 did not intend to eliminate “murder under the felony murder rule” can be found in Penal Code section 189(f), a provision the Commission staff apparently overlooked. That section further narrows the scope of the new law by stipulating that when a defendant kills a peace officer during the commission of an enumerated felony, s/he is guilty of felony murder regardless of his/her intent.

Thus, while it may be true that the amendments to sections 188 and 189 modified the *scope* of murder under the felony-murder or natural and probable consequences *theories*, they did not eliminate a single crime and did not even eliminate these two theories as sources of murder liability.

The case law generated by Penal Code section 1170.95 confirms this interpretation and belies the suggestion that Senate Bill 1437 “eliminated the crime of murder under the felony murder rule and the natural and probable consequences doctrine.”

For example, *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, explained that the only thing that Senate Bill 1437 did was “*amend[] the mens rea requirements for the offense of murder.*” (*Id.* at pp. 281, 287; see also *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 246.)

People v. Solis (2020) 46 Cal.App.5th 762 likewise pointed out that “[t]he intent of the legislation was to limit application of the felony murder rule and murder based on the natural and probable consequences doctrine by *modifying the mens rea element* of those crimes.” (*Id.* at p. 768–769[.] And in *People v. Cervantes* (2020) 46 Cal.App.5th 213, the court pointed out that “SB 1437 *modified* California’s felony murder rule and natural and probable consequences doctrine to ensure murder liability is not imposed on someone unless they were the actual killer, acted with the intent to kill, or acted as a major participant in the underlying felony and with reckless indifference to human life.” (*Id.* at p. 220; see also *People v. Martinez* (2019) 31 Cal.App.5th 719, 722 [“Senate Bill 1437 made statutory changes altering the definitions of malice and first and second degree murder”].)

Of the nearly two dozen published cases interpreting SB 1437, not a single one has said that it *eliminated* a crime. In *People v. Gentile* [Review Granted; formerly 35 Cal.App.5th 932], the Court of Appeal explicitly rejected the notion that SB 1437 eliminated murder liability under the natural and probable consequences theory:

. . . defendant argues that the amendment to section 189, “has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine.” *We disagree*. This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu*, and would lead to absurd results. Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances. (*Id.* at pp. 943-944; italics added.)

B.

Government Code section 17556(g) also prohibits the commission from finding reimbursable costs if the test claim statute “*changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.*” A host of recent cases have explicitly ruled that “Senate Bill 1437 did not address. . . punishment at all. Instead, it amended the mental state requirements for murder.” (*People v. Superior Court (Gooden)*, *supra*, 42 Cal.App.5th at p. 282; *People v. Superior Court (Gooden)*, *supra*, 42 Cal.App.5th 270, *People v. Lamoureux*, *supra*, 42 Cal.App.5th 241 and *People v. Solis*, *supra*, 46 Cal.App.5th 762; *People v. Cruz* (2020) 46 Cal.App.5th 740, 755 have all.)

C.

The Commission staff's proposed decision does not appear to analyze whether the test claim statute - Penal Code section 1170.95 - “*relat[ed] directly to the enforcement of the crime or infraction*” as required by Government Code § 17556(g)

Although the 30 or so cases that have invoked section 17556 have never defined the word “enforcement, Black's Law Dictionary defines “enforce” as “to compel obedience to.” (*Black's Law Dictionary* (11th ed. 2019)) and Webster's defines it “to

Ms. Keely Bosler, Chairperson
August 10, 2020

compel observance of a law, etc.” (*Webster’s New World Dictionary* (College Edition), p. 480.)

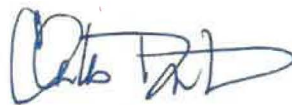
Penal Code. Section 1170.95 clearly does not relate to the police or prosecutor’s authority to “compel obedience” to or “observance of” the law that makes it a crime to murder. It does not apply at all to the arrest or prosecution of murder cases. It is simply a resentencing statute that permits a person who has already been convicted of felony murder or murder under a natural and probable consequences theory, and who meets certain criteria, to petition the court to apply for a reduction of his/her sentence. Thus, even if we agreed that the changes to Penal Code section 188 and 189 eliminated a crime, section 1170.95 still does not “relat[e] directly to the enforcement of the crime” of murder defined in those statutes.

D.

Penal Code section 1170.95 petitions involve complex legal issues that require experienced counsel and substantial amounts of legal research, writing and courtroom litigation. It has placed a considerable burden on our office’s staff as well as our budget. For this reason, and because we strongly believe that the expenses incurred under section 1170.95 are legally reimbursable, I strongly urge the honorable members of the Commission to reject the proposed decision and grant the test claim.

Respectfully submitted,

ALAMEDA COUNTY PUBLIC DEFENDER



Charles M. Denton
Assistant Public Defender
Supervisor, Law & Motions Division

CMD/kr

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 19, 2020, I served the:

- **Alameda County Public Defenders Office’s Late Comments on the Draft Proposed Decision filed August 17, 2020**

Accomplice Liability for Felony Murder, 19-TC-02

Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)

County of Los Angeles, Claimant

by making it available on the Commission’s website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 19, 2020 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/19/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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Senate Concurrent Resolution No. 48

RESOLUTION CHAPTER 175

Senate Concurrent Resolution No. 48—Relative to criminal sentencing.

[Filed with Secretary of State September 22, 2017.]

legislative counsel's digest

SCR 48, Skinner. Criminal sentencing.

This measure would recognize the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime.

WHEREAS, According to the Department of Corrections and Rehabilitation (CDCR) Internet Web site, California continues to house inmates in numbers beyond its maximum capacity at an average of 130 percent of capacity. In some institutions, such as Wasco State Prison, the inmate population is at 169.7 percent of capacity, housing well over 2,000 people over the designed maximum capacity. Overpopulation has been the main contributing factor to inhumane and poor living conditions; and

WHEREAS, In California, incarceration of an inmate by CDCR is costing taxpayers \$70,836 annually, according to the Legislative Analyst's Office as of the 2016–17 fiscal year; and

WHEREAS, It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability; reform is needed in California to limit convictions and subsequent sentencing in both felony murder cases and aider and abettor matters prosecuted under “natural and probable consequences” doctrine so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences which are not commensurate with the culpability of the defendant; and

WHEREAS, In California, defendants in felony murder cases are not judged based on their level of intention or culpability but are sentenced as if they had the intent to kill even if the victim of the underlying felony actually commits the fatal act; and

WHEREAS, In California, a conviction for capital murder results in a death or life without the possibility of parole sentence, a conviction for noncapital first-degree murder results in a sentence of 25 years to life imprisonment; and a sentence for second-degree murder as long as the facts do not indicate a shooting from a vehicle or the victim being a peace officer results in a sentence of 15 years to life; and

WHEREAS, A 17-percent grant rate in 2016 according to CDCR demonstrates that a 25 years to life sentence generally results in few defendants being granted parole; and

WHEREAS, Prosecutors must prove beyond a reasonable doubt that a defendant acted with premeditation and deliberation and expressly intended to kill the victim in order for the defendant to be convicted of first-degree murder; and

WHEREAS, Under the felony-murder rule, criminal liability for a homicide is significantly broadened; and a prosecutor only needs to prove that the defendant is involved in the commission, attempted commission, or flight following the commission or attempted commission of a statutorily enumerated felony (Section 189 of the Penal Code) to secure a first-degree murder conviction even if the defendant did not do the killing, and even if the killing was unintentional, accidental, or negligent; and

WHEREAS, In the case of second-degree felony murder, the prosecutor only has to prove that the defendant intended to commit an “inherently dangerous” felony; and

WHEREAS, Under the felony-murder rule, a defendant does not have to intend to kill anyone, nor commit the homicidal act, to be sentenced to first-degree murder or second-degree murder; and

WHEREAS, It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen results of another felon’s action, especially when such conduct was not agreed upon; and

WHEREAS, Criminal liability and sentencing should comport with individual culpability, thereby making conviction under a felony murder theory inconsistent with basic principles of law and equity; and

WHEREAS, In California, to be liable for special circumstance felony murder and sentenced to death or to life without the possibility of parole, pursuant to Section 190.2 of the Penal Code, the prosecution must prove the defendant intended to commit the underlying felony and also prove two additional elements: that the person who did not commit the homicidal act acted as a major participant in the felony and acted with reckless indifference to human life; (see *People v. Banks* (2015) 61 Cal.4th 788); and

WHEREAS, The California Supreme Court in the *Banks* decision stated that imposing these two statutory additional requirements—required to impose either life without the possibility of parole or a death sentence—comports with the United States Supreme Court Eighth Amendment jurisprudence proscribing cruel and unusual punishment; and

WHEREAS, In cases not prosecuted under a felony-murder theory, in order to convict a defendant of first-degree murder, a jury has to find beyond a reasonable doubt that a person acted with intentional malice; and

WHEREAS, In California, under the felony-murder rule, the prosecution does not have to prove that a killing was intended and need only prove that a defendant intended to commit the underlying felony or intended to commit an inherently dangerous felony; and

WHEREAS, Both Hawaii and Kentucky eradicated the practice by statute and Michigan abrogated the felony-murder rule through case law; and

WHEREAS, The Michigan Supreme Court noted when it abolished the felony-murder rule, “Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based” (People v. Aaron (1980) 299 N.W. 2d 304); and

WHEREAS, The due process clause found in both the Fourteenth and Fifth amendments to the United States Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime in order to convict the accused. This should hold true for felony murder cases, but the doctrine of felony murder circumvents this important principle and allows for conviction and punishment to be the same as for those who committed a murder with malice aforethought; and

WHEREAS, Felony murder was conceived in England in the 1700s and brought to the United States in the early 1800s. After much criticism from the courts in England due to the disproportionality of sentencing individuals who had no malice or intent to kill the same as perpetrators of the fatal act, Parliament abolished the felony-murder rule in 1957; and

WHEREAS, The United States is one of the only countries in the world that still allows prosecutions under the felony-murder rule; and

WHEREAS, In addition to the disproportionate sentencing that occurs in felony murder cases, there is need for additional reform when addressing aider and abettor liability for other criminal matters, specifically the “natural and probable” consequences doctrine, which also results in greater punishment for lesser culpability; and

WHEREAS, In California, people who commit a felony are not sentenced according to their individual level of culpability, but all participants, even those who indirectly encouraged the commission of a felony, even by words or gestures, may be held to the same degree of culpability as the person who committed the offense (People v. Villa (1957) 156 Cal.App.2d 128); and

WHEREAS, Defendants charged and convicted under felony murder are subject to the same sentencing as the actual perpetrator of the murder, even if their actual involvement was limited to a lesser crime, judges and jurors are not allowed to apportion degrees of culpability. Good public policy dictates that after conviction, judges or jurors should be given this opportunity; similar to the method currently employed for serious felonies called “strike hearings.” In this way a defendant may receive a more appropriate sentence for the crime committed; and

WHEREAS, An aider and abettor is criminally responsible not only for the crime he or she intends, but also for any crime that “naturally and probably” results from his or her intended crime; the result of this doctrine is that all participants in a fistfight can be held liable for first-degree murder

when only one defendant commits a murder, notwithstanding the fact that the other participants did not know the defendant was armed, the killing occurred after the fistfight ended, and the participants did not aid or abet the shooting (People v. Medina (2009) 46 Cal.4th 913); resulting in individuals lacking the mens rea and culpability for murder being punished as if they were the ones who committed the fatal act; and

WHEREAS, As stated by Justice Goodwin Liu in People v. Cruz-Santos, this leads to overbroad application: “At its essence, the natural and probable consequences doctrine imposes liability on the basis of negligence layered on top of a defendant’s culpability for aiding and abetting a target offense. (See People v. Chiu, (2014) 59 Cal.4th 155 at p. 164 [““because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.””].) Although reasonable foreseeability can be a legitimate basis for assigning culpability, courts and commentators have long observed that the concept is susceptible to overbroad application. (See Thing v. La Chusa (1989) 48 Cal.3d 644, 668 [“there are clear judicial days on which a court can foresee forever”]; Goldberg v. Housing Authority of City of Newark (N.J. 1962) 186 A.2d 291, 293 [“Everyone can foresee the commission of crime virtually anywhere and at any time.”]; Guthrie et al. (2001) Inside the Judicial Mind, 86 Cornell L.Rev. 777, 799 [“Hindsight vision is 20/20. People overstate their own ability to have predicted the past and believe that others should have been able to predict events better than was possible. Psychologists call this tendency for people to overestimate the predictability of past events the ‘hindsight bias.’ ” (fns. omitted)]; Rachlinski (1998) A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L.Rev. 571, 571 [““Nothing is so easy as to be wise after the event.” ” (fn. omitted, quoting Cornman v. The Eastern Counties Railway Co. (Exch. 1859) 157 Eng. Rep. 1050, 1052)].); and

WHEREAS, It is the proper role of trial courts to screen out cases in which the concept of foreseeability cannot bridge the gap between a defendant’s culpability in aiding and abetting the target offense and the culpability ordinarily required to convict on the nontarget offense. This judicial check serves to ensure that natural and probable consequences liability—a judge made doctrine in tension with the usual mens rea requirement of the criminal law—is kept “consistent with reasonable concepts of culpability.” People v. Chiu (2014) 59 Cal.4th 155, 165; and

WHEREAS, It can be cruel and unusual punishment to not assess individual liability for nonperpetrators of the fatal act or in nonhomicide matters the criminal charge resulting in prosecution and impute culpability for another’s bad act, thereby imposing lengthy sentences that are disproportionate to the conduct in the underlying case; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the Legislature recognizes the need for statutory changes

to more equitably sentence offenders in accordance with their involvement in the crime; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the author for appropriate distribution.

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SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No: SB 1437 **Hearing Date:** April 24, 2018
Author: Skinner
Version: February 16, 2018
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Accomplice Liability for Felony Murder*

HISTORY

Source: Restore Justice (co-sponsor)
Anti-Recidivism Coalition (co-sponsor)
Californians for Safety and Justice (co-sponsor)
California Coalition for Women Prisoners (co-sponsor)
CARES for Youth (co-sponsor)
Felony Murder Elimination Project (co-sponsor)
Initiate Justice (co-sponsor)
Pacific Juvenile Defender Center (co-sponsor)
University of San Francisco School of Law Criminal and Juvenile Justice Clinic
and Racial Justice Clinic (co-sponsor)
USC Gould School of Law Post-Conviction Justice Project (co-sponsor)
Youth Justice Coalition (co-sponsor)

Prior Legislation: SCR 48 (Skinner) – Ch. 175, Stats. 2017
AB 2195 (Bonilla) – 2016, failed passage in Assembly Appropriations
SB 878 (Hayden) – 1999, failed passage on the Senate Floor

Support: The Advocacy Fund; Bend the Arc Jewish Action; Californians United for a Responsible Budget; California Public Defenders Association; Catholic Worker Hospitality House; Center for Juvenile Law and Policy; Center on Juvenile and Criminal Justice; Community Housing Partnership; Community Works West; Courage Campaign; East Side Studios; Ella Baker Center for Human Rights; Fair Chance Project; Friends Committee on Legislation of California Lawyers Committee for Civil Rights of the San Francisco Bay Area; Felony Murder Elimination Project; Full Moon Pickles and Catering; the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; Legal Services for Prisoners with Children; The Modesto/Stanslaus NAACP; Pillars of the Community; the Place4Grace; Prison Activist Resource Center; Prisoner Advocacy Network; Prisoner Hunger Strike Solidarity; Riverside Temple Beth El; Rubicon Programs; Showing Up for Racial Injustice – Long Beach; Sister Inmate; Survived & Punished; Time for Change Foundation; University of San Francisco School of Law's Criminal and Juvenile Justice Clinic and Racial Justice Clinic; United Auto Workers Local 2865; WE ARE HERE TO HELP; Women's Center for Creative Work; 9iWomen's Council of the California Chapter of the National Association of Social Workers; Young Women's Freedom Center; 29 individuals

Opposition: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; Peace Officers Research Association; Riverside Sheriffs Association

PURPOSE

The purpose of this bill is to revise the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

Existing law defines malice for this purpose as either express or implied and defines those terms. (Pen. Code, § 188.)

- It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.
- It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Existing law provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188.)

This bill would prohibit malice from being imputed to a person based solely on his or her participation in a crime.

This bill would prohibit a participant in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189.)

Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190.)

Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life. (Pen. Code, §§ 187 & 190.05.)

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder,

unless the person personally committed the homicidal act, the person acted with premeditated intent to aid and abet an act wherein a death would occur, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law, as added by Proposition 8, adopted June 8, 1982, and amended by Proposition 21, adopted March 7, 2000, among other things, defines a serious felony. (Pen. Code, § 667.1.)

Existing law, also added by Proposition 8, adopted June 8, 1982, and amended by Proposition 36, adopted November 6, 2012, commonly known as the Three Strikes Law, requires increased penalties for certain recidivist offenders in addition to any other enhancement or penalty provisions that may apply, including individuals with current and prior convictions of a serious felony, as specified. (Pen. Code, §§ 667.5 & 1192.7.)

This bill would include in the list of serious felonies the commission of a felony inherently dangerous to human life wherein a person was killed.

This bill would provide a means of resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder, 2nd degree felony murder, or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill.

The bill would provide that the court cannot, through this resentencing process, remove a strike from the petitioner's record. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

COMMENTS

1. Need for This Bill

According to the author:

SB 1437 seeks to restore proportional responsibility in the application of California's murder statute reserving the harshest punishments for those who intentionally planned or actually committed the killing.

In criminal justice, a person's intent is a critical element to determine punishment for a criminal offense with one glaring exception. Under current California law, prosecutors are able to replace the intent to commit murder with the intent to commit a felony if the felony results in a death. Thus a person can be found guilty of murder if a death occurs while a felony is committed. It does not matter whether the death was intended or whether a person had knowledge that the death had even occurred.

The result is that California's felony murder statute has been applied even when a death was accidental, unintentional or unforeseen but occurred during the course of certain crimes.

This application of the statute has caused disproportionately long sentences for people who did not commit murder, and who in some cases had, at best, very peripheral involvement in the crime that resulted in a death.

According to a 2018 survey by the Anti-Recidivism Coalition and Restore Justice, 72% of women currently incarcerated in California with a life sentence did not commit the homicide. Additionally, the average age of those charged and sentenced under this interpretation of the murder statute is 20 years old; indicating that youth who were peripheral to a homicide are often held as responsible as the actual killer.

The California Supreme Court has commented on the necessity to fix this interpretation of California's murder statute. In *People v. Dillon*, the state Supreme Court called the use of the felony murder rule to charge those who did not commit a murder, or had no knowledge or involvement in the planning of the murder, "barbaric".

States such as Arkansas, Massachusetts, Kentucky, Hawaii, Michigan, and Ohio have narrowed the scope of what is known as the felony murder rule and limited the application of their murder statute. Ohio, for example, now requires that a killing that occurs during a felony must be an intentional killing in order to receive a first-degree murder conviction.

SB 1437 clarifies that a person may only be convicted of murder if the individual willingly participated in an act that results in a homicide or that was clearly intended to result in a homicide.

Under this bill, prosecutors would no longer be able to substitute the intent to commit a felony for the intent to commit murder.

SB 1437 would also provide a means for resentencing those who were convicted of murder under the felony murder rule but who did not actually commit the homicide.

2. Murder Generally

Murder is the most egregious form of homicide, which is the taking of the life of another human being. Homicides are killings of another, whether lawful or unlawful. Under California law murder is defined as "the unlawful killing of a human being or a fetus with malice aforethought." (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter because the element of "malice" is required to be convicted of murder.

Malice

Both first-degree murder and second-degree murder require what is known as "malice." Malice may be expressed or implied. Express malice means that you specifically intend to kill the victim. Implied malice is when: (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was committed deliberately with the knowledge that of the danger to human life, and with a conscious disregard for that life.

The most simple way to understand the element of malice is that the act does not require ill will or hatred to a particular person. Merely acting with a wanton disregard for human life and committing an act that involves a high degree of probability that it will result in death, is acting with malice aforethought. (*People v. Summers* (1983) 147 Cal.App. 3d 180, 184.)

First-Degree Murder

There are three methods for convicting a person of first-degree murder in California:

- If the killing was willful, deliberate, and premeditated.
- The murder was committed: through use of a destructive or explosive device, with ammunition designed to penetrate armor, poison, by lying in wait, or by inflicting torture.
- *With the felony-murder rule* (by committing a specifically enumerated felony that turns any death committed during the course of that felony into first-degree murder).

Second-Degree Murder

Second-degree murder is distinguishable from first-degree murder because it is willful, but it is not deliberate and premeditated. In principle, second-degree murder has always been intended to therefore encompass all murder that is not defined as first-degree murder. So for instance, if a defendant initiates a physical altercation with another person without intending to kill that person, nevertheless that person dies as a result of the altercation the defendant initiated, the defendant is likely to have committed second-degree murder (absent a legal defense).

Punishment

First-Degree Murder

In California a conviction for first-degree murder (including felony-murder) can result in one of three sentences:

- Imprisonment in state prison for a term of 25 years to life;
- Life imprisonment in state prison without the possibility of parole; or
- Death

State law requires a sentence of life imprisonment without parole or death for homicides involving special circumstances set by the California Penal Code. For example, the court must consider whether the defendant:

- committed first degree murder while engaging in a felony or
- avoiding a lawful arrest,
- using a bomb or explosive device, or
- intending to kill another person for financial gain.

The court must also confer a sentence of life imprisonment without parole or death if the defendant:

- committed first degree murder of a peace officer,
- federal law enforcement officer,
- firefighter,
- prosecutor, or
- judge.

State laws also allow for the most stringent forms of punishment when the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity." This generally refers to murders involving torture.

Second-Degree Murder

California state laws set the term of imprisonment for second degree murder as 15 years to life in state prison. The term increases to 20 years to life if the defendant killed the victim while shooting a firearm from a motor vehicle. In addition, the term may increase to 25 years to life if the victim of the crime was a peace officer.

State laws also allow the court to consider whether the defendant has a prior criminal record. If the defendant has previously served time in prison for murder, the possible sentence for second degree murder may range between 15 years to life in state prison and life imprisonment without the possibility of parole.

3. The Felony Murder Doctrine

The felony murder rule applies to murder in the first degree as well as murder in the second degree. The rule creates liability for murder for actors (and their accomplices) who kill another person during the commission of a felony. The death need not be in furtherance of the felony, in fact the death can be accidental.

The purpose of the rule is to deter those who commit felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental during the perpetration or attempted perpetration of the felony. (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

First-Degree Felony Murder

First-degree felony murder rule applies when a death occurs during the commission of one of a list of enumerated felonies. These felonies are as follows: arson, robbery, any burglary, carjacking, train wrecking, kidnapping, mayhem, rape, torture, and a list of sexual crimes (including rape, sodomy, oral copulation, forcible penetration, or lewd acts with a minor). (Pen. Code, § 189.)

If someone is standing watch while his friend breaks into a locked vehicle and is discovered by a security guard and they all flee on foot. If the security guard falls to the ground in pursuit of the burglars and dies as a result of the fall, both co-defendants could be convicted of murder.

Second-Degree Felony Murder

Second degree murder occurs when a death occurs during the commission of a felony that has not been enumerated in code as constituting first-degree felony murder, but that courts have defined as "inherently dangerous." (*People v. Ford* (1964) 60 Cal.2d 772.) The standard courts are supposed to use for inherently dangerous is that the felony cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal. 3d 824, 833.)

So therefore, a defendant who fires a weapon in the air to deter criminals from burglarizing their property can be convicted of second-degree felony murder if the firing of the weapon kills a human being. That defendant could be convicted of 15-years to life in state prison.

4. Lack of Deterrent Effect on Criminal Behavior

“The Legislature has said the effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first-degree murder for any homicide committed in the course thereof.” (People v. Cavitt (2004) 33 Cal. 4th 187, 197.)

The deterrent effect of the felony-murder doctrine has been debated for decades. Countless legal scholars and law review articles have addressed the issue. Most recent studies have concluded that the felony murder rule does not have a deterrent effect on the commission of dangerous felonies or deaths during the commission of a felony.¹ Proponents have argued that the felony-murder rule encourages criminals to reduce the number of felonies they commit and take greater care to avoid causing death while committing a felony. Opponents argue that criminals are unaware that the felony-murder rule even exists, and that it is impossible to deter criminals from committing unintentional and unforeseeable acts.

A 2002 study of FBI crime data found that nearly 20 percent of all murders annually between the years of 1970-1998 were felony murders. The results of the study suggested that the felony-murder rule has a relatively small effect on criminal behavior, and it does not substantially affect either the overall felony or felony-murder rate. Secondly, the study found that the effects varied by type of felony. While difficult to determine, the rule may have had a positive effect on reducing deaths during theft related offenses, it may have actually increased the rates of death in robbery-homicides. The rule was found to have no effect on rape deaths.²

5. Elimination of the Felony Murder Doctrine Worldwide

The United States adopted the felony murder rule as a form of English Common Law. English Common Law is the common legal system and concepts that has been adopted by courts throughout England, the United Kingdom, and their colonies worldwide.

- Abolished in England and Wales via the Homicide Act of 1957.
- Abolished in Northern Ireland via the Criminal Justice Act of Northern Ireland in 1966.
- Held unconstitutional in Canada as breaching the principles of fundamental justice. (*R v Vaillancourt* (1987) 2 SCR 636.)
- Abolished in Australia and replaced with a modified version known as “constructive murder” which requires that the offender commit an offense with a base penalty of 25 years to life in prison and that the death occurred in an attempt, during, or immediately after the base offense. Abolished and modified in the Crimes Act of 1958.

¹ *The American Felony Murder Rule: Purpose and Effect* by Daniel Ganz, 2012, UC Berkeley; *The Culpability of Felony Murder* by Guyora Binder, 2008 Notre Dame Law Review; *Felony-Murder Rule a Doctrine at Constitutional Crossroads* by Nelson E. Roth and Scott E. Sundby, 1985 Cornell Law Review

² *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* by Anup Malani, 2002, (clerk to Justice Sandra Day O’Connor, U.S. Supreme Court)

- There was never a felony murder rule in Scotland.

In the United States there are still 46 states that have some form of a felony murder rule. Hawaii, Kentucky, Michigan, and Ohio have completely abolished the felony murder rule. In 24 of those states, including California, the punishment can be death. The felony murder rule has been removed from the American Law Institute's Model Penal Code.

This bill does not eliminate the felony murder rule. The purpose of this legislation is to merely revise the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.

6. Difficulties in Gathering Data on Felony Murder in California

The problem in collecting data on felony murder is that the abstract of judgement in murder cases only reflect conviction of murder in the first or second degree. It does not reflect the basis for the conviction. Felony murder is not a separate charge which can be easily tracked. A murder defendant is charged with murder in violation of Penal Code § 187 and the degree is determined by the trier of fact at trial, or is admitted by the defendant when entering a plea. There isn't any way to determine from the abstract of judgment if a first or second-degree murder conviction was premeditated, unpremeditated, or felony murder.

The only exception, where the conviction would be broken down, is in murder cases where there is a special circumstance which makes the offense punishable by death or life without parole. In these cases, a felony murder special circumstance (Penal Code §190.2 (a) (17)) would be alleged in the charging document and reflected in the abstract of judgment if found to be true. These death penalty/LWOP cases, where data can be obtained, are only a portion of the overall murder cases.

It would appear that the only way to gather the data on numbers of felony murder convictions in California would be a case file inspection in the court in the jurisdiction where the conviction was obtained.

7. Argument in Support

According to the *Pacific Juvenile Defender Center*:

The Pacific Juvenile Defender Center (PJDC) provides support to more than 1000 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers throughout California. We work to improve the quality of legal representation, assure fairness for youth in court proceedings, and promote practices that will produce good outcomes. As a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center, we are also part of national efforts to improve the treatment of youth in the justice system.

Under current California law, a person may be held liable for first-degree murder without intending for a killing to occur or aiding the killing in any way. The death may be accidental, unintentional, and unforeseen, but as long as it occurred during the course of certain crimes, all participants – whether or not they performed the

homicidal act, knew a co-participant was armed, or were even at the scene of the killing – may be liable for first-degree murder.

Our members are well aware of the need to reform felony murder rules because juveniles are so often affected by them. Almost universally, young people do things in groups, and when something goes wrong our clients are genuinely surprised and horrified. Even when they have agreed to do some underlying act such as robbery, they never expect that anyone will get hurt. Current California laws allow those youth to be convicted of murder just as would be a person who actually caused or intended the death to occur. While allowing conviction for murder without the requisite action or intent is unfair to adults and juveniles alike, it is especially unfair to young people because they are developmentally incapable of maturely assessing the risks and consequences of their acts.

In a series of cases, the United States Supreme Court has held that juveniles are less culpable than adults, and that traditional justifications for punishment cannot fairly be applied to them. The court has specifically noted that young peoples' actions are characterized by immaturity, impetuosity, failure to appreciate risks and consequences; and peer pressure¹ – exactly the kinds of factors that would result in being involved in an unintended situation where a death occurred. As neurological development continues young people change and become more capable of making mature judgments, but the human brain is not fully mature until age 25,² so the number of juveniles and young adults impacted by the felony murder rule is substantial.

S.B. 1437 would not eliminate felony murder liability, but it would impose significant limitations on it. The bill would amend Penal Code section 188, subdivision (a)(3), to prohibit malice from being imputed to a person based solely on his or her participation in a crime, and would prohibit a participant or conspirator in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act. Pursuant to amendments to Penal Code section 189, subdivision (e), it would prohibit a participant or conspirator in the perpetration or attempted perpetration of specified felonies listed in Penal Code section 189, subd. (a), in which a death occurs from being liable for murder, unless (1) the person personally committed the homicidal act; (2) the person acted with premeditated intent to aid and abet an act wherein a death would occur; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life. S.B. 1437 would also add Penal Code section 1425, providing a resentencing mechanism to re-examine cases that were decided without those limitations.

This legislation will not eliminate criminal responsibility for accomplices in criminal activity. Participants in crime will still be held responsible for their involvement in the underlying crime, and those who actually cause a death will still be liable for murder. S.B. 1437 simply reduces the unfairness of the felony murder rule by refocusing attention on the intent and actions of the participants.

It is time for this Legislature to move toward elimination of felony murder liability. Thirty-five years ago, in *People v. Dillon* (1983) 34 Cal.3d. 441, the

California Supreme Court referred to our felony murder rules as “barbaric,” but concluded that because our rules are statutorily based, only the Legislature can change them. The rule has already been abolished or limited in a number of countries, and in a growing number of states, including Arkansas, Massachusetts, Kentucky, Hawaii, Michigan, and Ohio.

8. Argument in Opposition

According to the *California District Attorneys Association*:

This bill eliminates murder liability for those who participate in felonies that are inherently dangerous to human life in which a death occurs if those participants do not personally commit the homicidal act, do not act with premeditated intent to aid and abet an act in which a death would occur, or for those who do not act as a major participant in the underlying felony. While we agree that there is room for some measured reform in this area, the complete elimination of murder liability goes too far and draws no distinction between those who participate in dangerous felonies that result in the death of someone and those which do not.

There are a number of concerns raised in this bill:

First, the retroactive application of this bill applies to convictions that resulted from both jury and bench trials as well as convictions that resulted from negotiated plea bargains. Under the provisions of this measure, a resentencing hearing will necessarily require a full court record, including transcripts and exhibits, to determine the exact level of participation in the crime in order to determine whether a particular defendant is entitled to relief. In cases that resolved through a negotiated plea, no such record exists and virtually all participants in murders may qualify for relief to which they may not be entitled.

Additionally, this bill requires the prosecution to prove beyond a reasonable doubt that the petitioner falls into one of the categories that precludes resentencing. In cases that resolved through a negotiated plea, the absence of a full court record will necessarily prevent the people from establishing beyond a reasonable doubt whether a petitioner is excluded. The result will entitle virtually all petitioners who apply, even those who were major participants in the crime which resulted in death, to be entitled to a resentencing and the elimination of their well-deserved criminal liability.

Second, by placing the burden on the prosecution to prove beyond a reasonable doubt that petitioners do not qualify for resentencing, this bill will require the litigation of facts previously not litigated in the original case, particularly in cases that resolved through a plea. It is unclear from this bill whether the determination of those facts will be conducted by the resentencing judge or will necessitate a jury – which has significant procedural and constitutional implications as well as significant costs.

Moreover, this bill provides no exception to allow for the trial transcript to be used in a resentencing hearing. The effect of this would be to necessitate the calling of witnesses, other victims, and family members who may have been

involved in the original case. The effects of this to crime victims and survivors would be devastating.

Finally, the requirements placed on a petitioner to seek a resentencing hearing merely require the submission of a request indicating that a petitioner was convicted of murder and that the prosecution theory could have included a theory of first or second degree felony murder. Charging documents, plea forms, jury verdict forms and other documents involved in the prosecution of murder cases do not specify the theory under which someone is charged or even convicted of murder. The only way to determine whether a felony murder theory was advanced in a particular case would be to examine the transcripts at trial. The effect of this provision of the bill would be to allow everyone convicted of murder – actual killers, those acting with premeditated intent, and major participants acting with reckless indifference to human life included – to successfully petition to have a resentencing hearing. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner's ineligibility for a resentencing, this bill will effectively authorize the release of actual killers and those who played major roles in the killing of others during dangerous felonies.

We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately this bill falls short and creates some potentially disastrous and costly problems that renders this bill unworkable.

-- END --

Date of Hearing: June 26, 2018
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

SB 1437 (Skinner) – As Amended May 25, 2018

SUMMARY: Limits liability for individuals based on a theory of 1st or 2nd degree felony murder. Allows individuals previously sentenced on a theory of felony murder to petition for resentencing if they meet specified qualifications. Specifically, **this bill:**

- 1) States that the mental state required for murder (malice) shall not be imputed to a person based solely on his or her participation in a crime.
- 2) Specifies that a participant in the commission or attempted commission of a felony inherently dangerous to human life may be imputed to have acted with implied malice only if he or she personally committed the homicidal act.
- 3) States that a participant in certain specified felonies is liable for first degree murder only if one of the following is proven:
 - a) The person was the actual killer;
 - b) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; and,
 - c) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified.
- 4) Makes a crime that involves any felony that is inherently dangerous to human life in which a person was killed, a serious felony (strike).
- 5) States that a defendant may submit a request to have his or her conviction vacated and petition for resentencing when all of the following conditions apply:
 - a) A complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder, second degree felony murder, or murder under the natural and probable consequences doctrine;
 - b) The defendant was sentenced to first degree or second degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or second degree murder; and,

- c) The defendant could not be convicted of first degree or second degree murder because of changes made by the provisions of this bill.
- 6) Requires that the petition include a declaration by the petitioner that he or she believes that he or she is eligible for relief under the provisions of this bill.
- 7) Specifies that upon receipt of the petition, the court shall provide notice to the attorney who represented the petitioner in the superior court, or to the public defender if the attorney of record is no longer available, and to the district attorney in the county in which the petitioner was prosecuted.
- 8) States that if the court finds that there is sufficient evidence that the petitioner falls within the provisions of this section, the court shall hold a resentencing hearing to determine whether to recall the sentence and commitment previously ordered and to resentence the petitioner in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.
- 9) Provides that the parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her sentence vacated and for resentencing.
- 10) States that if there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence.
- 11) Specifies that if the petitioner was charged with or convicted of first degree murder under a theory of felony murder, the petitioner shall have the initial burden of going forward with evidence that he or she was not the actual killer, did not act with the intent to kill, and did not act as a major participant with reckless disregard for human life in the commission of the felony.
- 12) Specifies that if the defendant meets the burden of going forward with the evidence, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.
- 13) States that if the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.
- 14) The prosecutor may rely on the record of conviction to meet its burden, but the petitioner may offer new or additional evidence to meet the burden of going forward or in rebuttal of the prosecution's evidence.
- 15) States that if the petitioner was charged with or convicted of second degree murder under a theory of felony murder or the natural and probable consequences doctrine, the petitioner shall have the initial burden of going forward with evidence that he or she did not personally commit the homicidal act.
- 16) Provides that if the defendant meets the burden of going forward with the evidence, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the

petitioner is ineligible for resentencing.

- 17) States that if the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.
- 18) Clarifies that the resentencing procedure does not authorize a court to remove a strike from the petitioner's record.

EXISTING LAW:

- 1) Provides that all murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, lewd and lascivious act upon a child under the age of 14 years, oral copulation, or penetration by a foreign object, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. (Pen. Code, § 189.)
- 2) Provides that the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more special circumstances is found to be true.
- 3) States that special circumstances include that the murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, lewd and lascivious act upon a child under the age of 14 years, oral copulation, or penetration by a foreign object, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death. (Penal Code §190.2, subd. (a)(17).)
- 4) Specifies that every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony listed above, which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole. (Penal Code §190.2, subd. (d).)
- 5) Provides that one who aids and abets another in the commission of a crime is a principal and is just as culpable as the principal offender. (Pen. Code, § 31.)
- 6) States that every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190, subd. (a).)

- 7) Except as otherwise provided, every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life. (Pen. Code, § 190, subd. (a).)
- 8) States the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or special circumstances has been found to be true. (Pen. Code, § 190.2.)
- 9) Special circumstances include a murder that was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit robbery, kidnapping, rape, sodomy, lewd or lascivious act upon the person of a child under the age of 14 years, oral copulation, burglary, arson, train wrecking, mayhem, rape, or carjacking. (Pen. Code, § 190.2, subd(a)(17).)
- 10) Specifies that every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids or abets in the commission of a specified felony which results in the death of a person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance involving commission of specified felonies has been found to be true. (Pen. Code, § 190.2.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "SB 1437 seeks to restore proportional responsibility in the application of California's murder statute reserving the harshest punishments for those who intentionally planned or actually committed the killing.

"In criminal justice, a person's intent is a critical element to determine punishment for a criminal offense with one glaring exception. Under current California law, prosecutors are able to replace the intent to commit murder with the intent to commit a felony if the felony results in a death. Thus a person can be found guilty of murder if a death occurs while a felony is committed. It does not matter whether the death was intended or whether a person had knowledge that the death had even occurred.

"The result is that California's felony murder statute has been applied even when a death was accidental, unintentional or unforeseen but occurred during the course of certain crimes.

"This application of the statute has caused disproportionately long sentences for people who did not commit murder, and who in some cases had, at best, very peripheral involvement in the crime that resulted in a death.

"According to a 2018 survey by the Anti-Recidivism Coalition and Restore Justice, 72% of women currently incarcerated in California with a life sentence did not commit the homicide. Additionally, the average age of those charged and sentenced under this interpretation of the murder statute is 20 years old; indicating that youth who were peripheral to a homicide are often held as responsible as the actual killer.

“The California Supreme Court has commented on the necessity to fix this interpretation of California’s murder statute. In *People v. Dillon*, the state Supreme Court called the use of the felony murder rule to charge those who did not commit a murder, or had no knowledge or involvement in the planning of the murder, ‘barbaric’.

“States such as Arkansas, Massachusetts, Kentucky, Hawaii, Michigan, and Ohio have narrowed the scope of what is known as the felony murder rule and limited the application of their murder statute. Ohio, for example, now requires that a killing that occurs during a felony must be an intentional killing in order to receive a first-degree murder conviction.

“SB 1437 clarifies that a person may only be convicted of murder if the individual willingly participated in an act that results in a homicide or that was clearly intended to result in a homicide.”

- 2) **Felony Murder Rule:** The felony murder rule is a legal doctrine that excludes considerations of context and intention in a murder-crime: when someone is killed during the commission of a felony, regardless of how or by whom they are killed, the person engaged in the felony is charged with murder. The United States is the only country in the world to use the felony murder rule. Hawaii and Kentucky have banned the felony murder rule by statute and in Michigan through the Supreme Court. In Michigan, the Supreme Court noted when it abolished the felony murder rule: “Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases, unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.”

Under the current felony murder rule in California, criminal liability for a homicide is very broad. A defendant may be convicted of first-degree murder under the felony-murder rule if the defendant is involved in the commission, attempted commission, or flight following the commission or attempted commission of a statutorily-enumerated felony (Penal Code § 189), even if the defendant did not do the killing, and even if the killing was unintentional, accidental, or negligent. First degree murder carries a sentence of 25 years to life. A first degree murder accompanied by one or more special circumstances is punishable by death or life without parole. Special circumstances include the participation in one of the same statutorily-enumerated felonies which qualified the crime as first degree murder. If the accomplice was not the actual killer, the accomplice is still punishable with death or life without parole if the accomplice was a major participant in the crime and acted with reckless indifference to human life.

A defendant may be convicted of second-degree felony murder if a killing happened during the commission, attempted commission, or flight following the commission or attempted commission of an “inherently dangerous felony” even if the defendant did not do the killing, and even if the killing was unintentional, accidental, or negligent. Second degree murder carries a sentence of 15 years to life.

This bill would limit the liability for individuals under a theory of 1st or 2nd degree felony murder. Under the provisions of this bill, an individual would not be liable for 2nd murder under a theory of felony murder unless the individual personally committed the act that

resulted in death. Under the provisions of this bill an individual, would not be liable for 1st degree felony murder unless; (1) the person was the actual killer; (2) the person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified.

This bill does not make any changes to the sentencing for an individual found liable for 1st degree felony murder. Under this bill, those individuals would still potentially be eligible for a death sentence or life without parole, if certain criteria were met.

Under the provisions of this bill, an individual would remain criminally liable for their participation in any other crime, even if they were not liable for felony murder.

This bill contains provisions that would allow individuals that are currently serving sentences based on a theory of felony murder to petition the court for resentencing.

- 3) **Concept of Felony Murder/Felony Murder and Culpability:** Felony murder relies on the concept that an individual who participates in a felony should be responsible for a death that occurs during the course of that felony regardless of how that death occurred. But for the commission of the crime, the death would not have occurred. Based on that concept, the person that participated in the felony is responsible for the death of another, even if the death is unintentional, accidental, or committed by another person.

The broadest version of the doctrine of felony murder makes even an accidental killing—one caused by non-negligent conduct a murder. If a death is accidental, then by definition the state can prove no mental fault (not even negligence, the least culpable recognized state of mind) with regard to the element of causing the death of another human being.

(<https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1696&context=wlulr>) Under California criminal law, the general rule to be found guilty of murder is that the person must intend to kill or act with conscious disregard for human life. The felony murder rule has been broadly criticized because it does not require a defendant to have that state of mind which is generally required to establish culpability for a murder.

- 4) **Felony-Murder Rule Does Not Necessarily Act as a Deterrent:** In California conviction for murder, requires proof of intent to kill or action taken with conscious disregard for human life. Under the felony murder rule, a person can be convicted of murder without proof of any intent to kill or conscious disregard of human life, if the death at issue occurred during the commission of a felony. Proponents of the rule argue that it encourages criminals to reduce the number of felonies they commit and to take greater care to avoid causing death while committing a felony. Opponents argue that criminals are unaware of the felony murder rule and, more importantly, that it is impossible to deter criminals from committing unintentional acts. Critics also argue that the felony murder rule distorts marginal deterrence incentives—once a felon has accidentally caused one death, there is less to deter him from intentionally killing other witnesses to the crime.

(<http://www.law.virginia.edu/pdf/malani/felonymurder021111rand.pdf>)

Anup Malani, published a paper in 2002, which examined data related to the felony-murder

rule. Ms. Malani concluded that the felony murder rule does not provide an effective deterrent to criminal behavior. Ms. Malani compared the difference in average crime rates in states and years with and without the rule (defined as states that do and do not punish felony murder as first-degree murder, respectively) during the 1968-98 period. Ms. Malani found that the felony murder rule does not substantially improve crime rates. Based on her research, Ms. Malani suggested that if the primary rationale for a state to retain the felony murder rule is to reduce crime, the state should reconsider the rule. (Id.)

- 5) **Argument in Support:** According to the *Center on Criminal and Juvenile Justice*, “California’s accomplice liability law can impose first degree murder charges on individuals who are accused of a felony—such as robbery or burglary—that resulted in a death. While a murder conviction typically requires proof of premeditation and intent, the accomplice liability law creates an exception to this standard and allows the state to impose the most severe penalties, including life in prison, for the commission of a lesser offense. This life sentence is imposed even if a person did not kill, aid in the killing, nor act with any intent to harm. While it is important to hold those who endanger public safety accountable, punishment should be proportional to an individual’s culpability. SB 1437 will make clear that a charge of first degree murder requires that someone had intent to kill, aided and abetted the killing, or acted with reckless indifference to human life.

“This bill does not end criminal liability for accomplices in crime; those who participated in the underlying crime will still be charged for their participation in the crime. Those who actually caused the death will still be liable for murder. All participants will be held accountable and will be appropriately sentenced based on their level of participation in the homicide.

“Existing accomplice laws disproportionately impact youth of color and women. The majority of those incarcerated as accomplices are under the age of 25 at the time of the crime. Moreover surveys indicate that approximately 70 percent of women charged with homicide were accomplices, not the actual perpetrators of the act that led to death. These women are often in coercive relationships with the perpetrators. Nevertheless, because of the acts of others, they are subjected to life sentences, and sometimes even a longer sentence than the actual perpetrator.

“As California seeks to address severe, unconstitutional overcrowding in its state prisons, voters and lawmakers have enacted reforms, including AB 109, Prop 47, and Prop 57, that are reducing incarcerated populations, shortening overly-punitive sentences, and bringing more Californians home. However, the benefit of these recent reforms has accrued primarily to those with nonviolent convictions. To meaningfully reduce prison populations and repair the harm of decades of mass incarceration, the state must also provide relief to those with violent felony convictions. By addressing the characteristic unfairness of accomplice liability law, the California Legislature will demonstrate its commitment to bringing overdue reforms to violent felony sentencing and redirecting state resources away from costly investments in corrections.”

- 6) **Argument in Opposition:** According to the *California District Attorneys Association*, “There are a number of concerns raised in this bill:

“First, the retroactive application of this bill applies to convictions that resulted from both

jury and bench trials as well as convictions that resulted from negotiated plea bargains. Under the provisions of this measure, a resentencing hearing will necessarily require a full court record, including transcripts and exhibits, to determine the exact level of participation in the crime in order to determine whether a particular defendant is entitled to relief. In cases that resolved through a negotiated plea, no such record exists and virtually all participants in murders may qualify for relief to which they may not be entitled.

“Additionally, this bill requires the prosecution to prove beyond a reasonable doubt that the petitioner falls into one of the categories that precludes resentencing. In cases that resolved through a negotiated plea, the absence of a full court record will necessarily prevent the people from establishing beyond a reasonable doubt whether a petitioner is excluded. The result will entitle virtually all petitioners who apply, even those who were major participants in the crime which resulted in death, to be entitled to a resentencing and the elimination of their well-deserved criminal liability.

“Second, by placing the burden on the prosecution to prove beyond a reasonable doubt that petitioners do not qualify for resentencing, this bill will require the litigation of facts previously not litigated in the original case, particularly in cases that resolved through a plea. It is unclear from this bill whether the determination of those facts will be conducted by the resentencing judge or will necessitate a jury – which has significant procedural and constitutional implications as well as significant costs.

“Moreover, this bill provides no exception to allow for the trial transcript to be used in a resentencing hearing. The effect of this would be to necessitate the calling of witnesses, other victims, and family members who may have been involved in the original case. The effects of this to crime victims and survivors would be devastating.

“Finally, the requirements placed on a petitioner to seek a resentencing hearing merely require the submission of a request indicating that a petitioner was convicted of murder and that the prosecution theory could have included a theory of first or second degree felony murder. Charging documents, plea forms, jury verdict forms and other documents involved in the prosecution of murder cases do not specify the theory under which someone is charged or even convicted of murder. The only way to determine whether a felony murder theory was advanced in a particular case would be to examine the transcripts at trial. The effect of this provision of the bill would be to allow everyone convicted of murder – actual killers, those acting with premeditated intent, and major participants acting with reckless indifference to human life included – to successfully petition to have a resentencing hearing. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner’s ineligibility for a resentencing, this bill will effectively authorize the release of actual killers and those who played major roles in the killing of others during dangerous felonies.

“We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately this bill falls short and creates some potentially disastrous and costly problems that renders this bill unworkable.”

7) Related Legislation:

- a) AB 3104 (Cooper), would limit the sentence for specified first degree murder convictions where the person is not the actual killer, but participated in specified felonies, to 25 years to life. Would specify that a person who is not the actual killer and who does not act with reckless indifference to human life and is not a major participant in the crime, but who is an accomplice in a specified felony that results in the death of a person, is guilty of second degree murder, punishable by 15 years to life. AB 3104 is on the Assembly Inactive File.
- b) SB 971 (Nguyen), would additionally include among those special circumstances that the victim was intentionally killed because of his or her sexual orientation or gender, as defined. SB 971 failed passage in the Senate Public Safety Committee.

8) Prior Legislation:

- a) AB 2195 (Bonilla), of the 2015-2016 Legislative Session, would have require the district attorney of each county to collect data on the number of persons charged with and convicted of felony murder, disaggregated by race and gender, and, beginning July 1, 2017, to report that data to the Department of Justice. AB 2195 was held on the Assembly Appropriations Committee Suspense File.
- b) SB 878 (Hayden), of the 1999-2000 Legislative Session, would have required the court in a case involving felony murder with a defendant who did not physically or directly commit the murder, whether imposition of a sentence of first degree murder is proportionate to the offense committed and to the defendant's culpability in committing that offense by considering specified criteria and to state its reasons on the record. SB 878 failed passage on the Senate Floor.

REGISTERED SUPPORT / OPPOSITION:**Support**

Restore Justice (Co-sponsor)
 Anti-Recidivism Coalition (Co-sponsor)
 Californians for Safety and Justice (Co-sponsor)
 California Coalition for Women Prisoners (Co-sponsor)
 CARES for Youth (Co-sponsor)
 Felony Murder Elimination Project (Co-sponsor)
 Initiate Justice (Co-sponsor)
 Pacific Juvenile Defender Center (Co-sponsor)
 University of San Francisco School of Law Criminal and Juvenile Justice Clinic and Racial Justice Clinic (Co-sponsor)
 USC Gould School of Law Post-Conviction Justice Project (Co-sponsor)
 Youth Justice Coalition (Co-sponsor)
 American Civil Liberties Union of California
 The Advocacy Fund
 American Friends Service Committee
 Beit T'Shuvah

Bend the Arc Jewish Action
California Attorneys for Criminal Justice
Californians United for a Responsible Budget
California Public Defenders Association
Catholic Worker Hospitality House
Center for Juvenile Law and Policy
Center on Juvenile and Criminal Justice
Community Housing Partnership
Community Works West
Courage Campaign
East Side Studios
Ella Baker Center for Human Rights
Fair Chance Project
Friends Committee on Legislation of California
Human Rights Watch
Lawyers Committee for Civil Rights of the San Francisco Bay Area
Felony Murder Elimination Project
Full Moon Pickles and Catering
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Legal Services for Prisoners with Children
Los Angeles Chapter of the National Action Network
The Modesto/Stanslaus NAACP
New Jersey Parents Caucus
Pillars of the Community
Place4Grace
Prison Activist Resource Center
Prisoner Advocacy Network
Prisoner Hunger Strike Solidarity
Riverside Temple Beth El
Rubicon Programs
San Francisco Public Defender
Showing Up for Racial Injustice – Long Beach
Sister Inmate
Survived & Punished
Time for Change Foundation
University of San Francisco School of Law's Criminal and Juvenile Justice Clinic and Racial Justice Clinic
United Auto Workers Local 2865
WE ARE HERE TO HELP
Welcome Home LA Reentry
White People 4 Black Lives
Women's Center for Creative Work
Women's Council of the California Chapter of the National Association of Social Workers;
Young Women's Freedom Center

325 Private Individuals

Opposition

Association of Deputy District Attorneys
California Association of Code Enforcement Officers
California College and University Police Chiefs Association
California District Attorneys Association
California Peace Officers' Association
California Narcotic Officers Association
California Police Chiefs Association
California State Sheriff's Association
Crime Victims United
Los Angeles County District Attorney's Office
Los Angeles Police Protective League
Los Angeles Professional Peace Officers Association
Peace Officers Research Association of California
Riverside Sheriffs' Association

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

SENATE COMMITTEE ON APPROPRIATIONS

Senator Ricardo Lara, Chair
2017 - 2018 Regular Session

SB 1437 (Skinner) - Accomplice liability for felony murder

Version: February 16, 2018

Policy Vote: PUB. S. 6 - 1

Urgency: No

Mandate: Yes

Hearing Date: May 14, 2018

Consultant: Shaun Naidu

This bill meets the criteria for referral to the Suspense File.

Bill Summary: SB 1437 would prohibit the application of the felony-murder rule to a participant to or conspirator of the underlying felony who did not commit the homicidal act personally.

Fiscal Impact:

- Court: Unknown, potentially-major costs in the millions of dollars to the courts to process and adjudicate resentencing petitions. Costs would be dependent on the number of individuals who would file a petition for resentencing pursuant to this bill. (General Fund*)
- Department of Corrections and Rehabilitation (CDCR): Unknown, potentially-major costs in the hundreds of thousands of dollars to the millions of dollars to the department to supervise and transport inmates from state facilities to the appropriate courthouses for resentencing hearings. Actual costs would be dependent on the number of individuals whom CDCR is required to transport and how many inmates the department could transport and supervise per excursion. (General Fund)

Additionally, CDCR anticipates administrative workload costs of about \$200,000 for case records audit and review of resentencing documents, data and document entry into the Strategic Offender Management System (SOMS), and release processing and data entry into the Electronic Records Management System. (General Fund)

Unknown, potentially-major out-year or current-year savings in reduced incarceration expenses for inmates resentenced to a shorter term of incarceration. The proposed 2018-19 per capita cost to house a person in a state prison is \$80,729 annually, with an annual marginal rate per inmate of between \$10,000 and \$12,000. The average contract-prison rate cost per inmate is over \$30,000 annually. The actual savings would be dependent on the number of individuals who successfully petition the court for resentencing and whose sentences to state prison are reduced to a shorter term than what was initially imposed. When these averted admissions are compounded, the savings could reach into the millions of dollars annually. (General Fund)

- Local costs: Unknown costs to county District Attorneys' Offices and Public Defenders' Offices to litigate petitions for resentencing. These costs likely would be reimbursable by the state, the extent to which would be determined by the Commission on State Mandates. (General Fund, local funds)

*Trial Court Trust Fund

Background: California law defines murder as “the unlawful killing of a human being or a fetus with malice aforethought.” (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter due to the additional element of malice, which may be expressed or implied. Murder is further delineated into first and second degrees. Depending on the associated circumstances of the offense, first-degree murder carries the possible punishments of death, life in prison without the possibility of parole, or a term in state prison of twenty-five years to life. First-degree murder, in part, is a murder that is committed in the perpetration of, or attempted perpetration of, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Any murder not enumerated as first-degree murder in statute is second-degree murder, which carries a punishment of a term in state prison of fifteen years to life.

California voters passed Proposition 8 (1982), which created a statutory definition of a “serious felony” and enacted what is commonly known as the Three Strikes Law. Both the serious felony list and the Three Strikes Law were later amended by the voters with Proposition 21 (2000) and Proposition 36 (2012), respectively. The Three Strikes Law requires increased penalties for certain recidivist persons in addition to any other enhancement or penalty provisions that may apply, including individuals with current and prior convictions of a serious felony, as specified.

The felony-murder rule (or doctrine) can result in a first-degree or a second-degree murder conviction. The rule creates culpability for murder for people who kill another person during the commission of a felony. The culpability extends to accomplices and co-conspirators. Moreover, the death does not need to be in furtherance of the felony offense and may be accidental.

First-degree felony murder takes place when a death occurs during the commission of one of the enumerated crimes associated with first-degree murder. Second-degree felony murder occurs when a death results from the commission of a felony that (1) has not been included in the first-degree murder category and (2) is, objectively, “inherently dangerous” to human life. The court has held that a felony is inherently dangerous when it cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal.3d 824, 833.)

Proposed Law: This bill would:

- Prohibit malice from being imputed to a person based solely on his or her participation in a crime.
- Prohibit a participant or conspirator in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.
- Prohibit a participant or conspirator in the perpetration or attempted perpetration of one of the specified first-degree murder felonies in which a death occurs from being liable for murder, unless the person:
 - Personally committed the homicidal act;
 - Acted with premeditated intent to aid and abet an act wherein a death would occur; or,
 - Was a major participant in the underlying felony and acted with reckless indifference to human life.
- Include in the list of serious felonies the commission of a felony inherently dangerous to human life wherein a person was killed.

- Provide a means of resentencing a person when all of the following apply:
 - A complaint, information, or indictment was filed against him or her that allowed the prosecution to proceed under a theory of first-degree felony murder, second-degree felony murder, or murder under the natural and probable consequences doctrine;
 - The person was sentenced for first-degree or second-degree murder or accepted a plea offer in lieu of a trial at which he or she could be convicted for first-degree or second-degree murder; and,
 - The person could not be charged with murder after the enactment of this bill.
- Provide that the court cannot, through this resentencing process, remove a strike from the petitioner's record.

Related Legislation: SCR 48 (Skinner, Ch. 175, Res. 2017) resolved that the Legislature recognizes a need for statutory changes to the felony-murder rule to more equitably sentence persons in accordance with their involvement in the crime.

AB 2195 (Bonilla, 2016) would have required the collection and reporting, as specified, of data on the number of persons, by race and gender, charged with and convicted of felony murder. AB 2195 was held on the Suspense File of the Assembly Committee on Appropriations.

SB 878 (Hayden, 1999) would have required the court, after a conviction of more than one defendant of first-degree felony murder, to determine, prior to imposing the sentence on the defendant who did not physically or directly commit the murder, whether the imposition of a sentence of first-degree murder is proportionate to the offense committed by the defendant and to the defendant's culpability of the offense, based on specified factors. SB 878 failed passage on the Senate floor.

Staff Comments: As the abstract of judgement reflects only the degree of a conviction for murder, it is difficult to determine the number of individuals incarcerated for murder whose basis of conviction is the felony-murder rule. The Department of Corrections and Rehabilitation similarly does not track this information. According to information from the author, as quoted by the analysis of this bill by the Senate Committee on Public Safety, 72 percent of women currently incarcerated in California with a life sentence did not personally commit the homicidal act.

With respect to the overall population in state prison for a murder conviction, CDCR reports that a snapshot on December 31, 2017 showed 14,473 inmates were serving a term for the principal offense of first-degree murder and 7,299 were serving a term for the principal offense of second-degree murder. If 10 percent of this population, or 2,177 individuals, would file a petition for resentencing under this bill, and it took the court an average of four hours to adjudicate a petition from receipt to final order, it would result in additional workload costs to the court of about \$7.6 million. While the court is not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to fund additional staff and resources.

Similarly, SB 1437 would produce additional costs to CDCR to transport petitioners to and from court hearings. There are many factors that affect the costs of out-of-institution transportation, including each inmate's escape risk and in-custody behavior,

the distance from an inmate's housing facility to the courthouse, and the pace at which a court moves through its docket. Presuming that two correctional officers with regular hourly wages would transport one inmate with a total travel and court time of four hours, which is a conservative assumption, this bill would cost the department almost \$300 per hearing. If the court and travel time were extended, department costs would rise commensurately. If the department were able to transport multiple inmates to a courthouse at one time, the per-inmate costs would be lowered in turn.

-- END --

Date of Hearing: August 8, 2018

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Lorena Gonzalez Fletcher, Chair

SB 1437 (Skinner) – As Amended May 25, 2018

Policy Committee: Public Safety

Vote: 5 - 2

Urgency: No

State Mandated Local Program: Yes

Reimbursable: No

SUMMARY:

This bill limits liability for individuals based on a theory of 1st or 2nd degree felony murder if the person did not actually commit the murder and meets other criteria. This bill also allows individuals previously sentenced on a theory of felony murder to petition for resentencing if they meet specified qualifications.

FISCAL EFFECT:

- 1) Unknown one-time GF costs, likely in the millions of dollars or more, for courts to hold resentencing hearings.
- 2) Unknown one-time GF costs, potentially in the hundreds of thousands to millions of dollars, for the California Department of Corrections and Rehabilitation (CDCR) to transport inmates to resentencing hearings.
- 3) Ongoing administrative GF costs of about \$200,000 for CDCR to review and update records.
- 4) Minor one-time costs for CDCR to train staff on the changes to the law.
- 5) GF costs of \$42,000 in 2018-19 and \$84,000 in 2019-20 for the Department of Justice to handle an increase in the number of appeals related to resentencing requests and to update records to reflect resentencing changes.

COMMENTS:

- 1) **Background.** The felony-murder rule is a legal doctrine that excludes considerations of context and intention in a murder. When someone is killed during the commission of a felony, regardless of how or by whom they are killed, any person engaged in the felony is charged with murder. The United States is the only country in the world to use the felony-murder rule. Hawaii and Kentucky have banned the felony-murder rule by statute and in Michigan has banned it through a decision by the Michigan Supreme Court. In Michigan, the Supreme Court noted when it abolished the felony-murder rule:

Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases, unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.”

Under the current felony-murder rule in California, criminal liability for a homicide is very broad. A defendant may be convicted of first-degree murder under the felony-murder rule if the defendant is involved in the commission, attempted commission, or flight following the commission or attempted commission of a felony, even if the defendant did not commit a murder, and even if the killing was unintentional, accidental, or negligent. First degree murder carries a sentence of 25 years to life. A defendant may be convicted of second-degree felony murder if a killing happened during the commission, attempted commission, or flight following the commission or attempted commission of an “inherently dangerous felony” even if the defendant did not commit a murder, and even if the killing was unintentional, accidental, or negligent. Second degree murder carries a sentence of 15 years to life.

- 2) **Purpose.** This bill would limit the liability for individuals under a theory of 1st or 2nd degree felony murder. Under the provisions of this bill, an individual would not be liable for 2nd murder under a theory of felony murder unless the individual personally committed the act that resulted in death. Under the provisions of this bill an individual would not be liable for 1st degree felony murder unless (a) the person was the actual killer; (b) the person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or (c) the person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified. According to the author:

SB 1437 seeks to restore proportional responsibility in the application of California’s murder statute reserving the harshest punishments for those who intentionally planned or actually committed the killing.

Analysis Prepared by: Jessica Peters / APPR. / (916) 319-2081

4-20-2018

Rejoining Moral Culpability with Criminal Liability: Reconsideration of the Felony Murder Doctrine for the Current Time

William Bald

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REJOINING MORAL CULPABILITY WITH CRIMINAL LIABILITY: RECONSIDERATION OF THE FELONY MURDER DOCTRINE FOR THE CURRENT TIME

William Bald†

INTRODUCTION

In 2014, Kurese Bell, a young man from the San Diego area, was arrested after committing two armed robberies. Bell and his accomplice, Marlon Thomas, robbed a smoke shop and a marijuana dispensary, with both robberies occurring within four days of each other. During the second robbery, the two men exchanged gunfire with a security guard, who had newly been hired to keep watch over the dispensary. The guard was hit in the fray, but not before he was able to shoot and kill Thomas. Bell was charged and convicted of first-degree murder under California's felony murder rule,¹ even though he did not fire the bullet that killed his accomplice.² Bell was later sentenced to sixty-five years to life in prison, plus thirty-five years to run concurrently.³

The felony murder rule attempts to hold criminals such as Mr. Bell liable for unintended killings which happen to occur during the commission of a felony.⁴ The California Supreme Court has stated that “[t]he felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant’s mental state.”⁵ While the idea of holding someone morally culpable for a killing they did not intend contrasts with the general principles of criminal law, the intent to commit the felony is generally explained to constitute an implied intent

† J.D. Candidate, Notre Dame Law School, 2019. The author would like to thank the entire Journal of Legislation editing team for the many hours of work that they spent on this endeavor. A special thanks goes out to Professor Richard Garnett for his advice and to Professor Stephen Cribari for helping to plant the seeds of this paper during his first year criminal law class. And last but certainly not least, the author would like to thank his parents, Hope and Ron, and his brother, Matthew, for their continued belief and support.

1 CAL. PENAL CODE § 189 (West 2018).

2 It can also be said that Bell did not possess the criminal intent necessary for a first-degree murder conviction in California. First-degree murder in California follows the common law approach, which requires malice aforethought, premeditation, and deliberation. David Crump, “*Murder, Pennsylvania Style*”: *Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W. VA. L. REV. 257, 262–63 (2007).

3 Dana Littlefield, *Robber Gets 65 Years to Life in Dispensary Robbery, Murder*, SAN DIEGO UNION-TRIB. (Sept. 1, 2017, 11:10 AM), <http://www.sandiegouniontribune.com/news/courts/sd-bell-sentencing-20170901-story.html>.

4 Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 (2011).

5 *People v. Chun*, 203 P.3d 425, 430 (Cal. 2009).

to commit common law murder.⁶ Most courts, when justifying the rule within their opinions, explain its use as one of deterrence.⁷ California's murder statute reads:

All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289 . . . is murder in the first degree.⁸

This statute and others like it are illustrative of the felony murder doctrine. The felony murder rule is in effect in a majority of American jurisdictions⁹ even as it has been condemned and criticized by some in the academic community¹⁰ for a swath of reasons, such as its enforcement of disproportionate punishments,¹¹ its expansion of cases eligible for the death penalty,¹² and its apparent lack of any actual deterrent effect.¹³

This Comment seeks to analyze the felony murder rule from a legislative perspective. While it is important to discuss the role of courts across the country who have been active in their attempts to judicially abrogate or limit the felony murder doctrine,¹⁴ the focus of this Comment lies squarely upon the actual statutes that make up the doctrine of felony murder. The ultimate goal of this Comment is to provide a framework for what this author would consider the "ideal" felony murder statute: one that can best comply with the justifications for the existence of the doctrine while avoiding as many of the doctrine's numerous pitfalls as possible. Part I of this Comment will give a brief history of the felony murder rule from its beginnings in English common law to modern day statutes. Part II will examine some of the criticisms levied upon the rule as well as some of the limitations put in place to combat them. Part III will examine the statutory structures generally implemented by legislative bodies when codifying the rule. Finally, Part IV will contain this

6 Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 2 (2006) (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06 (3d ed. 2001)).

7 The idea is that the possibility of harsher punishments will stop criminals from committing felonies or cause them to be careful not to negligently or accidentally kill while engaging in such felonies. Michael C. Gregerson, Note, *Recent Decisions of the Minnesota Supreme Court: Case Note: Criminal Law—Dangerous, Not Deadly: Possession of a Firearm Distinguished from Use Under the Felony-Murder Rule—State v. Anderson*, 31 WM. MITCHELL L. REV. 607, 613 (2004).

8 CAL. PENAL CODE § 189 (West 2018). The sections referred to in the statute refer to statutes regarding torture, sodomy, lewd or lascivious acts, oral copulation, and forcible acts of sexual penetration.

9 John S. Huster, Comment, *The California Courts Stray from the Felony in Felony Murder: What is "In Perpetration" of the Crime?*, 28 U.S.F. L. REV. 739, 743–44 (1994).

10 See Binder, *supra* note 4, at 404–05 (citing MODEL PENAL CODE & COMMENTARIES PT. II § 210.2 cmt. 6, at 32–42 (AM. LAW. INST. Official Draft and Revised Comments 1980)).

11 Tamu Sudduth, Comment, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299, 1327 (1984).

12 Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 776–79 (1999).

13 *Id.* at 779–82.

14 And indeed, this Comment will touch upon some examples of efforts by the judiciary to constrain and control various felony murder statutes.

author's suggestion as to how to best design a felony murder statute in order to fulfill the rule's intended legislative purpose.

I. HISTORY OF THE FELONY MURDER RULE

A. A Historical Overview

The precise origins of the doctrine are unclear. One possible source for the theory behind the rule is the medieval theory of "tainting" in which culpability for a death attaches regardless of the killer's mental state.¹⁵ Some legal historians generally opine that the first actual statement of the felony murder doctrine is the English case of *Lord Dacres*, which was decided in 1535.¹⁶ Lord Dacres had trespassed upon a park with his companions in order to illegally hunt there, at which time he and his hunting party agreed to kill anyone who would stop them from doing so.¹⁷ Their pact came to a realization when a member of the group did indeed kill one of the park's gamekeepers.¹⁸ Although Lord Dacres was not physically present at the site of the murder, he, along with the other members of the hunting party, were charged with murder and sentenced to death.¹⁹ However, the holding of the case which imposed liability on Lord Dacres was not based on his joining of an unlawful act, but instead on the theory of "constructive presence," which frustrates the construction of the case as the inception of the felony murder rule.²⁰

Another case which some scholars have cited as the origin of the felony-murder doctrine is the case of *Mansell & Herbert*.²¹ The *Mansell & Herbert* case arose from an attack upon the home of Sir Richard Mansfield by a gang under the command of George Herbert.²² The men had gone to Mansfield's house in order to seize goods while pretending to have lawful authority.²³ One of the men in Herbert's group threw a stone at someone standing in the gateway of the house but missed and accidentally hit a woman who was exiting the house, and who later died as a result of her wounds.²⁴ The court held that because the person intended to perform an act of violence against a third party, even though another died, it was murder regardless of the fact that the eventual victim was not the intended target.²⁵

15 Gerber, *supra* note 12, at 765.

16 Gregerson, *supra* note 7, at 611; *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980) (citations omitted).

17 *Aaron*, 299 N.W.2d at 307 (citations omitted).

18 *Id.* at 307-08.

19 *Id.* at 308.

20 *Id.*

21 *Id.*

22 Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 77 (2004).

23 *People v. Aaron*, 299 N.W.2d 304, 308 (Mich. 1980).

24 *Id.*

25 *Id.*

Alternatively, other commentators have listed Edward Coke's statement of the rule in 1797 as the original source of the rule which caused the doctrine to gain prominence.²⁶ Lord Coke's statement of the felony murder rule reads:

If the act be unlawful it is murder. As if A. meaning to steale a deerre in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had not intent to hurt the boy, nor knew not of himm. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is per infortunium (misadventure): for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.²⁷

Lord Coke was suggesting that the evil intent associated with an unlawful act could be substituted for the malice required for homicide.²⁸ However, other scholars have criticized Lord Coke's statement, claiming—as did the Michigan Supreme Court in *Aaron*—that it was not based off of any existing authority.²⁹ Regardless of the inception of the felony murder rule in England, the doctrine was seldom used in its country of origin before its abolition in 1957.³⁰

B. Current Status of the Doctrine

If the origins of the felony murder rule at English common law are to be considered murky at best, so too is its integration into the American legal system.³¹ As the American criminal law system developed to include separate degrees of

26 Gregerson, *supra* note 7, at 612 (citing Michael J. Roman, "Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of *State v. Oimen* and *State v. Rivera*, 77 MARQ. L. REV. 785, 828 n. 15 (1994)); *Aaron*, 299 N.W.2d at 308–09 (citing 2 MICH. CRIM. JURY INSTRUCTIONS (Ann Arbor: Institute of Continuing Legal Education), Felony-Murder Commentary, pp. 16-107–16-109).

27 *Aaron*, 299 N.W.2d at 309 (citing EDWARD COKE, THIRD INSTITUTES 56 (1797)).

28 Binder, *supra* note 22, at 83.

29 *People v. Aaron*, 299 N.W.2d 304, 309 (Mich. 1980) (citing JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 57, 65 (1883)).

30 *Id.* at 312 (citing Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 635 (1957)).

31 There appears to be some disagreement as to whether the American felony-murder rule originated from its English common law counterpart. Compare Roman, *supra* note 26, at 787 ("Like many aspects of the present legal system in Wisconsin, the felony-murder doctrine (or felony-murder rule) had its genesis in the common law."), with Binder, *supra* note 22, at 63 (stating that America did not receive any felony murder rules from England, as despite cases such as Lord Dacres's, there was no legal authority supporting any such rule in place at the time of the American Revolution).

murder,³² participation in a felony was used by some states as a grading factor in determining which degree a criminal would be charged with.³³ The first formal felony murder statute was enacted by Illinois in 1827.³⁴ The doctrine was popular among the states, with all but seven states and the federal government adopting some form of the rule by the end of the nineteenth century.³⁵

As it stands now, a mere three states have completely abolished the felony murder rule, with most other jurisdictions retaining the doctrine in some form.³⁶ Hawaii,³⁷ Kentucky,³⁸ and Michigan³⁹ comprise the states which have completely removed the rule.⁴⁰ The decision by the Supreme Court of Michigan in *Aaron* is noteworthy because it is the only affirmative abolition of the rule in America to originate in the judicial branch of a state as opposed to the legislature. The defendant in *Aaron* was convicted of first-degree murder after committing a felony which resulted in an armed robbery.⁴¹ The issue at hand was an instruction by the trial court that “[the jury] could convict defendant of first-degree murder if they found that defendant killed the victim during the commission or attempted commission of an armed robbery.”⁴² The Supreme Court noted that Michigan did not have a statutorily defined felony murder doctrine, nor did it previously recognize the existence of any common-law rules on the subject.⁴³ Stating that the abolition of the rule would have “little effect on the result of the majority of cases,”⁴⁴ the court held that “malice is an essential element of any murder, as that term is judicially defined, whether the murder

32 Binder, *supra* note 22, at 119.

33 Pennsylvania’s 1794 criminal law reform statute was the first statute of this kind, and eventually influenced homicide reform in two-thirds of the other states by the end of the nineteenth century. *Id.* at 119–20.

34 *Id.* at 120–21 (citing ILL. REV. CODE, CRIM. CODE §§ 22, 24, 28 (1827)).

35 *Id.* at 123 (the seven states were Kentucky, Louisiana, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont).

36 Birdsong, *supra* note 6, at 20 (“While three states, Kentucky, Hawaii, and Michigan, have abolished felony murder, every other jurisdiction in the United States has retained it in some form.”); Huster, *supra* note 9, at 743–44 (“While the rule has been abolished in England, its place of origin, the majority of American states still apply the felony murder doctrine in some form.”).

37 See the commentary for HAW. REV. STAT. § 707-701 (2017), citing “an extensive history of thoughtful condemnation,” states that the legislature decided to follow the “wiser course” set out by England and India in abolishing the statute.

38 KY. REV. STAT. ANN. § 507.020 (West 2017). While being sure to note that killings that occur in the commission of a dangerous felony *can* still constitute murder, the commentary to the Kentucky statute abandoned the doctrine of felony murder as an independent basis for establishing an offense of homicide.

39 *People v. Aaron*, 299 N.W.2d 304, 321–26 (Mich. 1980) (“We believe it is no longer acceptable to equate the intent to commit a felony with the intent to kill . . .”).

40 Ohio has also effectively abolished the felony murder rule by requiring that deaths occurring while committing or attempting to commit a felony be “purposely cause[d].” OHIO REV. CODE ANN. § 2903.01 (West 2017); see also Graham T. Stiles, Comment, *North Carolina’s Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalities to Satisfy First Degree Felony-Murder*, 22 CAMPBELL L. REV. 169, 180 (1999).

41 *Aaron*, 299 N.W.2d at 307.

42 *Id.*

43 *Id.* at 321–26.

44 *Id.* at 327. The court claimed that in most cases in which the felony murder rule had been applied, its use was unnecessary because the requirement of malice could almost always be inferred from the evidence presented.

occurs in the course of a felony or otherwise.”⁴⁵ This abrogation of the felony murder rule is significant because it raises an intriguing reasoning for the furor behind the doctrine: that most deaths committed during the commissions of felonies can already be prosecuted through other homicide statutes.⁴⁶

II. CRITICISMS OF THE FELONY MURDER RULE

For a doctrine still in effect in a majority of American jurisdictions, the felony murder rule has drawn much ire from many legal scholars. It is important, before diving into how such statutes can most effectively be constructed, to examine the criticisms of the doctrine. Doing so allows potential legislative bodies to be aware of the difficulties they face when creating and amending felony murder statutes.

A. *The Mens Rea Element*

The reasoning by the Michigan Supreme Court in *Aaron* that many felony murder charges are redundant begins to point to one of the most vocal criticisms of the doctrine, which is the mens rea element. One of the common criticisms of felony murder centers on its perceived lack of a mens rea, or intent requirement.⁴⁷ This is because under the doctrine, accidental deaths can be prosecuted as murder, which generally requires a specific intent.⁴⁸ However, this argument is not entirely correct, as Mr. O’Herron notes in his article on the subject,⁴⁹ because the felony murder doctrine *does* require a mens rea. The mens rea which is necessary to sustain a felony murder conviction is not, however, the intent to commit what would be murder in a given jurisdiction. Instead, the required intent is merely the intent to commit the felony during which the death occurred.⁵⁰ In simpler terms, the felony murder rule “transfers the mental state required to commit the felony to the fatal act itself.”⁵¹ This

45 *Id.* at 326; *see also* State v. Galloway, 275 N.W.2d 736 (Iowa 1979) (holding that the Iowa felony murder rule is directed at “murders” occurring during the commission of felonies as opposed to “killings,” making malice a necessary element in the instruction and application of felony murder cases); W. E. Shipley, *Judicial Abrogation of Felony-Murder Doctrine*, 13 A.L.R.4th 1226 (1982).

46 The traditional models for the degrees of murder are that “murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion.” Robert Weisberg, *Impulsive Intent/Impassioned Design*, 47 TEX. TECH L. REV. 61, 63 (2014) (citing Austin v. United States, 382 F.2d 129, 137 (D.C. Cir. 1967)). Manslaughter, on the other hand, is a form of criminal homicide that is defined in the Model Penal Code as a homicide that is committed recklessly or when “a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” MODEL PENAL CODE § 210.3(1)(a)–(b) (AM. LAW INST. 2018).

47 John O’Herron, *Felony Murder Without a Felony Limitation: Predicate Felonies and Practical Concerns in the States*, 46 No. 4 CRIM. LAW BULLETIN ART. 4 (2010) (“Most of the criticism of the doctrine has focused on the most troublesome aspect of the doctrine: the lack of a mens rea requirement”).

48 Gerber, *supra* note 12, at 770.

49 *See supra* note 47. Mr. O’Herron was serving as a law clerk to with the Honorable Chief Justice Cynthia D. Kinser at the Supreme Court of Virginia during the authoring of his article. He now serves as an associate at the law firm of Thompson McMullan.

50 *Id.*

51 Gerber, *supra* note 12, at 770. A more expansive view of the transferred intent requirement briefly arose in North Carolina in the case of State v. Jones, 516 S.E.2d 405 (N.C. App. 1999). In *Jones*, the defendant was charged with felony murder after he had a drunk driving accident which resulted in the death of two college

allows accidental deaths which occur in the commission of a felony to be charged as murder so long as the prosecution can prove the intent to commit the particular felony at issue.⁵² The extreme hypothetical that arises when one thinks about this idea of transferred intent would be someone who witnesses a robbery dying of shock upon seeing the heinous act. This hypothetical defendant would have the necessary intent to commit the underlying felony, which in this case is the robbery, and therefore could be charged with felony murder.⁵³

While the application of the transferring intent seems fairly straightforward, the states have adopted different interpretations of the degree of criminal intent that can actually be transferred to a felony murder charge. An example of the broadest application of felony murder mens rea is the statute in place in Georgia.⁵⁴ This specific statute states that “[a] person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being *irrespective of malice.*”⁵⁵ The explicit disregard for the necessity of malice makes the statute applicable to practically any felony imaginable.⁵⁶ An example of the statute’s broad application is seen in the case of *Durden v. State*.⁵⁷ In *Durden*, the defendant had broken into a store in order to commit a robbery when he got into a gunfight with the store’s owner. The defendant did not manage to shoot the store owner, but the owner died shortly after the exchange from cardiac arrest.⁵⁸ The Georgia Supreme Court found that a jury was authorized in finding the defendant guilty of felony murder based on this death.⁵⁹

Other states have gone in the opposite direction, which is to say that they limit the transfer of criminal intent from a felony to felony murder. For example, the courts in New Mexico have judicially limited their felony murder statute⁶⁰ to “requir[e]

students. The *Jones* case brought forward an intriguing question about the extent criminal intent could be transferred for felony murder cases. This is because the defendant did not technically intend to commit the underlying felony, which was assault with a deadly weapon (in this case a motor vehicle). The defendant only had the intent to drive drunk, not to commit an assault. See Stiles, *supra* note 40. However, this line of reasoning was swiftly shut down on appeal by the Supreme Court of North Carolina. *State v. Jones*, 538 S.E.2d 917 (N.C. 2000). While the court conceded that the criminal negligence at hand could be used to satisfy the intent requirements for crimes such as manslaughter, such negligence was not intended to satisfy the mens rea for first degree felony murder. *Jones*, 538 S.E.2d at 923.

52 Gerber, *supra* note 12, at 770.

53 Mr. O’Herron argues in his article that when the predicate felonies upon which a felony murder charge can be brought are enumerated in a statute, this transfer of intent is a positive aspect of the doctrine because it furthers the intended purposes of the rule, such as punishing defendants more harshly for dangerous acts that do end in a death. See O’Herron, *supra* note 47. Mr. O’Herron’s views will be discussed in more detail later in this Comment.

54 *Id.* at 4.

55 GA. CODE ANN. § 16-5-1(c) (2017) (emphasis added).

56 This is not exactly the case, as the judicial branch of Georgia has limited the statute to apply to inherently dangerous felonies, as discussed below.

57 See O’Herron, *supra* note 47, at 4–5 (citing *Durden v. State*, 297 S.E.2d 237 (Ga. 1982)).

58 *Durden*, 297 S.E.2d at 325.

59 *Id.* at 329.

60 N.M. STAT. ANN. § 30-2-1(A)(2) (2017). The statute reads that “[m]urder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . in the commission of or attempt to commit any felony” It should be noted that the statute itself seems very broad, leading to the judicial branch of the New Mexico government to take it upon themselves to limit its application. See O’Herron, *supra* note 47, at 5.

proof that the defendant intended to kill the victim.”⁶¹ This effectively means that a killing in the commission of a felony must already be murder in the second degree in order for the felony murder statute to apply.⁶² This interpretation of the intent shifting component of felony murder seems to miss some of the purpose of the doctrine, however. It seems that the New Mexico interpretation of the rule ceases to punish defendants for *deaths* that occur in the course of felonies and instead punishes *murders* that occur during such felonies. The distinction is that the deterrent effect of the doctrine⁶³ moves away from preventing potential criminals from committing felonies and toward preventing criminals who have decided to engage in felonies from committing murder. It seems that with this being the case, having a felony murder statute becomes superfluous, as such crimes are deterred and punished by other degrees of murder or manslaughter statutes.⁶⁴

B. Proportionality

The perceived lack or diminution of the mens rea requirement in the felony murder rule leads many detractors to also decry the seemingly disproportionate punishments the doctrine brings about. The eighth amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁶⁵ The Supreme Court has held that the prohibition on “cruel and unusual” punishments also applies to punishments that are excessive for the offense committed.⁶⁶ In the early history of felony murder, the idea of proportionate crimes was not an incredibly important matter since all felonies carried the same penalty.⁶⁷ In the modern world, however, most jurisdictions of the United States classify offenses, including homicides, “to reflect a theory of proportionality to the severity of the crime.”⁶⁸ This idea of proportionality arises most noticeably when considering the felony murder rule’s application to cases involving accidental deaths in the commission of felonies. As Justice White stated in *Enmund v. Florida*,⁶⁹ “it is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’”⁷⁰

To this end the Supreme Court has laid out a framework that the various courts should use when analyzing the proportionality of a punishment.⁷¹ The Court laid out three objective criteria in this test, imploring courts to consider: “(i) the gravity of the

61 *State v. Ortega*, 817 P.2d 1196, 1204–05 (N.M. 1991).

62 O’Herron, *supra* note 47, at 5 (citing *State v. Campos*, 921 P.2d 1266, 1273 (N.M. 1996)).

63 Whether or not such an effect exists will be discussed later in this section.

64 *See supra* note 46 and accompanying text; MODEL PENAL CODE § 210.3(1)(a)-(b) (AM. LAW INST. 2018).

65 U.S. CONST. AMEND. VIII (emphasis added). This amendment is made binding upon the states through the fourteenth amendment.

66 Sudduth, *supra* note 11, at 1310.

67 Roman, *supra* note 26, at 789–90.

68 *Id.* at 789.

69 458 U.S. 782 (1982).

70 *Id.* at 798 (citing H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

71 *Solem v. Helm*, 463 U.S. 277 (1983).

offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”⁷² Additionally, because state constitutions have their own clauses pertaining to proportionality, criminal punishments at the state level must conform to the requirements of both the federal and state constitutions which apply.⁷³ This has led to some states further limiting the breadth of sentences available for felony murder prosecutions. For example, the California Supreme Court has held that a punishment which may not be disproportionate in the abstract⁷⁴ may still be impermissible if the defendant is not proportionately culpable.⁷⁵ The *Dillon* court declared that the “facts of the crime in questions’ . . . i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar,” must be considered in the proportionality analysis for felony murder sentences.⁷⁶ In *Dillon*, the defendant was a high school student who was attempting to rob an illegal marijuana farm.⁷⁷ When the owner of the farm snuck up on the boy and his friends from behind, the defendant “began rapidly firing his rifle at him,” eventually killing the owner.⁷⁸ The California Supreme Court found that the defendant’s sentence of life imprisonment was excessive, considering the facts that the shooting in question was responsive instead of proactive and that none of the defendant’s accomplices received a charge of homicide at all.⁷⁹ By viewing the totality of the facts at hand, the Supreme Court was able to examine the proportionality of the individual case, as opposed to viewing the sentence in light of the charged crime alone.

Regardless of the additional limitations that may be present at the state level, it would appear that the test articulated by the Supreme Court in *Solem v. Helm*, specifically the first prong, actually seems to justify the punishments doled out by felony murder statutes. This is because the predicate element of the rule is that a defendant actually has committed a felony. The “gravity” of such an offense seems to be incredibly large from a societal standpoint, especially considering the intended deterrent effect of the doctrine. The criticisms of proportionality are at their zenith, however, when it comes to felony murder’s potential expansion of capital punishment crimes and vicarious liability.

1. Vicarious Liability

One of the more troubling aspects of the felony murder doctrine, especially in the realm of proportionality, is the idea of applying vicarious liability to the actual killer’s accomplices.⁸⁰ Under the common law version of the doctrine, one could be

72 *Id.* at 292.

73 Sudduth, *supra* note 11, at 1311.

74 California courts have long used a similar proportionality test to that stated in *Solem*. In *re* Lynch, 503 P.2d 921 (Cal. 1972).

75 *People v. Dillon*, 668 P.2d 697, 721 (Cal. 1983).

76 *Id.* at 720 (citing *In re Foss*, 519 P.2d 1073, 1078 (Cal. 1974)).

77 *Id.* at 700–01.

78 *Id.* at 701.

79 *Id.* at 727.

80 Roman, *supra* note 26, at 807–08.

found guilty of felony murder “no matter if they, the accomplice, or the victim caused a death during the defendant’s commission or attempted commission of the underlying felony.”⁸¹ This theory of criminal liability is evident in the case of Kurese Bell, whose story was detailed in the introduction to this Comment.⁸² Mr. Bell did not fire the bullet that killed his friend, Marlon Thomas. In fact, no person involved in the commission of the robbery killed Mr. Thomas, with the fatal bullet instead originating from the gun of a security guard hired by the targeted business. Despite this, Mr. Bell was still charged and convicted under the felony murder doctrine. As the application of the doctrine in situations such as these seems somewhat nonsensical, some states have taken steps to limit the rule.⁸³ Seven jurisdictions actually define felony murder as “murder as participation in a felony *in which any participant causes death*.”⁸⁴ A further five states allow for liability under felony murder when *any* person causes a death.⁸⁵ When considering situations such as Mr. Bell’s, in which a death is caused by someone resisting a felonious act, jurisdictions have implemented two limitations: the “agency theory” and the “proximate cause theory.”⁸⁶

Under the agency theory, “for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him.”⁸⁷ Another way to look at the agency theory is to describe it as killings that are in furtherance to the felonious aims that the accomplices agreed to.⁸⁸ This idea is illustrated in the California case of *People v. Pool*,⁸⁹ which concerned a defendant who participated in a stage coach robbery, and the death that occurred was that of a constable who pursued them afterward.⁹⁰ The Supreme Court of California found the defendant liable because the defendant conspired to commit the robbery, including resisting apprehension should they be captured.⁹¹ The decision in *Pool*, timeworn though it may be, emphasizes the point that by agreeing to commit the felony, which in *Pool*’s case was a robbery, the accomplice who did not pull the trigger implicitly agreed to killings which would occur in the commission, or in this case the escape from, the felony.⁹² The agency theory has become the most accepted limitation of vicarious liability in felony murder statutes.⁹³

81 *Id.* at 808.

82 *See supra* note 3 and accompanying text.

83 Roman, *supra* note 26, at 808.

84 Binder, *supra* note 4, at 513 (emphasis added). The jurisdictions with this specific definition are Alabama, Connecticut, Montana, New York, North Dakota, Oregon, and Washington.

85 *Id.* at 516. The additional five jurisdictions are Alaska, Arizona, Colorado, Florida, and New Jersey.

86 Roman, *supra* note 26, at 809.

87 *Id.* (citing Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing is Done by One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R. 3d 239, 242 (1974).

88 Binder, *supra* note 22, at 198.

89 27 Cal. 572 (Cal. 1865).

90 *Id.* at 573.

91 *Id.* at 580.

92 Binder, *supra* note 22, at 198.

93 Roman, *supra* note 26, at 810.

On the other hand, the theory of proximate causation does not extend liability to charges of felony murder where the death is caused by an unexpected chain of events.⁹⁴ Thus the proximate cause theory requires that the death be reasonably foreseeable. Another way to articulate this theory is to say that the death be a “natural and probable consequence of the act agreed to.”⁹⁵ This promulgation of the theory is expressed by the Court of Criminal Appeals of Texas in *Darlington v. State*.⁹⁶ *Darlington*, much like *Pool*, concerned a robbery that resulted in an unintended death. The court in *Darlington* decided that because the defendant agreed to rob the train, he would have known that such a killing could have been a probable result.⁹⁷

The differences between the two theories are apparent when one applies them to a real-world scenario such as Kurese Bell. Under the agency theory of felony murder accomplice liability, Mr. Bell would not have been liable for the death as the security guard was certainly not acting in concert with the robbers. Under the proximate cause theory, however, it is possible that Mr. Bell could be found liable because the carrying of a gun during a robbery could make the death (or the shootout causing the death) foreseeable.⁹⁸

2. Expansion of the Death Penalty to Vicariously Liable Felons

Even with the limitations states have imposed on vicarious liability through the felony murder rule, concerns of proportionality between the punishment and the action come up whenever the death penalty rears its ugly head. While the death penalty has been held to not be cruel and unusual per se,⁹⁹ circumstances when it is applied to vicariously liable defendants become especially suspect. This was the issue at hand in *Enmund v. Florida*,¹⁰⁰ where the defendant was convicted of first degree murder through the felony murder rule after the death of two elderly people during the course of a robbery.¹⁰¹ However, the defendant in question had not participated in the actual killings or even the robbery, but instead was merely the getaway driver.¹⁰² The Supreme Court reversed the decision of the Florida Supreme Court sentencing the defendant to death, declaring that “Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”¹⁰³ Additionally, the Court declared that applying the death penalty to Enmund and cases like his “[did]

94 *Id.* (citing David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 383–87 (1985)).

95 Binder, *supra* note 22, at 198 (citing *Darlington v. State*, 50 S.W. 375, 376 (Tex. Crim. App. 1899)).

96 50 S.W. 375 (Tex. Crim. App. 1899).

97 *Id.* at 376.

98 It is obvious that when using the proximate cause theory, there would need to be some sort of statutory provision or legislative intent adequately defining what should be considered “reasonably foreseeable” in regards to deaths which occur during felonies.

99 Lily Kling, *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 AM. CRIM. L. REV. 463, 465 (1998) (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

100 458 U.S. 782 (1982).

101 *Id.* at 782.

102 *Id.*

103 *Id.* at 801.

not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”¹⁰⁴ The Court held that “unless there was a showing that the defendant killed, attempted to kill, or intended to kill, the death penalty was disproportionate and thus unconstitutional when imposed on a non-triggerperson.”¹⁰⁵

C. *The Lack of Deterrence*

One of the primary justifications for the continued survival and application of the felony murder rule is the deterrent effect it has on criminals.¹⁰⁶ The supposed deterrent effect has two main facets: namely, that the felony murder rule will deter felons from causing a death while committing crimes, and that the rule will deter potential felons from committing a felony at all.¹⁰⁷ Some proponents of this line of thinking have even gone so far as to suggest that having the rule in place will convince co-felons to “dissuade each other from using violence if they know they will be liable for murder.”¹⁰⁸

The principal problem with this justification is that it is practically impossible to deter someone from the act of another.¹⁰⁹ How is a defendant supposed to be deterred from committing an unintended act? Even if a felon were to be more careful during the commission of his or her felony, unintended events and consequences can still arise that were completely unforeseen to the felon. Another problem arises when one considers that the average felon does not have any knowledge of the felony murder rule or the potential liability they face should a death occur.¹¹⁰ Due to this criticism of the questionable deterrent effect of the doctrine, the courts of the state of California have held that the rule should be given the narrowest possible application consistent with its purpose.¹¹¹ This type of limitation, although it be judicial in nature, combats the condemnation the doctrine faces and attempt to make the rule more compatible with its indicated purpose.

III. COMMON STATUTORY STRUCTURES

A. *Enumerating Felonies in Felony Murder Statutes*

While the aforementioned criticisms certainly paint a concerning perspective of the felony murder doctrine, many states work to alleviate these issues by limiting the applicable underlying statutes upon which a charge of felony murder can be

104 *Id.*

105 Kling, *supra* note 99, at 467 (citing *Enmund*, 458 U.S. at 787).

106 Roman, *supra* note 26, at 822. However, as one author notes, “[t]he history of the original rule . . . does not reveal the deterrent focus underlying the modern rule.” Gerber, *supra* note 12, at 779 (“Coke, Forster, and Blackstone did not justify the doctrine on deterrence grounds.”).

107 Roman, *supra* note 26, at 822.

108 Huster, *supra* note 9, at 747.

109 Gerber, *supra* note 12, at 780.

110 *Id.* at 781.

111 Huster, *supra* note 9, at 748 (citing *People v. Satchell*, 489 P.2d 1361, 1365 (Cal. 1971)) (“[T]he court has held that the rule will not be applied where it does not serve its deterrent purpose.”).

brought.¹¹² In his article on the subject, Mr. O’Herron claims that by limiting the predicate felonies, the doctrine can be dutifully confined to its intended purposes, thereby limiting many of the criticisms levied its way.¹¹³ Many courts, however, have declined to explicitly define an exhaustive list of the felonies to which felony murder can be applied, and have instead defined murder as causing a death in the course of a felony “clearly dangerous to human life.”¹¹⁴

1. Inherently Dangerous Felonies

The issue with statutes that base felony murder on felonies “clearly dangerous to human life” arises with the question of which felonies should be considered to be dangerous.¹¹⁵ In *Ex parte Mitchell*¹¹⁶ the Court of Criminal Appeals in Alabama tackled just such a question. The Alabama court examined two tests other jurisdictions had used when confronted with this question. The first, the “elements test,” requires that “the court consider the elements of the felony ‘in the abstract’ rather than look at the particular facts of the case under considerations.”¹¹⁷ The other test is known as the “facts test,” which allows the jury to consider the facts and circumstances of the particular case to determine if the felony in question is inherently dangerous in the manner and the circumstances in which it was committed.¹¹⁸

a. The “Facts Test”

As the Supreme Court of Alabama noted, the “facts test,” when used to determine whether a felony is “inherently dangerous,” allows the jury to consider the totality of the facts and circumstances surrounding the specific crime at issue. In the case of

112 For an example of a statute that enumerates a set list of felonies that can be used as the basis for felony murder, see CAL. PENAL CODE § 189 (West 2018), *supra* note 9, and accompanying text. Another example is found in the Arkansas capital murder statute, which dictates that a person commits capital murder if they cause a death in the furtherance or immediate flight from a list of felonies including terrorism, rape, kidnapping, vehicular piracy, robbery, aggravated robbery, residential burglary, commercial burglary, aggravated residential burglary, a felony violation of the Uniform Controlled Substance Act, first degree escape, and arson. ARK. CODE. ANN. § 5-10-101 (2017).

113 O’Herron, *supra* note 47, at 9–10. Mr. O’Herron, in voicing his support for the doctrine of felony murder, notes that as “an act causing death during another wrongful act, a felony should be treated more harshly than an act causing death independent from any other wrongful act.” It appears that Mr. O’Herron believes that because defendants are already involved in a morally corrupt act (the predicate felony), the fact that a death occurred is rightfully punished harshly by the felony murder rule. Thus, by enumerating the exact felonies under which felony murder can be brought, the doctrine succeeds in punishing those victims who ultimately do cause a death.

114 For example, the Alabama murder statute reads: “A person commits the crime of murder if he or she . . . commits or attempts to commit . . . any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in the immediate flight therefrom, he or she . . . causes the death of any person.” ALA. CODE. § 13A-6-2 (2017).

115 Another problem comes about when legislatures decide to get “tough on crime” and thus choose to expand the list or breadth of enumerated felonies to which felony murder can attach. Gerber, *supra* note 12, at 768.

116 936 So. 2d 1094 (Ala. Crim. App. 2006).

117 *Id.* at 1096 (citing *State v. Stewart*, 663 A.2d 912, 918–19 (R.I. 1995)).

118 *Id.* at 1097.

Mitchell, the underlying felony supporting the felony murder charge at issue was unlawful distribution of a controlled substance.¹¹⁹ Specifically, Mitchell and an accomplice were in a vehicle and were in the business of selling marijuana. They attempted to sell the illicit substance to a potential customer, who instead tried to rob the two men.¹²⁰ The robber shot Mitchell's accomplice, who later died from his wounds. The Alabama Supreme Court held that the fact-based approach was "the more logical approach," and more consistent with the way the doctrine had been developed in the state.¹²¹ The court did not provide much detail for their reasoning in the matter, but did quote the Rhode Island Supreme Court in saying that "the better approach is for the trier of fact to consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed."¹²²

While the idea of viewing the totality of the circumstances surrounding a felony seems at first blush to be ideal, the facts test, as shown in *Mitchell*, can lead to truly troubling results. In *Mitchell*, the defendant was held liable for his co-felon's death even though the death was caused by a third party over which the defendant had no control. Additionally, the underlying charge in the *Mitchell* case was merely distribution of a controlled substance. While there could be some argument that the distribution of illegal drugs is inherently dangerous due to the level of violence surrounding that particular industry, the Alabama Supreme Court points to no legislative history which would point to the fact that the state legislature considered the crime in such a way.

Additionally, it could be argued that the facts-based test fails to provide criminals with fair notice that their conduct will leave them open to felony murder liability. In essence, the application by a trier of fact that the particular circumstances of a given case are "inherently dangerous" could be considered an ex post facto law in violation of the Due Process Clause.¹²³ The Supreme Court of the United States has held that the ex post facto clause can also extend to judicial enactments.¹²⁴ In this instance, the application of the facts-based inquiry into the nature of the felony appears to act as an after-the-fact aggravation of the crime. Because the jury in *Mitchell's* case found the crime of illegal distribution of controlled substances to be "inherently dangerous" without the input of any legislative history, the judiciary effectively raised the punishment that Mitchell received for his crime. The necessity of this factual approach becomes even more dubious when one considers that the facts of

119 Which in this case was marijuana. *Id.* at 1096.

120 *Id.* at n.2.

121 *Id.* at 1101.

122 *Stewart*, 663 A.2d at 919.

123 U.S. CONST. art. I, § 10, cl. 1.

124 Stiles, *supra* note 40, at 197 (citing *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964)) ("An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an 'ex post facto law.'"). Other improper categories of law and enactments include making an action criminal which would have been innocent when the crime was done before the passing of the law or enactment, allowing for the imposition of a different or greater punishment than was allowed when the crime was committed, and altering the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time of the offense was committed. Stiles, *supra* note 40, at 197 (citing *Collins v. Youngblood*, 497 U.S. 37, 42 (1990)).

the case could have subjected Mitchell to a higher penalty through the normal use of the state's sentencing standards.¹²⁵

b. The "Elements Test"

The elements test for inherently dangerous felonies, as opposed to the facts test, examines the elements of the crime in question without regard for the facts of the underlying case.¹²⁶ According to the New Mexico Supreme Court in *Mora*,

[t]he abstract approach involves a two-step process by which the court first examines the 'primary element' of the offense at issue to determine whether it involves the requisite danger to life. The court then looks to the 'factors elevating the offense to a felony' to determine whether the felony, taken in the abstract, is inherently dangerous to human life.¹²⁷

The California Supreme Court applied this abstract approach in the case of *People v. Patterson*.¹²⁸ In *Patterson*, the defendant provided the victim with cocaine. The victim soon became sick and died of acute cocaine intoxication. The defendant was charged with murder under California's second-degree felony murder doctrine.¹²⁹ The *Patterson* court refused to replace the elements test in place in California with the facts test outlined above because in every instance such a test would be applied, there would already have been a death.¹³⁰ The court reasoned that that "the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous."¹³¹

The court first had to decide whether to consider the elements of the entire statute dealing with controlled substances¹³² or to view the section of that statute dealing

125 The Alabama Sentencing Commission's "Drug Worksheet," which can be found on their website, contains a two point increase for the use or possession of a dangerous weapon during a drug crime. *New Sentencing Standards: General Instructions, Worksheets, and Sentence Length Tables*, AL. SENTENCING COMM'N, http://sentencingcommission.alacourt.gov/sent_standards.html (last visited Apr. 11, 2018).

126 Ex parte Mitchell, 936 So. 2d 1094, 1096–97 (Ala. Crim. App. 2006). (citing *State v. Mora*, 950 P.2d 789, 796–97 (N.M. 1977)).

127 *Mora*, 950 P.2d at 796–97 (citing *People v. Lee*, 286 Cal. Rptr. 117, 122 (Cal. Ct. App. 1991)). An example of the second step in the process is contained in *People v. Henderson*, in which the court considered whether the crime of false imprisonment was a felony inherently dangerous to human life. The statute differentiated between felony and misdemeanor false imprisonment by making it a felony to commit the crime with "violence, malice, fraud or deceit." However, the court stated that the legislature did not make any relevant distinctions as to those specific elements, as they were solely used to distinguish between the different levels of the crime. 560 P.2d 1180, 1184–85 (Cal. 1977).

128 778 P.2d 549 (Cal. 1989).

129 "Second-degree felony murder attaches to any death resulting from a commission of a non-enumerated felony 'inherently dangerous to human life'" which gives the act the implied malice to which felony murder can then be applied. Though the recent decision in *People v. Sarun Chun* declares that the California second-degree felony murder doctrine is a creature of statute, the rule is generally believed to be one of judicial creation. David Mishook, Note, *People v. Sarun Chun—In its Latest Battle with Merger Doctrine, Has the California Supreme Court Effectively Merged Second-Degree Felony Murder out of Existence?*, 15 BERKELEY J. CRIM. L. 127, 131 (2010) (citing *People v. Ford*, 60 Cal. 2d 772, 795 (Cal. 1964)).

130 *Patterson*, 778 P.2d at 554. (citing *People v. Burroughs*, 678 P.2d 894, 897 (Cal. 1989)).

131 *Id.* (quoting *Burroughs*, 678 P.2d at 897–98).

132 CAL. HEALTH & SAFETY CODE § 11352 (West 2018).

with cocaine separately. The court noted that “[t]he fact that the Legislature has included a variety of offenses . . . does not require that we treat them as a unitary entity,”¹³³ and found that the reasoning for the conglomerated statute was merely convenience; thus, the court could examine the cocaine provision of the code separately. Thus, the court held that the determination of whether furnishing cocaine is inherently dangerous should not turn on whether other drugs included in the same statute were also dangerous.¹³⁴

Finally, the court provided guidance to the trial court on remand to evaluate whether the statute under which the defendant’s crime fell was “inherently dangerous to human life.”¹³⁵ The court concluded that for the purposes of second-degree felony murder’s implied malice requirement, an “inherently dangerous felony” is one which has a high probability that a death will result.¹³⁶ Even more poignantly, the court stated that “it is the Legislature, rather than this court, that should determine whether expansion of the second-degree felony murder rule is an appropriate method by which to address this problem,” and thus they were bound to apply the elements test to the statute at hand.¹³⁷

B. *The Texas Solution: Inherently Dangerous Acts*

The Texas felony murder statute¹³⁸ uses a much different framework than those discussed above. As opposed to specifically enumerating which felonies may be used as predicates for a charge of felony murder, the Texas statute states that a person commits murder if he or she:

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.¹³⁹

This statute makes moot some of the proportionality complaints against the felony murder doctrine, because the dangerous act by the defendant must be what has caused the death in question.¹⁴⁰ Mr. Crump, in his article concerning the merits of the Texas statute, states that this version of felony murder liability is superior to the enumerated felonies approach because, in this iteration, the doctrine would require personal blameworthiness on the part of the defendant.¹⁴¹ This is not to say that there

133 *Patterson*, 778 P.2d at 556.

134 *Id.*

135 *Id.* at 557–58.

136 The court also noted that any more lenient standard could improperly expand the scope of the second-degree felony-murder doctrine. *Id.* at 558.

137 *Id.*

138 TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2017).

139 *Id.*

140 David Crump, *Should We have Different Views of Felony Murder Depending on the Governing Statute?*, 47 TEX. TECH L. REV. 113, 118–19 (2014).

141 *Id.* at 115.

are no problems with the construction of the Texas statute, however, and one issue potentially surfaces when the predicate felony requires only criminal negligence as opposed to intent or knowledge.¹⁴² Mr. O'Herron, however, takes a much more negative view of the Texas felony murder statute.¹⁴³ In regards to the element of a "clearly dangerous" act, Mr. O'Herron claims that the element makes the doctrine unduly less broad, as it seems to preclude the application of the rule to felonies that would not typically result in death.¹⁴⁴ Despite Mr. O'Herron's arguments, it does seem as if requiring an actual "clearly dangerous" act by a potential defendant goes a long way towards reconnecting the idea of moral culpability with the charge being brought.

C. Degrees of Felony Murder

Another way that some states limit the doctrine of felony murder is to include different degrees of punishment for different types of underlying felonies.¹⁴⁵ This separation by the states appears to be a recognition that certain underlying felonies are more egregious than others and should be punished accordingly.¹⁴⁶ While some states do segregate specified levels of felonies into different degrees, most of them do not do so in ways that make the application of the doctrine effective.¹⁴⁷ Mr. O'Herron outlines his view on how felony murder should properly be segmented into the various categories of the degrees of murder. He outlines that first-degree murder should be reserved for the felonies that are historically associated with the doctrine.¹⁴⁸ Second-degree felony murder would then be reserved for dangerous felonies that are not *quite* as dangerous as those outlined for consideration of first-degree felony murder,¹⁴⁹ much like the California take on the doctrine.¹⁵⁰ Only two

¹⁴² According to Mr. Crump, this issue is mostly on hand when the predicate felony is injury to a child. *Id.* at 119.

¹⁴³ O'Herron, *supra* note 47, at 5–6.

¹⁴⁴ *Id.* Mr. O'Herron also notes the broad interpretation of the "in furtherance of" language in the Texas statute. He cites to *Bigon v. State*, in which the Texas Court of Criminal Appeals held that "driv[ing] a heavily loaded jeep towing a loaded trailer across the center stripe of a roadway into the oncoming lane of travel" was in furtherance of the crime of driving while intoxicated. 252 S.W.3d 360, 366, 373 (Tex. Crim. App. 2008).

¹⁴⁵ We have already seen an example of this idea in Part II(1)(b), *supra*, where the California courts had introduced second-degree felony murder to be applied to felonies not enumerated by the first-degree felony murder statute but still being "inherently dangerous to human life." See Mishook, *supra* note 127, and the accompanying text.

¹⁴⁶ O'Herron, *supra* note 47, at 13.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 14 ("A felony is properly included in a first-degree felony murder statute if it requires an intent to do harm that is proportional to the punishment imposed for first degree murder, usually life in prison, and if its commission includes the reasonable foreseeability of death.") Mr. O'Herron's reasoning is reminiscent of the applicability of felony murder in its original form at common law, which was not nearly as troubling as it is today due to the fact that the small number of felonious crimes in effect at the time were all punishable by the same sentence.

¹⁴⁹ *Id.* at 15 ("[S]econd degree felony murder should encompass those felonies that are *potentially* dangerous to human life, as opposed to those that are *inherently* dangerous to human life and necessarily involve a willingness to take life.").

¹⁵⁰ See Mishook, *supra* note 129, and the accompanying text.

states¹⁵¹ go lower than second-degree murder when defining the extent of their felony murder doctrines, and it is questionable whether they qualify as “felony manslaughter” statutes, as such crimes would foreseeably come incredibly close to matching the elements of regular manslaughter statutes.¹⁵²

IV. PROPOSED SOLUTIONS

The felony murder rule is a useful tool that enables society to punish criminals who, in the course of their crimes, cause the death of another human being. While there is no shortage of criticisms levied upon the felony murder rule, these are not so insurmountable that a legislature could not create a law that avoids a great many of them. For example, Mr. O’Herron appears to be on the right track when he states that enumerating the felonies upon which the felony murder rule can be used is essential to limit the doctrine and confine it to its intended purposes of retribution and deterrence.¹⁵³

However, it appears that the only way to truly limit the doctrine in order to avoid questions of proportionality, is to revert the felony murder rule to apply only to those underlying felonies that would be considered inherently dangerous.¹⁵⁴ At the inception of the doctrine, the number of felonies available to prosecutors was incredibly limited, and included only the most heinous crimes.¹⁵⁵ By extending the felony murder rule to other, less serious crimes, the risk of creating disproportionate punishments becomes increasingly tangible. As such, it does not seem prudent to burden the legislature with the creation of separate degrees of felony murder,¹⁵⁶ especially because deaths that are caused in the commission of such felonies will likely fall under the actual murder or manslaughter statutes of that jurisdiction.¹⁵⁷ Another benefit of limiting the available underlying felonies through specific statutory enumeration is that it gives proper notice of potential consequences to potential felons. By taking the decision as to which felonies are “inherently dangerous” out of the hands of the courts, the doctrine becomes much more clear and unambiguous.¹⁵⁸

This is not intended to discount the idea proposed in the Texas felony murder statute,¹⁵⁹ which requires a clearly dangerous act for a felony to be used as a predicate

151 The two states are Kansas (*See* KAN. STAT. ANN. § 21-5405(a)(2)) (2017) and Mississippi (*See* MISS. CODE ANN. § 97-3-27 (2017)).

152 O’Herron, *supra* note 47, at 15.

153 *See supra* note 113 and the accompanying text.

154 This can also apply to crimes which are substantially similar to these traditional felonies or those which serve as an extension thereof.

155 Some of the traditionally enumerated felony murder felonies include robbery, arson, kidnapping, burglary, rape, and terrorism. *See* O’Herron, *supra* note 47, at 14.

156 *See supra* Part II(C).

157 *See supra* note 46 and the accompanying text.

158 That being said, should a legislature be dead set on including all “inherently dangerous felonies,” it would be wise of them to statutorily enact the elements test as the method of determining which felonies qualify. As discussed above, the elements test is better at following the intent of the legislature as to which felonies they deemed inherently dangerous while passing their statutes.

159 Which has been called a “better formulation” by Mr. Crump. Crump, *supra* note 140, at 119.

element of felony murder. Quite the contrary; it would appear that combining the dangerous act element with the enumeration of predicate felonies could create the most well rounded felony murder statute that would best circumvent the potential problems with the doctrine. Limiting the number of felonies ensures that the criminals being punished have actually committed morally reprehensible crimes, which gives a stronger basis for the idea that their intent to commit such a crime should be transferred to the death which occurred. By then adding the requirement that the defendant have acted in some way so as to cause the death, the hypothetical statute would also tie the commission of the felony into the cause of the death and the proportionality of the sentence.

Furthermore, it would be beneficial for a state legislature to require that the hypothetical defendant “purposefully and knowingly” commit the dangerous act.¹⁶⁰ This would ensure that unknowing defendants would not be held vicariously liable for actions taken solely by their co-felons. It should be noted, however, that this would cause a defendant only to be liable for deaths caused *by his own actions*. For an example, take the case of Mr. Bell, which was chronicled in the introduction to this note.¹⁶¹ Mr. Bell was committing the crime of robbery, which would be one of the enumerated felonies under this hypothetical statute,¹⁶² and got into a gunfight with a security officer, which would be a clearly dangerous act which Mr. Bell knowingly and purposefully entered into. Thus, the hypothetical ideal statute would not shield a defendant from liability merely because the defendant was not the one to actually kill the victim. However, it does more closely join the ideas of cause, moral culpability, and punishment.¹⁶³

CONCLUSION

While many of the criticisms of the felony murder doctrine are warranted to a certain degree, it must be admitted that the rule itself has a designed and necessary role in the framework of the criminal justice system. Mr. O’Herron’s point that felons who cause a death while perpetrating their crimes should be punished more harshly is well taken.¹⁶⁴ The idea of punishing those who cause deaths with relative severity is consistent with the theory of using criminal punishment as a form of retribution and deterrent.¹⁶⁵ However, there is a need to limit the doctrine in order to avoid the

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note 3 and the accompanying text.

¹⁶² The full text of this ideal statute would read something like: “A person commits the crime of murder when they commit or attempt to commit robbery, arson, kidnapping, burglary, rape, or terrorism, and in the course of the commission or attempt, or in immediate flight from the commission or attempt, he purposely and knowingly commits or attempts to commit an act clearly dangerous to human life that proximately causes the death of an individual.”

¹⁶³ Perhaps Mr. Bell, though he may feel hard done by as he did not “actually” kill anyone himself, does deserve his harsher sentence. He participated in a robbery and a gunfight, acts which in and of themselves are morally reprehensible, without which the death in question would almost certainly not have occurred. As this Comment has previously discussed, illegal acts that cause wrongful deaths seem as if they should be punished harsher than those that occur during innocent conduct. See *supra* note 111 and the accompanying text.

¹⁶⁴ See *supra* note 113 and the accompanying text.

¹⁶⁵ As Justice Kennedy stated in the Supreme Court’s opinion in *Graham v. Florida*, “[r]etribution is a legitimate reason to punish.” 560 U.S. 48, 71 (2010).

many drawbacks which have plagued the rule since its inception. The most efficient way to accomplish this end is for state and federal legislatures to take a more direct, hands on approach, and confront these problems before it becomes necessary to be subject to judicial review. By implementing limitations in the actual statutes, such as enumerating the predicate felonies and requiring an act which is dangerous to human life, legislatures can clearly define when a potential felon will face liability for deaths caused by themselves or others in the course of such a felony.

DePaul University

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John F. Decker



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**THE MENTAL STATE REQUIREMENT FOR ACCOMPLICE LIABILITY IN
AMERICAN CRIMINAL LAW**

JOHN F. DECKER*

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I. INTRODUCTION

Due to the inconsistency between the plain language of states’ accomplice liability legislation and its respective interpretation in the state courts, many states’ accomplice laws present a confused picture in terms of the law’s stance on accomplice liability. No aspect of this law is more complex than that relating to the mental state requirement for accomplice liability. Nevertheless, if one engages in a cursory examination of the legal literature, case law, and state legislation concerning the mental state requirement for accomplice liability, essentially three approaches surface. These approaches differ in the degree to which they hold an individual culpable for the conduct of another. First, there is the perspective (which is particularly popular in the academic community) that favors a very limited, narrow approach whereby accomplice liability is dependent upon a finding that an accused’s “purpose [was] to encourage or assist another in the commission of a crime.”¹ Meanwhile, a second perspective (which the Model Penal Code follows to some extent²) tolerates a more

1. WAYNE R. LAFAVE, CRIMINAL LAW § 13.2(b), at 675 (4th ed. 2003).

2. See MODEL PENAL CODE § 2.06(4) (1962) (providing that a defendant is guilty of accomplice liability “if he acts with the kind of culpability . . . that is sufficient for the commission of the offense”).

expansive approach whereby an accomplice's liability turns on whether the accomplice harbored the mental state required of the substantive crime allegedly aided or abetted.³ Finally, the third and broadest approach holds an accomplice liable for the "natural and probable" consequences of a principal's conduct that the accomplice somehow assisted or encouraged,⁴ regardless of the accomplice's mental state.⁵

The first approach, which this Article will refer to as the Category I approach, asserts that an individual should only be liable for the acts of a principal if that individual acted with the specific intent to promote or assist the principal's commission of the crime.⁶ This theory holds that a mental state of knowledge or recklessness on the part of an alleged accomplice is insufficient to hold the alleged accomplice culpable.⁷ Jurisdictions following this approach will only hold an alleged accomplice liable for the crimes that the alleged accomplice *intended* a perpetrator commit. Also, if the perpetrator commits a secondary crime in pursuance of the intended crime, the accomplice is not liable for the secondary crime unless the accomplice intended to promote or facilitate this offense as well.⁸ So long as the alleged accomplice intended to somehow assist or encourage the principal's criminality, the accomplice is liable even if the substantive crime only requires recklessness or negligence on the part of the principal.⁹ Thus, if *A* loans his gun to *B* knowing *B* intends to use it to shoot his

3. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[A] (4th ed. 2006) ("[I]t is more precisely correct to state that an accomplice must possess two states of mind: (1) the intent to assist the primary party to engage in the conduct that forms the basis of the offense; and (2) the mental state required for commission of the offense, as provided in the definition of the substantive crime." (citing *State v. Foster*, 522 A.2d 277, 283 (Conn. 1987))).

4. *People v. Feagans*, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985) (citing *People v. Campbell*, 396 N.E.2d 607, 613 (Ill. App. Ct. 1979)).

5. LAFAVE, *supra* note 1, § 13.3(b), at 688.

6. *Id.* § 13.2(c), at 676 (citing *Bogdanov v. People*, 941 P.2d 247, 251 (Colo. 1997), *amended by* 955 P.2d 997 (Colo. 1997)) ("Under the usual requirement that the accomplice must intentionally assist or encourage, it is not sufficient that he intentionally engaged in acts which, as it turned out, did give assistance or encouragement to the principal. Rather, the accomplice must intend that his acts have the effect of assisting or encouraging another.").

7. See *id.* (citing *People v. Beeman*, 674 P.2d 1318, 1325 (Cal. 1984)) ("[E]ven if knowledge of the actor's intent (as opposed to sharing that intent) is otherwise sufficient, the accomplice must have intended to give the aid or encouragement.").

8. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) ("[An accomplice must] in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, [and] seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it.").

9. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 347 (1985) ("The intention requirement, however, does not preclude holding a person for complicity in a crime for which recklessness or negligence suffices for liability, so long as the secondary actor *intended* to help or persuade the primary actor to do the

neighbor's barking dog, *A* would not be an accomplice to *B*'s act unless he himself intends that *B*'s neighbor's dog be shot. Likewise, if *X* gives the keys of her car to *Y*, who is intoxicated, knowing *Y* intends to drive the car, *X* would not be criminally liable if *Y*'s reckless driving kills or injures an innocent person. Thus, this might simply be described as the "specific intent" approach.

The second approach, which this study refers to as the Category II model, is what might be called the "statutorily prescribed mental state" approach. According to this somewhat more expansive view, an individual may be liable for a crime the individual did not specifically intend for the perpetrator to commit.¹⁰ Rather, liability attaches if the alleged accomplice acted "with the mental culpability required for the commission" of the offense.¹¹ Thus, states following this approach will hold an individual liable for the conduct of another if that individual possessed the mental state prescribed by the state's substantive criminal statute, whether the requisite mental state for conviction is intent, knowledge, recklessness, or criminal negligence.¹² Returning to the hypotheticals discussed above, where *A* loans his gun *knowing* of *B*'s intent to shoot the neighbor's barking dog, *A* would now be criminally liable for the knowing, unauthorized infliction of injury or death on an animal, even though *A* has no intent for the crime occur.¹³ Likewise, where *X* gives her car keys to the intoxicated *Y* knowing *Y* will drive her car and *Y* recklessly kills *Z*, *X* would be liable for reckless homicide along with *Y* if we agree *X* harbors a *reckless* state of mind.¹⁴ Both *A* and *X* would be liable because each acts with the mental culpability required for the commission of their respective offenses.

reckless or negligent act. When a person does an act that recklessly causes the death of another, he is liable for manslaughter as a principal offender. That he did not intend the death is irrelevant.").

10. See, e.g., *State v. Foster*, 522 A.2d 277, 282 (Conn. 1987) ("[Accomplice] liability does not require that a defendant act with the conscious objective to cause the result described by a statute.").

11. N.Y. PENAL LAW § 20.00 (McKinney 2004).

12. See, e.g., N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007) (providing that an accomplice may be liable for "act[ing] purposely, knowingly, recklessly, or negligently with respect to [a] result, as required for the commission of the offense").

13. See MODEL PENAL CODE § 2.02(2)(b) (1962) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

14. See *id.* § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

Category II states can be divided into two subcategories: (1) states that articulate the Category II approach statutorily, and (2) states whose courts have judicially interpreted the Category II approach from statutes void of Category II language. The states that statutorily follow the Category II approach can be further divided into states that require the statutorily prescribed mental state with regard to result-oriented crimes alone, and those that do not differentiate between conduct- and result-oriented crimes.¹⁵ The Model Penal Code, codified by a number of states,¹⁶ allows for liability if an accomplice possessed the requisite mental state for conviction of a perpetrator when “causing a particular result is an element” of the crime (e.g., the “death” in homicide; the “injury” in battery).¹⁷ However, if the crime focuses on the conduct of the actor rather than the result (e.g., the “unauthorized entry” in burglary; the “substantial step” in criminal attempt), it is necessary that the accomplice have the specific intent that the principal commit the crime.¹⁸ States that do not distinguish between conduct- and result-oriented crimes will hold an individual liable for the conduct of another as long as the individual possessed the statutorily prescribed mental state for the substantive crime.¹⁹

The third approach, which this Article refers to as Category III, is the most expansive of the approaches. States following this approach will hold an actor liable for all the natural and probable consequences of the intended crime.²⁰ Although some jurisdictions may not use this exact language,²¹ these states reject the necessity of proving the accomplice had either the specific intent required by the Category I approach or the statutorily prescribed mental state mandated by the Category II approach. Therefore, if the principal committed a secondary crime in the course of carrying out the target crime even if the accomplice had no way of knowing or anticipating that an incidental or secondary crime would occur, a court will nonetheless convict the accomplice of the incidental crime if the court determines it to be a natural and probable consequence of the intended crime. Now the hypotheticals above become really

15. See *infra* Part II.B.

16. DRESSLER, *supra* note 3, § 3.03, at 33 (citing Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 539 (1988)).

17. MODEL PENAL CODE § 2.06(4).

18. *Id.* § 2.06(3).

19. See *infra* notes 47–52 and accompanying text.

20. See, e.g., WIS. STAT. ANN. § 939.05(2)(c) (West 2005) (holding an accomplice liable for any crime committed “in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime”).

21. See, e.g., MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) (holding an accomplice liable for “any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended”).

interesting. Assume after *B* shoots his neighbor's barking dog with *A*'s gun, the neighbor, *C*, becomes angry and engages *B* in a physical altercation during which *B* shoots and injures *C*. If we agree the altercation and resultant injury suffered by *C* are natural and probable consequences of *A*'s arming *B* while knowing of *B*'s intentions, *A* would be liable as an accomplice for *B*'s battery of *C*. In the example where *X* gives her keys to the intoxicated *Y* (which itself is a violation of the state's motor vehicle code), now assume *Y* not only recklessly becomes involved in a fatal vehicle crash but also that *Y* collides with a gasoline truck, which explodes and causes a nearby building to catch fire. If we agree that when *X* gives the intoxicated *Y* the keys to her car she should be held accountable for all natural and probable consequences, it is arguable that *X* is liable not only for reckless homicide if *Y* is involved in a fatal collision while driving *X*'s car but also for criminal damage to property or perhaps arson. Or, worse yet, if a firefighter or building occupant dies in the fire, it might even be asserted that *X* is liable for manslaughter.

Members of the academic community, including Professors Wayne LaFave,²² Joshua Dressler,²³ and Audrey Rogers,²⁴ have strongly criticized the Category III approach because it holds an individual to the same culpability as a principal for a crime the commission of which the accomplice had no knowledge of or intent to assist in. Scholars have also asserted that "this foreseeable-offense extension of the complicity doctrine is clearly a minority view."²⁵ In any event, under this view one is held accountable for the incidental crime as a result of choosing to enter into the criminal arena, an environment

22. LAFAVE, *supra* note 1, § 13.3, at 683–84 ("Under the better view, one is not an accomplice to a crime merely because that crime was committed in furtherance of a conspiracy of which he is a member, or because that crime was a natural and probable consequence of another offense as to which he is an accomplice."); *id.* § 13.3(b), at 688 ("The 'natural and probable consequence' rule of accomplice liability, if viewed as a broad generalization, is inconsistent with more fundamental principles of our system of criminal law.")

23. DRESSLER, *supra* note 3, § 30.05[B][5], at 517–18 (citing *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002); MODEL PENAL CODE § 2.06 cmt. 6, n.42; Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1361 & n.33 (1998)) ("The natural-and-probable-consequences doctrine has been subjected to substantial justifiable criticism. . . . Thus, the effect of the rule is to permit conviction of an accomplice whose culpability as to the non-target offense is *less* than is required to prove the guilt of the primary party. And yet, in view of the relative roles of the primary and secondary parties, one would assume that an accomplice should not be convicted of an offense unless he has the same or higher degree of culpability required to convict the perpetrator.")

24. Rogers, *supra* note 23, at 1379 ("Since the natural and probable consequence doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness, courts should be especially mindful of it when assessing accomplice liability for unintentional crimes.")

25. PAUL H. ROBINSON, CRIMINAL LAW § 6.1, at 333 (1997).

where history has shown criminality has a tendency to spread like fast growing cancer cells.

The goal of this Article is to examine the legislation and case law concerning accomplice liability at the state level²⁶ in order to assess the extent to which individual states follow one approach over another regarding the required mental state for criminal accountability.²⁷ Part II focuses exclusively on the various accomplice liability statutes that appear at the state level. It points out language that commonly appears describing the *actus rea* and *mens rea* requirements and terminology which may be unique to a particular state jurisdiction. Part II also explores related statutory provisions, such as whether a state has a codified defense of withdrawal or an exception for the victim or incidental party. Part III explores the case law in those states that follow, or rather flirt with, the narrow Category I approach. Part IV examines those states that follow, by statute or judicial interpretation, either one of the two subcategories of the Category II, or statutorily prescribed, approach. Part V reviews those states that, by statute or judicial interpretation, accept the broadest approach (Category III) to accomplice liability and impose liability for the natural and probable consequences of a principal's conduct without regard to the mental state of an accomplice with respect to an incidental crime. Finally, Part VI addresses states with confusing, novel, or unique approaches to *mens rea* for accomplice liability. Some of these states have conflicting or inadequate case law on the issue of accomplice liability, preventing a categorization. Other states' *mens rea* requirements depend on the particular type of crime committed and therefore do not fit neatly into any one particular approach.

II. A FACIAL REVIEW OF THE STATUTORY LANGUAGE

This part of the Article focuses exclusively on the statutory language describing individual states' mental state requirements for accomplice liability. It analyzes, by engaging in a facial examination of the respective states' legislation, which category a particular state belongs to with respect to its

26. For a review of accomplice liability and mental state law at the federal level, see Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341 (2002).

27. In deciding which category a particular state falls in, the designation will depend on whether the jurisdiction has case law following the natural and probable consequences approach or some variant, in which case the state will be placed in the Category III grouping. If it does not, an assessment will be made whether it favors a mental state requirement for accomplice liability that is required of the substantive crime, in which case it will be placed in the Category II grouping. If the jurisdiction insists an accomplice must intend that a particular crime be perpetrated by a principal, then it will be placed in the Category I grouping. Finally, for states that cannot be placed into any of the three categories, Part VI discusses the group of states having novel or unique approaches to accomplice liability.

accomplice liability statute. It does not reflect or refer to any judicial interpretation of the specific statutory provisions. Parts III–VI discuss at length the case law interpretations of the various states. Because of the inconsistencies between the statutory language and its application in the state courts, later Parts of this article reveal, for example, that a given state might pattern its legislation after a Category I approach while exploration of its case law may show that the state actually follows a Category III approach to the mental state requirement for accomplice liability.²⁸

A. *Category I Statutes: “Specific Intent”*

At this juncture, it should be noted that section 2.06(3) of the Model Penal Code states:

A person is an accomplice of another person in the commission of an offense if:

- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits such other person to commit it, or
 - (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do so; or
- (b) his conduct is expressly declared by law to establish his complicity.²⁹

Standing alone, this section appears to require nothing less than a specific intent to promote or facilitate the criminality of another before an alleged accomplice would be responsible for a perpetrator’s conduct.³⁰

It appears as many as thirteen states pattern their mental state requirement for their accomplice liability statutes after section 2.06(3) of the Model Penal

28. Compare 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002) (imposing liability where the alleged accomplice possesses “the intent to promote or facilitate” the perpetrator’s commission of an offense), with *People v. Feagans*, 480 N.E.2d 153, 159 (Ill. App. Ct. 1985) (citing *People v. Campbell*, 396 N.E.2d 607, 613 (Ill. App. Ct. 1979)) (allowing liability where the crime was a “natural and probable consequence” of the intended offense).

29. MODEL PENAL CODE § 2.06(3) (1962).

30. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 851 (3d ed. 1982) (“A specific intent, when an element of the mens rea of a particular offense, is some intent other than to do the actus reus thereof which is specifically required for guilt.”).

Code.³¹ Focused solely on the statutory language in their accomplice liability legislation, these thirteen states therefore follow the Category I, or specific intent, approach to accomplice liability. Although these jurisdictions require nothing less than an alleged accomplice's specific intent to aid a perpetrator, legislatures express the mental state terminology in slightly different language from jurisdiction to jurisdiction. Three of these states pattern their legislation directly after the language used in section 2.06(3). These states' statutes contain nearly identical language to the Model Penal Code's requirement that an accomplice act with the purpose of promoting or facilitating the offense committed by the principal.³² For example, New Jersey asserts a person is an accomplice of another if that person acts "[w]ith the purpose of promoting or facilitating the commission of the offense."³³ Montana uses nearly identical language to describe its mental state requirement for an accomplice.³⁴ Similarly, Missouri demands that an individual act "with the purpose of promoting the commission of an offense" before considering the individual criminally responsible for the conduct of another.³⁵

Other states in this specific intent category, including Alaska, Colorado, Delaware, Illinois, Oregon, and South Dakota, deviate slightly from the Model Penal Code's language and require that an accomplice act with the intent to promote or assist another, rather than with the purpose to aid another, in the commission of an offense.³⁶ These six states use virtually identical language to describe an accomplice's required mental state. Colorado's statutory language, for example, holds a person legally accountable for the actions of a principal if the person acted "with the intent to promote or facilitate the commission of the

31. See ALA. CODE § 13A-2-23 (LexisNexis 2005); ALASKA STAT. § 11.16.110(2) (2006); COLO. REV. STAT. § 18-1-603 (2008); DEL. CODE ANN. tit. 11, § 271(2) (2007); GA. CODE ANN. § 16-2-20(b)(3)-(4) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002); MO. ANN. STAT. § 562.041.1(2) (West 1999); MONT. CODE ANN. § 45-2-302(3) (2007); N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2005); OR. REV. STAT. § 161.155(2) (2007); S.D. CODIFIED LAWS § 22-3-3 (2006); TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

32. Compare MO. ANN. STAT. § 562.041.1(2) (West 1999) ("with the purpose of promoting the commission of an offense"), and MONT. CODE ANN. § 45-2-302(3) (2007) ("with the purpose to promote or facilitate such commission"), and N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2005) ("[w]ith the purpose of promoting or facilitating the commission of the offense"), with MODEL PENAL CODE § 2.06(3) ("with the purpose of promoting or facilitating the commission of the offense").

33. N.J. STAT. ANN. § 2C:2-6(c)(1) (West 2005).

34. MONT. CODE ANN. § 45-2-302(3) (2007) ("with the purpose to promote or facilitate such commission").

35. MO. ANN. STAT. § 562.041(1)(2) (West 1999).

36. See ALASKA STAT. § 11.16.110(2) (2006); COLO. REV. STAT. § 18-1-603 (2008); DEL. CODE ANN. tit. 11, § 271(2) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002); OR. REV. STAT. § 161.155(2) (2007); S.D. CODIFIED LAWS § 22-3-3 (2006).

offense.”³⁷ Similarly, Delaware insists that if a person is “[i]ntending to promote or facilitate the commission of the offense,” that person is guilty of an offense committed by another.³⁸

Alabama, Georgia, Tennessee, and Texas phrase their intent requirement for accomplice liability in a somewhat different manner.³⁹ Although it does not follow the exact wording of section 2.06(3) of the Model Penal Code, Alabama requires that an alleged accomplice act “with the intent to promote or assist the commission of the offense.”⁴⁰ Tennessee and Texas, in this same respect, state in their respective statutes that a person is criminally liable for acting “with intent to promote or assist the commission of the offense.”⁴¹ Georgia, on the other hand, simply requires that an alleged accomplice either “[i]ntentionally aids or abets in the commission of the crime; or . . . [i]ntentionally advises, encourages, hires, counsels or procures” a principal.⁴² In any event, none of these thirteen states have statutes reflecting Category II or Category III language.

B. Category II Statutes: “Statutorily Prescribed Mental State”

Section 2.06(4) of the Model Penal Code provides an alternate route to finding accomplice liability beyond that found in section 2.06(3). This subsection reflects what might be called a statutorily prescribed mental state approach. Specifically, it reads:

When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.⁴³

It is important to remember that the thirteen states following the specific intent, or Category I, scheme patterned after section 2.06(3) of the Model Penal Code

37. COLO. REV. STAT. § 18-1-603 (2008).

38. DEL. CODE ANN. tit. 11, § 271(2) (2007).

39. See ALA. CODE § 13A-2-23 (LexisNexis 2005); GA. CODE ANN. § 16-2-20(b)(3)–(4) (2007); TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003).

40. ALA. CODE § 13A-2-23 (LexisNexis 2005).

41. TENN. CODE ANN. § 39-11-402(2) (2006); TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003). It should be noted, however, that the Texas statute holds that if a person conspires with another to commit a felony, that person is responsible for another felony committed by a coconspirator notwithstanding the fact that the person had “no intent to commit it.” § 7.02(b).

42. GA. CODE ANN. § 16-2-20(b)(3)–(4) (2007).

43. MODEL PENAL CODE § 2.06(4) (1962).

do not provide for accomplice liability similar to section 2.06(4).⁴⁴ Meanwhile, six states—Arkansas, Arizona, Hawaii, Kentucky, New Hampshire, and Pennsylvania—pattern their mental state requirement after section 2.06(4) of the Model Penal Code and provide for criminal liability when causing a particular result is an element of the offense and when an accused acted with the same kind of culpable mental state or the same kind of culpability with respect to the particular result that is required to convict a principal.⁴⁵ Each of these states follows both sections 2.06(3) and 2.06(4) of the Model Penal Code. In other words, these six states allow for liability if the accused either had the intention of promoting or facilitating the commission of the offense or had the kind of culpability with respect to the result that is sufficient for the commission of the offense for a result-oriented crime.⁴⁶

Beyond those jurisdictions which provide for liability based on a shared mental state for result-oriented crimes, another five states—Connecticut, New York, North Dakota, Ohio, and Utah—extend criminal responsibility to an accomplice who harbored the mental state necessary for the commission of the crime, regardless of whether or not the crime committed contains a result element.⁴⁷ For instance, Connecticut and Utah hold an alleged accomplice liable who acts “with the mental state required for commission of an offense.”⁴⁸ New York’s statute states that so long as an accomplice had the “mental culpability required for the commission” of the offense, the accomplice is criminally responsible.⁴⁹ Similarly, Ohio requires that an alleged accomplice act “with the kind of culpability required for the commission of an offense,”⁵⁰ while North Dakota insists the accomplice act “with the kind of culpability required for the offense.”⁵¹ As with the states allowing for a shared mental state with respect to

44. See statutes cited *supra* note 31.

45. See ARIZ. REV. STAT. ANN. § 13-303(B) (2008); ARK. CODE ANN. § 5-2-403(b) (2006); HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007); 18 PA. CONS. STAT. ANN. § 306(d) (West 1998).

46. See ARIZ. REV. STAT. ANN. § 13-301, -303 (2008); ARK. CODE ANN. § 5-2-403(a)-(b) (2006); HAW. REV. STAT. ANN. §§ 702-222 to -223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)-(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(III)(a), (IV) (LexisNexis 2007); 18 PA. CONS. STAT. ANN. § 306(c)-(d) (West 1998). In this group, Arizona is the only state which has not only “intent to promote or facilitate” language, ARIZ. REV. STAT. ANN. § 13-301, and result-oriented language, *id.* § 13-303(B), but also a “natural and probable . . . consequence” provision. *Id.* § 13-303(A)(3).

47. See CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (McKinney 2004); N.D. CENT. CODE § 12.1-03-01(1)(a) (1997); OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006); UTAH CODE ANN. § 76-2-202 (2003).

48. CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); UTAH CODE ANN. § 76-2-202 (2003).

49. N.Y. PENAL LAW § 20.00 (McKinney 2004).

50. OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006).

51. N.D. CENT. CODE § 12.1-03-01(1)(a) (1997).

result-oriented crimes, Connecticut, New York, North Dakota, and Utah also allow for liability if an actor intentionally aids another in the commission of a crime.⁵² Thus, most of the states that follow the Category II, or statutorily prescribed mental state, approach also contain a provision mirroring the Category I, or specific intent, approach.

C. *Category III Statutes: “Natural and Probable Consequences”*

Six states do not limit liability merely to a person who possesses the specific intent or the statutorily prescribed mental state required for the actual commission of the crime in their respective accomplice liability legislation. Rather, this grouping follows a very broad model of accomplice liability and holds a person accountable not just for the crimes the person intended to aid and abet but also for any offense that is a reasonably foreseeable consequence of the criminal scheme.⁵³ Five of the Category III states have statutory provisions stating that an accomplice must have the specific intent to assist a perpetrator in the intended crime⁵⁴ but also have a second provision allowing for liability for any crimes done in furtherance of the intended crime.⁵⁵ For example, Kansas

52. See CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (MCKINNEY 2004); N.D. CENT. CODE § 12.1-03-01(1)(b) (1997); UTAH CODE ANN. § 76-2-202 (2003). Ohio’s statute contains no specific intent provision. See OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006). On the other hand, Arizona also has a natural and probable consequences provision. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

53. See ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008); IOWA CODE ANN. § 703.2 (West 2003); KAN. STAT. ANN. § 21-3205(2) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008); WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

54. See ARIZ. REV. STAT. ANN. § 13-301 (2008) (“with the *intent* to promote or facilitate the commission of an offense”) (emphasis added); KAN. STAT. ANN. § 21-3205(1) (2007) (“A person is criminally responsible for a crime committed by another if such person *intentionally* aids . . . the other”) (emphasis added); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007) (“[w]ith the *intent* of promoting or facilitating the commission of the crime”) (emphasis added); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) (“A person is criminally liable for a crime committed by another if the person *intentionally* aids . . . the other”) (emphasis added); WIS. STAT. ANN. § 939.05(2)(b) (West 2005) (“[i]ntentionally aids and abets the commission”) (emphasis added).

55. See ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008) (“The person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.”); KAN. STAT. ANN. § 21-3205(2) (2007) (“A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if *reasonably foreseeable* by such person as a *probable consequence* of committing or attempting to commit the crime intended.”) (emphasis added); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (Supp. 2007) (“A person is an accomplice under this subsection to any crime the commission of which was a *reasonably foreseeable consequence* of the person’s conduct”) (emphasis added);

and Minnesota both state that one is liable “for any other crime committed in pursuance of the intended crime if reasonably foreseeable . . . as a probable consequence,”⁵⁶ while Arizona states that one is responsible for “any offense that is a natural and probable or a reasonably foreseeable consequence of the offense for which the person was an accomplice.”⁵⁷

Wisconsin’s statute differs in that it allows for liability for one who is a “party to a conspiracy with another to commit [an offense] or advises, hires, counsels or otherwise procures” the perpetrator.⁵⁸ Wisconsin, like the other states following the Category III approach, expands an accomplice’s criminal liability to include “any other crime which is committed in pursuance of the intended crime” if it “is a natural and probable consequence of the intended crime.”⁵⁹

While Iowa’s criminal code does not have a specific intent provision, it does use a similar approach regarding liability for crimes done in furtherance of the original crime. Iowa is unique in that it expresses this provision in negative nomenclature; namely, one is responsible for another’s criminal acts “unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.”⁶⁰

D. Statutes Requiring “Knowledge” Rather than “Intent”

Four states pattern their legislation similar to that of the Category I states with one major exception. Rather than requiring intent on the part of an accomplice, these states simply require that the accomplice knowingly assist a perpetrator in the commission of the crime.⁶¹ Wyoming holds individuals accountable who “knowingly” aid or abet another’s crime,⁶² while Indiana

MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008) (“A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if *reasonably foreseeable* by the person as a *probable consequence* of committing or attempting to commit the crime intended.”) (emphasis added); WIS. STAT. ANN. § 939.05(2)(c) (West 2005) (“Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a *natural and probable consequence* of the intended crime.”) (emphasis added).

56. KAN. STAT. ANN. § 21-3205(2) (2007); MINN. STAT. ANN. § 609.05(2) (West 2003 & Supp. 2008).

57. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

58. WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

59. *Id.*

60. IOWA CODE ANN. § 703.2 (West 2003).

61. *See* IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004); WASH. REV. CODE ANN. § 9A.08.020(2)–(3)(a) (West 2000); W. VA. CODE ANN. § 61-2-14e (LexisNexis 2005); WYO. STAT. ANN. § 6-1-201(a) (2007).

62. WYO. STAT. ANN. § 6-1-201(a) (2007).

declares an individual responsible if that individual “knowingly or intentionally aids, induces, or causes another person to commit an offense.”⁶³ West Virginia requires one to “knowingly” aid and abet a few crimes⁶⁴ but generally requires no mental state for accomplice liability with respect to other crimes.⁶⁵ Finally, Washington holds one liable as an accomplice who acts “[w]ith knowledge that [the assistance] will promote or facilitate the commission of the crime.”⁶⁶

E. Statutes Lacking Any Mental State Requirement

Eighteen states do not pattern their mental state requirements after the Category I, Category II, or Category III approach. Instead, these states do not appear to require any mental state on the part of an accomplice to find liability.⁶⁷ For example, Michigan’s law indicates, “Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission . . . shall be punished as if he had directly committed such offense.”⁶⁸ Likewise, Nebraska’s statute states that “[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.”⁶⁹ New Mexico imposes liability when an accomplice “procures, counsels, aids or abets in [the crime’s] commission.”⁷⁰ South Carolina and Vermont hold that courts are to treat “[a] person who aids in the commission of a felony” the same as a “principal.”⁷¹ California provides that “[a]ll persons . . . [who] aid and abet” are responsible,⁷² while Florida’s law reads that “[w]hoever . . . aids, abets, counsels, hires, or otherwise procures such offense

63. IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004).

64. W. VA. CODE ANN. § 61-2-14e (LexisNexis 2005) (listing kidnapping, holding hostage, demanding ransom, concealment of a minor child, and several other crimes).

65. W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

66. WASH. REV. CODE ANN. § 9A.08.020(3)(a) (West 2000).

67. See CAL. PENAL CODE § 31 (West Supp. 2008); FLA. STAT. ANN. § 777.011 (West 2005); IDAHO CODE ANN. § 18-204 (2004 & Supp. 2008); LA. REV. STAT. ANN. § 14:24 (2007); MD. CODE ANN., CRIM. PROC. § 4-204 (LexisNexis 2008); MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); MICH. COMP. LAWS ANN. § 767.39 (West 2000); MISS. CODE ANN. § 97-1-3 (2006); NEB. REV. STAT. § 28-206 (1995); NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006); N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004); N.C. GEN. STAT. § 14-5.2 (2007); OKLA. STAT. ANN. tit. 22, § 432 (West 2003); R.I. GEN. LAWS § 11-1-3 (2002); S.C. CODE ANN. § 16-1-40 (2003); VT. STAT. ANN. tit. 13, §§ 3-4 (1998); VA. CODE ANN. § 18.2-18 (2004); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

68. MICH. COMP. LAWS ANN. § 767.39 (West 2000).

69. NEB. REV. STAT. § 28-206 (1995).

70. N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004).

71. S.C. CODE ANN. § 16-1-40 (2003); VT. STAT. ANN. tit. 13, § 3 (1998).

72. CAL. PENAL CODE § 31 (West 1999).

to be committed” is liable under accountability principles.⁷³ Rhode Island’s accomplice measure states that “[e]very person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense” is accountable to the same extent as “the principal offender.”⁷⁴ Massachusetts states that “[w]hoever aids in the commission of a felony . . . by counseling, hiring or otherwise procuring such felony to be committed” is punishable in the manner as provided for “the principal felon.”⁷⁵ Similarly, Oklahoma’s law proscribes that any person “concerned in the commission of a felony,” whether that person is the actual perpetrator or one who “aid[s] or abet[s] in its commission,” is criminally accountable for such felony.⁷⁶ Mississippi’s stricture reads that “[e]very person who shall be an accessory to any felony” is as criminally liable as “the principal.”⁷⁷ North Carolina and Virginia’s statutes offer similar language.⁷⁸

Nevada explicitly denies the necessity of any mental state requirement for an accomplice to be criminally responsible.⁷⁹ Nevada’s statute indicates that “[t]he fact that [a] person . . . could not or did not entertain a criminal intent shall not be a defense” if that person assisted a perpetrator’s commission of an offense.⁸⁰

Maryland’s statute differs in that it not only lacks a mental state requirement, but it also lacks any indication of who it considers an “accessory before the fact.”⁸¹ The Maryland statute simply states, without further explanation, that “the distinction between an accessory before the fact and a principal is abrogated” and that “an accessory before the fact may be charged, tried, convicted, and sentenced as a principal.”⁸²

73. FLA. STAT. ANN. § 777.011 (West 2005).

74. R.I. GEN. LAWS § 11-1-3 (2002).

75. MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000).

76. OKLA. STAT. ANN. tit. 22, § 432 (West 2003).

77. MISS. CODE ANN. § 97-1-3 (2006).

78. N.C. GEN. STAT. § 14-5.2 (2007); VA. CODE ANN. § 18.2-18 (2004).

79. NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006).

80. *Id.*

81. MD. CODE ANN., CRIM. PROC. § 4-204 (LexisNexis 2008).

82. *Id.* § 4-204(b). It should be noted, however, that the *Maryland Pattern Jury Instructions* indicate that to prove a defendant was an accessory before the fact, the State must prove the defendant acted “with the intent to make the crime succeed.” MD. STATE BAR ASS’N STANDING COMM. ON PATTERN JURY INSTRUCTIONS, MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS 6:01 (10th ed. 2005).

F. Statutes Allowing for a Defense for the Victim of a Crime

The Model Penal Code's accomplice liability statute protects one from accomplice liability if one "is a victim of that offense."⁸³ For example, under this provision, the minor victim of a statutory rape cannot be liable as an accomplice to the adult rapist's conduct, even if the minor encouraged the adult perpetrator.⁸⁴ Nine states have similar provisions in their accomplice liability legislation.⁸⁵ For example, Pennsylvania will not hold an alleged accomplice liable who "is a victim of that offense,"⁸⁶ while Washington's statute will not allow for the conviction of an alleged accomplice who "is a victim of that crime."⁸⁷

G. Statutes with Incidental Party Provisions

Another defense the Model Penal Code provides protects an individual if the crime "is so defined that his conduct is inevitably incident to its commission."⁸⁸ This provision, for instance, would not allow a state to charge the purchaser of illegal drugs as an accomplice to the sale of the drugs.⁸⁹ Six states have codified similar incidental party provisions in their accomplice liability statutes.⁹⁰ Missouri's statute indicates an alleged accomplice will not be liable if the crime "is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense."⁹¹ Maine's provision likewise allows a defense for an alleged accomplice if "the crime is so defined that it cannot be committed without the person's cooperation."⁹²

83. MODEL PENAL CODE § 2.06(6)(a) (1962).

84. *Id.* § 2.06 cmt. 9(a).

85. See DEL. CODE ANN. tit. 11, § 273(1) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c)(1) (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(A) (Supp. 2007); MO. ANN. STAT. § 562.041.2(1) (West 1999); MONT. CODE ANN. § 45-2-302(3)(a) (2007); N.H. REV. STAT. ANN. § 626:8(VI)(a) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2-6(e)(1) (West 2005); 18 PA. CONS. STAT. ANN. § 306(f)(1) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(5)(a) (West 2000).

86. 18 PA. CONS. STAT. ANN. § 306(f)(1) (West 1998).

87. WASH. REV. CODE ANN. § 9A.08.020(5)(a) (West 2000).

88. MODEL PENAL CODE § 2.06(6)(b).

89. JOHN F. DECKER, ILLINOIS CRIMINAL LAW § 3.10, at 188 (4th ed. 2006) (citing 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 38, at 252-53 (15th ed. 1993)).

90. See 720 ILL. COMP. STAT. ANN. 5/5-2(c)(2) (West 2002); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(B) (Supp. 2007); MO. ANN. STAT. § 562.041.2(2) (West 1999); N.H. REV. STAT. ANN. § 626:8(VI)(B) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2-6(e)(2) (West 2005); 18 PA. CONS. STAT. ANN. § 306(f)(2) (West 1998).

91. MO. ANN. STAT. § 562.041.2(2) (West 1999).

92. ME. REV. STAT. ANN. tit. 17-A, § 57(5)(B) (Supp. 2007).

H. Statutes with Withdrawal Provisions

The Model Penal Code allows for an alleged accomplice to avoid criminal liability by withdrawing from the criminal complicity prior to a perpetrator's commission of the crime.⁹³ Subsection (6)(c) of the Model Penal Code's accomplice liability provision provides a defense for one who "terminates his complicity prior to the commission of the offense and (i) wholly deprives it of effectiveness in the commission of the offense; or (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense."⁹⁴ Twelve states have similar withdrawal provisions in their respective accomplice liability statutes.⁹⁵ For example, Illinois's statute states that an alleged accomplice is not criminally responsible if:

Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and [either] wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.⁹⁶

Minnesota, on the other hand, only requires that an individual who acted with the purpose of assisting the perpetrator "abandon[] that purpose and make[] a reasonable effort to prevent the commission of the crime prior to its commission."⁹⁷

I. Statutes with Liability for Persons Exempt from the Substantive Offense

Also contained within section 2.06 of the Model Penal Code is a legislative exemption provision. This subsection holds an individual "who is legally incapable of committing" the offense accountable as an accomplice if the offense is "committed by the conduct of another person for which [the individual] is legally accountable."⁹⁸ This provision is designed to make a

93. MODEL PENAL CODE § 2.06(6)(c).

94. *Id.*

95. See DEL. CODE ANN. tit. 11, § 273(3) (2007); 720 ILL. COMP. STAT. ANN. 5/5-2(c)(3) (West 2002); IND. CODE ANN. § 35-41-3-10 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 17-A, § 57(5)(C) (Supp. 2007); MINN. STAT. ANN. § 609.05(3) (West 2003 & Supp. 2008); MO. ANN. STAT. § 562.041.2(3) (West 1999); N.H. REV. STAT. ANN. § 626:8(VI)(c) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2-6(e)(3) (West 2005); OHIO REV. CODE ANN. § 2923.03(E) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(f)(3) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(5)(b) (West 2000); WIS. STAT. ANN. § 939.05(2)(c) (West 2005).

96. 720 ILL. COMP. STAT. ANN. 5/5-2(c)(3) (West 2002).

97. MINN. STAT. ANN. § 609.05(3) (West 2003 & Supp. 2008).

98. MODEL PENAL CODE § 2.06(5).

person an accomplice even though that person is personally exempt from the reach of the substantive offense.⁹⁹ The example cited in comments to the Model Penal Code—albeit rather antiquated—is the husband who is exempt from the reach of the common law rape proscription due to the marital exemption rule.¹⁰⁰ Perhaps a more appropriate example would be the adult who is free of the reach of the local curfew law but who encourages or facilitates a minor's presence in a public area after hours without adult accompaniment.¹⁰¹

Six states have statutory provisions similar to section 2.06(5).¹⁰² Delaware's statute provides that "it is no defense that . . . [t]he offense in question, as defined, can be committed only by a particular class of persons," of which the defendant is not a member,¹⁰³ while New Jersey maintains that "[a] person who is legally incapable of committing a particular offense" may be liable if that person is "legally accountable" for the conduct of the perpetrator.¹⁰⁴

J. Statutes Containing an Innocent Agent Provision

The Model Penal Code¹⁰⁵ and nineteen states¹⁰⁶ have an innocent agent provision in their accomplice accountability measures allowing for accomplice

99. *See id.* § 2.06 cmt. 8.

100. *Id.* (citing *Cody v. State*, 361 P.2d 307, 315–16 (Okla. Crim. App. 1961)) (allowing a husband to be tried as an accessory for the rape of his wife); *cf. id.* § 213.1(1) ("A male who has sexual intercourse with a female not his wife is guilty of rape . . .").

101. *See, e.g.*, UNIVERSITY CITY, MO., MUNICIPAL CODE § 9.20.020 (2007) ("It is unlawful for any minor under the age of seventeen (17) years to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of eleven p.m. and six a.m. of the following day, official city time, except on Fridays and Saturdays, when the hours shall be twelve midnight to six a.m.; however, the provisions of this section shall not apply to a minor accompanied by his or her parent, guardian or other adult person having the care and custody of the minor, or where the minor is upon an emergency errand or legitimate business directed by his or her parent, guardian or other adult person having the care and custody of the minor.").

102. *See* DEL. CODE ANN. tit. 11, § 272(3) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(4) (Supp. 2007); N.H. REV. STAT. ANN. § 626:8(I) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(d) (West 2005); 18 PA. CONS. STAT. ANN. § 306(e) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(4) (West 2000).

103. DEL. CODE ANN. tit. 11, § 272(3) (2007).

104. N.J. STAT. ANN. § 2C:2–6(d) (West 2005).

105. MODEL PENAL CODE § 2.06(2)(a).

106. *See* ALASKA STAT. § 11.16.110(3) (2006); ARIZ. REV. STAT. ANN. § 13-303(A)(2) (2008); ARK. CODE ANN. § 5-2-402(3) (2006); CAL. PENAL CODE § 31 (West 1999); COLO. REV. STAT. § 18-1-602(1)(b) (2008); DEL. CODE ANN. tit. 11, § 271(1) (2007); GA. CODE ANN. § 16-2-20(b)(2) (2007); HAW. REV. STAT. ANN. § 702-221(2)(a) (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/5-2(a) (West 2002); KY. REV. STAT. ANN. § 502.010(1) (LexisNexis 1999); ME. REV. STAT. ANN. tit. 17-A, § 57(2)(A) (Supp. 2007); MONT. CODE ANN. § 45-2-302(1) (2007); N.H. REV. STAT. ANN. § 626:8(II)(a) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2–6(b)(1) (West

liability if the alleged accomplice encouraged an innocent agent, such as a very young child, to perpetrate the offense. The Model Penal Code states that “[a] person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.”¹⁰⁷ For example, Alaska holds a person criminally accountable for another’s conduct where the person is “acting with the culpable mental state that is sufficient for the commission of the offense, [and] the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct.”¹⁰⁸

K. Statutes Containing a Legal Duty Provision

Six states¹⁰⁹ and the Model Penal Code¹¹⁰ base accomplice liability on one’s breach of a legal duty. The Model Penal Code language states that a person is an accomplice of another if that person, “with the purpose of promoting or facilitating the commission of the offense, . . . having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.”¹¹¹ While most of the statutes in this small grouping parallel the Model Penal Code’s language,¹¹² the Tennessee law in this regard reads that a person is criminally accountable for another’s crimes if:

Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.¹¹³

2005); OHIO REV. CODE ANN. § 2923.03(A)(4) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(b)(1) (West 1998); TENN. CODE ANN. § 39-11-402(1) (2006); TEX. PENAL CODE ANN. § 7.02(a)(1) (Vernon 2003); WASH. REV. CODE ANN. § 9A.08.020(2)(a) (West 2000).

107. MODEL PENAL CODE § 2.06(2)(a).

108. ALASKA STAT. § 11.16.110(3) (2006).

109. See ARK. CODE ANN. § 5-2-403(a)(3) (2006); DEL. CODE ANN. tit. 11, § 271(2)(c) (2007); HAW. REV. STAT. ANN. § 702-222(1)(c) (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)(c) (LexisNexis 1999); OR. REV. STAT. § 161.155(2)(c) (2007); TENN. CODE ANN. § 39-11-402(3) (2006).

110. MODEL PENAL CODE § 2.06(3)(a)(iii).

111. *Id.*

112. See ARK. CODE ANN. § 5-2-403(a)(3) (2006); DEL. CODE ANN. tit. 11, § 271(2)(c) (2007); HAW. REV. STAT. ANN. § 702-222(1)(c) (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)(c) (LexisNexis 1999); OR. REV. STAT. § 161.155(2)(c) (2007).

113. TENN. CODE ANN. § 39-11-402(3) (2006).

L. Statutes Allowing for Liability of an Accomplice Without the Conviction of the Perpetrator

At common law, “an accessory could not be convicted of a crime unless and until the principal was convicted.”¹¹⁴ Similarly, “an accessory could not be convicted of a more serious offense, or a higher degree of an offense, than his principal.”¹¹⁵ However, the Model Penal Code makes it clear that:

An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.¹¹⁶

Twenty states have similar statutes designed to abrogate the common law rule conditioning prosecution of an accomplice on the conviction of the principal.¹¹⁷ For instance, the Illinois criminal code provides,

A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or degree of offense, or is not amenable to justice, or has been acquitted.¹¹⁸

Meanwhile, Iowa law provides, “The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part

114. DRESSLER, *supra* note 3, § 30.03[B][5], at 505.

115. *Id.* § 30.03[B][6], at 506.

116. MODEL PENAL CODE § 2.06(7).

117. See DEL. CODE ANN. tit. 11, § 272(2) (2007); 720 ILL. COMP. STAT. ANN. 5/5-3 (West 2002); IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004); IOWA CODE ANN. § 703.1 (West 2003); KAN. STAT. ANN. § 21-3205(3) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(6) (Supp. 2007); MD. CODE ANN., CRIM. PROC. § 4-204(c) (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 274, § 3 (West 2000); MINN. STAT. ANN. § 609.05(4) (West 2003 & Supp. 2008); MISS. CODE ANN. § 97-1-3 (2006); NEV. REV. STAT. ANN. § 195.040 (LexisNexis 2006); N.H. REV. STAT. ANN. § 626:8(VII) (LexisNexis 2007); N.J. STAT. ANN. § 2C:2-6(f) (West 2005); N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004); N.D. CENT. CODE § 12.1-03-01(2)(b) (1997); OHIO REV. CODE ANN. § 2923.03(B) (LexisNexis 2006); 18 PA. CONS. STAT. ANN. § 306(g) (West 1998); WASH. REV. CODE ANN. § 9A.08.020(6) (West 2000); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005); WYO. STAT. ANN. § 6-1-201(b)(ii) (2007).

118. 720 ILL. COMP. STAT. ANN. 5/5-3 (West 2002).

the person had in it, and does not depend upon the degree of another person's guilt."¹¹⁹

M. Statutes Only Pertaining to Felonies

Although the Model Penal Code¹²⁰ and the vast majority of states hold an individual liable as an accomplice whether the offense is a felony or a misdemeanor, five states explicitly state that their accomplice statute applies only to felonies.¹²¹ South Carolina's accomplice legislation only applies to "[a] person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony."¹²² Similarly, Mississippi allows for criminal liability for "[e]very person who shall be an accessory to any felony, before the fact."¹²³

N. Statutes with Provisions Unique to Their Particular State

Three states—Connecticut, North Carolina, and Virginia—have accomplice liability statutes with provisions unique to their particular state.¹²⁴ Connecticut, for instance, is the only state that has a firearm provision in its accomplice liability legislation. Specifically, it reads:

A person who sells, delivers or provides any firearm . . . to another person to engage in conduct which constitutes an offense knowing or under circumstances in which he should know that such other person intends to use such firearm in such conduct shall be criminally liable for such conduct and shall be prosecuted and punished as if he were the principal offender.¹²⁵

119. IOWA CODE ANN. § 703.1 (West 2003).

120. See MODEL PENAL CODE § 2.06(1)–(2) (referring to “offenses”).

121. See MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); MISS. CODE ANN. § 97-1-3 (2006); OKLA. STAT. ANN. tit. 22, § 432 (West 2003); S.C. CODE ANN. § 16-1-40 (2003); VA. CODE ANN. § 18.2-18 (2004).

122. S.C. CODE ANN. § 16-1-40 (2003).

123. MISS. CODE ANN. § 97-1-3 (2006).

124. See CONN. GEN. STAT. ANN. § 53a-8(b) (West 2007); N.C. GEN. STAT. § 14-5.2 (2007); VA. CODE ANN. § 18.2-18 (2004).

125. CONN. GEN. STAT. ANN. § 53a-8(b) (West 2007).

In other words, if an accomplice provides a firearm to the principal, the accomplice must only possess the mental state of knowledge rather than the requisite mental state necessary to convict the principal.¹²⁶

North Carolina's statute is unique in that it contains a provision regarding the evidence necessary to convict an accomplice of a capital felony. The North Carolina law reads:

[I]f a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.¹²⁷

A Class B2 felony falls outside the reach of North Carolina's death penalty provision.¹²⁸ Thus, if the offense is a capital felony, North Carolina will hold an alleged accomplice to a lesser penalty than the principal felon if there is no evidence against the accomplice besides the testimony of the other parties to the crime.¹²⁹

While several states explicitly provide that they will hold an accomplice to an offense as liable as the actual perpetrator,¹³⁰ Virginia's statute is distinctive in that it specifies only certain types of capital murder in which Virginia will treat an accessory before the fact as the actual perpetrator.¹³¹ Virginia's code

126. Connecticut is a Category II state with regard to all other offenses and therefore requires that the accomplice have the shared mental state with regard to the crime that is necessary to convict the perpetrator. *See id.*; *supra* notes 47–48 and accompanying text.

127. N.C. GEN. STAT. § 14-5.2 (2007).

128. In North Carolina, a felon convicted of murder in the first degree is guilty of a Class A felony and therefore may receive the death penalty. *Id.* § 14-17. However, a felon convicted of murder in the second degree, which is a Class B2 felony, *id.*, is not eligible for the death penalty. *Id.* § 15A-1340.17.

129. *Id.* § 14-5.2.

130. *See, e.g.*, S.D. CODIFIED LAWS § 22-3-3 (2006) (“Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime.”).

131. VA. CODE ANN. § 18.2-18 (2004) (“In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of subdivision 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision 10 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2-31, an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.”).

specifies that if an accessory before the fact aids in the offenses of murder for hire, murder in connection with a criminal enterprise, or murder in connection with terrorism, then the accessory before the fact is liable for murder in the first degree,¹³² which is a Class 2 felony.¹³³ However, principals who commit those crimes are liable for capital murder, which is a Class 1 felony.¹³⁴ For all other crimes, however, accessories before the fact are treated in the same manner as the perpetrator.¹³⁵

O. Statutes that Make Reference to the Common Law Distinctions of Principals and Accessories

Although the Model Penal Code¹³⁶ and the majority of states¹³⁷ no longer maintain the common law distinctions of accessories and principals in their statutory language, six states continue to use these common law terms in their legislation.¹³⁸ North Carolina's statute, for instance, asserts that "[e]very person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal."¹³⁹ Vermont has patterned its legislation in a similar manner. Using the same common law terminology, it states that "[a] person who is accessory before the fact" is equally as liable as the "principal offender."¹⁴⁰ Virginia's statute refers to both the "principal in the second degree" and the "accessory before the fact."¹⁴¹

P. Statutes that Intertwine Criminal Facilitation or Conspiracy

Because the crimes of criminal facilitation and conspiracy have many of the same elements as accomplice liability,¹⁴² some states have intertwined their

132. *Id.*

133. *Id.* § 18.2-32.

134. *Id.* § 18.2-31 (Supp. 2008).

135. *Id.* § 18.2-18.

136. See MODEL PENAL CODE § 2.06(c)(2) (1962).

137. LAFAVE, *supra* note 1, § 13.1(e), at 670.

138. See MD. CODE ANN., CRIM. PROC. § 4-204 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000); N.C. GEN. STAT. § 14-5.2 (2007); VT. STAT. ANN. tit. 13, § 4 (1998); VA. CODE ANN. § 18.2-18 (2004); W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005).

139. N.C. GEN. STAT. § 14-5.2 (2007).

140. VT. STAT. ANN. tit. 13, § 4 (1998).

141. VA. CODE ANN. § 18.2-18 (2004).

142. Compare 16 AM. JUR. 2D *Conspiracy* §§ 10, 13-15 (1998) (listing the elements of conspiracy as agreement, intent, knowledge, and overt act), and 35 N.Y. JUR. 2D *Criminal Law: Substantive Principles and Offenses* §§ 344-46 (2008) (listing the elements of criminal facilitation as scienter, commission of the facilitated crime, and actual assistance), with 21 AM. JUR. 2D *Criminal Law* §§ 173-76 (2008) (listing the elements of accomplice liability as acting with another, common plan or design, knowledge, and intent).

criminal facilitation and conspiracy statutes with their accomplice liability legislation.¹⁴³ Ohio and Kentucky frame their respective complicity statutes to include both accomplice liability and conspiracy.¹⁴⁴ Under Ohio law, a person is liable under the complicity statute who, possessing the requisite mental state for conviction of the perpetrator, aids or abets the principal or “[c]onspire[s] with another to commit the offense.”¹⁴⁵ Kentucky’s statute, in the same respect, includes the offense of “engag[ing] in a conspiracy with another person” within its complicity statute.¹⁴⁶

Texas includes the crime of conspiracy within its accomplice legislation;¹⁴⁷ however, the mental state requirement necessary for a conviction of conspiracy differs from that necessary for accomplice liability. The Texas law reads:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated¹⁴⁸

Other states have criminal facilitation prohibitions separate and apart from their accomplice legislation.¹⁴⁹ Kentucky has codified the crime of criminal facilitation, holding an individual liable when, “acting with knowledge that another person is committing or intends to commit a crime, he . . . knowingly provides such person with means or opportunity for the commission of the crime.”¹⁵⁰ Therefore, although Kentucky’s accomplice liability statute allows conviction if the alleged accomplice either had the intention of promoting or facilitating the commission of the offense or had the kind of culpability with respect to the result that is sufficient for the commission of the offense for a

143. See KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999); OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006); S.D. CODIFIED LAWS § 22-3-3 (2006); TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

144. See KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999); OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006).

145. OHIO REV. CODE ANN. § 2923.03(A)(2)–(3) (LexisNexis 2006).

146. KY. REV. STAT. ANN. § 502.020(2)(a) (LexisNexis 1999).

147. TEX. PENAL CODE ANN. § 7.02(b) (Vernon 2003).

148. *Id.* Thus, while this provision uses a Category III mental state approach with regard to conspiracy, *id.*, Texas uses a Category I mental state approach with regard to accomplice liability, *id.* § 7.02(a).

149. See KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999); N.Y. PENAL LAW §§ 115.00–115.15 (McKinney 2004).

150. KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999).

result-oriented crime,¹⁵¹ Kentucky may convict an individual of criminal facilitation for possessing a mental state of mere knowledge.¹⁵²

III. STATES WITH CASE LAW FOLLOWING THE CATEGORY I APPROACH: SPECIFIC INTENT

When examining the respective states' case law, with most of these states having accomplice statutes patterned after either the Category I model,¹⁵³ the Category II model,¹⁵⁴ or both,¹⁵⁵ one finds only six states that interpret their statutes in a fashion demanding proof of specific intent to promote or assist on the part of the alleged accomplice. These states are Florida, Mississippi, New Mexico, Oregon, Pennsylvania, and Texas.

A. Florida

Florida's criminal code imposes liability on anyone who "aids, abets, counsels, hires, or otherwise procures" a criminal offense, regardless of that person's actual or constructive presence at the commission of the offense.¹⁵⁶ Notwithstanding the statutory language, the case law does not track the statute in that the case law also requires proof that a defendant intended to participate in the crime.¹⁵⁷ For example, in *Giniebra v. State*,¹⁵⁸ where a trial court had

151. See *supra* note 46 and accompanying text.

152. § 506.080(1).

153. See discussion *supra* Part II.A.

154. See discussion *supra* Part II.B.

155. See *supra* notes 45–52 and accompanying text.

156. FLA. STAT. ANN. § 777.011 (West 2005) ("Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.").

157. In *Christie v. State*, 652 So. 2d 932 (Fla. Dist. Ct. App. 1995) (per curiam), the court explained that "[t]o convict defendant as an aider and abettor, the state had to show that defendant (1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted or incited the perpetrators to actually commit the crime; and (2) intended to participate in the crime." *Id.* at 934 (citing *Howard v. State*, 473 So. 2d 841, 841 (Fla. Dist. Ct. App. 1985)). Therefore, in a cocaine transaction where the principals double-crossed cocaine suppliers, forcibly took the cocaine at the site of the drug deal, kidnapped the suppliers, and killed them, and where the defendant "was the boss of the drug deal, participated in its planning and supervised its execution," *id.* at 933, the court held that the defendant was a "willing participant." *Id.* at 935.

In *K.O. v. State*, 673 So. 2d 47 (Fla. Dist. Ct. App. 1995), the court held that where the defendant intended to participate in a scheme of breaking the window of a vehicle at a car dealership in order to steal a telephone, which his cohort apparently removed from the vehicle, "there was evidence sufficient to sustain the conviction for burglary under an aiding and abetting

convicted the defendant of second degree murder and kidnapping, the Florida District Court of Appeal affirmed only the kidnapping charge.¹⁵⁹ In this case, the defendant admitted after arrest to being present during the kidnapping of the victim that was motivated by ransom.¹⁶⁰ In addition to the defendant's admission to being present, forensic evidence placed the defendant at the scene where the kidnappers were holding and likely killed the victim.¹⁶¹ The victim's murder followed the kidnapping and unsuccessful ransom demand, but the defendant denied having participated in the murder.¹⁶²

The defendant appealed his convictions based on insufficiency of evidence.¹⁶³ The Florida District Court of Appeal stated that "[t]o convict as a principal, the State must show that [the defendant] intended the crime to be committed and assisted the actual perpetrator in committing the crime."¹⁶⁴ The court then stated that nothing in the record evinced that defendant intended or participated in the victim's murder, and consequently, the court reversed the defendant's conviction for second degree murder.¹⁶⁵ However, the court found sufficient evidence to affirm the conviction for kidnapping.¹⁶⁶

Meanwhile, in *R.M. v. State*,¹⁶⁷ the defendant "was one of three youths who threw tiles at the victim . . . ; however, the victim was only struck by one of the

theory." *Id.* at 48. The court explained that the defendant "could be convicted of burglary if the evidence presented by the state at trial was sufficient to show that he (1) assisted the actual perpetrators by doing or saying something that caused, encouraged, assisted, or incited the perpetrators to actually commit the crime, and (2) intended to participate in the crime." *Id.* (citing *A.B.G. v. State*, 586 So. 2d 445, 447 (Fla. Dist. Ct. App. 1991)).

Additionally, in *Evans v. State*, 643 So. 2d 1204 (Fla. Dist. Ct. App. 1994), the court provided that "[t]o secure a conviction on an aider and abettor theory, the state must establish . . . that the defendant intended to participate in the crime" and that "mere knowledge that an offense is being committed is not the same as participation with the requisite criminal intent." *Id.* at 1205-06 (quoting *C.P.P. v. State*, 479 So. 2d 858, 859 (Fla. Dist. Ct. App. 1985)) (internal quotation marks omitted). Therefore, the court held that where that the defendant-passenger merely knew that other occupants in a pickup truck intended to shoot the windows out of a store, the evidence was insufficient to convict him of aiding and abetting. *Id.* at 1206.

Finally, in *Jones v. State*, 648 So. 2d 1210 (Fla. Dist. Ct. App. 1995), the court upheld a jury instruction that the defendant's knowledge of the principal's use of a firearm was not required in order to convict the defendant. *Id.* at 1210-11. Notably, the court stated that "[t]o be found guilty as a principal it is not necessary for the aider and abettor to know of every detail of the crime so long as there exists evidence of the aider's intent to participate." *Id.* at 1211.

158. 787 So. 2d 51 (Fla. Dist. Ct. App. 2001).

159. *Id.* at 51, 53.

160. *Id.* at 52-53.

161. *Id.* at 52.

162. *Id.* at 52-53.

163. *See id.* at 53.

164. *Id.*

165. *Id.*

166. *Id.*

167. 664 So. 2d 42 (Fla. Dist. Ct. App. 1995).

tiles,” and it was unclear as to which of the youths threw that particular tile.¹⁶⁸ Because of the uncertainty as to who caused the injury to the victim, the State prosecuted the defendant as an accomplice to battery.¹⁶⁹ The Florida appellate court stated that “[i]n order to be convicted as an aider and abettor, the evidence must show that the defendant ‘(1) assisted the actual perpetrator by doing or saying something that causes, encourages or assists or incites the perpetrator to actually commit the crime; and (2) *intended to participate in the crime.*’”¹⁷⁰ Here, the evidence revealed that “the concerted throwing of the tiles [demonstrated] that the crime had been planned in advance,” and consequently, “there was sufficient evidence to convict [the defendant] of battery.”¹⁷¹

B. Mississippi

It appears Mississippi is another one of the few states which falls into Category I status.¹⁷² In *Malone v. State*,¹⁷³ the principal approached the victim as she was trying to enter her house, struck her with a “slapjack,” and took money, diamonds, and jewelry from the victim.¹⁷⁴ At trial, the principal’s testimony established that although the defendant was not present at the time of the robbery, he made the initial call to the principal and asked her to come meet his cohorts, who would assist her in stealing the diamonds.¹⁷⁵ The principal also stated that the defendant took the diamonds from the principal after the robbery and gave her five \$100 bills for bringing him the diamonds.¹⁷⁶

The defendant appealed his conviction of being an accessory before the fact of armed robbery, claiming the trial court’s jury instructions charged the jury on a criminal conspiracy theory, failed to define “aiding and abetting,” and failed to call for a finding of specific intent.¹⁷⁷ In regard to the issue of intent, the Supreme Court of Mississippi upheld the conviction after finding that the jury instructions, which required the jury to find that the defendant was “acting in concert with others . . . with the unlawful and felonious intent to steal” in order

168. *Id.*

169. *Id.* at 43.

170. *Id.* (emphasis added) (quoting *Rouse v. State*, 583 So. 2d 1111, 1112 (Fla. Dist. Ct. App. 1991)).

171. *Id.* at 42–43.

172. Interestingly, Mississippi law contains no mental state requirement. MISS. CODE ANN. § 97-1-3 (2006) (“Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal . . .”).

173. 486 So. 2d 360 (Miss. 1986).

174. *Id.* at 361 (internal quotation marks omitted).

175. *Id.* at 361–63.

176. *Id.* at 362.

177. *Id.* at 363–64.

to reach a guilty verdict, were proper.¹⁷⁸ The court concluded that “[a]ny alleged deficiency in the instructions on the matter of advising the jury of the concepts of aiding and abetting and specific intent were more than cured” by the instructions given.¹⁷⁹

In *White v. State*,¹⁸⁰ the State charged and obtained a conviction of the defendant–accomplice for robbery.¹⁸¹ In this case, the defendant and three others baited the victims to an isolated location and robbed them at gunpoint.¹⁸² The three other individuals pleaded guilty and testified against the defendant.¹⁸³ The trial court gave the jury two avenues to find the defendant guilty, either as a direct participant or as an accomplice.¹⁸⁴ The jury found the defendant guilty of robbery but did not specify whether they convicted him as a principal or as an accessory.¹⁸⁵ The jury instruction regarding the theory that the defendant may have been an aider and abettor read in part:

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts *with the intent to commit a crime*, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it *with the intent to bring about the crime*.¹⁸⁶

The Mississippi Supreme Court upheld the defendant’s conviction, finding “no error in the submission of this instruction.”¹⁸⁷

C. *New Mexico*

Notwithstanding its accessory statute which reflects no mental state requirement,¹⁸⁸ New Mexico provides a strong example of a jurisdiction which

178. *Id.* at 364–65.

179. *Id.* at 364.

180. 919 So. 2d 1029 (Miss. Ct. App. 2005).

181. *Id.* at 1031, 1034.

182. *Id.* at 1031.

183. *Id.*

184. *Id.* at 1032.

185. *Id.* at 1035.

186. *Id.* at 1033 (emphasis added).

187. *Id.* at 1034, 1036.

judicially adheres to the Category I perspective.¹⁸⁹ In *State v. Carrasco*,¹⁹⁰ two principals went into a convenience store while the defendant waited in the car.¹⁹¹ While in the store, one principal struck the clerk, knocked her down, and kicked her as the other principal attempted to open the cash register.¹⁹² When a customer entered the store, the principals ran out of the store, jumped into the car, and drove away with the defendant driving the vehicle.¹⁹³ At the defendant's trial, where he faced multiple charges as an accessory, the defendant "testified that he was intoxicated [during the incident] and that he either went to sleep or blacked-out in the car" while the principals were inside of the store.¹⁹⁴ Therefore, although the defendant admitted to driving the two principals away from the store, he also claimed to know "nothing of the acts" the principals committed inside the store until after they informed him of their attempted robbery while they were driving away.¹⁹⁵ Nevertheless, a trial court convicted the defendant of "conspiracy to commit robbery, accessory to assault with intent to commit a violent felony (robbery), accessory to aggravated battery, accessory to attempted robbery, and accessory to false imprisonment."¹⁹⁶

The New Mexico Court of Appeals, in upholding the defendant's convictions, "relied on the doctrine that an accessory may be held liable for all crimes which are the natural and probable consequence of the attempted criminal offense."¹⁹⁷ However, the Supreme Court of New Mexico rejected this

188. N.M. STAT. ANN. § 30-1-13 (LexisNexis 2004) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission . . .").

189. See *State v. Bankert*, 875 P.2d 370, 374 (N.M. 1994) (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822) (adopting the elements of accomplice liability from the New Mexico uniform jury instructions for criminal cases). In *Bankert*, the evidence established that the alleged accomplice "badly wanted [an illegal drug] deal to take place"—so much so that he killed a supplier in order to allow the principal to take possession of the drugs. *Id.* at 375–76. The Supreme Court of New Mexico determined that the defendant–accomplice was guilty as an accomplice to possession of drugs with intent to distribute, which served as the predicate offense necessary to convict the defendant–accomplice of felony murder. *Id.* at 376. The *Bankert* court stated that the Uniform Jury Instructions demand proof that "[t]he defendant *intended that the crime be committed*; . . . [t]he crime was committed; [and t]he defendant helped, encouraged or caused the crime to be committed." *Id.* at 374 (emphasis added) (internal quotation marks omitted) (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822).

190. 946 P.2d 1075 (N.M. 1997).

191. *Id.* at 1078.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1078–79.

197. *Id.* at 1079.

opinion insofar as it applied the “natural and probable consequence test.”¹⁹⁸ Instead, the court stated that in order to be held liable as an accessory, an individual “must share the criminal intent of the principal.”¹⁹⁹ The court noted that the *New Mexico Uniform Jury Instructions* demand that “[t]he defendant intended that *the crime* be committed” before accomplice liability attaches.²⁰⁰ In other words:

[A] jury must find a community of purpose for *each* crime of the principal. This principle means that a jury must find that a defendant *intended* that the acts necessary for *each* crime be committed; a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal’s acts.²⁰¹

In explicitly rejecting the natural and probable consequences test, the court commented that although other states have adopted this approach, scholars have criticized it.²⁰² Additionally, the court justified its refusal to adhere to the natural and probable consequences doctrine by noting that the doctrine does not conform to the mental state required by section 2.06(3) of the Model Penal Code or New Mexico’s accomplice liability jurisprudence.²⁰³ Finally, although the court felt there was sufficient evidence to warrant convictions on each of the charges under the correct mental state requirement, the court required a retrial due to unrelated error.²⁰⁴

D. Oregon

Oregon’s accomplice statute²⁰⁵ and courts²⁰⁶ require proof that the defendant–accomplice acted with the “intent to promote or facilitate the

198. *Id.* (internal quotation marks omitted).

199. *Id.* (citing *State v. Ochoa*, 72 P.2d 609, 615 (N.M. 1937)).

200. *Id.* (quoting N.M. RULES ANN., CRIM. U.J.I. § 14-2822) (emphasis added).

201. *Id.*

202. *Id.*; cf. *supra* notes 22–25 and accompanying text (citing scholarly criticism).

203. *Corrasco*, 946 P.2d at 1079.

204. *Id.* at 1086.

205. OR. REV. STAT. § 161.155 (2007) (“A person is criminally liable for the conduct of another person constituting a crime if: (1) [t]he person is made criminally liable by the statute defining the crime; or (2) [w]ith the intent to promote or facilitate the commission of the crime the person: (a) [s]olicits or commands such other person to commit the crime; or (b) [a]ids or abets or agrees or attempts to aid or abet such person in planning or committing the crime; or (c) [h]aving a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make.”).

206. For example, in *State ex rel. Juvenile Dep’t of Multnomah County v. Holloway*, 795 P.2d 589 (Or. Ct. App. 1990), the court held that although the juvenile defendant was in a pickup

commission of the crime.” For example, *State ex rel. Juvenile Department of Marion County v. Arevalo*²⁰⁷ involved a juvenile defendant a lower court found responsible for kidnapping as a principal and first degree sexual abuse as an accomplice.²⁰⁸ Here, the defendant, “other boys and the victim were together in a physical education class when,” during the teacher’s absence, defendant and the other boys dragged the victim into an adjacent room.²⁰⁹ As one of the boys sat on top of the victim, the defendant stood by the door while several of the other boys grabbed the victim’s breasts.²¹⁰ The Oregon Court of Appeals upheld the findings of the juvenile court, including that the defendant aided and abetted the sexual abuse.²¹¹ The court pointed out that “[t]he state was required to prove that [the] child aided or abetted the commission of the crime with the intent to facilitate its commission.”²¹² Here, although the defendant had not touched the victim’s breasts, the defendant observed a codefendant’s hands going up the victim’s shirt and “could see that the assault had taken a sexual turn.”²¹³ The defendant also invited other boys into the room and overheard one boy yell, “Take her shirt off.”²¹⁴ Thus, the court concluded the defendant had the requisite “intent to promote or facilitate” the sexual abuse carried out by the other boys.²¹⁵

Similarly, in *State v. Branam*,²¹⁶ based on the finding of the defendant’s specific intent to aid and abet, the court found the defendant to be an accomplice to her boyfriend’s first degree criminal mistreatment of her three young boys.²¹⁷ According to the evidence, the defendant’s boyfriend spanked the boys to such an extent that they suffered bruises.²¹⁸ The appellate court noted that the accomplice statute imputes the conduct of another to an accused

truck that was involved in a gang-related drive-by-shooting, he had not aided and abetted an attempted murder where the evidence did not support a conclusion that he had the “intent to promote or facilitate” the shooting. *Id.* at 590–92 (quoting OR. REV. STAT. § 161.155(2)(b) (2007)). Also, in *State ex rel. Juvenile Dep’t of Multnomah County v. Greenwood*, 813 P.2d 58 (Or. Ct. App. 1991), the court upheld a defendant’s conviction where she assisted her sister in forcibly stealing a purse from the victim because “under the accomplice statute, the state had only to show that the defendant had the intent to promote or facilitate her sister’s commission of robbery in order to complete its proof of the elements of second-degree robbery.” *Id.* at 59–60.

207. 844 P.2d 928 (Or. Ct. App. 1992).

208. *Id.* at 929.

209. *Id.*

210. *Id.*

211. *Id.* at 930–31.

212. *Id.* at 930.

213. *Id.* at 930–31.

214. *Id.* at 931 (internal quotation marks omitted).

215. *Id.* at 930.

216. 739 P.2d 606 (Or. Ct. App. 1987).

217. *Id.* at 607–08.

218. *Id.* at 607.

if the accused had the “intent to promote or facilitate” the perpetrator’s criminality and had a “legal duty to prevent the commission of the crime, [but] fail[ed] to make an effort the [accused was legally] required to make.”²¹⁹ Here, the trial court properly found the defendant had the necessary intent to promote or facilitate the criminal mistreatment.²²⁰

In *State v. Moreno*,²²¹ the defendant appealed his conviction of possession of a precursor substance with intent to manufacture a controlled substance.²²² In this case, the defendant stole five packages of Sudafed cold medicine from a pharmacy.²²³ After his arrest, the defendant admitted that he stole the Sudafed and “that he intended to sell it on the street for money.”²²⁴ The defendant also acknowledged “that he knew that Sudafed contains pseudoephedrine and that pseudoephedrine is a precursor substance used to manufacture methamphetamine.”²²⁵ However, the defendant denied “that he intended personally to manufacture methamphetamine or that he even knew how to manufacture it.”²²⁶

The Oregon drug measure under which the trial court convicted the defendant required the jury to find that the defendant held the “‘conscious objective’ to manufacture methamphetamine.”²²⁷ Because the facts of the case did not suggest that the defendant intended that the Sudafed be used to manufacture methamphetamine, the state argued for criminal liability on an aiding and abetting theory.²²⁸ Accordingly, the state argued that the defendant possessed the requisite conscious objective because he intended to sell the Sudafed to another knowing the other person would likely or certainly use it to manufacture methamphetamine.²²⁹

However, the Court of Appeals of Oregon disagreed. Reversing the conviction, the court stated that knowledge was “not enough to establish liability on the state’s alternative theory that defendant aided and abetted

219. *Id.* (internal quotation marks omitted) (quoting OR. REV. STAT. § 161.155(2)(c) (2007)).

220. *Id.* at 608. There was also evidence the defendant spanked her children excessively. *Id.* at 607. However, the primary focus of the court’s discussion regarding the defendant’s liability was on the accomplice theory. *See id.* at 607–08.

221. 104 P.3d 628 (Or. Ct. App. 2005).

222. *Id.* at 628.

223. *Id.* at 628–29.

224. *Id.* at 629.

225. *Id.*

226. *Id.*

227. *Id.* at 630 (quoting OR. REV. STAT. § 161.085(7) (2007)).

228. *Id.* at 629–31.

229. *Id.* at 631.

another in the commission of the crime.”²³⁰ Ultimately, the court concluded that:

The mental state required for criminal liability on an aid and abet theory is essentially the same as for a principal’s liability in this circumstance. A person is guilty of a crime committed by another if that person, “*with the intent to promote or facilitate the commission or the crime,*” aids and abets the “other person in planning or committing the crime.”²³¹

Therefore, the jury had to find that the defendant actually possessed the conscious objective, not merely the awareness, that another would use the Sudafed to manufacture methamphetamine.²³² In other words, at best, the defendant was interested in selling the Sudafed to make money, and as such, to assume he intended to sell it to some hypothetical person with the conscious objective that such person use it to manufacture methamphetamine was nothing less than pure conjecture.

E. Pennsylvania

Pennsylvania is a jurisdiction which reflects both Category I and Category II language in its accomplice statute,²³³ but its case law follows a Category I pattern.²³⁴ Although Pennsylvania opinions often refer to the need for shared

230. *Id.*

231. *Id.* (quoting OR. REV. STAT. § 161.155(2) (2007)).

232. *Id.*

233. See 18 PA. CONS. STAT. ANN. § 306(c)–(d) (West 1998) (“A person is an accomplice of another person in the commission of an offense if: (1) with the intent of promoting or facilitating the commission of the offense, he: (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (2) his conduct is expressly declared by law to establish his complicity. . . . When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.”).

234. For example, the court in *Commonwealth v. Potts*, 566 A.2d 287 (Pa. Super. Ct. 1989), determined that “there was sufficient evidence for the fact finder to reject the [defendant’s] contention that he merely intended to beat up the deceased, and to instead find that . . . he intended to facilitate the killing of [the victim].” *Id.* at 291. Therefore, the court upheld the defendant’s conviction as an accomplice because “an accomplice is equally criminally liable for the acts of another if he acts ‘with the intent of promoting or facilitating the commission of an offense,’ and agrees or aids or attempts to aid such other person in either planning or committing the criminal offense.” *Id.* (quoting *Commonwealth v. Driver*, 493 A.2d 778, 779–80 (Pa. Super. Ct. 1985)).

criminal intent,²³⁵ a close examination of these decisions reveals the accomplice must have the intent to commit the crime perpetrated by the principal. In *Commonwealth v. Murphy*,²³⁶ the Pennsylvania Supreme Court upheld the defendant's conviction as a principal and as an accomplice of delivery of and conspiracy to deliver a controlled substance.²³⁷ In this case, an undercover Pennsylvania state trooper approached the defendant on the street and asked him if he knew where the undercover officer could buy some "dope."²³⁸ The defendant asked the undercover officer if he was "a cop" and, when the officer replied that he was not, the defendant called the principal over.²³⁹ The defendant told the principal that the officer was not a cop and assured the principal the officer was "cool."²⁴⁰ After determining how much the officer wished to buy, the principal left the officer and the defendant on the corner for several minutes.²⁴¹ When he returned, the principal asked the officer to follow him down the street, where the officer eventually purchased two bags of heroin with two marked \$20 bills.²⁴² When the officer returned to the corner with the drugs, the defendant asked the officer for half of one of the bags, but the officer declined.²⁴³ Subsequently, officers arrested both the defendant and the principal, and the trial court convicted the defendant.²⁴⁴ Thereafter, the defendant unsuccessfully appealed to the superior court.²⁴⁵ Finally, the defendant appealed the superior court's decision that there was sufficient evidence to convict him of the delivery charges based on accomplice liability.²⁴⁶

In determining the propriety of this judgment, the Pennsylvania Supreme Court stated that an accomplice must have the requisite intent "of promoting or facilitating the commission of the offense," which must be shown by first, "evidence that the defendant intended to aid or promote the underlying offense," and second, "evidence that the defendant actively participated in the crime by

235. See, e.g., *Commonwealth v. Wilson*, 296 A.2d 719, 721 (Pa. 1972) ("[S]hared criminal intent must be found to be present to justify a finding that an accused was an accomplice." (citing *Commonwealth v. Lowry*, 98 A.2d 733, 736 (Pa. 1953); *Commonwealth v. Thomas*, 53 A.2d 112, 114 (Pa. 1947); *Commonwealth v. Doris*, 135 A. 313, 314 (Pa. 1926)); *Commonwealth v. Cunningham*, 447 A.2d 615, 617 (Pa. Super. Ct. 1982) ("To aid and abet in the commission of a crime, one must possess a shared intent to commit it." (citing *Commonwealth v. Leach*, 317 A.2d 293, 295 (Pa. 1974); *Commonwealth v. Henderson*, 378 A.2d 393, 398 (Pa. Super. Ct. 1977))).

236. 844 A.2d 1228 (Pa. 2004).

237. *Id.* at 1232–33.

238. *Id.* at 1231.

239. *Id.*

240. *Id.* (internal quotation marks omitted).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1231–32.

245. *Id.* at 1232–33.

246. *Id.* at 1233.

soliciting, aiding, or agreeing to aid the principal.”²⁴⁷ It upheld this conviction because the defendant aided in the delivery of the contraband with the clear intent to do so, as he “called out to [the principal] after the trooper approached him, confirmed to [the principal] that the trooper was not a police officer, stayed with the trooper while [the principal] got drugs, and requested compensation from the trooper for his efforts.”²⁴⁸

In applying this approach to accomplice liability, the Pennsylvania courts have also explicitly rejected other, more expansive perspectives. For instance, in *Murphy* the court stated that a court could not convict the defendant where he simply knew of the criminal activity or was merely present at the scene of the crime: “There must be some additional evidence that the defendant intended to aid in the commission of the underlying crime, and then did or attempted to do so.”²⁴⁹ In this sense, Pennsylvania appears not to follow those jurisdictions where the State can secure a conviction for accomplice liability with a lesser mental state than specific intent.²⁵⁰

F. Texas

The Texas law entitled “Criminal Responsibility for Conduct of Another” contains a subsection which insists on “intent to promote or assist the commission of the offense” for aiding and abetting.²⁵¹ The Texas case law appears to be true to the state’s accomplice legislation.²⁵²

247. *Id.* at 1234 (quoting 18 PA. CONS. STAT. ANN. § 306(c)(1) (West 1998); Commonwealth v. Spotz, 716 A.2d 580, 585 (Pa. 1998)).

248. *Id.* at 1237.

249. *Id.* at 1234.

250. See discussion *supra* Part II.D.

251. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003) (“A person is criminally responsible for an offense committed by the conduct of another if: . . . (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.”).

252. See, e.g., Horton v. State, 880 S.W.2d 22 (Tex. App. 1993). In *Horton*, police officers charged the victim with driving while intoxicated. *Id.* at 23. After his arrest, the officers took him to the county jail, “booked [him] in, and then placed [him] in the detoxification tank.” *Id.* Later, the victim died of injuries inflicted upon him while in the jail facility. *Id.* at 23–24. The defendant, a law enforcement officer, “was charged with the commission of murder as both a principal and/or as a party.” *Id.* at 24. The appellate court reversed the defendant’s conviction and concluded the record was “devoid of any evidence which would justify a finding that [the defendant] was guilty of the offense as a principal,” noting that “any culpability of [the defendant] would be only as a party” *Id.* The court stated that where the defendant was at best “responsible for the actions of the primary actor, the State must prove conduct constituting an offense, plus an act by [the defendant] done with the intent to promote or assist such conduct.” *Id.* at 24–25 (emphasis added) (citing Beier v. State, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985)). Here, the court concluded that the

In *Hill v. State*,²⁵³ a Texas Court of Appeals ruling, the defendant was found guilty “as a party to the first degree felony offense of injury to a child.”²⁵⁴ In this case, a hospital admitted the nine year old son of the defendant “with severe and infected bruises and injuries.”²⁵⁵ A registered nurse noticed the victim “had various bruises and injuries obviously inflicted at different times.”²⁵⁶ Subsequently, when police investigated the matter, the defendant’s husband confessed that several days before the child’s hospitalization he had “spanked” the victim with a metal rod.²⁵⁷ Because the police believed the defendant to be an accomplice, they charged her with aiding and abetting her husband’s beatings of the victim.²⁵⁸ The appellate court stated that “for the appellant to be criminally responsible for the offense committed [by her husband], the evidence must show that ‘acting with intent to promote or assist the commission of the offense, [she] solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid the other person to commit the offense.’”²⁵⁹ The court found,

From the evidence, the jury could discern a pattern, existing during a number of years, that on the occasions when [her husband] arrived home from work and [the defendant] told him one of the children had been bad, [her husband] would take the child into his bedroom and “spank” the child with a metal rod or a stick. There was evidence that these “spankings” had resulted in physical injuries to the children, including knots on the heads . . . and the fracture of eight of [the victim’s] ribs. On some of these occasions [the defendant] would be present; at other times she would leave the house at [her husband’s] direction.²⁶⁰

The court concluded that the evidence was sufficient for the jury to find that the defendant, “albeit not present during the ‘spanking,’ acted to promote or assist in the ‘spanking’” of the victim, and as such, the court affirmed her conviction.²⁶¹

State failed to rebut the “reasonable hypothesis . . . that the fatal blows could have been inflicted [by others] either in the detox[ification] tank or in the hallway before [the defendant] was present.” *Id.* at 25.

253. 883 S.W.2d 765 (Tex. App. 1994).

254. *Id.* at 766–67.

255. *Id.* at 767.

256. *Id.*

257. *Id.*

258. *Id.* at 767–68.

259. *Id.* at 770 (quoting TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2003)).

260. *Id.*

261. *Id.* at 770–71.

In an another opinion from a Texas Court of Appeals, *Wooden v. State*,²⁶² a witness observed the defendant and three other men get out of a car and surround a parked truck, from which they evidently intended to steal some items.²⁶³ Upon noticing the witness observing the men, the defendant and the other men returned to the car and drove to the witness's vantage point.²⁶⁴ One of the men, seated in the rear seat behind the defendant, reached down, picked up a gun, and pointed it at the witness's car.²⁶⁵ When the witness picked up his phone to call 911, the men drove away.²⁶⁶ The trial court convicted the defendant as an accomplice to aggravated robbery based on the attempted theft and his companion's pointing the gun at the witness in an attempt to prevent the witness from interfering.²⁶⁷ On appeal, the court stated that in order for a court to find the defendant guilty of aggravated robbery, the evidence must show he intended to promote both the theft and the pointing of the gun at the witness that created the basis for an aggravated robbery charge.²⁶⁸ The defendant claimed that he did not know his companion had a gun and, as such, could not have intended to promote or assist an aggravated robbery.²⁶⁹ The court agreed and therefore reversed the aggravated robbery conviction.²⁷⁰ The court reasoned:

While [defendant's] statement, "I did not throw out the gun," is some evidence that appellant knew a gun was thrown out of the car, it does not indicate that appellant knew the gun was in the car when the men were talking to [the witness] or that appellant encouraged his companion to threaten [the witness] with the gun.²⁷¹

The court concluded that the State was required to prove the defendant "intended to promote or assist" the robbery but that it had not.²⁷²

262. 101 S.W.3d 542 (Tex. App. 2003).

263. *Id.* at 543–44.

264. *Id.* at 544.

265. *Id.*

266. *Id.*

267. *Id.* at 545.

268. *Id.* at 547–48.

269. *Id.*

270. *Id.* at 546–49.

271. *Id.* at 548.

272. *Id.* at 547–48.

IV. STATES WITH CASE LAW FOLLOWING THE CATEGORY II APPROACH:
 STATUTORILY PRESCRIBED MENTAL STATE

The fourteen states that follow the Category II approach fit into one of two general subcategories: (1) states in which Category II language is codified and strictly applied by the courts and (2) states in which Category II language is not codified but judicially construed by the courts. Connecticut, Hawaii, Kentucky, New Hampshire, New York, and Utah are the only six states in this first category.²⁷³ Of these states, Hawaii, Kentucky, and New Hampshire essentially codify Model Penal Code section 2.06(4),²⁷⁴ while Connecticut, New York, and Utah require a shared mental state for any offense, not just for result-oriented crimes.²⁷⁵ In Georgia, Idaho, Massachusetts, New Jersey, Oklahoma, Rhode Island, Vermont, and Wyoming, the state courts have created a Category II approach where Category II language is absent from the accomplice statutes.²⁷⁶ Finally, although it might be argued that several other states, most notably Alaska and Washington, follow the Category II approach, Part VI explores these states' novel or unique approaches to accomplice liability.

A. “Codified” Category II Approach

While courts in Connecticut, New York, and Utah apply the Category II approach from statutes containing only Category II language,²⁷⁷ courts in Hawaii, Kentucky, and New Hampshire follow the Category II approach from statutes that provide for accomplice liability under both a Category I and Category II perspective.²⁷⁸

1. Connecticut

In Connecticut, the courts strictly apply an accomplice statute under which an accomplice is liable for a crime committed by a principal if the accomplice aids and abets the principal and acts “with the mental state required for

273. See discussion *infra* Part IV.A.

274. See *supra* notes 43–47 and accompanying text.

275. See *supra* notes 47–48 and accompanying text.

276. See discussion *infra* Part IV.B.

277. See CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007); N.Y. PENAL LAW § 20.00 (McKinney 2004); UTAH CODE ANN. § 76-2-202 (2003).

278. See HAW. REV. STAT. ANN. §§ 702-222 to -223 (LexisNexis 2007); KY. REV. STAT. ANN. § 502.020(1)–(2) (LexisNexis 1999); N.H. REV. STAT. ANN. § 626:8(III)(a), (IV) (LexisNexis 2007).

commission of an offense.”²⁷⁹ In *State v. Foster*,²⁸⁰ a jury convicted the defendant, *inter alia*, of criminally negligent homicide based on an accomplice theory.²⁸¹ In this case, the defendant and the principal confronted the victim, whom they suspected had raped the defendant’s girlfriend.²⁸² The defendant beat the victim and then left the principal with a knife to guard the victim while the defendant retrieved his girlfriend to identify the victim as the rapist.²⁸³ While the defendant was away, the victim charged at the principal, who then fatally stabbed the victim.²⁸⁴

On appeal, the defendant contended and the Supreme Court of Connecticut acknowledged that courts previously understood Connecticut accomplice law to require “proof of a dual intent, i.e., ‘that the accessory have the intent to *aid* the principal *and* that in so aiding he intend to *commit* the offense with which he is charged.’”²⁸⁵ The defendant then argued that because (1) accomplice liability in Connecticut required that the accomplice intend to commit the charged offense, and (2) “criminally negligent homicide requires that an unintended death occur,” accomplice liability for criminally negligent homicide was a “logical impossibility in that it would require a defendant, in aiding another, to intend to commit a crime in which an unintended result occurs.”²⁸⁶

The Supreme Court of Connecticut disagreed with the defendant, however, stating that the defendant’s reliance on the concept of dual intent was “misplaced”²⁸⁷ and concluding:

[The accomplice liability statute] is not limited to cases where the substantive crime requires the specific intent to bring about a result. [It] merely requires that a defendant have the *mental state required for the commission of a crime* while intentionally aiding another. . . . Accordingly, an accessory may be liable in aiding another if he acts intentionally, knowingly, recklessly or with criminal negligence toward the result, depending on the mental state required by the substantive

279. CONN. GEN. STAT. ANN. § 53a-8(a) (West 2007) (“A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.”). Importantly, this statute reflects no Category I language.

280. 522 A.2d 277 (Conn. 1987).

281. *Id.* at 278 (citing CONN. GEN. STAT. ANN. § 53a-8 (West 1987) (current version at CONN. GEN. STAT. ANN. § 53a-8 (West 2007)); CONN. GEN. STAT. ANN. § 53a-58 (West 2007)).

282. *Id.* at 279.

283. *Id.*

284. *Id.*

285. *Id.* at 280 (quoting *State v. Harrison*, 425 A.2d 111, 113 (Conn. 1979)).

286. *Id.* at 281.

287. *Id.*

crime. When a crime requires that a person act with criminal negligence, an accessory is liable if he acts “with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”²⁸⁸

Here, the jury could have reasonably concluded that the defendant intentionally aided the principal by giving him the knife and negligently “failed to perceive a substantial and unjustifiable risk that death would occur by handing [the principal] the knife to prevent [the victim] from escaping.”²⁸⁹ Accordingly, the Supreme Court of Connecticut affirmed the defendant’s conviction for criminally negligent homicide²⁹⁰ based on a Category II approach to accomplice liability.

In *State v. Crosswell*,²⁹¹ the defendant and the two principals agreed to steal \$15,000 that the principals believed was hidden in an apartment.²⁹² The defendant and the principals broke into the apartment, ransacked it, and restrained its occupants; one of the principals also beat an occupant in order to silence her.²⁹³ After one of the principals found the money, the defendant and the principals left and then divided the \$15,000 among themselves.²⁹⁴ A jury convicted the defendant, *inter alia*, as an accessory to first degree burglary.²⁹⁵ Here, the jury instructions stated that “reference to the mental state required means that the alleged accessory must have the same intent to commit the crime that is required of the actual perpetrators of the crime.”²⁹⁶

On appeal, the defendant claimed “that the [S]tate failed to prove that he intended to commit a crime” in the premises, which is an element of first degree burglary.²⁹⁷ In addition, the defendant argued that being an accessory to first degree burglary requires proof of the same mental state necessary to commit first degree burglary.²⁹⁸ The State, by contrast, argued that case law stated that an “accessory was not required to ‘possess the intent to commit the specific

288. *Id.* at 283 (footnote call numbers omitted) (quoting CONN. GEN. STAT. ANN. § 53a-3(14) (West 2007 & Supp. 2008)).

289. *Id.* at 286.

290. *Id.* at 288.

291. 612 A.2d 1174 (Conn. 1992).

292. *Id.* at 1177.

293. *Id.*

294. *Id.* at 1177–78.

295. *Id.* at 1176.

296. *Id.* at 1184 (internal quotation marks omitted).

297. *Id.* at 1181–82 (quoting CONN. GEN. STAT. ANN. § 53a-101(a) (West 1992) (current version at CONN. GEN. STAT. ANN. § 53a-101(a) (West Supp. 2008))).

298. *Id.* (citing CONN. GEN. STAT. ANN. § 53a-8 (West 1992) (current version at CONN. GEN. STAT. ANN. § 53a-8 (West 2007))).

degree' of the crime charged."²⁹⁹ The Supreme Court of Connecticut responded that "[t]aking a literal view of the plain language of the accessory statute," it effectively agreed with the position "that 'the mental state required of an accomplice who is charged with a crime [cannot be] less than that which must be proved against a principal.'"³⁰⁰ The court held that to be liable as an accomplice, the defendant must possess the mental state necessary to convict him of the substantive crime.³⁰¹ After examining the evidence, namely, that the defendant knew that the principals entered the house to commit a robbery and that infliction of injury was a possibility, the court concluded that the defendant had the mental state to commit first degree burglary.³⁰² Consequently, the court upheld the defendant's conviction for that offense.³⁰³

2. *New York*

Under New York's accomplice statute, to be guilty as an accomplice, one must act with the same "mental culpability" required of the principal.³⁰⁴ New York's statute, like Connecticut's, has no Category I provision.³⁰⁵ When analyzing earlier accomplice liability law, however, New York courts stated that when a defendant aided and abetted a "common purpose," he was "presumed to intend the natural consequences of his act."³⁰⁶ For example, in *People v. Lieberman*, the New York Court of Appeals examined a case where a group of four young men decided to assault tramps and vagrants.³⁰⁷ Upon finding a man sitting on the front steps of an abandoned home, members of the group proceeded to punch the man until he fell to the ground.³⁰⁸ At this point, the victim ran to aid the man lying on the sidewalk, whereupon an altercation erupted between the victim and the group.³⁰⁹ One of the defendant's confederates subsequently struck the victim, who fell to the sidewalk and struck the back of his head on the edge of the sidewalk, which rendered him

299. *Id.* (quoting *State v. McCalpine*, 463 A.2d 545, 551 (Conn. 1983)).

300. *Id.* at 1184 (quoting *McCalpine*, 463 A.2d at 551–52 (Shea, J., concurring) (alteration in original)).

301. *Id.*

302. *Id.*

303. *Id.*

304. N.Y. PENAL LAW § 20.00 (McKinney 2004) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.").

305. *See id.*; *supra* note 279 and accompanying text.

306. *People v. Lieberman*, 148 N.E.2d 293, 295 (N.Y. 1958) (citations omitted).

307. *Id.* at 294.

308. *Id.*

309. *Id.*

unconscious.³¹⁰ The defendant and his three companions then left the scene, and the victim subsequently died without regaining consciousness.³¹¹ The State prosecuted the defendant and his codefendants for manslaughter, but the trial court granted a motion to dismiss.³¹²

On appeal, the New York Court of Appeals reinstated the charge.³¹³ The court held that the evidence proved the existence of a plan to “beat up ‘tramps and vagrants’ which, when set in motion,” led to the victim’s death.³¹⁴ The court reasoned that a jury could properly conclude that the defendant was “a willing and active participant from start to finish.”³¹⁵ Although the victim’s death may not have been what the group intended, the court noted that “both here and in sister States . . . a person is presumed to intend the natural consequences of his act.”³¹⁶ Because the victim’s death was a “natural and probable consequence” of the group’s plan, the court concluded that a jury could find the defendant liable even though the victim’s resulting death “was unexpected and formed no part of the original scheme.”³¹⁷

Notwithstanding *Lieberman* and similar early cases, later New York opinions track the requirements of the New York accomplice statute, which mandates shared intent. In *People v. Torres*,³¹⁸ the New York Supreme Court, Appellate Division, reversed the murder conviction of a defendant who had argued with the victim and armed himself with a knife with which to murder the victim.³¹⁹ Another man the defendant knew shot the victim.³²⁰ In this case, the appellate court held that the People failed to prove the defendant was “acting in concert with the person who shot the deceased.”³²¹ The court stated that “even if the defendant was aware of the weapon possessed by the shooter, the People failed to prove that the defendant shared or was aware of the shooter’s intent to kill” the victim.³²² The court added that “[n]otwithstanding the defendant’s admitted but uneffectuated intent to stab [the victim],” the People had not proved that the defendant had the intent to see the victim die by gunfire.³²³

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 295.

314. *Id.* at 294.

315. *Id.*

316. *Id.* at 295 (citations omitted).

317. *Id.*

318. 545 N.Y.S.2d 398 (N.Y. App. Div. 1989).

319. *Id.* at 399.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* (citing *People v. LaCoot*, 500 N.Y.S.2d 12, 12 (N.Y. App. Div. 1986)).

Because the state failed to prove “that the defendant shared the shooter’s intent to kill,” the court felt obliged to reverse the defendant’s conviction.³²⁴

In *People v. Rossey*,³²⁵ the New York Supreme Court, Appellate Division, had previously reversed the defendant’s murder conviction because it was not convinced the defendant “shared the intent to kill” the victim.³²⁶ Later, the New York Court of Appeals reinstated the conviction of the defendant, who had driven the codefendant to an area, looked for and conversed with the victim, and drove the codefendant from the area afterward.³²⁷ The court found that: (1) the defendant had been present during the commission of the crime, and (2) a rational trier of fact could have concluded the defendant was “acting in concert with the shooter,” thus satisfying the requirements for conviction under an accomplice liability theory.³²⁸ The court further stated that although it was circumstantial evidence that established that the “defendant shared [the principal’s] intention to kill,” such evidence could support a conviction under New York accomplice law.³²⁹ In conclusion, *Rossey* and *Torres* demonstrate that New York follows a shared intent approach.

3. *Utah*

Utah’s criminal code requires a shared mental state for aiding and abetting.³³⁰ Its case law is true to its accomplice legislation.³³¹ In *State v. Cayer*,³³² a group of men beat the victim while the defendant remained inside a

324. *Id.*

325. 678 N.E.2d 473 (N.Y. 1997).

326. *Id.* at 473 (citing *People v. Rossey*, 635 N.Y.S.2d 970, 971 (N.Y. App. Div. 1995)).

327. *Id.* at 474.

328. *Id.*

329. *Id.* at 473–74 (citing *People v. Cabey*, 649 N.E.2d 1164, 1166 (N.Y. 1995)).

330. UTAH CODE ANN. § 76-2-202 (2003) (“Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.”).

331. *See State v. Holgate*, 10 P.3d 346 (Utah 2000) (holding that in order to convict a defendant of aggravated battery as an accomplice, the State “had to show that [the defendant], acting ‘with the mental state required for the commission of’ aggravated burglary,” aided the principal in the commission of the offense (quoting UTAH CODE ANN. § 76-2-202 (2003))); *see also State v. Chaney*, 989 P.2d 1091, 1101, 1103 (Utah Ct. App. 1999) (stating that “criminal liability attaches to one who solicits, requests, commands, encourages, or intentionally aids another and does so with the mental state required for commission of the offense” and rejecting the argument that specific intent is required for accomplice liability); *State v. Beltran-Felix*, 922 P.2d 30, 36 (Utah Ct. App. 1996) (holding that where the defendant claimed that he did not act “with the mental state required to commit the offense” of aggravated sexual assault as an accomplice, the jury properly concluded that the “defendant intentionally aided [the principal] in the sexual assault”).

332. 814 P.2d 604 (Utah Ct. App. 1991).

trailer and prevented the victim's friend from going to the victim's aid.³³³ A jury convicted the defendant of second degree murder under the Utah accomplice liability statute and he appealed on the ground that there was insufficient evidence to support the jury's verdict.³³⁴ The Court of Appeals of Utah disagreed, stating that the "[d]efendant prevented [the victim's friend] from going outside to help [the victim] by hitting [the friend] every time he attempted to get up. A jury could reasonably conclude this conduct by defendant aided his friends in the beating death of [the victim]."³³⁵ Moreover, "a reasonable jury could infer that defendant had the requisite mental state for the offense" because "[h]e made no attempt to aid the victim either by seeking help . . . or by intervening on the victim's behalf."³³⁶

4. Hawaii

Under Hawaii's "complicity" liability statute, a person is an accomplice if that person aids with the intent to promote or facilitate the underlying offense.³³⁷ Meanwhile, under Hawaii's "complicity with respect to the result" statute, where a "particular result is an element of an offense," a person is an accomplice to the conduct that produced the result if the person acted with the *mens rea* required for the offense.³³⁸ Consequently, because one need not invariably harbor specific intent as to a criminal result to be an accomplice in Hawaii, this state is also a Category II jurisdiction.

In *State v. Hernandez*,³³⁹ the Hawaii Supreme Court upheld a conviction relying on the complicity statute.³⁴⁰ In that case, where the defendant was present when the perpetrator began his attack upon the victim, prevented the beaten and bloodied victim from escaping, and returned her to the perpetrator

333. *Id.* at 607.

334. *Id.* at 608, 612 (citing UTAH CODE ANN. § 76-5-203 (1990) (current version at UTAH CODE ANN. § 76-5-203 (Supp. 2008)); UTAH CODE ANN. § 76-2-202 (2003)).

335. *Id.* at 612.

336. *Id.*

337. HAW. REV. STAT. ANN. § 702-222 (LexisNexis 2007) ("A person is an accomplice of another person in the commission of an offense if: (1) [w]ith the intention of promoting or facilitating the commission of the offense, the person: (a) [s]olicits the other person to commit it; or (b) [a]ids or agrees or attempts to aid the other person in planning or committing it; or (c) [h]aving a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do . . .").

338. HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing the result is an accomplice in the commission of that offense, if the accomplice acts, with respect to that result, with the state of mind that is sufficient for the commission of the offense.").

339. 605 P.2d 75 (Haw. 1980) (per curiam).

340. *Id.* at 79.

who then sexually abused her by inserting a beer bottle in her vagina, the defendant was liable as an accomplice for the sexual abuse because he had aided the perpetrator “with the intention of facilitating the commission of the offense.”³⁴¹

In *State v. Kaiama*,³⁴² the Hawaii Supreme Court applied the complicity with respect to the result statute.³⁴³ After the defendant and the principal met the victim in a bar, the three went to a beach sometime after midnight, whereupon the victim offered to perform oral sex on the defendant and principal.³⁴⁴ Infuriated by the suggestion, the defendant and principal attacked the victim, who escaped by jumping in the ocean.³⁴⁵ The two then threw rocks at the victim to discourage him from coming out of the water.³⁴⁶ The defendant claimed the principal went into the ocean, where he struggled with the victim.³⁴⁷ Afterward, the principal told the defendant he had “drowned” the victim.³⁴⁸ Later, the victim was found dead from drowning.³⁴⁹ At the defendant’s trial, where a jury convicted the defendant of second degree murder, the jury had been instructed that they could find the defendant liable as an accomplice for the homicide “as long as he acted with the required state of mind with respect to the actual result,” to wit, the victim’s death.³⁵⁰ Although the defendant claimed that this instruction was inadequate, the Hawaii Supreme Court ruled that it was an accurate reflection of Hawaii’s complicity with respect to the result law and affirmed the defendant’s conviction.³⁵¹

5. *New Hampshire*

The New Hampshire Supreme Court previously held that an accomplice must have specific intent that the principal commit the substantive offense that was charged, even though the language of the criminal code appeared to tolerate

341. *Id.* at 76–79 (citing HAW. REV. STAT. ANN. § 702-222 (LexisNexis 2007)). However, the evidence was insufficient to convict the defendant of a second count of sexual abuse arising from the State’s claim that the perpetrator had also inserted the beer bottle into the victim’s anus. *Id.* at 79.

342. 911 P.2d 735 (Haw. 1996).

343. *Id.* at 747 (citing HAW. REV. STAT. ANN. § 702-223 (LexisNexis 2007)).

344. *Id.* at 738.

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 739.

349. *Id.* at 737.

350. *Id.* at 740, 746–47.

351. *Id.* at 747.

a lesser mental state for result-based crimes.³⁵² Then, in 2001, the legislature amended its accomplice legislation in a deliberate attempt to narrow the test for accomplice liability, making it clear that New Hampshire is a Category II state.³⁵³

In *Etzweiler*, a 1984 New Hampshire Supreme Court opinion, a grand jury indicted the defendant charging him with two counts of negligent homicide and with being an accomplice to two counts of negligent homicide, but the supreme court later dismissed all the charges against the defendant.³⁵⁴ In this case, the defendant and principal arrived in the defendant's car at the plant where they both worked.³⁵⁵ The defendant then loaned his car to the allegedly intoxicated principal, whom the defendant allegedly knew was intoxicated, and the principal drove and collided with another car, killing two of its passengers.³⁵⁶

The trial court transferred five questions of law to the Supreme Court of New Hampshire, but the supreme court recognized only the question of "whether the legislature . . . intended to impose criminal liability upon a person who lends his automobile to an intoxicated driver but does not accompany the driver, when the driver's operation of the borrowed automobile causes death."³⁵⁷ The court held that whether the defendant's conduct could conceivably "fall within the statutory language defining negligent homicide"

352. Compare *State v. Etzweiler*, 480 A.2d 870, 874 (N.H. 1984) ("[U]nder our statute, the accomplice must aid the primary actor in the substantive offense with the purpose of facilitating the substantive offense . . ."), *superseded by statute*, Act of July 11, 2001, 2001 N.H. Laws 446 (codified as amended at N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)), *as recognized in* *State v. Anthony*, 861 A.2d 773, 775 (N.H. 2004), *with* N.H. REV. STAT. ANN. § 626:8(III) (LexisNexis 1974) ("A person is an accomplice of another person in the commission of an offense if: (a) [w]ith the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it . . ."), *and id.* § 626:8(IV) ("[W]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.") (current version at N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)).

353. See N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007) ("Notwithstanding the requirement of a purpose as set forth in paragraph III(a), when causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense. In other words, to establish accomplice liability under this section, it shall not be necessary that the accomplice act with a purpose to promote or facilitate the offense. An accomplice in conduct can be found criminally liable for causing a prohibited result, provided the result was a reasonably foreseeable consequence of the conduct and the accomplice acted purposely, knowingly, recklessly, or negligently with respect to that result, as required for the commission of the offense.").

354. *Etzweiler*, 480 A.2d at 872.

355. *Id.*

356. *Id.*

357. *Id.*

was a matter “for legislative concern” and, as such, chose only to address whether the defendant could be guilty as an accomplice.³⁵⁸

Discussing section 626:8 of the New Hampshire Revised Statutes, the Supreme Court of New Hampshire explained that subsection III “sets forth the elements which must be present above, beyond, and regardless of the substantive offense” for accomplice liability and subsection IV “sets forth the elements of the substantive offense that the State has the burden of establishing against the accomplice.”³⁵⁹ The supreme court continued:

The State has alleged that, with the purpose of promoting or facilitating the offense of driving under the influence of alcohol, [the defendant] aided [the principal] in the commission of that offense. However, under [New Hampshire’s] statute, the accomplice must aid the primary actor in the substantive offense with the purpose of facilitating the substantive offense—in this case, negligent homicide

. . . [The defendant], as a matter of law, could not be an accomplice to negligent homicide. To satisfy the requirements of [the accomplice statute], the State must establish that [the defendant]’s acts were designed to aid [the principal] in committing negligent homicide. Yet under the negligent homicide statute, [the principal] must be unaware of the risk of death that his conduct created. . . . We cannot see how [the defendant] could intentionally aid [the principal] in a crime that [the principal] was unaware that he was committing. Thus, we hold, as a matter of law, that, in the present context of the Criminal Code, an individual may not be an accomplice to negligent homicide.³⁶⁰

The supreme court thereafter dismissed the charges against the defendant.³⁶¹

Then, in 2004, the Supreme Court of New Hampshire rejected the *Etzweiler* holding after considering the 2001 legislative amendment to New Hampshire’s accomplice liability statute.³⁶² In *State v. Anthony*, the defendant helped her

358. *Id.* at 873. Here, the court felt it was beyond its judicial prerogative to rule that the defendant would be guilty as a principal under the terms of the negligent homicide statute when he was not even present in the vehicle when the deadly driving occurred. *See id.* at 872–73.

359. *Id.* at 873–74 (discussing N.H. REV. STAT. ANN. § 626:8(III)–(IV) (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 626:8(III)–(IV) (LexisNexis 2007))).

360. *Id.* at 874–75 (citing N.H. REV. STAT. ANN. § 626:2(II)(d) (LexisNexis 2007); N.H. REV. STAT. ANN. § 630:3 (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 630:3 (LexisNexis 2007))).

361. *Id.* at 875.

362. *See State v. Anthony*, 861 A.2d 773, 775 (N.H. 2004) (discussing N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007); *State v. Locke*, 761 A.2d 376, 379 (1999), *superseded by statute*, Act of July 1, 2001, 2001 N.H. Laws 446 (codified as amended at § 626:8(IV)); *Etzweiler*, 480 A.2d at 874).

husband tie a horse's legs together, which caused the horse to suffer pain and injury.³⁶³ At trial, the State charged the defendant with being an accomplice to intentional cruelty to animals, but the jury found the defendant guilty of "the lesser included offense of accomplice to negligent cruelty to animals."³⁶⁴

On appeal, the defendant cited *Etzweiler*, contending that the *Etzweiler* interpretation of New Hampshire's accomplice liability statute would require an accomplice's purposeful intent to injure, and therefore being an accomplice to negligent cruelty to animals could not be a crime.³⁶⁵ The Supreme Court of New Hampshire affirmed the conviction, however, concluding:

[C]onsistent[] with the majority of courts interpreting accomplice liability statutes derived from the Model Penal Code, . . . accomplice liability under [section] 626:8, III and IV requires proof "(1) that the accomplice intended to promote or facilitate another's unlawful or dangerous *conduct*, and (2) that the accomplice acted with the culpable mental state specified in the underlying statute with respect to the result[]."366

The court explained that the legislature did not intend its use of the phrase "with a purpose to promote or facilitate the offense" to require, even under the original version of the New Hampshire accomplice law, both intent to aid and intent for the commission of the underlying offense; it further suggested that *Etzweiler* was simply wrongly decided.³⁶⁷ Thereafter, the court upheld the defendant's conviction for negligent cruelty to animals under an accomplice theory because the defendant (1) "intentionally aided her husband in confining a horse" and (2) failed to become aware of the resulting "substantial and unjustifiable risk" to the horse.³⁶⁸ Here, the defendant had both (1) the intent to aid the principal's conduct and (2) the negligence required of the substantive crime.³⁶⁹

363. *Anthony*, 861 A.2d at 774.

364. *Id.*

365. *Id.* (citing N.H. REV. STAT. ANN. § 626:8 (LexisNexis 1984) (current version at N.H. REV. STAT. ANN. § 626:8 (LexisNexis 2007)); *Etzweiler*, 480 A.2d at 874).

366. *Id.* at 776 (quoting *Riley v. State*, 60 P.3d 204, 215 (Alaska Ct. App. 2002)).

367. *See id.* (quoting N.H. REV. STAT. ANN. § 626:8(IV) (LexisNexis 2007)) ("We conclude that the 2001 amendment to [section] 626:8, IV was not enacted to alter the original intent of the statute, but rather to clarify it in response to *Etzweiler*.").

368. *Id.* at 777.

369. *See id.*

6. *Kentucky*

Kentucky's complicity statute follows sections 2.06(3)–(4) of the Model Penal Code, effectively making Kentucky a Category II state.³⁷⁰ In *Tharp v. Commonwealth*,³⁷¹ the Supreme Court of Kentucky affirmed the conviction of the defendant for “wanton murder by complicity and . . . criminal abuse in the second degree.”³⁷² The defendant's child had died from abuse by the defendant's husband.³⁷³ At trial, the defendant “testified that she had never witnessed her husband abusing [their child],” although she had previously stated to the police that she had in fact seen her husband abusing their child on two separate occasions, one of which led to the death of their child.³⁷⁴ A jury convicted the defendant on a theory of complicity; the defendant appealed, contending that the jury received improper instructions on guilt by complicity because the instructions did not require a determination of the husband's mental state at the time he killed the victim.³⁷⁵

On appeal, the Supreme Court of Kentucky explained:

[Kentucky's accomplice liability statute] describes two separate and distinct theories under which a person can be found guilty by complicity, *i.e.*, “complicity to the act” under subsection (1) of the statute, which applies when the principal actor's *conduct* constitutes the criminal offense, and “complicity to the result” under subsection (2) of the statute, which applies when the *result* of the principal's conduct constitutes the criminal offense

The primary distinction between these two statutory theories of accomplice liability is that a person can be guilty of “complicity to the act” under [subsection (1)] only if he/she possesses the *intent* that the principal actor commit the criminal act. However, a person can be guilty of “complicity to the result” under [subsection (2)] without the intent that the principal's act cause the criminal result, but with a state of mind which equates with “the kind of culpability with respect to the

370. See *supra* notes 44–46 and accompanying text; KY. REV. STAT. ANN. § 502.020 (LexisNexis 1999) (“A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids . . . such person in planning or committing the offense When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he . . . [a]ids . . . another person in planning, or engaging in the conduct causing such result . . .”).

371. 40 S.W.3d 356 (Ky. 2000).

372. *Id.* at 359–60, 369.

373. *Id.* at 359.

374. *Id.*

375. *Id.* at 359–60, 365.

result that is sufficient for the commission of the offense,” whether intent, recklessness, wantonness, or aggravated wantonness.³⁷⁶

The Supreme Court of Kentucky also cited the Model Penal Code:

“[Section 2.06(4)] makes it clear that complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime. . . .” It has been asserted that the purpose of Section 2.06(4) is to ameliorate the harshest aspects of the so-called “natural and probable consequence” doctrine, under which an accomplice is held criminally liable for a crime which he/she *did not* intend to aid or assist so long as the resultant crime was a natural and probable consequence of the crime he/she *did* intend to aid or assist.³⁷⁷

Holding that the degree of liability of the husband was “immaterial” with regard to the defendant’s culpability for a result-based crime, the court concluded that the defendant possessed the requisite level of “aggravated wantonness” for a conviction of wanton murder by complicity.³⁷⁸

In *Wilson v. Commonwealth*,³⁷⁹ the Supreme Court of Kentucky reversed and remanded a circuit court’s conviction of the defendant because the jury instructions on complicity were erroneous.³⁸⁰ The circuit court had convicted the defendant of one count of complicity to first degree rape and two counts of complicity to second degree rape in the rape of her children by several men.³⁸¹ The defendant challenged paragraph D of the jury instruction, which read:

You will find the Defendant . . . Guilty of Complicity to Second Degree Rape under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following: A. . . . [the principal] engaged in sexual intercourse with [the victim]; B. That at the time of such intercourse, [the principal] was eighteen (18) years of age or older and [the victim] was less than fourteen (14) years of age.

376. *Id.* at 360 (citing KY. REV. STAT. ANN. § 502.020(1)–(2) (LexisNexis 1999); *id.* § 502 official commentary; ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW AND PROCEDURE §§ 3-3(b)(3), at 106, (c)(2), at 114 (1998)).

377. *Id.* at 365–66 (quoting MODEL PENAL CODE § 2.06 cmt. 7 (1962)) (citing Rogers, *supra* note 23, at 1360, 1362).

378. *Id.* at 366.

379. No. 2002-SC-370-MR, 2004 WL 2624155 (Ky. Nov. 18, 2004).

380. *Id.* at *1.

381. *Id.*

C. That the Defendant . . . was the mother of [the victim]; AND D. That the Defendant . . . aided or assisted [the principal] in having sexual intercourse with [the victim] or, knowing that sexual intercourse may occur, failed to make a proper effort to prevent the act.³⁸²

The court acknowledged that it had approved an instruction containing language similar to paragraph D in its earlier opinion of *Tharp v. Commonwealth*, a homicide case.³⁸³ However, the court in *Wilson* noted that homicide “is a ‘result offense’ . . . in which the crime is the result of the conduct”; in other words, the crime is the death itself, not the conduct that causes death.³⁸⁴ Thus, “if the accomplice intended the principal’s conduct to result in the victim’s death, then such intent is a required element of the offense and the conviction is of complicity to murder or complicity to manslaughter in the first degree.”³⁸⁵ In contrast, “[i]f the accomplice did not intend the principal’s conduct to cause the victim’s death, then the classification of the homicide depends upon the degree of the defendant’s culpability with respect to the result, *i.e.*, the victim’s death.”³⁸⁶ The court pointed out, “In *Tharp*, there was no evidence that the victim’s mother intended for her husband to kill her child.”³⁸⁷ Consequently,

[T]he instructions in *Tharp* permitted the jury to convict the mother of reckless homicide if her failure to make a proper effort to prevent her child’s death constituted recklessness, or of manslaughter in the second degree if her failure constituted wantonness, or of wanton murder if her failure constituted aggravated wantonness.³⁸⁸

Turning to the case at hand, the *Wilson* court then distinguished homicide from rape, which “is not a result offense.”³⁸⁹ The court pointed out that in “‘statutory rape,’ it is the *conduct* of sexual intercourse . . . that constitutes the crime.”³⁹⁰ Thus, “conviction of complicity to rape . . . requires proof of *intent*

382. *Id.* at *2.

383. *Id.* (citing *Tharp v. Commonwealth*, 40 S.W.3d 356, 364 (Ky. 2000)).

384. *Id.*

385. *Id.*

386. *Id.* (citing KY. REV. STAT. ANN. § 502.020(1) (LexisNexis 1999); *Harper v. Commonwealth*, 43 S.W.3d 261, 266–67 (Ky. 2001)).

387. *Id.*

388. *Id.* (citing *Tharp*, 40 S.W.3d at 364–66).

389. *Id.* at *3.

390. *Id.* (emphasis added).

that the [rape] be committed.”³⁹¹ Here, “[m]ere knowledge, as required by the instruction in this case, proves only criminal facilitation.”³⁹²

The court concluded that “[t]here was ample evidence in this case from which a jury could have concluded that [the defendant] intended for [the principal] to engage in sexual intercourse with [the defendant’s child],” but because “the instruction only required the jury to conclude that [the defendant] knew ‘that sexual intercourse may occur,’” the deficiency warranted a reversal.³⁹³ Furthermore, the court acknowledged that “other complicity instructions were similarly deficient,” and as such, a new trial was warranted.³⁹⁴

B. “Judicially Construed” Category II Approach

Though the accomplice statutes in the eight remaining Category II states—Georgia, Idaho, Massachusetts, New Jersey, Oklahoma, Rhode Island, Vermont, and Wyoming—are devoid of any Category II language, the courts nevertheless construe their accomplice laws consistent with the Category II approach.

1. Georgia

Georgia’s criminal code does not contain language reflecting either the natural and probable consequences doctrine or the shared intent approach.³⁹⁵ Nevertheless, one Georgia appellate case has applied the natural and probable consequence doctrine where there was a common design. In *Guzman v. State*,³⁹⁶ the defendant provided alcohol to minors, consumed it with them, and then gave his car keys to one of the minors, a fourteen year old, who drove off with two of the other minors and crashed into a tree, killing both passengers.³⁹⁷ A jury convicted the defendant “as a party to the crime” of two counts of vehicular

391. *Id.* (emphasis added).

392. *Id.* (citing KY. REV. STAT. ANN. § 506.080(1) (LexisNexis 1999)) (“A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.”).

393. *Id.*

394. *Id.*

395. GA. CODE ANN. § 16-2-20(a), (b)(3)–(4) (2007) (“Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime. . . . A person is concerned in the commission of a crime only if he: . . . [i]ntentionally aids or abets in the commission of the crime; or . . . [i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime.”).

396. 586 S.E.2d 59 (Ga. Ct. App. 2003).

397. *Id.* at 61.

homicide in the first degree and five counts of furnishing alcohol to a minor.³⁹⁸ As part of its analysis, the Georgia Court of Appeals raised the issue of whether there was a “common design [between the defendant and the minor driver] to act together for the accomplishment of driving under the influence in a less safe manner.”³⁹⁹ The court concluded that “[t]he jury could have reasonably concluded that [defendant and the minor] had a common design to allow [the minor] to drive after drinking alcohol” because, contrary to law, defendant provided the minor with alcohol and his car keys and did nothing to stop the minor, who had little experience in either driving or consuming alcohol, from leaving with the car.⁴⁰⁰ The court reasoned that even though defendant’s mere “presence” at the scene would not be enough to establish that defendant was a party to vehicular homicide,⁴⁰¹ “[e]very person is presumed to intend the *natural and probable consequences* of his conduct, particularly if that conduct be unlawful and dangerous to the safety or lives of others.”⁴⁰²

However, a 2007 Georgia Supreme Court opinion follows the shared intent approach. In *Hill v. State*,⁴⁰³ the defendant and codefendant had armed themselves and assaulted the victims in an attempt to rob a restaurant.⁴⁰⁴ An alarm sounded and the first victim fled, but the codefendant chased him down in the belief that the victim had the restaurant’s money.⁴⁰⁵ The defendant allowed the second victim to run free and then joined the codefendant and first victim in a nearby alley.⁴⁰⁶ The defendant, upon being asked by the codefendant whether the codefendant should kill the victim, first replied “no, don’t” but then said “I don’t know, man, it’s up to you.”⁴⁰⁷ The codefendant then fatally shot the victim and both the defendants fled.⁴⁰⁸ A jury convicted the defendant on charges of felony murder and kidnapping with bodily injury.⁴⁰⁹ On appeal, the defendant argued, among other things, that the evidence adduced at trial supported the crimes in the restaurant but was insufficient for his conviction on charges arising from the codefendant’s actions in the alley.⁴¹⁰ The Georgia Supreme

398. *Id.*

399. *Id.* at 62.

400. *Id.*

401. *Id.* at 63 (internal quotation marks omitted) (quoting *Smith v. State*, 373 S.E.2d 97, 98 (Ga. Ct. App. 1988)).

402. *Id.* (alteration in original) (emphasis added) (quoting *Helton v. State*, 455 S.E.2d 848, 849 (Ga. Ct. App. 1988)).

403. 642 S.E.2d 64 (Ga. 2007).

404. *Id.* at 65.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

Court affirmed the lower court's verdict, citing a previous discussion of Georgia statutory law by the court: "Proof that the defendant share[d] a common criminal intent with the actual perpetrators is necessary, and may be inferred from the defendant's conduct before, during, and after the crime."⁴¹¹ The court concluded that the State had produced sufficient evidence at trial.⁴¹² Based on the evidence that the defendant was "willingly present when [the victim] was killed"; that defendant "fled the crime scene with [codefendant]; and that he afterwards bragged about his participation in the crimes," the court concluded that a reasonable jury could have inferred the defendant "shared the criminal intent of the actual perpetrator."⁴¹³ Inasmuch as the Georgia Supreme Court has explicitly followed the shared intent approach in *Hill* and its previous decisions,⁴¹⁴ the author believes Georgia is a member of the Category II jurisdictions.

2. Idaho

In a single statutory provision, Idaho proscribes one's direct involvement in the crime and also covers one who "aid[s] and abet[s] in its commission, or, not being present, [one who may] have advised and encouraged its commission."⁴¹⁵ Its accomplice case law, meanwhile, holds that one must have the same mental state required for commission of the offense.⁴¹⁶ In *State v. Gonzalez*, a trial court acquitted the defendant of voluntary manslaughter on a theory of aiding and abetting.⁴¹⁷ In this case, the defendant and a confederate armed themselves after the defendant became jealous of suspected relations between his wife and

411. *Id.* at 66 (quoting *Eckman v. State*, 548 S.E.2d 310, 313 (Ga. 2001)).

412. *Id.*

413. *Id.* (quoting *Eckman*, 548 S.E.2d at 310).

414. *See, e.g., Eckman*, 548 S.E.2d at 313 ("Proof that the defendant shares a common criminal intent with the actual perpetrators is necessary." (citing *Jones v. State*, 295 S.E.2d 71 (Ga. 1982))); *Grace v. State*, 425 S.E.2d 865, 869 (Ga. 1993) (inquiring if the defendant "shares in the criminal intent" (citing *Sands v. State*, 418 S.E.2d 55, 57 (Ga. 1992))); *Jones*, 295 S.E.2d at 73 (Ga. 1982) ("The elements of proof that one is a party to a crime or an accomplice requires proof of a common criminal intent." (citing *Lamar v. State*, 224 S.E.2d 69, 70 (Ga. Ct. App. 1976))); *Thornton v. State*, 46 S.E. 640, 642 (Ga. 1903) ("For one to be guilty as principal in the second degree, it is essential that he share in the criminal intent of the principal in the first degree. The same criminal intent must exist in the minds of both."); *Springer v. State*, 30 S.E. 971, 971 (Ga. 1897) ("Participation in the commission of the same criminal act, and in the execution of a common criminal intent, is therefore necessary, to render one criminal, in a legal sense, an accomplice of another."), *abrogated on other grounds by Selvidge v. State*, 313 S.E.2d 84 (Ga. 1984).

415. IDAHO CODE ANN. § 18-204 (2004 & Supp. 2008).

416. *State v. Gonzalez*, 12 P.3d 382, 384 (Idaho Ct. App. 2000) (quoting *State v. Hickman*, 806 P.2d 959, 960 (Idaho Ct. App. 1991)).

417. *Id.* at 383–84.

the victim.⁴¹⁸ The defendant and his confederate then waited in the confederate's trailer, where the victim also lived.⁴¹⁹ When the victim returned, he attacked the defendant before the defendant could react.⁴²⁰ The defendant contended that while being attacked by the victim, he begged for his confederate to intervene, whereupon his confederate shot and killed the victim.⁴²¹ However, there was sufficient evidence to indicate that the defendant may have in fact attacked the victim first, failed in his attempt, and encouraged his confederate to shoot the victim after the victim began to defend himself.⁴²²

Although the jury convicted the defendant of voluntary manslaughter, the defendant "filed a renewed motion for judgment of acquittal on the ground that there was no evidence that [the defendant] knew [his confederate] was going to shoot and kill the victim when the victim was beating [the defendant] and [the defendant] asked [the confederate] for assistance."⁴²³ The trial court granted the defendant's motion and explained that "no evidence supported the jury's conclusion that [the defendant] aided and abetted [the confederate's] shooting and killing the victim."⁴²⁴ The Court of Appeals of Idaho disagreed.⁴²⁵ The court explained, first, "[v]oluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion."⁴²⁶ Second,

[T]he aider and abettor must have the requisite intent and acted in some manner to bring about the intended result. The definition of aiding and abetting may encompass the activity of one who intentionally assists or encourages or knowingly participates by any of such means in bringing about the commission of a crime. Thus, in order to prove [the defendant] guilty of voluntary manslaughter, the state had to show that he had the requisite intent to bring about the death of [the victim] and acted in furtherance of that intent by encouraging or soliciting [his confederate] to shoot [the victim] under the circumstances which [the defendant] himself had helped to create.⁴²⁷

418. *Id.* at 383.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 384.

423. *Id.* at 383–84.

424. *Id.* at 384.

425. *Id.*

426. *Id.* (citing IDAHO CODE ANN. § 18-4006(1) (2004 & Supp. 2008); *State v. Grube*, 883 P.2d 1069, 1073 (Idaho 1994)).

427. *Id.* at 384–85 (citation omitted).

The court concluded that a reasonable mind could infer from the facts of this case that the defendant had the requisite intent for voluntary manslaughter.⁴²⁸ The jury could reasonably have found that the defendant “attempted to shoot [the victim] in accord with his previously expressed threat to kill him; that his attempt failed; that a struggle ensued in which [the defendant] encouraged [his confederate] to shoot and kill [the victim]; and that they thereafter agreed upon a story of self-defense.”⁴²⁹

In *State v. Romero-Garcia*,⁴³⁰ police officers met with a confidential informant who had arranged for a cocaine purchase through the defendant.⁴³¹ Officers followed the informant’s vehicle while the informant picked up the defendant at his home.⁴³² The informant and the defendant subsequently drove to an apartment parking lot.⁴³³ While under surveillance, the defendant “exited the vehicle, walked to an apartment, and returned to the vehicle” with a drug dealer.⁴³⁴ The dealer “agreed to sell [the informant] an ounce of cocaine, and walked back to the apartment to obtain the drugs.”⁴³⁵ Upon returning to the vehicle, the dealer gave the ounce of cocaine to the informant in exchange for \$800.⁴³⁶ The defendant received \$200 “[f]or his part in the transaction,” and was taken home.⁴³⁷ After police arrested the defendant, the trial court convicted the defendant of aiding and abetting trafficking in cocaine and aiding and abetting the failure to affix drug tax stamps.⁴³⁸

On appeal, the defendant contended that there was not sufficient evidence to support his conviction on the charge of aiding and abetting the failure to affix illegal drug tax stamps.⁴³⁹ The Court of Appeals of Idaho stated that (1) “[u]nder the Idaho Illegal Drug Tax Act, illegal drug tax stamps were required to be permanently affixed to the cocaine sold”; (2) “[b]ecause no stamps were attached, the drug dealer was charged with and found guilty of failure to affix the required tax stamps”; and (3) the defendant was guilty of aiding and abetting the dealer’s failure to affix the required tax stamps.⁴⁴⁰

According to the court, the main issue regarding whether the defendant was an accomplice to the tax stamp violation centered on the required mental state,

428. *Id.* at 386.

429. *Id.*

430. 75 P.3d 1209 (Idaho Ct. App. 2003).

431. *Id.* at 1211.

432. *Id.* at 1211–12.

433. *Id.* at 1212.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.* at 1214.

which is “generally the same as that required for the underlying offense—the aider and abettor must share the criminal intent of the principal and there must be a community of purpose in the unlawful undertaking.”⁴⁴¹ After examining the tax stamp statute and the Idaho aiding and abetting law, the court explained that for a charge of aiding and abetting the failure to affix tax stamps “the mental state necessary to that charge required only that [the defendant] knowingly participated in or assisted the drug dealer in the possession or distribution of cocaine.”⁴⁴² Since the State presented sufficient evidence supporting these facts at the trial level, the court affirmed the defendant’s conviction.⁴⁴³

3. *Massachusetts*

In the state of Massachusetts, in order to establish guilt as an accessory before the fact,⁴⁴⁴ the accomplice must “intentionally assist[] the principal in the commission of the crime and . . . shar[e] with the principal the [same] mental state” that is required to convict the principal of that crime.⁴⁴⁵ In *Commonwealth v. Richards*, a jury had convicted the defendant–accomplice of armed robbery and assault with intent to murder.⁴⁴⁶ The Massachusetts Supreme Judicial Court upheld the conviction on the grounds that the nature of the defendant–accomplice’s aid in the commission of the armed robbery was evidence that he intended the assault with intent to murder that occurred.⁴⁴⁷ Here, the defendant gave guns to the principal and a co–accomplice, drove them to a store, developed a plan for the robbery, and drove them away from the

441. *Id.* (citing *State v. Scroggins*, 716 P.2d 1152, 1158 (Idaho 1985)).

442. *Id.* at 1215.

443. *Id.* at 1216.

444. *See* MASS. GEN. LAWS ANN. ch. 274, § 2 (West 2000) (“Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.”).

445. *Commonwealth v. Richards*, 293 N.E.2d 854, 860 (Mass. 1973) (citing *State v. Hickam*, 8 S.W. 252, 258 (Mo. 1888); *State v. Taylor*, 39 A. 447, 451 (Vt. 1898)); *see also* *Commonwealth v. Raposo*, 595 N.E.2d 773, 776 (Mass. 1992) (“[I]t is clear that what is required to be convicted as an accessory before the fact is not only knowledge of the crime and a *shared intent* to bring it about, but also some sort of act that contributes to its happening.”) (emphasis added); *Commonwealth v. Pope*, 491 N.E.2d 240, 245 (Mass. 1986) (“The Commonwealth had to show, first, that [the principal] killed [the victim] with deliberately premeditated malice aforethought and, second, that the defendant assisted [the principal] in the commission of [the] crime while *sharing with the principal the mental state* required for murder in the first degree, or, in the absence of deliberate premeditation, murder in the second degree.”) (emphasis added).

446. *Richards*, 293 N.E.2d at 856.

447. *Id.* at 860.

robbery.⁴⁴⁸ During the robbery, a police sergeant responded and the principal shot him while the defendant was outside the store.⁴⁴⁹ The court laid out a procedure for convicting the defendant–accomplice: first, the State must show that the principal is guilty of the offense;⁴⁵⁰ and second, the State must show that the accomplice “intentionally assisted the principal” and did so while “*sharing with the principal the mental state required for that crime.*”⁴⁵¹ The court held that an accomplice meets the required mental state if the “purpose to murder in the mind of the [accomplice] was a conditional or contingent one, a willingness to see the shooting take place should it become necessary to effectuate the robbery or make good an escape.”⁴⁵² In this case, the defendant was the “ringleader,” he planned the robbery’s commission and the escape, and he furnished loaded weapons.⁴⁵³ The court held that these facts showed the defendant acted with a contingent plan in his mind that the principal would use the gun on anyone who obstructed the robbery.⁴⁵⁴

4. *New Jersey*

The New Jersey “complicity” statute contains no Category II language and on its face insists on proof of a defendant’s “purpose of promoting or facilitating the commission of the offense.”⁴⁵⁵ Upon closer scrutiny, however, the case law from New Jersey, including the oft-cited *State v. Weeks*,⁴⁵⁶ reveals it is in fact a Category II state insisting on “shared intent.”⁴⁵⁷ In *State v.*

448. *Id.* at 856–57.

449. *Id.* at 857.

450. *Id.* at 860.

451. *Id.* (emphasis added) (citing *State v. Hickam*, 8 S.W. 252, 258 (Mo. 1888); *State v. Taylor*, 39 A. 447, 451 (Vt. 1898)).

452. *Id.* (citing *Taylor*, 39 A. at 451).

453. *Id.*

454. *Id.* (comparing these facts with the similar facts and guilty verdict in *People v. Poplar*, 173 N.W.2d 732 (Mich. Ct. App. 1969)).

455. N.J. STAT. ANN. § 2C:2–6C (West 2005) (“A person is an accomplice of another person in the commission of an offense if: (1) [w]ith the purpose of promoting or facilitating the commission of the offense; he (a) [s]olicits such other person to commit it; (b) [a]ids or agrees or attempts to aid such other person in planning or committing it; or (c) [h]aving a legal duty to prevent the commission of the offense, fails to make proper effort so to do . . .”).

456. 526 A.2d 1077 (N.J. 1987).

457. Much of the apparent confusion about New Jersey’s stance on the mental state for accomplice liability appears to stem from *Weeks*, where the Supreme Court of New Jersey stated “the [Model Penal Code] now specifically requires that the accomplice have the ‘purpose of promoting or facilitating the commission of the offense’ of which the principal was convicted.” *Id.* at 1080 (quoting MODEL PENAL CODE § 2.06(3)(a) (1985)). The court noted the New Jersey statutory “language in [section] 2C:2–6C(1) is identical.” *Id.* Further, it pointed out that New Jersey law deliberately “limits the scope of liability to crimes which the accomplice had the purpose of promoting or facilitating. It is intended not to include those which he merely *knowingly*

Bielkiewicz,⁴⁵⁸ two tow truck drivers, including the victim, first got into an argument and then a physical confrontation with the second defendant, whereupon the first defendant and another individual came to assist the second defendant.⁴⁵⁹ When the two tow truck drivers attempted to leave the scene in their respective vehicles, the second tow truck driver stated that he saw the second defendant fire several shots into the victim's truck.⁴⁶⁰ There was conflicting testimony about the first defendant's role at this point; at least one witness suggested that there were two shooters, one of whom was the defendant.⁴⁶¹ The prosecution proceeded on the theory that the gunfire which killed the victim was probably that of the second defendant and that the first defendant was an accomplice.⁴⁶² A jury convicted both defendants of purposeful and knowing murder.⁴⁶³ Both defendants appealed, claiming the trial court's accomplice instructions were flawed for failing to consider the possibility of lesser included offense liability.⁴⁶⁴

The Superior Court of New Jersey, Appellate Division reversed both defendants' convictions because the trial court's accomplice instructions were incomplete and because it was unclear which defendant the jury believed to be the shooter.⁴⁶⁵ The court first noted, "By definition an accomplice must be a person who acts with the *purpose* of promoting or facilitating the commission of *the* substantive offense for which he is charged as an accomplice."⁴⁶⁶ Consequently, the trial court should instruct a jury that in order to find a defendant guilty as an accomplice it must find that the defendant "shared in the intent which is the crime's basic element, and at least indirectly participated in

facilitated substantially. We agree with the [Model Penal Code] in this regard." *Id.* at 1081 (emphasis added) (internal quotation marks omitted) (quoting 2 N.J. CRIMINAL LAW REVISION COMM'N, THE NEW JERSEY PENAL CODE 58 (1971)). In *Weeks*, the Supreme Court of New Jersey ruled that a court could not convict a defendant as an accomplice to an armed robbery where the trial court's "instruction did not clearly require the jury to find that defendant had *shared the purpose* to commit a robbery *with a weapon*." *Id.* at 1082 (first emphasis added). This language seemingly would prevent a New Jersey defendant from being an accomplice where, for example, the defendant recklessly facilitated a criminal result. However, subsequent judicial interpretation reveals otherwise. See *infra* notes 458–72 and accompanying text.

458. 632 A.2d 277 (N.J. Super. Ct. App. Div. 1993).

459. *Id.* at 279–80.

460. *Id.* at 280.

461. *Id.*

462. *Id.*

463. *Id.* at 278.

464. *Id.* at 278–79.

465. *Id.* at 285–86.

466. *Id.* at 281 (internal quotation marks omitted) (quoting *State v. White*, 484 A.2d 691, 694 (N.J. 1984)).

the commission of the criminal act.”⁴⁶⁷ This presented the superior court with a question—assuming the first defendant did not intend the second defendant kill the tow truck driver but rather recklessly contributed to the victim’s demise, how could the first defendant have intended a lesser crime, such as manslaughter, which required recklessness?⁴⁶⁸ In answering this question, the court relied on its previous decision in *State v. Bridges*,⁴⁶⁹ which stated:

Weeks holds that in order to convict a defendant as an accomplice to a crime, the jury must “find that the defendant had the *purpose* to participate in the crime [as] defined in the Code. . . .” [*Weeks* demands h]e must have had the “conscious object or design of facilitating” that crime. . . .

What then of vicarious liability for a crime whose culpability requirement is not knowing or purposeful action but rather reckless action? If vicarious liability requires the purpose that the crime be committed, but if the crime does not have a purposeful element, can there be vicarious liability at all? The apparent conundrum is how one can intend a reckless act. We are, however, satisfied that that conundrum is semantical rather than substantive. . . .

. . . .

. . . [I]mposition of vicarious liability for a crime whose culpability requirement is recklessness requires an initial focus on the actor’s conduct rather than on the crime itself. As a first condition, the accomplice . . . must have intended that the actor’s conduct take place, *i.e.*, that the accomplice . . . had the purpose of promoting or facilitating the commission of that conduct by the actor and took some step or steps . . . in order actually to promote or facilitate that conduct. . . .

If the actor is liable for a “reckless” crime, vicarious liability for that crime or a lesser-included “reckless” crime may attach to an accomplice . . . who purposely promoted or facilitated the actor’s conduct; who was aware when he did so, considering the circumstances then known to him, that the criminal result was a substantial and [un]justifiable risk of that conduct; and who nevertheless promoted that conduct in conscious disregard of that risk. If the actor is liable for an “intent” crime, vicarious liability for that crime may only attach to an accomplice . . . who shared the intent that that crime be committed.

467. *Id.* (internal quotation marks omitted) (quoting *State v. Fair*, 211 A.2d 359, 369 (N.J. 1965)).

468. *Id.* at 281–82.

469. 604 A.2d 131 (N.J. Super. Ct. App. Div. 1992), *aff’d in part, rev’d in part*, 628 A.2d 270 (N.J. 1993)).

Vicarious liability for a “reckless” crime may also, however, attach when the actor commits an “intent” crime and the accomplice . . . did not intend that that crime be committed but nevertheless intended that the actor take a specific action or actions which resulted in the crime. If criminal liability for the criminal result of that conduct can be predicated on a reckless state of mind, an accomplice . . . can be vicariously liable for that “reckless” crime under the same principles which apply where the actor’s culpability is also based on recklessness. This is so even if the actor himself is guilty of an “intent” crime. The point . . . is that each participant in a common plan may participate therein with a different state of mind. The liability of each participant for any ensuing crime is dependent on his own state of mind, not on anyone else’s.⁴⁷⁰

Thus, in *Bielkiewicz*, the court observed:

[W]hile the [trial] court properly instructed the jury that a defendant must have “the purpose to promote or facilitate the crime of purposeful or knowing murder” to be found guilty of murder as an accomplice, it did not inform the jury that a defendant could be found guilty as an accomplice of aggravated manslaughter, manslaughter or assault. In fact, the court did not even mention accomplice liability in instructing the jury with respect to these lesser included offenses. The court also did not inform the jury that it could find one defendant guilty of murder as a principal and the other defendant guilty of aggravated manslaughter, manslaughter or assault as an accomplice. Indeed, the court implied the contrary when it told the jury that “one cannot be held as an accomplice unless you find as a fact that he shared the same purpose required to be proven against the person who actually committed the act.”⁴⁷¹

Here, then, the trial court could have informed the jury that although “the principal had committed purposeful or knowing murder, the accomplice could be found guilty of a lesser offense involving recklessness *if he intended that an assault be committed* upon [the victim] *but did not share the principal’s intent that that assault cause death or serious bodily injury.*”⁴⁷² Consequently, if this was the case, it would have been proper “to convict the accomplice of

470. *Id.* at 143–45 (third emphasis added) (citations omitted) (footnote call numbers omitted).

471. *Bielkiewicz*, 632 A.2d at 283.

472. *Id.* at 284–85 (emphasis added) (citing *Bridges*, 604 A.2d at 145).

aggravated manslaughter if there was a *probability* of death resulting from the assault he intended to commit or *manslaughter* if there was a [mere] *possibility* of death.”⁴⁷³

To conclude, although the *Bielkiewicz* court’s discussion became slightly confusing where it referred to New Jersey’s oft-quoted “shared in the intent” requirement,⁴⁷⁴ the court was in fact following a classic Category II analysis. If, indeed, the accomplice (1) intended to promote or facilitate the conduct—assaulting the victim—and (2) only harbored the mental state required for the lesser substantive crime—recklessly endangering the life of the victim without intent that he be killed—then the accomplice might be liable for some form of manslaughter but not purposeful and knowing murder. Here, the trial court’s failure to clarify this point in its instructions required the reversal.⁴⁷⁵

*State v. Cook*⁴⁷⁶ involved a defendant the State indicted for purposeful and knowing murder, unlawful possession of a weapon, and attempted theft charges.⁴⁷⁷ In this case, the victim, a fifty-two year old homeless man, was murdered during an attempted robbery.⁴⁷⁸ The defendant participated in the robbery but was not the actual perpetrator in the murder.⁴⁷⁹ After the police found the victim’s body, the defendant “first denied involvement but then admitted that he had watched [the principal] beat the victim and had himself hit the victim ‘once or twice.’”⁴⁸⁰

A jury found the defendant guilty of “purposeful and/or knowing murder” and the other charges after considering the evidence at trial.⁴⁸¹ On appeal, the defendant contended the trial court did not abide by the principles laid out in *Bielkiewicz* when it failed to “adequately explain to the jury that it could find him guilty as an accomplice to the lesser included offenses of aggravated manslaughter or manslaughter even if it believed that [the principal] had

473. *Id.* at 285 (emphasis added) (citing *State v. Bowens*, 532 A.2d 215, 223 (N.J. 1987); *State v. Curtis*, 479 A.2d 425, 431–32 (N.J. Super. Ct. App. Div. 1984)).

474. *See supra* note 467 and accompanying text.

475. *Bielkiewicz*, 632 A.2d at 286; *see also State v. Jackmon*, 702 A.2d 489, 492–93, 495, 500 (N.J. Super. Ct. App. Div. 1997) (holding that where the trial court convicted a defendant of first degree murder on an accomplice theory in circumstances where he admitted an intent to participate in an armed robbery but claimed he was angered when the principal began shooting people, the defendant’s mental state may have evinced only recklessness, and thus finding reversible error in the trial court’s erroneous instruction that first degree murder could be predicated on less than a purposeful state of mind).

476. 693 A.2d 483 (N.J. Super. Ct. App. Div. 1996).

477. *Id.* at 484.

478. *Id.* at 485.

479. *Id.* at 486.

480. *Id.* at 487.

481. *Id.*

committed purposeful and/or knowing murder.”⁴⁸² The New Jersey Superior Court, Appellate Division found error in the instruction, stating:

To gain a conviction based on accomplice liability, it is “essential that [the accomplice and principal] shared in the intent which is the crime’s basic element.” . . .

When an accomplice has been charged with an offense of a different degree than the principal or when the jury may find him/her guilty of a lesser included offense, the judge’s instructions must “carefully impart[] to the jury the distinctions between the specific intent required for the grades of the offense.” . . .

These principles are particularly important where multiple participants engage in a violent attack with the potential for differing states of mind. In such cases, “[t]he liability of each participant for any ensuing crime is dependent on his own state of mind, not on anyone[] else’s.”⁴⁸³

The court went on to explain,

[T]he [New Jersey] Supreme Court [has] stated: [“]If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind.[”]⁴⁸⁴

The court concluded that, considering that even the State had theorized the murder resulted from a robbery gone awry, the facts of the case required the trial court to instruct the jury on the various degrees of culpability and the possibility of conviction for lesser homicidal offenses based on the degree of the defendant’s mental culpability.⁴⁸⁵ After considering the evidence presented in the trial court, the court noted two plausible options. The jury could find that neither defendant initially planned a murder, but after the victim attacked the principal, the principal became enraged and formulated the intent to kill the victim,⁴⁸⁶ or that the defendant planned to tie the victim without expecting that

482. *Id.* at 488.

483. *Id.* (last alteration added) (citations omitted).

484. *Id.* (quoting *State v. Fair*, 211 A.2d 359, 369 (N.J. 1965)).

485. *Id.* at 488–89.

486. *Id.* at 489.

the principal would take advantage and kill the victim.⁴⁸⁷ Here, it is important to note that when the *Cook* court discussed the need to show that the defendant and the principal “shared in the intent which is the [substantive] crime’s basic element,”⁴⁸⁸ it was evidently using the term “intent” generically, referring to any mental state.

5. *Oklahoma*

Oklahoma also appears to follow the Category II model with respect to treating accomplices as principals, its courts generally using language stating that a defendant is an accomplice if the State could convict the defendant as a principal. Oklahoma law simply states: “[A]ll persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be prosecuted, tried and punished as principals.”⁴⁸⁹ In *Conover v. State*,⁴⁹⁰ witnesses observed the defendant and a confederate attack the victim, with the defendant “holding him and punching him and [the confederate] stabbing him.”⁴⁹¹ When a passerby approached to see what was happening, the defendant ran to the passerby’s car, banged on his windows while yelling profanities, and told him “that [the incident] was none of his business.”⁴⁹² Meanwhile, the confederate, who stayed with the victim, found a bottle, broke it, and slashed and stabbed the victim with it.⁴⁹³ After the victim died, an autopsy revealed the victim had bled to death as the result of stab wounds.⁴⁹⁴ The State charged the defendant with first degree murder on the alternative theories that he was the principal or the accomplice.⁴⁹⁵

Following his conviction, the defendant argued he was neither a principal nor an accomplice to murder.⁴⁹⁶ He claimed the aiding and abetting instructions were flawed because they did not require that he personally have the specific intent to kill as a condition for being convicted of first degree murder.⁴⁹⁷ The

487. *Id.*

488. *Id.* at 488 (quoting *State v. White*, 484 A.2d 691, 695 (N.J. 1984)).

489. OKLA. STAT. ANN. tit. 22, § 432 (West 2003); *see also* OKLA. STAT. ANN. tit. 21, § 172 (West 2003) (“[A]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.”).

490. 933 P.2d 904 (Okla. Crim. App. 1997).

491. *Id.* at 908.

492. *Id.* at 908–09.

493. *Id.* at 909.

494. *Id.*

495. *Id.* at 915.

496. *Id.* at 910.

497. *Id.* at 914.

Court of Criminal Appeals of Oklahoma pointed out that there was evidence that supported the defendant's conviction as a principal or as an accomplice.⁴⁹⁸ As to the accomplice issue, the court noted that the trial court instructions correctly provided that the defendant could be accountable if he "aided and abetted [the principal's] acts *knowing* of [the principal's] intent to take [the victim's] life."⁴⁹⁹ The court stated:

To adopt [defendant's] argument that he could only be convicted if he personally had the specific intent to kill would be to void the law of principals as it relates to aider and abettor. Under [the defendant's] argument, an accused could not be convicted of a crime unless he was in fact a perpetrator. As the law allows both a perpetrator and an aider and abettor to be found guilty as a principal to a crime, we find [the defendant's] argument is without merit⁵⁰⁰

In *Cannon v. State*,⁵⁰¹ the defendant and the principal had ransacked the eighty-four year old victim's house and driven off with her; they then beat her for a second time, poured gasoline on her, and burned her to death.⁵⁰² On appealing his conviction for first degree murder, among other crimes, the defendant argued that the jury instructions on "aiding and abetting negated the element of specific intent to kill" required for "malice murder," which allowed the jury to convict him of murder even if he had only "general criminal intent" to commit a crime.⁵⁰³ In other words, he asserted the jury could convict him of murder "if they found he had the intent to commit any crime."⁵⁰⁴ The Court of Criminal Appeals of Oklahoma disagreed:

The aiding and abetting instructions cannot be read in a vacuum; they explicitly refer to the underlying charged crime and indicate that the elements of the charged offense must be proved. Read as a whole, the instructions clearly required the jury to find that [the defendant's] conduct caused [the victim's] death and that he intended to take her life, or that he aided and abetted [the principal's] acts *knowing of and sharing in [the principal's] intent* to take [the victim's] life.⁵⁰⁵

498. *Id.* at 911.

499. *Id.* at 915–16 (emphasis added).

500. *Id.* at 916.

501. 904 P.2d 89 (Okla. Crim. App. 1995).

502. *Id.* at 94.

503. *Id.* at 99.

504. *Id.*

505. *Id.* (emphasis added).

Thus, the trial court had properly required the defendant to share the principal's mental state—in this case, the intent to kill necessary for malice murder—in order to be liable as an aider and abettor.⁵⁰⁶ As evidenced by these cases, Oklahoma follows a Category II perspective.

6. *Rhode Island*

The law of accomplice or accessory before the fact liability in Rhode Island contains no mental state requirement.⁵⁰⁷ The case law, however, requires a mental state of shared criminal intent with the principal.⁵⁰⁸ For example, in *State v. Gazerro*,⁵⁰⁹ the Rhode Island Supreme Court reversed a conviction for murder obtained under an accomplice theory because there was insufficient evidence of shared criminal intent.⁵¹⁰ In this case, the victim was present in defendant's automobile with the codefendant and two other individuals when the codefendant shot the victim in the head.⁵¹¹ A jury convicted the defendant in the trial court of murder as an aider and abettor,⁵¹² and the defendant appealed. In laying out Rhode Island's accomplice liability law, the supreme court relied on language from a federal appellate case, stating that,

Beyond mere presence, the circumstances must establish that a defendant "shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed. As the term 'aiding and abetting' implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed. It implies some conduct of

506. *Id.*

507. R.I. GEN. LAWS § 11-1-3 (2002) ("Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as a principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to by this title.").

508. *State v. Brezinski*, 731 A.2d 711, 715 (R.I. 1999) (per curiam) ("In order to find defendant guilty under the theory of aiding and abetting, the facts must establish that the defendant shared in the principal's criminal intent and that there was a community of unlawful purpose at the time the act is committed." (internal quotation marks omitted) (quoting *State v. Diaz*, 654 A.2d 1195, 1202 (R.I. 1995))).

509. 420 A.2d 816 (R.I. 1980).

510. *Id.* at 829–30.

511. *Id.* at 821 n.6.

512. *Id.* at 827.

an affirmative nature and mere negative acquiescence is not sufficient.”⁵¹³

In analyzing the facts, the court first reasoned that the fact that the defendant was seen with the principals shortly before the shooting offered “nothing other than the mere fact of association.”⁵¹⁴ Also, the fact that the defendant was the driver of the car did not itself indicate that he was part of any prearranged plan.⁵¹⁵ Finally, the victim’s statements given before he died gave no hint of defendant’s “state of mind or his knowledge of impending criminal activity.”⁵¹⁶ Since there was no other evidence that defendant aided and abetted the commission of the murder, the court found the trial court’s inferences of guilt drawn from the evidence was too speculative and thus reversed the defendant’s conviction.⁵¹⁷

In contrast, in *State v. Diaz*,⁵¹⁸ the Rhode Island Supreme Court affirmed convictions for two counts of murder under an accomplice theory where there was evidence of shared criminal intent.⁵¹⁹ Here, the defendant, who was possibly involved romantically with one of the victims, reported her firearm missing to the police before the principal’s shooting of the victims.⁵²⁰ Moreover, the defendant accompanied the principal, her boyfriend, to the scene of the shooting but fled before she could witness the shooting.⁵²¹ Later, the defendant lied to the police to cover for her boyfriend, who in the interim had committed suicide in New York.⁵²² Although the evidence presented before the trial court was almost all circumstantial, the jury convicted the defendant of murder as an accomplice.⁵²³ Before affirming the convictions, the court discussed the standard by which it was to measure accomplice liability:

In order to find that a defendant aided and abetted the commission of a crime, the facts must establish that the defendant *shared in the principal’s criminal intent* and that there was “a community of unlawful purpose at the time the act is committed.” The accused must be shown to have participated in the criminal act in furtherance of the

513. *Id.* at 828 (quoting *Johnson v. United States*, 195 F.2d 673, 675 (8th Cir. 1952)).

514. *Id.* at 829.

515. *Id.*

516. *Id.*

517. *Id.* at 829–30. However the court affirmed the codefendant shooter’s conviction. *Id.* at 830.

518. 654 A.2d 1195 (R.I. 1995).

519. *Id.* at 1202–04.

520. *Id.* at 1197.

521. *Id.* at 1198.

522. *Id.* at 1199.

523. *Id.* at 1196–1200.

common design, either before or at the time the criminal act was committed. Conduct of an affirmative nature is required; mere negative acquiescence is insufficient to connote guilt. These standards do not require, however, that the accused must foresee the consequences of such unlawful acts, nor do they require that every act of the accused must coincide with those of the principal.⁵²⁴

The court then summarized what it would require before it could find accomplice liability in the case at hand: “in order to affirm the judgment of conviction, we must be able . . . to conclude that sufficient circumstantial evidence proved that [the] defendant, either alone or sharing in [the principal’s] criminal intent, murdered the decedents deliberately with premeditation of longer than momentary duration.”⁵²⁵

In affirming the conviction, the court considered the following facts: the principal used a gun owned by the defendant to kill the victims; defendant had falsely reported to police that her gun had been stolen; defendant accompanied the principal to the victims’ home immediately before the shooting; defendant had a prior relationship with one of the victims; defendant saw the principal brandishing the weapon immediately before the shootings in such a manner as to suggest that a crime was about to occur; the principal carried out the murders in a manner defendant herself described as “execution-style”; and the defendant did not notify the authorities of the murders after feeling the scene.⁵²⁶

7. Vermont

Operating under perhaps the most oblique accomplice liability statute of the Category II states,⁵²⁷ Vermont’s courts changed their interpretation of the accomplice statute from Category III to Category II in *State v. Bacon*.⁵²⁸ In that case, the defendant and the codefendant, both inmates, escaped together from a correctional work crew and “broke into unoccupied seasonal camps over the next few days and found food and lodging.”⁵²⁹ In a subsequent recorded statement to police, the defendant stated that he and the codefendant found a neighborhood watch directory indicating that the victim lived alone in the area year-round.⁵³⁰ They then planned to steal the victim’s car.⁵³¹ The plan was for

524. *Id.* at 1202 (emphasis added) (citations omitted).

525. *Id.*

526. *Id.* at 1203.

527. VT. STAT. ANN. tit. 13, § 3 (1998) (“A person who aids in the commission of a felony shall be punished as a principal.”).

528. 658 A.2d 54 (Vt. 1995).

529. *Id.* at 58.

530. *Id.*

the defendant to enter the house and intimidate the victim with a metal bar.⁵³² The defendant and codefendant then went to the victim's house carrying a metal bar and a knife, respectively.⁵³³ When they arrived at the house the defendant became skittish, and the codefendant "reacted by exchanging the knife for the metal bar [the] defendant was carrying."⁵³⁴ The codefendant entered the house and shut the front door.⁵³⁵ When the defendant subsequently went into the house, he saw the codefendant hit the victim on the head with the bar.⁵³⁶ The codefendant then placed the bar over the victim's throat and stood on it.⁵³⁷ Following the codefendant's instructions, the defendant closed off the victim's dogs in another room.⁵³⁸ The codefendant then urged the defendant to stab the victim.⁵³⁹ When the defendant refused, the codefendant grabbed the knife from defendant's hands and stabbed the victim to death.⁵⁴⁰ Then, the defendant and codefendant stole money from the victim's purse, cleaned the blood stains, and "stole an ATV from a nearby camp to transport the body into the woods After disposing of the body, they returned to [the victim's] house and took her car."⁵⁴¹ Police later arrested them in Vermont.⁵⁴² The Vermont trial court convicted the defendant of being an accessory to felony murder committed during a burglary of the victim's residence and multiple other crimes associated with the murder.⁵⁴³

On appeal, the defendant (1) claimed that he had no "murderous intent" and (2) challenged an accomplice liability instruction by the trial court.⁵⁴⁴ The instruction had included the following language:

The prosecution must prove that the illegal common purpose existed and that one of the participants in the illegal plan committed the murder . . . during the alleged attempt or perpetration of the illegal plan to burglarize [the victim's] dwelling. *The defendant is liable for the acts of his accomplice . . . even if [the jury] find[s] that [the accomplice] departed from the illegal plan which they had previously*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.* at 58–59.

541. *Id.* at 59.

542. *Id.*

543. *Id.* at 58.

544. *Id.* at 59.

*made so long as [the accomplice]’s acts were incidental to the execution of or as a natural and probable consequence of their original plan, and in furtherance of their alleged common purpose.*⁵⁴⁵

The Vermont Supreme Court held that these instructions improperly permitted the jury “to convict defendant of being an accomplice to felony murder even if he neither intended to kill or cause great bodily harm to [the victim] nor acted with extreme indifference to human life”; the instructions allowed the jury to “impute defendant’s mental state with respect to the murder based solely on its determination that [the codefendant] harbored the requisite intent” to kill while the defendant may have only had the intent to burglarize the victim’s dwelling.⁵⁴⁶ The court disagreed with the accomplice liability principle from *State v. Orlandi*,⁵⁴⁷ which it acknowledged to be Vermont’s “leading case” on the required mental state for accomplice liability.⁵⁴⁸ The court explained that in this leading case, the *Orlandi* court had held,

Where several persons combine under a common understanding and with a common purpose to do an illegal act, every one is criminally responsible for the acts of each and all who participate with him in the execution of the unlawful design. . . .

. . . So, when the evidence is sufficient to enable the jury to find beyond a reasonable doubt that several persons have formed a common design . . . and are present for that purpose at the place agreed upon for the commission of the offense, each one is criminally responsible for the acts of the others in the prosecution of the design, *and for everything done by any one of them which follows incidentally in the execution of the design as one of its natural consequences, even though it was not intended as a part of the original plan.*⁵⁴⁹

The Vermont Supreme Court stated in *Bacon* that the principle set forth by the *Orlandi* court “violates one of the most basic principles of criminal law by allowing the jury to convict a person for causing a bad result without determining that the person had some culpable mental state with respect to that result.”⁵⁵⁰ The court implied the *Orlandi* statement was actually dictum because

545. *Id.* at 60.

546. *Id.* at 60–61.

547. 170 A. 908 (Vt. 1934).

548. *Bacon*, 658 A.2d at 61–62 (citing *State v. Davignon*, 565 A.2d 1301, 1304–05 (Vt. 1989); *State v. Doucette*, 470 A.2d 676, 681 (Vt. 1983); *Orlandi*, 170 A. at 910–11).

549. *Id.* at 61 (internal quotation marks omitted) (citations omitted) (quoting *Orlandi*, 170 A. at 910–11).

550. *Id.* at 62 (citing *Doucette*, 470 A.2d at 681).

in *Orlandi* “the charged conduct . . . was within the scope of the defendants’ intended plan.”⁵⁵¹ In any event, the court declared that a court can convict a defendant as an accomplice “‘only if he acted with the same intent as that required for’ the principal perpetrator of the crime.”⁵⁵² The court then concluded:

The purpose of the accomplice-liability rule is not to permit the conviction of participants to a crime who never intended a co-felon to commit the acts in fact committed. Rather, the rule is intended to allow the conviction of defendants who intended to, and did in fact, aid in the commission of the charged offense, but who were not the primary perpetrators of the crime or did not participate in every aspect of the planned illegal act.⁵⁵³

The court then turned to felony murder and held that “to convict a defendant as an accomplice to felony murder, the prosecutor must prove that the defendant possessed both the intent to commit the underlying felony as well as one of the three mental states required to convict the principal perpetrator of felony murder.”⁵⁵⁴ The Vermont Supreme Court reversed the felony murder conviction “because the [trial] court’s charge permitted the element of intent as to [the victim’s] murder to be found in either the defendant or his accomplice.”⁵⁵⁵ Thus, the shared intent requirement used by the *Bacon* court significantly narrowed the scope of Vermont’s accomplice law.

State v. Pitts,⁵⁵⁶ another Vermont Supreme Court opinion, involved a defendant whom the police charged with aggravated assault as a result of an altercation that left a laceration on the victim’s face requiring multiple stitches and leaving permanent scars.⁵⁵⁷ In this case, the victim and the father of the defendant’s child were engaged.⁵⁵⁸ Prior to the incident, the victim and her friends went to a pizzeria.⁵⁵⁹ When the victim and her friends started to leave to go home, they walked past the defendant and the principal.⁵⁶⁰ The defendant

551. *Id.* at 61 (citing *Orlandi*, 170 A. at 910–11).

552. *Id.* (emphasis added) (quoting *Davignon*, 565 A.2d at 1304–05).

553. *Id.* at 62.

554. *Id.* at 63. The court listed the three mental states required as follows: “an intent to kill, an intent to do great bodily harm, or a wanton disregard of the likelihood that death or great bodily harm would result.” *Id.* (citing *Doucette*, 470 A.2d at 682).

555. *Id.* at 64.

556. 800 A.2d 481 (Vt. 2002).

557. *Id.* at 482.

558. *Id.*

559. *Id.*

560. *Id.*

followed the victim and pushed her.⁵⁶¹ An altercation then occurred and the principal joined the fight.⁵⁶² The defendant and the principal alternated fighting the victim until the victim “felt a sudden burn on her che[e]k.”⁵⁶³ She later realized she had suffered an injury to her face but did not know who cut her.⁵⁶⁴ After being taken into custody, the police found on the defendant a box cutter and a handwritten rap song that implicated the defendant and principal in the assault.⁵⁶⁵ The police charged the defendant with aggravated assault.⁵⁶⁶

At trial, the State proceeded under two alternative theories: the defendant was the principal in the assault or the defendant aided and abetted the principal’s assault.⁵⁶⁷ The jury “acquitted defendant as the principal but convicted her of accessory to aggravated assault.”⁵⁶⁸ On appeal, the defendant argued the jury instruction was error.⁵⁶⁹ Specifically, she contended she “could be convicted of accomplice liability only if she *intended* to ‘purposely cause serious bodily injury to [the victim] *by cutting her.*’”⁵⁷⁰ The court disagreed and stated that in *Bacon*, “we held that a defendant can be convicted as an accomplice only where he acted with the same intent that is required to convict the principal.”⁵⁷¹ Here, the evidence supported the conclusion that the defendant shared the principal’s intent to cut the victim’s face. In the handwritten rap song, the defendant had “written in the first person of ‘Shortie Assassin,’ identified in trial testimony to be [the] defendant, and foretold that ‘Ox,’ identified in trial testimony to be [the principal], would hurt the women from King Street [(where the victim lived)].”⁵⁷² Specifically, the song lyrics predicted the injury to the victim’s face: “my girl Ox . . . [s]licin bitches where there [sic] eyelids meet.”⁵⁷³ Further, the evidence “supported the State’s theory that the defendant intended for herself or [the principal] to cause serious bodily injury to [the victim].”⁵⁷⁴ Finally, the defendant claimed that “an accomplice must share not only the principal’s intent to commit the elements of the crime, but also share the principal’s intent as to the means which will be used to carry out the

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.*

569. *Id.*

570. *Id.* at 483 (first emphasis added).

571. *Id.* (citing *State v. Bacon*, 658 A.2d 54, 61 (Vt. 1995)).

572. *Id.*

573. *Id.* at 483–84 (first alteration in original) (internal quotation marks omitted).

574. *Id.* at 484.

crime.”⁵⁷⁵ The court responded that a defendant “need not share with the principal the intent to use the exact means of the crime, so long as she shares the intent to commit all the elements of the crime.”⁵⁷⁶

8. Wyoming

In Wyoming, the “accessory” provision of the state’s code requires the “accessory before the fact” to have a mental state of knowledge,⁵⁷⁷ but the Wyoming courts’ construction of the statute appears to follow a Category II approach, requiring a court to convict a defendant as an accessory if it could also convict him as a principal.⁵⁷⁸ *Jahnke v. State* involved a defendant whose father psychologically and physically abused her and her brother, who developed an elaborate plan to confront their father.⁵⁷⁹ Prior to the execution of her brother’s plan, the defendant watched her brother prepare and lie in wait for their father, advised him about how to prepare for the crime, and saw herself as a “backup.”⁵⁸⁰ When the father returned home, her brother fired at their father, killing him almost instantly.⁵⁸¹ The defendant was prosecuted for first degree murder but convicted of aiding and abetting voluntary manslaughter.⁵⁸² The Supreme Court of Wyoming upheld the conviction for aiding and abetting the voluntary manslaughter of the victim.⁵⁸³ The court reasoned that in order to convict a criminal defendant on an aiding and abetting charge, “[t]he prosecution must demonstrate that a defendant shared the criminal intent of the principal if he is to be found guilty as an aider and abettor.”⁵⁸⁴ The court concluded that a reasonable jury could have found that the defendant had the requisite mental state required for conviction of voluntary manslaughter—she “was acting ‘upon a sudden heat of passion’ aroused by the earlier incidents which continued through her participation in the planning and accomplishment of what she characterized as the father’s execution.”⁵⁸⁵ Based on the court’s

575. *Id.*

576. *Id.*

577. WYO. STAT. ANN. § 6-1-201(a) (2007) (“A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact.”).

578. *Jahnke v. State*, 692 P.2d 911, 921 (Wyo. 1984).

579. *Id.* at 914–15

580. *Id.* at 915.

581. *Id.*

582. *Id.* at 916.

583. *Id.* at 914.

584. *Id.* at 921 (citations omitted).

585. *Id.* at 922 (referring to the Wyoming voluntary manslaughter law, WYO. STAT. ANN. § 6-2-105 (2007), which provides that whoever “unlawfully kills any human being without malice . . . [v]oluntarily, upon a sudden heat of passion” is guilty of voluntary manslaughter).

conclusion, it is obvious the court used the term “intent” to refer to any criminal mental state.

In *Fales v. State*,⁵⁸⁶ pursuant to a plan to burglarize a junior high school, the defendant had waited outside the school while the principals vandalized it inside and then received various stolen goods handed to her out of the school’s windows by the principals.⁵⁸⁷ The defendant challenged her conviction as an accessory before the fact to burglary, arguing that the evidence could not establish that she knowingly served as a lookout while the principals burglarized the school or that she knew what they were doing when in the building.⁵⁸⁸ The Wyoming Supreme Court disagreed, stating that an “aider and abettor must share the principal’s criminal intent” in order for conviction.⁵⁸⁹ Because the principals told the defendant of their intention to commit larceny in the school, a jury could reasonably infer that the defendant knew of their intent, especially since she remained outside and received stolen goods out the window, thus allowing the court to uphold the conviction.⁵⁹⁰

In *Black v. State*,⁵⁹¹ the defendant had planned and executed a robbery in the victim’s apartment, and although the defendant was unarmed, the two principals threatened the occupants with a gun and a knife.⁵⁹² One of the principals struck the victim with the gun before removing money from his jacket.⁵⁹³ A jury convicted the defendant of “aggravated assault with a deadly weapon, aggravated robbery, aggravated burglary, and conspiracy to commit aggravated robbery.”⁵⁹⁴ On appeal, the defendant argued the jury wrongly convicted him of the aggravated assault with a deadly weapon due to insufficient evidence that he had a deadly weapon or “knowingly or recklessly inflicted bodily injury on another person.”⁵⁹⁵ The Wyoming Supreme Court upheld the conviction, restating its past holdings that “no distinction is made between an aider and abettor and principal. Hence, an aider and abettor is guilty of the principal crime. Proof of participation in either capacity is sufficient to

586. 908 P.2d 404 (Wyo. 1995).

587. *Id.* at 407.

588. *Id.* at 407–08.

589. *Id.* at 408 (citing *Jahnke*, 692 P.2d at 921).

590. *Id.* (referring to the Wyoming burglary law, WYO. STAT. ANN. § 6-3-301(a) (2007), which states that “[a] person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit larceny or a felony therein”).

591. 46 P.3d 298 (Wyo. 2002).

592. *Id.* at 301–02.

593. *Id.* at 302.

594. *Id.* at 299.

595. *Id.* at 300–01.

convict a defendant as a principal.”⁵⁹⁶ As to the fact that the defendant had no weapon, the court responded that “it is not necessary to prove that each defendant did that which was necessary to establish each element of an offense but that it is sufficient to show that they were associated together in doing that which comprises each element of the offense.”⁵⁹⁷

V. STATES WITH CASE LAW FOLLOWING THE CATEGORY III APPROACH: NATURAL AND PROBABLE CONSEQUENCES.

There appear to be twenty states that have case law following the Category III model holding accomplices liable not just for crimes they intended to facilitate but also for incidental offenses that were “natural and foreseeable” or “natural and probable consequences” of the intended crime. These states fall into two subcategories: (1) states that codify the Category III approach and (2) states which do not codify Category III language but whose courts judicially construe it from accomplice statutes that on their face more resemble a Category I or Category II model.

A. “Codified” Category III Approach

Six states hold an accomplice liable for the natural and foreseeable consequences of the target crime pursuant to their respective accomplice liability statutes. These states are Arizona, Iowa, Kansas, Maine, Minnesota, and Wisconsin.⁵⁹⁸

1. Arizona

Prior to 2008, Arizona had both legislation and case law supporting a Category II approach but not Category III liability.⁵⁹⁹ For example, in *State v.*

596. *Id.* at 303 (citing *Hawkes v. State*, 626 P.2d 1041, 1043 (Wyo. 1981); *Neilson v. State*, 599 P.2d 1326, 1335 (Wyo. 1979)).

597. *Id.* at 301 (citing *Edge v. State*, 647 P.2d 557, 560 (Wyo. 1982)).

598. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008); IOWA CODE ANN. § 703.2 (West 2003); KAN. STAT. ANN. § 21-3205(2) (2007); ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006 & Supp. 2007); MINN. STAT. ANN. § 609.05 (West 2003 & Supp. 2008); WIS. STAT. ANN. § 939.05 (West 2005).

599. ARIZ. REV. STAT. ANN. § 13-301 (2008) (“‘[A]ccomplice’ means a person . . . who with the intent to promote or facilitate the commission of an offense: [(1) s]olicits or commands another person to commit the offense; or [(2) a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense[, or (3) p]rovides means or opportunity to another person to commit the offense.”); *id.* § 13-303 (“A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable

Garnica,⁶⁰⁰ the Court of Appeals of Arizona affirmed the defendant's convictions for accomplice liability for second degree murder, aggravated assault, and endangerment.⁶⁰¹ In this case, the defendant was drinking and partying with friends when another group that "had been drinking and partying at a different location . . . drove into the area and exited their vehicles."⁶⁰² According to the defendant's subsequent confession, members of each group began trading insults and eventually threw bottles at each other; the defendant's brother then started shooting at the other group as the defendant provided him ammunition.⁶⁰³ Ultimately, the defendant's brother not only shot a member of the other group but also killed an innocent victim.⁶⁰⁴

The Court of Appeals of Arizona first noted that the state had a statute patterned after Model Penal Code section 2.06(4), allowing for liability so long as the defendant "*acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense.*"⁶⁰⁵ The court concluded that by providing ammunition, the defendant not only intended to facilitate the shooter's conduct but also held the requisite mental state of recklessness required for each resulting crime of which the jury had convicted the defendant.⁶⁰⁶ Thus, the court affirmed the defendant's convictions using the Category II approach, explaining that the defendant both intended to facilitate his brother's conduct⁶⁰⁷ and recklessly created the result, to wit: endangerment,⁶⁰⁸ second degree murder,⁶⁰⁹ and assault.⁶¹⁰

consequence of the offense for which the person was an accomplice. . . . If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if: [(1) t]he person solicits or commands another person to engage in the conduct causing such result; or [(2) t]he person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.").

600. 98 P.3d 207 (Ariz. Ct. App. 2004).

601. *Id.* at 214.

602. *Id.* at 208.

603. *Id.*

604. *Id.*

605. *Id.* at 212 (internal quotation marks omitted) (citing MODEL PENAL CODE § 2.06(4) (1962)) (quoting ARIZ. REV. STAT. ANN. § 13-303(B) (2001) (current version at ARIZ. REV. STAT. ANN. § 13-303(B) (2008))).

606. *Id.* at 212–13.

607. *Id.* at 212. *Cf.* ARIZ. REV. STAT. ANN. § 13-303 (2008) (which is satisfied by proof of facilitating conduct).

608. *Id.* at 213 (citing ARIZ. REV. STAT. ANN. § 13-1201(A) (2001) (which is satisfied by proof of recklessly creating a substantial risk of imminent death)).

609. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (2001) (which is satisfied by proof of recklessly creating a grave risk of death) (current version at ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (Supp. 2007))).

610. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-1203(A)(1) (2001) (which is satisfied by proof of recklessly causing any physical injury to another)).

Likewise, in *State v. Nelson*,⁶¹¹ the Court of Appeals of Arizona relied on similar reasoning after the defendant appealed his conviction for negligent homicide.⁶¹² In this case, the victim, whom the defendant punched in the head many times and whom the principal continued to punch, died later at a hospital.⁶¹³ The State then tried and a jury convicted the defendant for negligent homicide on a theory of accomplice liability because of “the uncertainty about whether [the defendant] or [the principal] landed the punch or punches that caused [the victim]’s death.”⁶¹⁴

On appeal, the defendant contended that it was legally impossible to be convicted as an accomplice to negligent homicide because Arizona’s statutory definition of accomplice required that an accomplice act intentionally.⁶¹⁵ However, the Court of Appeals of Arizona looked to the provisions regarding result-based crimes that *Garnica* had relied on and expanded accomplice liability beyond crimes requiring recklessness to crimes involving negligent *mens rea*.⁶¹⁶ The court held that the “intent” language in the accomplice statute refers only to aiding the conduct itself, not to the mental state required for conviction of the substantive crime.⁶¹⁷ Therefore, although the defendant may have only intended to beat the victim and not kill him, his negligent conduct facilitated the deadly result.⁶¹⁸

However, in 2008, the Arizona legislature amended its accomplice statute by adding a provision which provides that an accomplice is criminally liable for “any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.”⁶¹⁹ Consequently, if a court were to review *Garnica* under the new Arizona law, it would be proper to rule that when the defendant recklessly endangered the life of the homicide victim by providing ammunition to his brother who was bent on harming the victim, the victim’s death was a natural and probable consequence of the endangerment. Likewise, in a case such as *Nelson*, a court could hold under the new statute that the victim’s death was a natural and probable consequence of the defendant and codefendant’s assault on the victim.

611. 150 P.3d 769 (Ariz. Ct. App. 2007).

612. *Id.* at 769.

613. *Id.* at 770.

614. *Id.*

615. *Id.*

616. *Id.* at 771–72 (discussing *State v. Garnica*, 98 P.3d 207, 213 (Ariz. Ct. App. 2004)) (citing ARIZ. REV. STAT. ANN. §§ 13-301, -303 (2001) (current versions at ARIZ. REV. STAT. ANN. §§ 13-301, -303 (2008))).

617. *Id.* at 772 (citing ARIZ. REV. STAT. ANN. § 13-303(B) (2001) (current version at ARIZ. REV. STAT. ANN. § 13-303(B) (2008))).

618. *Id.*

619. ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008).

2. Iowa

The Iowa legislature has codified the Category III approach in a “joint criminal conduct” provision which holds an alleged accomplice liable for another’s criminal acts “unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.”⁶²⁰ In *State v. Jefferson*,⁶²¹ the Supreme Court of Iowa set out the elements necessary for conviction under its “joint criminal liability” statute: (1) the “[d]efendant must be acting in concert with another”; (2) the “[d]efendant must knowingly be participating in a public offense”; (3) a “‘different crime’ must be committed by another participant in furtherance of [the] defendant’s offense”; and (4) “[t]he commission of the different crime must be reasonably foreseen.”⁶²² The *Jefferson* court applied these criteria to a case involving a robbery planned by the principal and accomplice; during the course of the robbery, the principal shot a convenience store clerk.⁶²³ The court opined that a reasonable jury could conclude the result was one the accomplice “did not plan and in which he did not personally participate, but which could reasonably be expected” and, as such, he was an accomplice not only to first degree robbery but also to the assault of the store clerk.⁶²⁴

In *State v. Hustead*,⁶²⁵ the Court of Appeals of Iowa upheld the defendant’s conviction for second degree burglary and first degree theft where the defendant was party to an arrangement to purchase property he knew to be stolen by the principal.⁶²⁶ In this case, the principal acted in concert with two other individuals to regularly burglarize businesses and farm sheds and then sell the stolen property to other individuals, including the defendant.⁶²⁷ The defendant was aware of the theft and burglary scheme and had purchased stolen property from the principal on numerous previous occasions.⁶²⁸ At trial, a jury convicted the defendant of aiding and abetting theft and burglary.⁶²⁹

620. IOWA CODE ANN. § 703.2 (West 2003) (“When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person’s guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in furtherance of the commission of the offense.”).

621. 574 N.W.2d 268 (Iowa 1997).

622. *Id.* at 277 (quoting *State v. Hohle*, 510 N.W.2d 847, 848 (Iowa 1994)).

623. *Id.* at 278.

624. *Id.*

625. 538 N.W.2d 867 (Iowa Ct. App. 1995).

626. *Id.* at 869.

627. *Id.*

628. *Id.*

629. *Id.*

On appeal, the defendant argued that the court could not hold him responsible for the crimes of theft and burglary because the State lacked sufficient evidence to show he “planned or participated” in the specific instances of theft and burglary “or had any knowledge of the specific crimes prior to the time they were committed.”⁶³⁰ In determining the defendant’s liability, the appellate court concluded that one need not have knowledge of the “*particular* crime committed by the perpetrator” to be criminally responsible as an aider or abettor.⁶³¹ Rather, in accord with the Category III approach, the Court of Appeals stated that a court may convict an alleged accomplice of “any criminal act which in the ordinary course of events was the natural and probable consequence of the criminal act [the accomplice] encouraged.”⁶³² Therefore, because the defendant had knowledge that the principal engaged in burglary and theft and, furthermore, facilitated the crimes the principal committed by purchasing the stolen goods, the court held that the trial court properly convicted defendant of first degree theft and second degree burglary.⁶³³

In *State v. Bahmer*,⁶³⁴ the Court of Appeals of Iowa used the “natural and probable consequences” language of *Hustead* to uphold a conviction for theft where the defendant agreed to accept stolen property as payment for a narcotics debt the principal owed to her.⁶³⁵ In this case, the principal stole a skid loader from a construction site to repay the defendant for the drug debt.⁶³⁶ The defendant had told the principal prior to the theft that she would accept a skid loader as payment, and she accepted the stolen skid loader in exchange for two ounces of crack cocaine and a two thousand dollar reduction of the principal’s drug debt.⁶³⁷ A jury convicted the defendant of theft by taking.⁶³⁸

The defendant asserted on appeal that the court could not hold her criminally responsible for theft by taking as an aider and abettor because she was not physically with the principal when the theft took place and because the State lacked sufficient evidence to prove that she “took possession of the [property] with the intent to deprive the owner of the property.”⁶³⁹ The court upheld the defendant’s conviction because, although she was not present at the time of the crime and may not have intended this specific owner be deprived of this specific skid loader, she was aware of the principal’s plan to steal and

630. *Id.* at 869.

631. *Id.* at 870 (emphasis added).

632. *Id.* (citation omitted).

633. *Id.*

634. No. 03-1696, 2004 WL 2804819 (Iowa Ct. App. Dec. 8, 2004).

635. *Id.* at *2 (citing *Hustead*, 538 N.W.2d at 870).

636. *Id.* at *1.

637. *Id.*

638. *Id.*

639. *Id.*

encouraged the principal's criminal conduct.⁶⁴⁰ Therefore, the court concluded that this particular crime of theft by taking was a natural and probable consequence of the defendant's encouragement.⁶⁴¹

In *State v. Satern*,⁶⁴² the Supreme Court of Iowa pointed out that "sections 703.1 and 703.2 articulate the particulars of accomplice liability" in Iowa.⁶⁴³ Specifically, section 703.1 provides that aiders and abettors are liable for the crime which they have "knowingly aided the principal in committing," either by participation or encouragement before or during its commission.⁶⁴⁴ The joint criminal conduct provision, section 703.2, "contemplates *two* acts—the crime the joint actor has knowingly participated in, and a second or resulting crime that is unplanned but could reasonably be expected to occur in furtherance of the first one."⁶⁴⁵ The court also stated that "[d]epending on the case, it may be appropriate for the court to instruct on both doctrines."⁶⁴⁶ In *Satern*, where it was unclear whether the defendant or his companion was the intoxicated driver who collided with another vehicle, killing the other driver, the trial court instructed the jury on both theories and the jury found the defendant guilty of vehicular homicide.⁶⁴⁷ Assuming the defendant was not the driver, he was still guilty because he allowed his intoxicated companion to drive his vehicle, which carried the potential of the natural and probable consequence of death to another.⁶⁴⁸

3. *Kansas*

Kansas's accomplice liability provision follows a Category III model in holding an alleged accomplice liable for any crime "committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence" of the intended crime.⁶⁴⁹ In *State v. Edwards*,⁶⁵⁰ the defendant and three cohorts entered the victim's house to rob him.⁶⁵¹ During the course of the robbery, one of the robbers stabbed the victim while the defendant was in another room of

640. See *id.* (citing *State v. Lott*, 255 N.W.2d 105, 107, 109 (Iowa 1977); *Hustead*, 538 N.W.2d at 870).

641. *Id.*

642. 516 N.W.2d 839 (Iowa 1994).

643. *Id.* at 845 (discussing IOWA CODE ANN. § 703.1–2 (West 2003)).

644. *Id.* at 843 (quoting *Lott*, 255 N.W.2d at 107).

645. *Id.* (citing *State v. Irvin*, 334 N.W.2d 312, 314–15 (Iowa Ct. App. 1983)).

646. *Id.* (citing *State v. Thompson*, 397 N.W.2d 679, 685 (Iowa 1986)).

647. *Id.* at 842–43.

648. *Id.* at 843.

649. KAN. STAT. ANN. § 21-3205(2) (2007).

650. 498 P.2d 48 (Kan. 1972).

651. *Id.* at 50.

the house.⁶⁵² The State charged the defendant with aggravated battery as well as robbery.⁶⁵³ Following his conviction on the battery charge, the defendant argued it was not foreseeable that his cohort would stab the victim.⁶⁵⁴ The Kansas Supreme Court disagreed:

There can be little doubt from the evidence that both the robbery and the battery occurred. There was direct evidence that defendant transported [the codefendant responsible for the stabbing] to the scene of these crimes. The statement of the defendant, as he viewed [the victim's] furniture, that *they* could make a killing . . . can only be interpreted as indicating some action was contemplated by him and his companions. Robbery is a crime of violence committed by threat or force. There was evidence that defendant participated in the aggravated robbery by taking a radio from the premises. From the facts it may readily be inferred that violence, if necessary, was contemplated when the four entered the house. . . . Under these circumstances the defendant can hardly be considered an innocent bystander in the whole affair.⁶⁵⁵

Thus, the court concluded that a plan to commit a crime of violence such as robbery carried with it a serious potential to expand into even more serious violent behavior.⁶⁵⁶ In other words, the aggravated battery could be seen as a natural outgrowth of the robbery. Here, the circumstances as a whole “clearly support an inference that defendant aided and abetted in the aggravated battery of the victim with the requisite criminal intent.”⁶⁵⁷

In *State v. Davis*,⁶⁵⁸ a trial court in Kansas convicted the defendant of aggravated battery and attempted misdemeanor theft.⁶⁵⁹ A dispatcher had informed a security guard of a call by a resident of an apartment building who had reported hearing sounds as if someone was breaking into vending machines in the building.⁶⁶⁰ Entering the building with his handgun drawn, the guard saw the defendant standing in front of the door to the laundry room and heard prying sounds from within the laundry room.⁶⁶¹ He ordered the defendant to place his

652. *Id.*

653. *Id.*

654. *Id.* at 51.

655. *Id.*

656. *Id.*

657. *Id.* at 53. It is important to note the “intentionally aid” language in subsection (1) of the Kansas statute incorporates the “reasonably foreseeable” language found in subsection (2). *See* KAN. STAT. ANN. § 21-3205(1)–(2) (2007).

658. 604 P.2d 68 (Kan. Ct. App. 1979).

659. *Id.* at 70.

660. *Id.* at 69.

661. *Id.*

hands against the wall, at which time he noticed the defendant only had one arm.⁶⁶² The defendant claimed he had recently left an apartment, then inquired to the guard about what was going on, and finally complied with the guard's orders on the third or fourth command.⁶⁶³ A confederate then came out of the laundry room and placed his hands against the wall.⁶⁶⁴ The guard noticed that a vending machine was pried open.⁶⁶⁵ As the guard looked away from the men, "they both moved away from the wall at the same time and [the confederate] . . . ran into the laundry room."⁶⁶⁶ Meanwhile, "[t]he defendant remained standing in the hallway, facing [the guard]," but did not try to attack the guard.⁶⁶⁷ Very shortly "after [the confederate] ran into the laundry room, a hand holding a handgun appeared from the laundry room" and fired four or five shots, striking the guard in his right arm.⁶⁶⁸ Although the guard did not see the shooter, "he did see the hand holding the handgun and did testify the gun was fired by a man of the same race as [the confederate]."⁶⁶⁹ Unable to defend himself, the guard "ran out the back door and when he looked back inside he saw [the defendant] and [the confederate] running down the hall in the opposite direction."⁶⁷⁰ The defendant and confederate were subsequently taken into custody and at trial were positively identified.⁶⁷¹

The Kansas Court of Appeals held that because the jury "obviously" properly convicted the defendant of aiding and abetting the theft, the major issue was whether the defendant was liable for the aggravated battery.⁶⁷² Because the evidence was insufficient to establish that the defendant intentionally aided the aggravated battery, the court analyzed whether it was "reasonably foreseeable by the defendant that an aggravated battery would occur as a probable consequence of committing misdemeanor theft or attempting to commit misdemeanor theft."⁶⁷³ The court first determined whether the intended crime was "inherently or foreseeably dangerous" to human life by "testing both the crime itself and the manner in which it was committed for dangerous characteristics."⁶⁷⁴ Concluding that misdemeanor theft was not an

662. *Id.*

663. *Id.* at 69–70.

664. *Id.*

665. *Id.*

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.*

672. *Id.* at 70–71.

673. *Id.* at 71.

674. *Id.* at 71 (internal quotation marks omitted) (quoting *State v. Smith*, 594 P.2d 218, 222 (Kan. 1979)).

inherently dangerous crime, like the robbery in *Edwards*,⁶⁷⁵ the court then examined the particular circumstances of the case:

In the case at bar the intended crime, misdemeanor theft, was to take place in the early morning hours in a laundry room that the defendant knew to be unoccupied when the theft occurred. A lookout was posted to insure that no one walked into the room while the theft was in progress. . . . The record on appeal does not even hint that the defendant knew or had any reason to suspect [the confederate] had a weapon. . . .

There is no evidence that the defendant and [the confederate] had any plan for escape or had discussed what they would do if discovered. There was no showing that either the defendant or [the confederate] had a propensity for violence or that they normally carried a weapon of any kind. Misdemeanor theft in itself is not a crime of violence, especially when conducted outside the presence of others.

. . . In our opinion, it is mere speculation to say that a person who with another is planning to commit a misdemeanor theft in an unoccupied room can reasonably foresee in the absence of other facts that the coconspirator will shoot someone in an effort to avoid apprehension.

. . . [In addition,] [t]he fact that defendant did not drop to the floor or run sheds no light on foreseeability. The security guard did not drop to the floor and he was being shot at.⁶⁷⁶

It is clear from the Kansas statute and opinions discussed above that Kansas courts are willing to apply the Category III model in appropriate circumstances.

4. *Maine*

Maine's criminal code states that "[a] person is an accomplice . . . to any crime the commission of which was a reasonably foreseeable consequence of his conduct."⁶⁷⁷ Aside from this explicit language, the Supreme Judicial Court of Maine's interpretation of the statute's legislative history further supports the doctrine of natural and foreseeable consequences. The court has explained that "the legislature . . . intended to impose liability upon accomplices for those crimes that were the *reasonably foreseeable consequence of their criminal enterprise*," even if there exists "an absence on their part of the same culpability

675. *State v. Edwards*, 498 P.2d 48, 51 (Kan. 1972).

676. *Davis*, 604 P.2d at 72–73.

677. ME. REV. STAT. ANN. tit. 17-A, § 57(3)(A) (2006 & Supp. 2007).

required for conviction as a principal to the crime.”⁶⁷⁸ Therefore, in Maine, “[s]o long as the accomplice intended to promote the primary crime, and the commission of the secondary crime was a *foreseeable consequence* of the accomplice’s participation in the primary crime, *no further evidence of the accomplice’s subjective state of mind as to the secondary crime* is required.”⁶⁷⁹

In *State v. Williams*,⁶⁸⁰ the defendant and the principal had entered a supermarket where the principal attempted to steal beer.⁶⁸¹ When the manager confronted the principal, the principal dropped the beer, punched the manager in the face, and began to exit the store.⁶⁸² Before he left the store, the principal pulled out a knife, swung it at the manager, and then stabbed another employee who had attempted to intervene.⁶⁸³ Once outside the store, the principal and the defendant exchanged celebratory “high-fives.”⁶⁸⁴ Another employee who witnessed the attack then approached the principal and the defendant and pointed his finger at them.⁶⁸⁵ The principal and the defendant then attacked this employee outside the store.⁶⁸⁶ As two other store employees tried to approach to help, the defendant screamed, “He’s got a knife, he’s got a knife.”⁶⁸⁷ The employee who the principal and the defendant attacked outside the store later died from his stab wounds.⁶⁸⁸ The defendant was indicted for murder, but the trial court convicted him of manslaughter.⁶⁸⁹

Upon review, the Supreme Judicial Court of Maine held that the trial court properly found the defendant guilty of manslaughter as an accomplice.⁶⁹⁰ In applying the natural and foreseeable consequences reasoning, the court looked to the trial court’s finding of fact that the defendant (1) had participated in the attack on the victim when the principal used the knife to stab the victim, and (2) confirmed his knowledge that the principal was wielding a weapon when he

678. *State v. Goodall*, 407 A.2d 268, 278 (Me. 1979) (emphasis added) (upholding defendant’s manslaughter conviction on an accomplice basis where the defendant intended his cohort assault the victim, who died, because the victim’s death was a “reasonably foreseeable consequence” of the cohort’s attack on the victim).

679. *State v. Linscott*, 520 A.2d 1067, 1070 (Me. 1987) (emphasis added). In this case, the court held the defendant accountable for murder based on the accountability theory even though the trial court found that the defendant did not intend to kill and “probably would not have participated in the robbery had he believed that [the victim] would be killed.” *Id.* at 1068.

680. 653 A.2d 902 (Me. 1995).

681. *Id.* at 904.

682. *Id.*

683. *Id.*

684. *Id.* at 905.

685. *Id.*

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.*

690. *Id.* at 904.

shouted, “He’s got a knife.”⁶⁹¹ Here, the lower court properly concluded that “[t]he average reasonable person with knowledge that [the principal] was wielding a knife would have reasonably foreseen that the joint attack on [the victim] could result in [the victim’s] death.”⁶⁹²

5. *Minnesota*

Minnesota courts rely on the plain language of their state’s accomplice liability statute in holding an alleged accomplice responsible for crimes “committed in pursuance of the intended crime if reasonably foreseeable by the [accomplice] as a probable consequence” of the intended crime.⁶⁹³ In *State v. Filippi*,⁶⁹⁴ the Minnesota Supreme Court upheld the defendant’s conviction for two assaults committed during a burglary in which the defendant was the accomplice.⁶⁹⁵ In this case, the defendant and the principal attempted to rob a drugstore,⁶⁹⁶ and the principal shot at police officers who responded to the robbery.⁶⁹⁷ After the police apprehended the two suspects, the principal testified at trial for the defendant, asserting “that the gun was his [own], that defendant had never seen him with the gun before, and that he did not tell defendant that he was carrying the gun with him during the burglary.”⁶⁹⁸ The defendant conceded to his involvement in the burglary but contended that the court should not hold him liable for the assaults committed by the principal.⁶⁹⁹

Referring to Minnesota’s accomplice liability statute, the Minnesota Supreme Court affirmed the defendant’s assault convictions.⁷⁰⁰ The court interpreted Minnesota law as requiring a two-part test to determine liability: “(1) whether the assaults were committed in furtherance of the intended crime and (2) whether the assaults were reasonably foreseeable by defendant as a probable consequence of the commission of the burglary.”⁷⁰¹ In the instant case,

691. *Id.* at 905.

692. *Id.* at 905–06.

693. MINN. STAT. ANN. § 609.05(1)–(2) (West 2003 & Supp. 2008) (“A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. . . . A person liable under subdivision 1 is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended.”).

694. 335 N.W.2d 739 (Minn. 1983).

695. *Id.* at 739.

696. *Id.* at 741.

697. *Id.*

698. *Id.*

699. *Id.* at 742.

700. *Id.* at 742–43.

701. *Id.* at 742.

the court stated that since there was no issue regarding whether the assaults were committed in “furtherance” of the burglary, the real issue was whether the defendant could have “reasonably foreseen” that these assaults would occur.⁷⁰² The court reasoned that it is “reasonably foreseeable” that during the course of a burglary, police are likely to arrive on the scene.⁷⁰³ The court further stated that a crime such as burglary “carries with it the possibility of violence” and that the defendant, simply through his participation in the crime, “knew or could foresee that the burglary might result in violence.”⁷⁰⁴ Therefore, the court found defendant liable for the assaults under a Category III analysis.

6. *Wisconsin*

The state of Wisconsin is another Category III state that follows the plain language of its accountability statute, which provides that a person can be an accomplice to the commission of a crime if that person “intentionally aids and abets” the offense or is acting in “pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime.”⁷⁰⁵ In addition, Wisconsin case law explicitly provides that the State is not required to prove intent in order to hold accomplices liable for the natural and probable consequences of their acts.⁷⁰⁶ In *State v. Asfoor*, the Wisconsin Supreme Court stated that “the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of an act he knowingly aided or encouraged.”⁷⁰⁷ In

702. *Id.*

703. *Id.*

704. *Id.*

705. WIS. STAT. ANN. § 939.05(2) (West 2005). Because the “intentionally aids” language is in one subsection of Wisconsin’s “Parties to Crime” provision, *id.* § 939.05(2)(b), and the “natural and probable consequence” language is in another, *id.* § 939.05(2)(c), at least one defendant has argued that “only a conspirator or a solicitor—not an aider and abettor—can be held liable for a crime other than the intended crime.” *State v. Asfoor*, 249 N.W.2d 529, 537 (Wis. 1977). In *Asfoor*, the court rejected this claim and held that a court can hold an aider or abettor liable under the statute for natural and probable consequences of the intended crimes. *Id.* at 537–38.

706. *See State v. Ivy*, 350 N.W.2d 622, 627–28 (Wis. 1984) (noting that the natural and probable consequence doctrine could support an accomplice’s conviction for armed robbery although the accomplice did not have knowledge the principal was armed with a dangerous weapon); *State v. Cydzik*, 211 N.W.2d 421, 429, 431 (Wis. 1973) (relying on the natural and probable consequence doctrine to uphold an accomplice’s conviction for murder carried out by the principal during their armed robbery of a supper club even though the accomplice had no intent that a killing occur).

707. *Asfoor*, 249 N.W.2d at 537–38 (quoting *People v. Durham*, 449 P.2d 198, 204 (Cal. 1969)).

Asfoor, the court upheld the defendant's conviction as an aider and abettor for the crime of negligent injury by use of a weapon even though the defendant had no intention of participating in that crime.⁷⁰⁸ The court determined that although one cannot intend to negligently cause injury to another, "there are often many intentional acts which lead to an injury caused by negligence."⁷⁰⁹ Here, the defendant knew that the principal and other perpetrators intended to commit a battery or the like against the victim, assisted them by driving them to the victim's location, and lent them his gun.⁷¹⁰ The court determined these were all overt acts in furtherance of the intended crime, which led to the unintended but natural and probable consequence of a gunshot injury to the victim caused by defendant's companion's negligent use of the gun.⁷¹¹

Similarly, in *State v. Hecht*,⁷¹² the Wisconsin Supreme Court relied on natural and probable consequence reasoning and upheld the defendant's conviction as an aider and abettor to the crime of possession of a controlled substance with intent to deliver.⁷¹³ In this case, the defendant helped arrange a substantial cocaine sale between a supplier and an undercover law enforcement agent.⁷¹⁴ The arrangement included the defendant setting up a meeting between a cocaine supplier and two agents and ensuring that the parties continue their contact for the final exchange.⁷¹⁵ The court found that the defendant's in-depth orchestration from start to finish to ensure the exchange of the cocaine was sufficient to find him liable as an aider and abettor, thus rejecting defendant's contention that he was merely involved in directing the agents to the potential cocaine supplier. The court concluded:

In this case, the jury could reasonably find that the defendant put into motion the wheels of a mechanism that would ultimately lead to a sale of cocaine to the agents. By his acts of keeping [the supplier] and the agents in close contact, he kept those wheels turning in a fluid motion. Under these circumstances, the jury could also reasonably find that the natural and probable consequence of this chain of events was the sale of cocaine and that the defendant is, therefore, liable for the possession

708. *See id.* at 536–37, 543.

709. *Id.* at 536.

710. *Id.*

711. *Id.* at 538.

712. 342 N.W.2d 721 (Wis. 1984).

713. *Id.* at 731, 733.

714. *Id.* at 730.

715. *Id.*

of a controlled substance with the intent to deliver, under the theory of aiding and abetting the commission of the crime.⁷¹⁶

B. “Judicially Construed” Category III Approach

In addition to those states that codify the Category III approach, there are fourteen states that do not use Category III language in their criminal code but whose courts have judicially construed their state’s respective accomplice statutes to proscribe liability in a manner that resembles a Category III approach. These states are Alabama, Arkansas, California, Delaware, Illinois, Indiana, Louisiana, Maryland, Michigan, Nebraska, North Carolina, South Carolina, Tennessee, and Virginia.

1. Alabama

Although Alabama’s criminal code requires specific intent to hold an individual accountable for the criminal behavior of another,⁷¹⁷ case law indicates that Alabama courts will consider holding accomplices liable for crimes that are “the proximate, natural, and logical consequences” of the target crime.⁷¹⁸ For example, in *Howell v. State* three individuals, including the defendant and the principal, conspired to rob a gas station.⁷¹⁹ When an officer arrived at the station suspecting something was amiss, the principal shot the officer. The defendant was convicted of assault with an intent to murder.⁷²⁰ On appeal, the Alabama Court of Criminal Appeals considered whether there was sufficient evidence to establish that the defendant “aided and abetted” the principal’s shooting of the officer.⁷²¹ The court stated, “[t]he accomplice . . . is criminally responsible for acts which are the direct, proximate, natural result of the conspiracy formed. He is not responsible for any special act[] not within the scope of the common purpose, but [which] grows out of the individual malice of the perpetrator.”⁷²² Here, an evaluation of the evidence revealed that the

716. *Id.* at 731–32.

717. See ALA. CODE § 13A-2-23 (LexisNexis 2005) (“A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense: (1) [h]e procures, induces or causes such other person to commit the offense; or (2) [h]e aids or abets such other person in committing the offense; or (3) [h]aving a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.”).

718. *Howell v. State*, 339 So. 2d 138, 140 (Ala. Crim. App. 1976) (internal quotation marks omitted) (quoting *Tanner v. State*, 9 So. 613, 615 (Ala. 1890)).

719. *Id.* at 139.

720. *Id.*

721. *Id.*

722. *Id.* at 140 (internal quotation marks omitted) (quoting *Tanner*, 9 So. at 615).

“[a]ssault with intent to murder would be a foreseeable consequence of the joint enterprise in which [the defendant and the two others] were engaged.”⁷²³

In *Hollingsworth v. State*,⁷²⁴ the defendant claimed that assaulting an officer was beyond the scope of his and the principal’s original plan, and the Alabama Court of Criminal Appeals agreed.⁷²⁵ The defendant acquired a pistol at the principal’s request, and he and the principal drove around drinking and smoking pot, allegedly looking for a party, at which time the principal noted that they were nearing the home of the victim, a deputy sheriff.⁷²⁶ The principal then pulled out a gun and emptied the magazine into the officer’s house.⁷²⁷ Defendant claimed he was unaware that the principal intended to shoot into the officer’s house until immediately prior to the crime.⁷²⁸

The court addressed prior accomplice liability cases, indicating that those cases held that “an accomplice is criminally responsible for the ‘proximate, natural, and logical consequences’ of the criminal activity of the conspirators,” but cautioned against “an extension of what was said in the cited cases beyond the ‘particular facts’ thereof.”⁷²⁹ The court noted that in each of these earlier accomplice liability cases, the underlying crime was homicide.⁷³⁰ The court continued:

That the principle set forth of criminal responsibility of an aider or abettor for the “proximate, natural, and logical consequences” of their common criminal undertaking would have applied under the circumstances of the instant case if [the victim], or anyone else in his dwelling, or thereabout, were in any way personally injured, by a bullet from the pistol fired by [the principal], constitutes no reason for holding [defendant] criminally responsible for any intentional crime of [the principal] directed at the person of [the victim], in the absence of any knowledge by [defendant], or reasonable notice to him, that [the principal] intended to injure [the victim].⁷³¹

723. *Id.*

724. 366 So. 2d 326 (Ala. Crim. App. 1978).

725. *Id.* at 330–33.

726. *Id.* at 328.

727. *Id.* at 328–29.

728. *Id.* at 328.

729. *Id.* at 332 (discussing *Stokley v. State*, 49 So. 2d 284, 291 (Ala. 1950); *Morris v. State*, 41 So. 274, 280 (Ala. 1906); *Tanner v. State*, 9 So. 613, 615 (Ala. 1890)).

730. *Id.* at 332–33.

731. *Id.* at 333.

The court concluded that the defendant was guilty of criminal conduct but that there was “no substantial evidence that he was guilty of the crime of assault.”⁷³²

In *D.L. v. State*,⁷³³ a group of juveniles, including the defendant, had engaged in a series of burglaries and thefts.⁷³⁴ One burglary involved theft of weapons from a home by the defendant, the principal, and other members of the group.⁷³⁵ However, because the principal did not get one of the firearms stolen in the burglary, he became angry and started a fire in the residence.⁷³⁶ After considering Alabama’s accomplice law, the Alabama Court of Criminal Appeals observed that, although the group had “burglarized a number of residence[s] during their ‘crime spree,’ there [was] no evidence that arson was a part of their scheme or their method of operation.”⁷³⁷ Thus, there was “no evidence that the arson was the proximate, natural, and logical result of the criminal adventure of burglary and theft upon which [these] juveniles were engaged.”⁷³⁸

2. *Arkansas*

Arkansas law reflects pieces of each of the three categories. Arkansas’s statute reflects both the specific intent approach, like section 2.06(3) of the Model Penal Code, as well as a shared mental state provision similar to section 2.06(4) of the Model Penal Code.⁷³⁹ Nevertheless, it appears that the Arkansas courts abide by the natural and foreseeable consequences doctrine.⁷⁴⁰ In *Bosnick*

732. *Id.*

733. 625 So. 2d 1201 (Ala. Crim. App. 1993).

734. *Id.* at 1202.

735. *Id.*

736. *Id.*

737. *Id.* at 1204.

738. *Id.*

739. See ARK. CODE ANN. § 5-2-403(a)–(b) (2006) (“A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person: (1) Solicits, advises, encourages, or coerces the other person to commit the offense; (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or (3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense. . . . When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person: (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result; (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or (3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.”).

740. See, e.g., *Johnson v. State*, 482 S.W.2d 600, 605 (Ark. 1972) (citing *Bosnick v. State*, 454 S.W.2d 311, 314 (Ark. 1970)) (“Each conspirator or participant is responsible for everything

v. *State*,⁷⁴¹ the defendant drove three armed men to a convenience store.⁷⁴² Upon arriving, the defendant stayed in the car while his cohorts entered the store.⁷⁴³ A police officer arrived and knocked on the door and one of the codefendants fired, killing him.⁷⁴⁴ Immediately afterward, the defendant yelled “[c]ome on, lets go” and drove the defendants away.⁷⁴⁵ A jury later convicted the defendant of premeditated murder.⁷⁴⁶ On appeal, the Supreme Court of Arkansas stated that an accomplice can be held liable for “every thing done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences.”⁷⁴⁷ The court reversed the conviction, however, because it determined that the trial court should have instructed the jury on the lesser included offense of felony murder.⁷⁴⁸

In *Pettit v. State*,⁷⁴⁹ the State charged the defendants with assault with intent to kill arising out of a robbery.⁷⁵⁰ Here, the two defendants and the principal had planned to rob the victim, who reportedly had a lot of money in his house.⁷⁵¹ The victim later testified that before the robbery he heard someone at his door saying, “[W]e know you’re in there. If you don’t come out we are coming in to get you.”⁷⁵² When the victim opened the door, he fired and wounded his assailant, who returned fire and shot the victim in the chest.⁷⁵³ The trio, deciding not to rob the victim, hurriedly left in a truck.⁷⁵⁴ The trial court provided the jury an “aider and abettor” instruction.⁷⁵⁵

The thrust of the defendants’ appeal was that in order “to be convicted of . . . assault with intent to kill, the person . . . must have a specific intent to take the life of the victim.”⁷⁵⁶ They contended that although they may have “plotted burglary and theft or perhaps robbery, there [was] no evidence that

done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences.”).

741. *Bosnick*, 454 S.W.2d 311.

742. *Id.* at 312–13.

743. *Id.* at 313.

744. *Id.*

745. *Id.*

746. *Id.* at 312–13.

747. *Id.* at 314 (internal quotation marks omitted) (quoting *Clark v. State*, 276 S.W. 849, 853 (Ark. 1925)).

748. *Id.* at 315.

749. No. CR 76-103, 1976 WL 139 (Ark. Oct. 11, 1976).

750. *Id.* at *1.

751. *Id.*

752. *Id.*

753. *Id.*

754. *Id.*

755. *Id.* at *2.

756. *Id.* at *1.

they, themselves, intended any harm or violence to [the victim].”⁷⁵⁷ The Arkansas Supreme Court responded by saying, “As to the complicity of those acting in concert . . . : [e]ach conspirator or participant is responsible for everything done which followed directly and immediately in the execution of the common purpose as one of its probable and natural consequences.”⁷⁵⁸ In this case, the court ruled there was ample evidence to support the jury’s verdict.⁷⁵⁹

3. *California*

Although California’s accomplice provision is silent as to a mental state,⁷⁶⁰ California courts follow the natural and probable consequences doctrine and repeat this language in case after case.⁷⁶¹ If the accused ultimately commits some different or additional crime other than the one the accused meant to aid and abet, “the natural and probable consequences doctrine is triggered.”⁷⁶² Under this doctrine, a court can convict the defendant of the charged crime if the defendant:

(1) [H]ad knowledge of a confederate’s unlawful purpose; (2) intended to commit, encourage, or facilitate the commission of any target crime; . . . (3) aided, promoted, encouraged, or instigated the target crime . . . his confederate (4) committed the charged crime; and (5) the charged crime was a natural and probable consequence of the target crime.⁷⁶³

Moreover, the jury need not agree on which offense was the target crime, and even “a misdemeanor can support a ‘natural and probable consequences’ aiding and abetting murder conviction.”⁷⁶⁴

757. *Id.* at *2.

758. *Id.* (quoting *Johnson v. State*, 482 S.W.2d 600, 605 (Ark. 1972)).

759. *Id.*

760. *See* CAL. PENAL CODE § 27(a)(3) (West 1999) (“The following persons are liable to punishment under the laws of this state: . . . All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state”); *id.* § 31 (West Supp. 2008) (“All persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed.”).

761. *See, e.g.*, *People v. Culuko*, 92 Cal. Rptr. 2d 789, 802 (Cal. Ct. App. 2000).

762. *Id.*

763. *Donaghe v. Galaza*, 4 Fed. App’x 338, 340 (9th Cir. 2001) (citing *Solis v. Garcia*, 219 F.3d 922, 927 (9th Cir. 2000)).

764. *Id.* at 341 (citing *Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999)).

In *People v. Culuko*,⁷⁶⁵ where the defendant's child's death was a consequence of criminal child abuse inflicted by either the defendant or her boyfriend, the court upheld the defendant's conviction for second degree murder, among other crimes, based on the natural and probable consequences doctrine.⁷⁶⁶ The California Court of Appeals commented:

[T]he test of natural and probable consequences is an objective one. . . . [T]he issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant.⁷⁶⁷

The defendant claimed the State was obliged to identify each particular "act" of child abuse the perpetrator inflicted.⁷⁶⁸ The court responded that the "aider and abettor may intend or expect the perpetrator to commit the crime in the form of a single, well-defined criminal 'act,'" or "the aider and abettor may have only the vaguest idea of the precise 'act' by which the perpetrator will commit the crime."⁷⁶⁹ Thus, it was sufficient that the accused was an accomplice to child abuse of some form.⁷⁷⁰ Finally, the court pointed out that "[t]he natural and probable consequences doctrine operates independently of the second degree felony-murder rule. It allows an aider and abettor to be convicted of murder, without malice, even where the target offense is not an inherently dangerous felony."⁷⁷¹

In *People v. Hammond*,⁷⁷² the California Court of Appeals affirmed the superior court's conviction of the defendant for murder, attempted murder, and robbery, again using a Category III analysis.⁷⁷³ In this case, the defendant drove the getaway car after the principal robbed a jewelry store and shot the store's owner and an employee, killing the owner.⁷⁷⁴ Defendant contested the charge of attempted murder, claiming he did not have the requisite intent to kill, supported by the fact the prosecutor conceded at trial that there was no evidence of such

765. *Culuko*, 92 Cal. Rptr. 2d 789.

766. *Id.* at 801-03.

767. *Id.* at 802 (alterations in original) (internal quotation marks omitted) (quoting *People v. Smith*, 67 Cal. Rptr. 2d 604, 609 (Cal. Ct. App. 1997)).

768. *Id.*

769. *Id.* at 803.

770. *Id.*

771. *Id.* at 799.

772. 226 Cal. Rptr. 475 (Cal. Ct. App. 1986).

773. *Id.* at 477-78.

774. *Id.* at 476.

intent on the defendant's part.⁷⁷⁵ The court of appeals disagreed, concluding that defendant's act of driving the getaway car was evidence of his intent to assist or facilitate the principal in perpetrating the robbery, and that as an aider and abettor, the defendant was then liable not only for the robbery which he intended to assist but also for any resulting "natural and probable consequences," including the attempted murder.⁷⁷⁶

*People v. Laster*⁷⁷⁷ involved two defendants the State had charged with four counts of attempted murder, allegedly the natural and probable consequences of their target crimes of discharging or permitting the discharge of a firearm from a motor vehicle.⁷⁷⁸ In this case, the defendant–driver set out with the defendant–passenger in a car to avenge a gang beating of the defendant–passenger's cousin.⁷⁷⁹ Defendants then claimed they picked up two more men, one being the principal.⁷⁸⁰ At a stop sign in the gang's neighborhood, they claimed the principal drew a gun and shot into a group playing basketball, presumed to include the gang members that beat the defendant–passenger's cousin.⁷⁸¹ Defendants claimed they knew the principal had a gun but did not know that the principal intended to shoot into the group of basketball players.⁷⁸²

The appellate court acknowledged that the prosecution (1) "selected target offenses with the fewest possible elements, so that they would be the easiest to prove,"—discharging or permitting the discharge of weapons from a motor vehicle—(2) claimed that the defendants had "knowingly and intentionally aided and abetted . . . these target offenses," (3) argued that "it was reasonably foreseeable that, as a consequence, the [principal] would commit attempted murder," and (4) concluded "that defendants were therefore guilty of attempted murder."⁷⁸³ Nonetheless, the court concluded that the prosecution's theory of the case, reflected in the jury instructions, was an appropriate use of the natural and probable consequences doctrine.⁷⁸⁴ The defendants also argued that the attempted murder and the discharge of the firearm were the same act so that one could not be the consequence of the other, but the court disagreed because it could not see "why the fact that the target offense and the offense ultimately committed . . . consisted of the same act lessened defendants' culpability."⁷⁸⁵

775. *Id.* at 477.

776. *Id.* at 477–78.

777. 61 Cal. Rptr. 2d 680 (Cal. Ct. App. 1997).

778. *Id.* at 682–83.

779. *Id.* at 685–86.

780. *Id.* at 685.

781. *Id.* at 686.

782. *Id.* at 685–86.

783. *Id.* at 687–88 (referring to CAL. PENAL CODE § 12034(b), (d) (West 1999)) (criminalizing discharging and permitting the discharge of a firearm from a motor vehicle).

784. *Id.* at 689.

785. *Id.* at 688.

Thus, the California Court of Appeals affirmed the superior court's convictions of both defendants for the four counts.⁷⁸⁶

4. Delaware

Delaware is another state whose statute follows the Category I model.⁷⁸⁷ Nevertheless, its case law appears to follow a broad Category III approach.⁷⁸⁸ In *Claudio v. State*, the defendant appealed his conviction as an accomplice to robbery, murder, and attempted murder.⁷⁸⁹ In this case, the defendant and the principal robbed two victims at knifepoint.⁷⁹⁰ The defendant stabbed one victim, wounding him, and the principal stabbed the other, killing him.⁷⁹¹ The trial court convicted the defendant of the murder on an accomplice liability theory.⁷⁹² On appeal, the defendant argued that he did not have the requisite specific intent to be liable for the murder.⁷⁹³ However, the Supreme Court of Delaware disagreed with the defendant's contentions, stating:

The inquiry under [the Delaware accomplice statute] is not whether each accomplice had the specific intent to commit murder, but whether he intended to promote or facilitate the principal's conduct constituting the offense. The defendant[] did not have to specifically intend that the result, a killing, should occur. As long as the result was a foreseeable consequence of the underlying felonious conduct their intent as accomplices includes the intent to facilitate the happening of this result.

786. *Id.* at 694.

787. See DEL. CODE ANN. tit. 11, § 271(2) (2007) ("A person is guilty of an offense committed by another person when: . . . Intending to promote or facilitate the commission of the offense the person: . . . Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or . . . Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or . . . Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.").

788. In *Collins v. State*, 1995 WL 120655 (Del. Mar. 10, 1995), the trial court instructed the jury to find "the defendant guilty if it found that the result of the ancillary crime (assault) was a 'foreseeable consequence' and in furtherance of the primary crime (robbery) for which [defendant] intended to be an accomplice." *Id.* at *2. The Supreme Court of Delaware held that the instruction was "well within the constricts of the law of complicity in Delaware." *Id.* (citing *Claudio v. State*, 585 A.2d 1278, 1281–82 (Del. 1991); *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980)). Here, the court found evidence which established that "it was foreseeable that during the armed robbery of a bar/package store, an onlooking patron of the bar might be seen as a threat to the success of the robbery and might be assaulted by one of the robbers." *Id.* at *3.

789. *Claudio*, 585 A.2d at 1279.

790. *Id.* at 1280.

791. *Id.*

792. *Id.* at 1282.

793. *Id.* at 1281–82.

Thus, Delaware law requires the jury to unanimously find that a principal-accomplice relationship existed between the participants with respect to a particular charge, e.g., in this case, robbery at knife point. However, the jury is not required thereafter to find that the defendants specifically intended the result of a consequential crime which occurs, e.g., in this case, murder and attempted murder.⁷⁹⁴

Here, the evidence revealed that the defendant agreed to rob the victims at knife point and was responsible for the principal's murder.⁷⁹⁵ The court pointed out that, in Delaware,

all persons who join together with a common intent and purpose to commit an unlawful act which, in itself, makes it not improbable that a crime not specifically agreed upon in advance might be committed, are responsible equally as principals for the commission of such an *incidental or consequential crime*, whenever the second crime is one in furtherance of or in aid to the originally contemplated unlawful act.⁷⁹⁶

In *Chance v. State*,⁷⁹⁷ the defendant appealed his conviction for second degree murder, but the Supreme Court of Delaware upheld the conviction on an accomplice liability theory.⁷⁹⁸ In this case, the defendant taunted the victim at a party and eventually instigated a general fight among the guests.⁷⁹⁹ When the victim attempted to leave, the defendant and three other party guests began to beat him.⁸⁰⁰ The victim died as a result of the beating.⁸⁰¹ The trial court instructed the jury that the defendant could be responsible as an accomplice for second degree murder or any of four lesser included offenses, stating:

It is the law that all persons who join together with a common intent and purpose to commit an unlawful act which, in itself, makes it foreseeable that a crime not specifically agreed upon in advance might be committed, are responsible equally as principals for the commission of such an incidental or consequential crime, whenever the second

794. *Id.* at 1282 (quoting *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980)) (citing *Probst v. State* A.2d 114, 123 (Del. 1998)).

795. *Id.*

796. *Id.* at 1281–82 (emphasis added).

797. 685 A.2d 351 (Del. 1996).

798. *Id.* at 352.

799. *Id.* at 352–53.

800. *Id.* at 353.

801. *Id.*

crime is one in furtherance of or in aid to the originally contemplated unlawful act.⁸⁰²

The jury found the defendant guilty of second degree murder based on a theory of accomplice liability.⁸⁰³ On appeal, the defendant claimed, *inter alia*, that the “instruction with regard to accomplice liability for an offense that is consequential to the originally contemplated unlawful act should only be given in a felony-murder situation.”⁸⁰⁴ The court disagreed and stated that if the jury found that a “principal-accomplice relationship existed” between the defendant and the others regarding the assault of the victim, “then each of them could be held responsible for the consequential death of [the victim] without the jury having to find that [the defendant] specifically intended the result of the consequential offense, *i.e.*, homicide.”⁸⁰⁵

5. *Illinois*

The Illinois accomplice statute requires specific intent to promote or facilitate the commission of a crime.⁸⁰⁶ However, the Illinois case law reflects what its courts commonly refer to as the “common design rule,”⁸⁰⁷ which they have interpreted as holding a person accountable not only for intended crimes but also for any natural and probable consequence of the common purpose.⁸⁰⁸ This rule holds that “when two or more people engage in a common criminal design, *any* acts in furtherance thereof committed by one party are considered the acts of all parties,”⁸⁰⁹ and applies even if the intended crime is a misdemeanor.⁸¹⁰ For instance, where the defendant may have intended only that he and his cohorts commit an aggravated assault against the victim, and his cohort later shoots and kills, the defendant is responsible for murder.⁸¹¹

802. *Id.* at 353–54.

803. *Id.* at 352.

804. *Id.* at 357–58.

805. *Id.* at 358.

806. *See* 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2002) (“A person is legally accountable for the conduct of another when: . . . [e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.”).

807. *People v. Kessler*, 315 N.E.2d 29, 32 (Ill. 1974).

808. *See People v. Morgan*, 364 N.E.2d 56, 60 (Ill. 1977) (quoting *People v. Morgan*, 350 N.E.2d 27, 34 (Ill. App. Ct. 1976)).

809. *People v. Hicks*, 676 N.E.2d 725, 728–29 (Ill. App. Ct. 1997) (emphasis added) (citing *People v. Martin*, 648 N.E.2d 992, 998 (Ill. App. Ct. 1995)), *rev’d on other grounds*, 639 N.E.2d 373 (Ill. 1998).

810. *See People v. Terry*, 460 N.E.2d 746, 749–50 (Ill. 1984).

811. *People v. McCoy*, 786 N.E.2d 1052, 1056 (Ill. App. Ct. 2003).

Similarly, even if the defendant's original intent is the commission of misdemeanor battery, but the principal kills the victim, the defendant is responsible for the killing.⁸¹² Thus, where the principal "told [a] group, which included defendant, that they should 'kick [the victim's] ass'" while a codefendant "displayed a gun," the fact that the defendant was part of a common design to hurt the victim also made him responsible for the principal's shooting of the victim and resulted in his murder conviction.⁸¹³

In *People v. Morgan*,⁸¹⁴ the defendant was part of a group planning a robbery of an individual, and one of his cohorts struck the victim with a two-by-four while another hit him with a hammer.⁸¹⁵ The court held the defendant accountable for murder because it was a natural and probable consequence of the group's common design to commit armed robbery, notwithstanding the defendant's claim that he did not possess the specific intent to murder.⁸¹⁶

In *People v. Green*,⁸¹⁷ the defendant, on the pretext of purchasing drugs, convinced an eventual murder victim to open the burglar gates leading into his apartment in order to allow two codefendants to rush in and demand money from the victim.⁸¹⁸ The codefendants murdered the victim and three others in the apartment, and the court of appeals held the defendant responsible for four counts of murder as well as burglary, home invasion, and armed robbery because the murders were a natural and probable consequence of the common purpose to commit robbery.⁸¹⁹

In *People v. Kessler*,⁸²⁰ the defendant and two cohorts embarked on a plan to burglarize an unoccupied tavern.⁸²¹ As the defendant waited outside the tavern in a vehicle, his two unarmed cohorts entered the tavern.⁸²² While inside, the tavern owner arrived,⁸²³ at which point, one of the defendant's cohorts shot the tavern owner with a gun he had found in the tavern during the course of the burglary.⁸²⁴ The defendant's cohorts exited the tavern, entered the defendant's vehicle, and sped off, but the defendant lost control of the vehicle.⁸²⁵ As the defendant's cohorts fled on foot, one of them shot at a pursuing officer, but the

812. *Terry*, 460 N.E.2d at 749–50 (Ill. 1984).

813. *People v. Duncan*, 698 N.E.2d 1078, 1083 (Ill. App. Ct. 1998).

814. 364 N.E.2d 56 (Ill. 1977).

815. *Id.* at 72.

816. *Id.* at 59–60.

817. 535 N.E.2d 413 (Ill. App. Ct. 1988).

818. *Id.* at 422.

819. *Id.*

820. 315 N.E.2d 29 (Ill. 1974).

821. *Id.* at 30.

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.* at 31.

defendant remained seated in the vehicle.⁸²⁶ The Illinois Supreme Court upheld convictions for not only one count of burglary but also two counts of attempted murder.⁸²⁷ Notwithstanding the defendant's claim he had no specific intent to commit attempted murder of either the tavern owner or the officer, the court affirmed his conviction for these offenses in accordance with common design principles.⁸²⁸

6. *Indiana*

Although the Indiana accomplice statute appears to demand a “knowingly or intentionally” basis for accomplice liability,⁸²⁹ the Indiana courts have construed it to follow a Category III “natural and probable consequences” analysis for liability.⁸³⁰ In *Johnson v. State*,⁸³¹ the defendant and the principal formulated a plan to rob the victim, the defendant's father-in-law, which resulted in the principal murdering the victim and the victim's wife while defendant watched and did nothing.⁸³² The defendant argued that his conviction as an accomplice for felony murder was inappropriate because the principal's actions exceeded the scope of the plan to rob the victim.⁸³³ The Indiana

826. *Id.*

827. *Id.* at 33.

828. *Id.* at 31–33.

829. See IND. CODE ANN. § 35-41-2-4 (LexisNexis 2004) (“A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person: (1) Has not been prosecuted for the offense; (2) Has not been convicted of the offense; or (3) Has been acquitted of the offense.”).

830. In *Richardson v. State*, 697 N.E.2d 462 (Ind. 1998), the Indiana Supreme Court held that “[a]n accomplice who acts in concert with another who actually committed the direct acts constituting the elements of the crime is equally as liable as a principal for all natural and probable consequences of the plan.” *Id.* at 465. Here, the defendant and principal beat the victim for not paying for cocaine supplied to him, during which beating the principal dropped a boulder on the victim's head causing the victim's death. *Id.* at 464. Because this was a natural and probable consequence of the attack on the victim, the defendant was liable for murder. *Id.* at 465.

In *Porter v. State*, 743 N.E.2d 1260 (Ind. Ct. App. 2001), the Indiana Court of Appeals employed the same language as the *Richardson* court. *Id.* at 1266 (quoting *Tynes v. State*, 650 N.E.2d 685, 687 (Ind. 1995)). In this case, following an argument with the victim, defendant handed a firearm to the principal, who shot the victim and wounded her, which ultimately was the basis for upholding the defendant's criminal recklessness conviction. *Id.* at 1262, 1266.

Finally, in *Berry v. State*, 819 N.E.2d 443 (Ind. Ct. App. 2004), the Indiana Court of Appeals held that “an accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence of their concerted action.” *Id.* at 450. Here, the defendant drove the principal to and from the location where the principal shot the victim to death and, as such, was an accomplice to murder. *Id.* at 447–48, 451.

831. 687 N.E.2d 345 (Ind. 1997).

832. *Id.* at 346.

833. *Id.* at 348.

Supreme Court disagreed, stating that the principal's commission of a more severe offense than planned does not negate an accomplice's liability if the resulting offense is a probable and natural result of the planned offense.⁸³⁴ The court held that planning to rob a person in his "own home is bound to create a risk that violence may ensue when the homeowner predictably attempts to protect himself and his family."⁸³⁵

7. Louisiana

Louisiana's criminal code provision addressing accomplice liability does not contain any language concerning liability for natural and foreseeable consequences.⁸³⁶ However, a review of the state's case law reveals the use of this doctrine. For example, in *State v. Smith*,⁸³⁷ the defendant and two codefendants set out to burglarize the home of the victim, their former employer.⁸³⁸ Upon the sudden, unexpected arrival of the victim and his wife, the defendant and one codefendant fled the scene; the second codefendant, however, remained to confront the victim.⁸³⁹ The codefendant shot and killed the victim and fled on foot.⁸⁴⁰ At trial, the codefendant-shooter took full responsibility for the death of the victim.⁸⁴¹ Regardless, a jury convicted all three defendants of murder.⁸⁴² The three defendants appealed the conviction, with the defendant and codefendant seeking "to distance themselves from the fatal shots fired by [the codefendant shooter]" by suggesting that they had not "even been aware that their companion was armed."⁸⁴³ In reviewing the trial court's decision, the Supreme Court of Louisiana applied not only felony murder but also accomplice law, stating that "under general principles of accessorial liability, 'all parties [to a crime] are guilty for deviations from the common plan which are the foreseeable consequences of carrying out the plan.'"⁸⁴⁴ In addition to this theory, the court went on to cite an earlier opinion,

834. *Id.* at 349–50 (citing *Tynes*, 650 N.E.2d at 687).

835. *Id.* at 350.

836. See LA. REV. STAT. ANN. § 14:24 (2007) ("All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.").

837. 748 So. 2d 1139 (La. 1999).

838. *Id.* at 1140.

839. *Id.* at 1141.

840. *Id.*

841. *Id.*

842. *Id.* at 1140.

843. *Id.* at 1143.

844. *Id.* (alteration in original) (citation omitted) (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW, § 7.5, at 212 (1986)).

where it held that, when “[a]cting in concert, each man . . . be[comes] responsible not only for his own acts but for the acts of the other.”⁸⁴⁵ Based on its own precedent and accepted accomplice liability theory, the supreme court affirmed the trial court’s decision, reasoning that “[t]he risk that an unauthorized entry of an inhabited dwelling may escalate into violence and death is a *foreseeable consequence* of burglary which every party to the offense must accept no matter what he or she actually intended.”⁸⁴⁶

On at least one occasion, the Louisiana Court of Appeals has shown it is willing to consider its “foreseeable consequences” theory in a case that does not rely on the felony murder rule. In *State v. B.J.D.*,⁸⁴⁷ two defendants and the principal went to a neighbor’s home to visit a classmate.⁸⁴⁸ Although no one was home, the defendants entered into the backyard without permission and began swimming in an aboveground pool.⁸⁴⁹ The principal “later admitted that he cut the pool’s liner with a box cutter.”⁸⁵⁰ The State subsequently charged the defendants with and convicted them of felony criminal damage to property.⁸⁵¹ On appeal, the defendants argued, *inter alia*, that “the evidence was insufficient to support the trial court’s adjudication of delinquency as principals to the [crime].”⁸⁵² The court reasoned that because “the State failed to prove that [d]efendants directly committed the act in this case, the State then had the burden of proving that [d]efendants either aided and abetted [the principal’s actions] or that [d]efendants counseled or procured [the principal’s actions].”⁸⁵³ The court determined that the principal’s “cutting of the pool’s liner was a deviation from the trio’s plan to trespass and swim in the pool.”⁸⁵⁴ Citing the “foreseeable consequences” language from *Smith*, the Louisiana Court of Appeals concluded that “the State did not prove that [d]efendants could have reasonably foreseen [the principal’s] cutting of the pool’s liner.”⁸⁵⁵ On this reasoning, the court overturned the defendant’s conviction.⁸⁵⁶

845. *Id.* (internal quotation marks omitted) (citing *State v. Anderson*, 707 So. 2d 1223, 1224 (La. 1998)).

846. *Id.* (emphasis added) (citing *State v. Cotton*, 341 So. 2d 362, 364 (La. 1976)).

847. 799 So. 2d 563 (La. Ct. App. 2001).

848. *Id.* at 565.

849. *Id.*

850. *Id.*

851. *Id.*

852. *Id.* at 568.

853. *Id.* at 569.

854. *Id.*

855. *Id.* (referring to *State v. Smith*, 748 So. 2d 1139, 1143 (La. 1999)).

856. *Id.*

8. *Maryland*

The Maryland “accessory” statute offers only definitions of parties and the abrogation of common law distinctions.⁸⁵⁷ The Maryland case law, however, appears to follow a Category III analysis.⁸⁵⁸ In *Johnson v. State*,⁸⁵⁹ the Maryland Court of Special Appeals—using a Category III approach—affirmed the defendant’s conviction for robbery with a deadly weapon and assault with intent to murder.⁸⁶⁰ In this case, the defendant and his confederate robbed a drugstore.⁸⁶¹ As they were leaving, the pharmacist turned to head to the rear of the store and was shot in the back and injured.⁸⁶² The pharmacist could not identify his shooter, and neither the defendant nor his confederate admitted to the shooting.⁸⁶³ The trial court convicted the defendant of robbery with a deadly weapon and assault with intent to murder.⁸⁶⁴

On appeal, the Court of Special Appeals of Maryland held that, as a participant in the robbery, the defendant was “responsible for all the natural or probable consequences that flowed from the common purpose to rob the pharmacist.”⁸⁶⁵ The court then explained that the question regarding who may have actually shot the victim did “not affect the legal sufficiency of the evidence to support [the defendant’s] conviction of assault with intent to murder.”⁸⁶⁶

In 1988, Maryland decided to distance itself from the natural and probable consequences nomenclature while still employing an analysis that holds defendant–accomplices responsible for incidental crimes that flow from the intended crime.⁸⁶⁷ In *Sheppard v. State*, the defendant and two confederates

857. See MD. CODE ANN., CRIM. PROC. § 4-204(a)–(b) (LexisNexis 2007) (“[T]he words ‘accessory before the fact’ and ‘principal’ have their judicially determined meanings. . . . Except for a sentencing proceeding under § 2-303 or § 2-304 of the Criminal Law Article [death sentences and life sentences without the possibility of parole, respectively]: (1) the distinction between an accessory before the fact and a principal is abrogated; and (2) an accessory before the fact may be charged, tried, convicted, and sentenced as a principal.”).

858. See, e.g., *Owens v. State*, 867 A.2d 334, 342 (Md. Ct. Spec. App. 2005) (“[W]hen the defendant participates in the main thrust of the criminal design, it is not necessary that he aid and abet in the *consequential crimes* in order for him to be criminally responsible for them.”) (emphasis added).

859. 262 A.2d 325 (Md. Ct. Spec. App. 1970).

860. *Id.* at 327.

861. *Id.*

862. *Id.*

863. *Id.*

864. *Id.*

865. *Id.* at 327 (citation omitted).

866. *Id.*

867. *Sheppard v. State*, 538 A.2d 773, 775 & n.3 (Md. 1988) (“While we disagree that the natural and probable consequence rule predicates liability on a negligence *mens rea*, we do agree

robbed two women in a store.⁸⁶⁸ Though police captured the defendant during the getaway, the police continued to pursue the three confederates, during which one of them shot at the police officers in pursuit.⁸⁶⁹

The Court of Appeals of Maryland upheld the defendant's conviction for assault with intent to murder the police officer even though the defendant was in police custody by the time the principal's crime of shooting at the police occurred.⁸⁷⁰ The court stated:

[A]ccomplice liability[] takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense. . . . In order to establish complicity for other crimes committed during the course of the criminal episode . . . , the State must establish that the charged offense *was done in furtherance of the commission of the principal offense or the escape therefrom*. . . .

. . . [T]he principal offense was the armed robbery of the two women at the liquor store. The aggravated assaults against the police officers, perpetrated during the escape from the commission of the robbery, were secondary or incidental offenses. . . . [C]ontrary to [the defendant's] contention that his responsibility for the aggravated assaults is dependent upon proof that he aided and abetted the commission of those offenses, [the defendant's] complicity rests on the fact that he aided and abetted the armed robbery.⁸⁷¹

Thus, although the Court of Appeals of Maryland has softened its language by inquiring whether the unintended crimes committed by another were "done in furtherance of the commission of the principal offense or escape therefrom," it appears to remain a member of the Category III jurisdictions.

that tort standards of foreseeability have no place in criminal complicity law. Thus, consistent with the rules of complicity in conspiracy law and under the felony murder doctrine, we prefer the language "in furtherance of the commission of the offense and the escape therefrom."'), *abrogated on other grounds* by *State v. Hawkins*, 604 A.2d 489, 501 (Md. 1992).

868. *Id.*

869. *Id.*

870. *Id.*

871. *Id.* at 775 (emphasis added) (citations omitted) (footnote call numbers omitted).

9. Michigan

Like Louisiana, Michigan's criminal code does not contain natural and probable consequences language.⁸⁷² The Michigan Supreme Court, however, has looked to legislative intent to support its application of the

common-law theory that a defendant can be held criminally liable as an accomplice if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an "incidental consequence[]" which might reasonably be expected to result from the intended wrong."⁸⁷³

In *People v. Robinson*, the Supreme Court of Michigan reinstated a second degree murder conviction that the Michigan Court of Appeals had previously reversed.⁸⁷⁴ In this case, the defendant and the principal went to the victim's house under the principal's direction to "f* * * [the victim] up."⁸⁷⁵ The principal knocked on the victim's door and the defendant struck the victim when he answered.⁸⁷⁶ The victim fell to the ground and the defendant hit him again.⁸⁷⁷ When the principal began to kick the victim, the defendant told the principal that "that was enough, and walked back to the car."⁸⁷⁸ The principal then shot and killed the victim.⁸⁷⁹

In reviewing the trial court's decision, the Michigan Court of Appeals had held that "the trial court improperly convicted defendant of second-degree murder because there was no evidence establishing that defendant was aware of or shared [the principal's] intent to kill the victim."⁸⁸⁰ The Supreme Court of Michigan then reversed the court of appeals' decision and held that "a defendant who intends to aid, abet, counsel, or procure the commission of [a] crime, is liable for that crime as well as the natural and probable consequences of that crime."⁸⁸¹ The supreme court cautioned that "[t]here can be no criminal

872. See MICH. COMP. LAWS ANN. § 767.39 (West 2000) ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.").

873. *People v. Robinson*, 715 N.W.2d 44, 49 (Mich. 2006) (alteration in original) (footnote call numbers omitted) (citing PERKINS & BOYCE, *supra* note 30, at 745).

874. *Id.* at 46.

875. *Id.*

876. *Id.*

877. *Id.*

878. *Id.*

879. *Id.*

880. *Id.* at 47.

881. *Id.* at 46.

responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it.”⁸⁸² The court concluded,

The victim’s death is clearly within the common enterprise the defendant aided because a homicide “might be expected to happen if the occasion should arise” within the common enterprise of committing an aggravated assault. . . . [A] “natural and probable consequence” of leaving the enraged [principal] alone with the victim is that [the principal] would ultimately murder the victim.⁸⁸³

10. Nebraska

Although there is no statutory law that speaks to the liability of accomplices with regard to unintended secondary crimes committed by principals,⁸⁸⁴ Nebraska case law supports the proposition that “one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.”⁸⁸⁵ In *State v. Trackwell*, the defendant and the principal, both collection agents, drove to the victim’s home for the purpose of repossessing the victim’s pickup truck.⁸⁸⁶ The defendant dropped the principal off to take the truck while the defendant waited in his car at the end of the victim’s driveway.⁸⁸⁷ As the principal drove the truck away, the victim, believing that her truck was the target of theft, attached herself to the rear of the truck.⁸⁸⁸ The principal continued to drive away and dragged the victim with him.⁸⁸⁹ At the end of the driveway, the victim fell to the ground and suffered lacerations and injuries from being dragged by the truck.⁸⁹⁰ A jury subsequently convicted the defendant of third degree assault

882. *Id.* at 49 (internal quotation marks omitted) (quoting *People v. Knapp*, 26 Mich. 112, 114 (1872)).

883. *Id.* at 50–51 (footnote call numbers omitted).

884. See NEB. REV. STAT. § 28-206 (1995) (“A person who aids, abets, procures or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.”).

885. *State v. Trackwell*, 458 N.W.2d 181, 184 (Neb. 1990) (citing *State v. Ivy*, 350 N.W.2d 622, 627 (Wis. 1984)).

886. *Id.* at 181–82.

887. *Id.* at 182.

888. *Id.*

889. *Id.*

890. *Id.*

after a trial in the county court.⁸⁹¹ The district court affirmed the conviction, and the defendant appealed to the Supreme Court of Nebraska.⁸⁹²

On appeal, the defendant claimed the evidence was insufficient to convict him of third degree assault.⁸⁹³ The Supreme Court of Nebraska noted that the trial court found accomplice liability on a theory that the defendant and the principal “were engaged in a ‘criminal enterprise’” of theft of personal property they knew remained in the truck.⁸⁹⁴ Therefore, according to the trial court, the defendant would “automatically be liable for any subsequent criminal act committed by [the principal].”⁸⁹⁵ Upon review, the Supreme Court of Nebraska looked to accomplice liability common law from other states.⁸⁹⁶ Citing the Alabama opinion of *Hollingsworth v. State*,⁸⁹⁷ the court noted that “an accomplice is criminally responsible for the proximate, natural, and logical consequences of the common criminal undertaking.”⁸⁹⁸ Furthermore, the court, referring to the “natural and probable consequence” language from the Wisconsin opinion of *State v. Ivy*,⁸⁹⁹ held that the defendant’s conviction for third degree assault was erroneous, reasoning that:

It was not a foreseeable consequence, nor was it a natural and probable consequence, that [the victim], whose presence was unknown to [the defendant], would attach herself to the rear of the pickup and allow herself to be dragged the length of the driveway, where she would eventually lose her grip and fall to the ground.⁹⁰⁰

In *State v. Jackson*,⁹⁰¹ an opinion from the Supreme Court of Nebraska, the defendant was waiting for a taxicab with his friend outside of a mini-mart when two individuals walked out of the mini-mart.⁹⁰² After a hostile verbal exchange between the two pairs of men, the two individuals crossed the street and continued to direct hostile remarks toward the defendant and his cohort.⁹⁰³ The defendant’s cohort followed the two men across the street and began fighting

891. *Id.*

892. *Id.*

893. *Id.* at 182.

894. *Id.* at 183.

895. *Id.*

896. *Id.* at 183–84.

897. 366 So. 2d 326 (Ala. Crim. App. 1978); *see supra* notes 724–32 and accompanying text.

898. *Trackwell*, 458 N.W.2d at 184 (quoting *Hollingsworth*, 366 So. 2d at 332).

899. 350 N.W.2d 622, 627 (Wis. 1984); *see supra* note 706 and accompanying text.

900. *Trackwell*, 458 N.W.2d at 184.

901. 601 N.W.2d 741 (1999).

902. *Id.* at 745–46.

903. *Id.*

with one of them, at which point the defendant followed his friend across the street.⁹⁰⁴ According to the defendant, he attempted to break up the fight but was accosted by the second individual.⁹⁰⁵ The defendant later asserted that he fought back in self-defense.⁹⁰⁶ During the confrontation, his cohort killed one of the individuals.⁹⁰⁷ As a result of his involvement in the fight, the defendant was charged with manslaughter on the theory of accomplice liability of one individual and first-degree assault of the other.⁹⁰⁸

At trial, the defendant argued that he could not be held liable for aiding and abetting the manslaughter committed by the principal because the defendant did nothing more than follow his cohort across the street.⁹⁰⁹ The Supreme Court of Nebraska disagreed, stating that the defendant could be held liable for the “natural and probable consequences of the intended criminal act.”⁹¹⁰ Although “mere presence, acquiescence, or silence is not enough” to find one liable under accomplice liability, the court found that, if the defendant, by “some word, act or deed,” evidenced his participation, he could be found liable.⁹¹¹ The court reasoned that a defendant who participates in the “common purpose of assaulting” the victims shall be held liable for any “natural and probable consequences of the intended criminal act.”⁹¹² Accordingly, the court held that a jury could reasonably find that the defendant’s actions evidenced his participation in the criminal conduct and, therefore, the charge of manslaughter under an accomplice theory was proper.⁹¹³

11. North Carolina

North Carolina’s accomplice liability statute makes no reference to a mental state.⁹¹⁴ However, the following cases suggest that North Carolina applies the

904. *Id.*

905. *Id.*

906. *Id.*

907. *Id.* at 747.

908. *Id.*

909. *Id.* at 751.

910. *Id.* at 750. *See also* *People v. Simmons*, No. A-00-1201, 2002 WL 377085 (Neb. Ct. App. Mar. 12, 2002) (holding that the fact that the defendant did not shoot the victim did not preclude his conviction for attempted murder and use of a firearm to commit a felony where the defendant and the principal, both armed with handguns, entered a bank with the intention of robbing it and the principal shot the victim).

911. *Id.*

912. *Jackson*, 601 N.W.2d at 750.

913. *Id.* at 751.

914. *See* N.C. GEN. STAT. § 14-5.2 (2007) (“All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.”).

Category III model. In *State v. Barnes*,⁹¹⁵ the defendant and codefendants had discussed the possibility of robbing someone.⁹¹⁶ The defendant and codefendants went to the home of the two victims.⁹¹⁷ The codefendants shot and killed the victims, and the defendant and his codefendants then robbed the victims' home of jewelry and other valuables.⁹¹⁸ The defendant and codefendants then went to another home where they gave the occupants information about the crime.⁹¹⁹ The occupants shortly thereafter informed the police.⁹²⁰ The police arrested all three perpetrators, and in their subsequent statements to police, each denied having been involved in the murder of the victims.⁹²¹ Physical evidence, including gunshot residue on the persons of all three perpetrators, tied them to the crime.⁹²² The defendant and codefendants were convicted of two counts of first degree murder and counts of armed robbery and burglary.⁹²³

On appeal, the defendant argued, *inter alia*, that the trial court committed prejudicial error in instructing the jury on the "acting in concert" rule with regard to premeditated and deliberate first degree murder.⁹²⁴ The trial court's jury instruction included the following language:

If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the others in pursuance of their common purpose or as a natural or probable consequence of the common purpose.⁹²⁵

The defendant argued that this instruction was contrary to the "acting in concert" rule espoused in the North Carolina Supreme Court's earlier decision of *State v. Blankenship*,⁹²⁶ which held that "the acting in concert doctrine did not encompass a defendant who was at the scene of a murder acting in concert with another with whom he shared a common plan to commit a crime, but who did not have the specific intent to kill the victim."⁹²⁷

915. 481 S.E.2d 44 (N.C. 1997).

916. *Id.* at 52.

917. *See id.*

918. *Id.* at 52–53.

919. *Id.* at 52.

920. *Id.*

921. *Id.* at 53.

922. *Id.*

923. *Id.* at 51.

924. *Id.* at 69.

925. *Id.* at 68.

926. 447 S.E.2d 727 (N.C. 1994), overruled by *Barnes*, 481 S.E.2d at 70.

927. *Barnes*, 481 S.E.2d at 70 (citing *Blankenship*, 447 S.E.2d at 738–39).

However, the North Carolina Supreme Court explicitly overruled *Blankenship* and held that the jury instructions on the “acting in concert” doctrine given in the case at hand were correct.⁹²⁸ In overruling *Blankenship*, the court also noted that they had previously applied the doctrine, quoting language from their 1837 opinion of *State v. Haney*,⁹²⁹ which held “where a privity and community of design has been established, the act of any one of those who have combined together for the same illegal purpose, done in furtherance of the unlawful design, is, in the consideration of law, the act of all.”⁹³⁰ The court concluded that, the North Carolina “acting in concert” rule should be understood as follows:

[I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that *particular* crime, but he is also guilty of any other crime committed by the other in *pursuance of the common purpose* . . . or as a *natural or probable consequence thereof*.⁹³¹

In *State v. Littlejohn*,⁹³² a North Carolina Court of Appeals opinion, the victim met the defendant, the principal, and a third individual and drove to a house in order to purchase false identification for use in the purchase of alcohol.⁹³³ While standing near their vehicle outside the house, the principal “cut [the victim’s] throat . . . and ran away . . . with [the victim’s] money. [The victim] opened the . . . door [of the vehicle] and screamed for help,” but the defendant told the victim to exit the vehicle.⁹³⁴ The defendant and the third individual then drove off.⁹³⁵ A jury subsequently convicted the defendant of armed “robbery . . . and assault with a deadly weapon with intent to kill [while] inflicting serious injury.”⁹³⁶

On appeal the defendant argued, *inter alia*, that the evidence adduced at trial was insufficient for his conviction for “assault with a deadly weapon with intent to kill inflicting serious injury.”⁹³⁷ The trial court gave an “acting in concert” instruction as follows:

928. *Id.*

929. 19 N.C. 373 (3 & 4 Dev. & Bat.) (N.C. 1837).

930. *Barnes*, 481 S.E.2d at 71 (quoting *Haney*, 19 N.C. at 378).

931. *Id.* (alteration in original) (emphasis added) (internal quotation marks omitted) (quoting *State v. Erlewine*, 403 S.E.2d 280, 286 (N.C. 1991)).

932. No. COA05-802, 2006 WL 539393 (N.C. Ct. App. Mar. 7, 2006).

933. *Id.* at *1.

934. *Id.*

935. *Id.*

936. *Id.* at *2.

937. *Id.*

If two or more persons join in a common purpose to commit a robbery with a dangerous weapon, each of them, if actually or constructively present, is not only guilty of that crime, if the other person committed a crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon; or the natural or probable consequence thereof.⁹³⁸

The court found that the trial court's jury instruction was consistent with the North Carolina Supreme Court's prior decision in *State v. Westbrook*,⁹³⁹ which had held,

[I]f two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbery, both would be equally guilty within the meaning of the law and if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits the crime, but *he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof.*⁹⁴⁰

The court also looked to its previous decision in *State v. Joyner*,⁹⁴¹ where the court stated that under "the concerted action" principle

[i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime . . . so long as [the defendant] is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.⁹⁴²

The *Littlejohn* court concluded that there was no error.⁹⁴³ It noted that the evidence at trial showed that the "defendant was both physically present . . . and acted together with [the codefendants] to accomplish the common plan of

938. *Id.* at *4.

939. 181 S.E.2d 572 (N.C. 1971), *vacated on other grounds*, *Westbrook v. North Carolina*, 408 U.S. 939, 939 (1972).

940. *Littlejohn*, 2006 WL 539393, at *4 (quoting *Westbrook*, 181 S.E.2d at 586).

941. 255 S.E.2d 390 (N.C. 1979).

942. *Littlejohn*, 2006 WL 539393, at *5 (emphasis omitted) (quoting *Joyner*, 255 S.E.2d at 395).

943. *Id.* at *7.

robbery.”⁹⁴⁴ The court concluded that defendant’s conviction on the secondary crime of assault with a deadly weapon with intent to kill inflicting serious injury was proper because the assault grew out of the concerted action of committing robbery.⁹⁴⁵

12. *South Carolina*

The South Carolina accomplice liability statute makes no mention of a mental state for its accomplice law.⁹⁴⁶ However, South Carolina case law states that where multiple actors commit an unlawful act and one of the actors commits a homicide, all of the actors are guilty of the homicide so long as it was a “probable or natural consequence of the acts done in pursuance of the common design.”⁹⁴⁷ An illustration of this reasoning appears in *State v. Dickman*, where a murder victim’s body was found and linked to the defendant and his confederate, but each claimed that the other had shot the victim.⁹⁴⁸ The trial judge’s instructions were that “the hand of one is the hand of all,” which the South Carolina Supreme Court felt was consistent with the principle that if a homicide is committed as the natural and probable consequence of acts done in pursuance of a common design, all involved are as guilty as the one who committed the homicide.⁹⁴⁹ Although the defendant himself apparently did not have the “nerve” to shoot the victim, the South Carolina Supreme Court affirmed the conviction, stating that the evidence showed that the defendant and the principal were acting according to a plan to murder the victim.⁹⁵⁰

*State v. Curry*⁹⁵¹ involved a drug deal gone awry, where one of the buyers was shot and died, and there was doubt about which codefendant shot him.⁹⁵² In appealing his murder conviction to the Court of Appeals of South Carolina, the defendant argued that the trial court’s instruction based on the “hand of one is the hand of all” theory was in error.⁹⁵³ Verbatim, the trial court’s instructions were:

944. *Id.* at *5.

945. *Id.* at *6.

946. See S.C. CODE ANN. § 16-1-40 (2003) (“A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.”).

947. *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (S.C. 2000) (citing *State v. Crowe*, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (S.C. 1972)).

948. *Id.* at 294, 534 S.E.2d at 268.

949. *Id.* at 295, 534 S.E.2d at 269.

950. *Id.*

951. 370 S.C. 674, 636 S.E.2d 649 (S.C. Ct. App. 2006).

952. *Id.* at 678, 636 S.E.2d at 650–51.

953. *Id.* at 682, 636 S.E.2d at 653.

It is my duty to charge you now that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. If a person joins with another to accomplish an illegal purpose, he is criminally responsible for everything done by the other person which occurs as a *natural consequence* of the acts done in carrying out the common plan and purpose.⁹⁵⁴

The defendant claimed the instruction was deficient because it did not include “*natural and probable consequence*” language.⁹⁵⁵ In finding the instructions adequate, the court quoted two earlier South Carolina Supreme Court decisions.⁹⁵⁶ The first decision stated: “[O]ne who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.”⁹⁵⁷ The second opinion held “if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both.”⁹⁵⁸ Thus, in the case at hand, the thrust of the jury instruction correctly conveyed South Carolina law regarding the “hand of one is the hand of all” rule.⁹⁵⁹

13. Tennessee

While the Tennessee statute addressing “conduct of another” makes no mention of the natural and probable consequences rule,⁹⁶⁰ it is reflected in the *Tennessee Pattern Jury Instructions—Criminal*⁹⁶¹ and Tennessee case law.⁹⁶² In

954. *Id.* at 683, 636 S.E.2d at 654 (emphasis added).

955. *Id.*

956. *Id.* (citing *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999); *State v. Kelsey*, 331 S.C. 50, 76–77, 502 S.E.2d 63, 76 (1998)).

957. *Id.* (quoting *Langley*, 343 S.C. at 648, 515 S.E.2d at 101).

958. *Id.* (quoting *Kelsey*, 331 S.C. at 76–77, 502 S.E.2d at 76).

959. *Id.*

960. See TENN. CODE ANN. § 39-11-402(2)–(3) (2006) (“A person is criminally responsible for an offense committed by the conduct of another, if: . . . (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.”).

961. TENN. PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.01 (“A defendant who is criminally responsible for an offense may be found guilty not only of that offense, but also for any other offense or offenses committed by another, if you find beyond a reasonable doubt that the other offense or offenses committed were natural and probable consequences of the original offense for which the defendant is found criminally responsible, and that the elements of the other

State v. Howard,⁹⁶³ the Supreme Court of Tennessee reversed and remanded the case for the trial court's failure to instruct the jury of the natural and probable consequences rule.⁹⁶⁴ In this case, the defendant and three individuals developed a scheme to rob a restaurant.⁹⁶⁵ The men entered the restaurant through the back door, instructed the restaurant employees to lie down on the ground, and entered the manager's office and demanded money.⁹⁶⁶ Although the manager "complied and gave the men the money they demanded, one man ordered, 'Shoot his ass. Shoot the mother----r.'"⁹⁶⁷ He was then shot and killed.⁹⁶⁸ Another employee was also shot and wounded during the robbery.⁹⁶⁹

The State charged the defendant with various offenses including murder, especially aggravated robbery, and conspiracy to commit aggravated robbery.⁹⁷⁰ At trial,

the court admitted into evidence a signed statement wherein [the defendant] admitted that he had accompanied [the codefendants] to the restaurant knowing that they intended to rob it. In his statement he admitted that all three of the other men had guns, but he neither admitted nor denied that he carried a gun himself. [The defendant] claimed that when [the codefendants] went into the restaurant he stayed "all the way in the back." Once he heard gunshots, he ran to the car. [The codefendants] followed him to the car and one stated, "I shot him, man, I shot him."⁹⁷¹

At trial, the prosecution did not present any evidence that the defendant shot either victim.⁹⁷² The court instructed the jury that the defendant would be "criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense," he

offense or offenses that accompanied the original offense have been proven beyond a reasonable doubt.").

962. See, e.g., *State v. Winters*, 137 S.W.3d 641, 657 (Tenn. Crim. App. 2003) ("A defendant is criminally responsible not only for the intended, or target crime, but also for those collateral crimes committed by a co-participant in the criminal episode that are the natural and probable consequence of the target crime.").

963. 30 S.W.3d 271 (Tenn. 2000).

964. *Id.* at 277–78.

965. *Id.* at 273.

966. *Id.* at 273–74.

967. *Id.* at 274.

968. *Id.*

969. *Id.*

970. *Id.*

971. *Id.*

972. *Id.*

aided or attempted to aid another person to commit the offense; it made no mention of the natural and probable consequences rule.⁹⁷³ Moreover, it explicitly instructed the jury it could not find the defendant guilty under the felony murder rule if it convicted him of premeditated murder.⁹⁷⁴ The jury “convicted [the defendant] of premeditated murder, especially aggravated robbery, and conspiracy to commit aggravated robbery.”⁹⁷⁵

On appeal, the defendant contended that there was not sufficient evidence to establish deliberation or premeditation.⁹⁷⁶ The Tennessee Court of Criminal Appeals “recognized that because the State had offered no proof that [the defendant] fired the shots that killed the victim, [the defendant’s] conviction” was therefore “based upon his criminal responsibility for the conduct of the shooter.”⁹⁷⁷ The court concluded that the defendant was criminally responsible based on the natural and probable consequences rule and affirmed his convictions even though the trial court had not instructed the jury on the rule.⁹⁷⁸

The defendant appealed the Tennessee Court of Criminal Appeals’ decision on three grounds:

- (1) the rule should not apply to an offense requiring an intentional mental state; (2) the rule as applied to homicides is already codified in the felony-murder statute; and (3) there is no factual basis for a finding that premeditated murder is the natural and probable consequence of aggravated robbery.⁹⁷⁹

The Supreme Court of Tennessee concluded that the trial court erred by not instructing the jury on the natural and probable consequences rule.⁹⁸⁰ In reversing and remanding for a new trial, the supreme court explained:

[T]he natural and probable consequences rule survived the codification of the common law into the criminal responsibility statutes even though it is not explicitly included in the statutes. The rule underlies the doctrine of criminal responsibility and is based on the recognition that aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put into motion. The doctrine extends the scope of criminal liability to the target crime intended by a

973. *Id.* at 275.

974. *Id.* at 274.

975. *Id.* at 275.

976. *Id.*

977. *Id.*

978. *Id.*

979. *Id.*

980. *Id.* at 277.

defendant as well as to other crimes committed by a confederate that were the natural and probable consequences of the commission of the original crime. . . .

. . . .

. . . [T]o impose criminal liability based on the natural and probable consequences rule, the State must prove beyond a reasonable doubt and the jury must find the following: (1) the elements of the crime or crimes that accompanied the target crime; (2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were natural and probable consequences of the target crime.⁹⁸¹

The Supreme Court of Tennessee determined the instruction on natural and probable consequences to be an “essential element that the State must prove beyond a reasonable doubt.”⁹⁸² Though the court reversed for failure to provide this instruction, it was quick to explain that, unlike reversal for insufficiency of evidence, the reversal for procedural error permitted the State to retry the defendant for the same charges.⁹⁸³

14. Virginia

Virginia has no statute referring to a mental state for accomplices.⁹⁸⁴ Its case law and the *Virginia Model Jury Instructions—Criminal* have a “concert of action” instruction which provides that

[i]f there is concert of action with the resulting crime one of its *incidental probable consequences*, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.⁹⁸⁵

981. *Id.* at 276 (citing *State v. Carson*, 950 S.W.2d 951, 954–55 (Tenn. 1997)).

982. *Id.* at 277.

983. *Id.*

984. See VA. CODE ANN. § 18.2-18 (2004) (“In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree . . .”).

985. 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.160 (2008) (emphasis added).

In *Spradlin v. Commonwealth*,⁹⁸⁶ the defendant and codefendant both appealed convictions of two counts of assault and battery, but the Virginia Court of Appeals affirmed.⁹⁸⁷ In this case, the victim testified that “while he and [the second victim] were sitting in a booth at [a restaurant] . . . the defendant[] . . . came to the booth and asked [the victim] why he had cursed him.”⁹⁸⁸ When the victim, who did not know and had never seen the defendant, replied that he did not do so, the defendant struck him.⁹⁸⁹ A fight broke out in which a group of men, including the defendant and codefendant, joined in pushing and shoving the victims outside into a parking lot.⁹⁹⁰ One victim later testified that the defendant and another continued to beat him in the parking lot, while three other men beat the second victim.⁹⁹¹

The defendant contended that he could not be liable for the crimes involving the second victim, and the codefendant contended he could not be liable for the crimes involving either victim.⁹⁹² Each defendant argued that conviction of the crimes charged in the indictments must be supported by evidence of actual violence inflicted by each defendant.⁹⁹³ Holding both defendants responsible, the Virginia Supreme Court stated:

Every person who is present lending countenance, aiding or abetting another in the commission of an offense is liable to the same punishment as if he had actually committed the offense. . . .

. . . .

If there is concert of action with the resulting crime one of its *incidental probable consequences*, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime. The question of whether the offense is the natural and probable result of the intended wrongful act is usually for the jury.⁹⁹⁴

After addressing the fact that the defendant started the fight and that defendant and codefendant were involved in its progression to the parking lot, the court explained that the defendant and codefendant were “present and

986. 79 S.E.2d 443 (Va. 1954).

987. *Id.* at 446.

988. *Id.* at 444.

989. *Id.*

990. *Id.*

991. *Id.*

992. *Id.*

993. *Id.* at 444–45.

994. *Id.* at 445 (emphasis added) (citations omitted).

associated in this concerted action and participated in bringing it about.”⁹⁹⁵ Affirming the convictions, the court concluded that the defendant and codefendant aided and abetted the commission of each of the crimes charged and that “it [was] immaterial whether they actually inflicted the specific injuries received by [the victims].”⁹⁹⁶

In *Rollston v. Commonwealth*,⁹⁹⁷ the victim and a friend had provided information to the police concerning the defendant and his associate’s involvement in a series of burglaries.⁹⁹⁸ While detectives were building the case, the victim and his friend’s brother were shot and killed in the victim’s home.⁹⁹⁹ Later, the defendant’s former girlfriend implicated the defendant as having information about these murders, namely, that when she went for a ride with the defendant, he had told her that two associates

had done something he could not believe; that on the previous evening he had taken them to [the victim’s] house and dropped them off; and that when he picked them up they told him they had “offed” two guys. [The defendant] went on to tell her he had returned to the house earlier that morning because he did not believe them; that he had seen that the two guys were, in fact, murdered; . . . that he was not part of any plan to commit the murders; and that he had heard [the codefendants] saying they would like to kill [the victims] prior to dropping them off, but he thought they were just kidding.¹⁰⁰⁰

While riding in the car, according to the former girlfriend, the defendant retrieved a knife and a gun from a ditch, claimed the gun was the murder weapon, and then discarded the gun and knife by throwing them off a bridge.¹⁰⁰¹

The Virginia trial court found the defendant guilty of two counts of first degree murder and two counts of use of a firearm in those murders, and the defendant appealed.¹⁰⁰² On appeal, the defendant first challenged the trial court’s use of an instruction on the liability of the principal in the second degree.¹⁰⁰³ It read:

995. *Id.* at 446.

996. *Id.*

997. 399 S.E.2d 823 (Va. Ct. App. 1991).

998. *Id.* at 824.

999. *Id.* at 825.

1000. *Id.* at 829.

1001. *Id.*

1002. *Id.* at 824.

1003. *Id.*

A principal in the first degree is the person who actually commits the crime. A principal in the second degree is a person who is present, *sharing the criminal intent of the perpetrator or* aiding and abetting, by helping in some way in the commission of the crime. Presence or consent alone is not sufficient to constitute aiding and abetting. It must be shown that the defendant intended his words, gestures, signals or actions to in some way encourage, advise, or urge, or in some way help the person committing the crime to commit it.¹⁰⁰⁴

However, the defendant contended that to be convicted the law required the State to prove that he shared the “specific intent to murder.”¹⁰⁰⁵

The Virginia Court of Appeals disagreed with the defendant, however, and stated that “[s]pecific intent is not required to convict the defendant” of first degree murder “as a principal in the second degree.”¹⁰⁰⁶ Instead, the court explained, to “share the criminal intent” meant that “the accused must either know or have reason to know of the principal’s criminal intention and must intend to encourage, incite, or aid the principal’s commission of the crime.”¹⁰⁰⁷

The defendant also challenged the trial court’s use of the Virginia model jury instruction on “concert of action,” which was the basis of his liability on the firearms charge.¹⁰⁰⁸ Again, however, the Virginia Court of Appeals disagreed with the defendant:

While a concert of action instruction may be proper in a felony murder case, it may also be proper to use when any unlawful enterprise is intended. The intended wrongful act could be any crime and need not be a felony. The only qualification is that the resulting crime be an *incidental, probable consequence* of the original enterprise, plan or purpose. Under the [State’s] theory, [the defendant and codefendants] planned the murders of [the victims]. This was the wrongful concerted action and [the defendant] was vicariously responsible under this principle for the firearm offenses. Even if he did not know that a firearm would be the murder weapon, he would be vicariously culpable

1004. *Id.* at 825 (quoting 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.100 (1989)).

1005. *Id.* at 825.

1006. *Id.* at 826.

1007. *Id.* (quoting *McGhee v. Commonwealth*, 270 S.E.2d 729, 732 (Va. 1980); *Cirios v. Commonwealth*, 373 S.E.2d 164, 167 (Va. 1988)).

1008. *Id.* at 827 (quoting 1 VA. MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 3.160 (1989)).

for the firearm offenses because they were “incidental probable consequences” of the murders.¹⁰⁰⁹

Finally, the defendant contended in his appeal that the evidence was insufficient to sustain the murder and firearm convictions.¹⁰¹⁰ The Virginia Court of Appeals disagreed again, concluding that while there was “no direct evidence that the defendant was present at the scene” or actively participating in the murder, the circumstantial evidence pointed to his guilt as an aider and abettor of the offense.¹⁰¹¹ The court further stated that the evidence allowed for a reasonable inference that, while the murder was in progress, the defendant was serving as a “lookout” and consequently acted as the driver of the “getaway” car.¹⁰¹² The court then held that the defendant was properly convicted as a principal in the second degree.¹⁰¹³

VI. STATES WITH AMBIGUOUS, NOVEL, OR UNIQUE APPROACHES TO ACCOMPLICE LIABILITY

Courts in several states reveal unclear, uneven, or unusual approaches to accomplice liability. In some of these states a discrepancy or ambiguity in reasoning surfaces that is not present in more easily categorized jurisdictions. In turn, it becomes difficult to reconcile these states with the three approaches outlined in this article.

However, within these states that appear to follow a novel, inconsistent, or even an unidentifiable approach to accomplice liability, some patterns emerge. These jurisdictions can be broken down into several subcategories: (1) states with unresolved issues due to (a) insufficient case law or (b) divergent case law; and (2) states with nonuniform rules.

A. *Unresolved Issues*

1. *Insufficient Case Law*

States with very limited numbers of cases relating to accomplice liability often display some ambiguity; yet one or more of the three approaches appears to influence many of these states, which include Alaska, Montana, North Dakota, and South Dakota.

1009. *Id.* at 828 (emphasis added).

1010. *Id.*

1011. *Id.* at 830 (citing *Grant v. Commonwealth*, 217 S.E.2d 806, 808 (Va. 1975)).

1012. *Id.* at 831.

1013. *Id.*

a. Alaska

Alaska has insufficient case law to determine which approach prevails. In a case that predates the current Alaska accomplice liability statute, *Tarnef v. State*,¹⁰¹⁴ the Alaska Supreme Court stated, “It is well established at common law and in Alaska that a person cannot be convicted of ‘aiding and abetting’ a crime unless it is shown that he had the specific criminal intent to bring about the illegal end.”¹⁰¹⁵ Later, the Alaska legislature revised its complicity statute consistent with Model Penal Code section 2.06(3), which follows the Category I model.¹⁰¹⁶ Moreover, the legislature did not include subsection (4) of section 2.06, which follows the Category II model.¹⁰¹⁷

In *Echols v. State*,¹⁰¹⁸ the Alaska Court of Appeals considered a case where a wife was charged with being an accomplice to a first degree assault committed by her husband.¹⁰¹⁹ The state’s evidence revealed that the defendant–wife asked her husband to discipline their child and then stood by and watched her husband inflict serious injury on their child by whipping the child with an electric cord.¹⁰²⁰ Looking to the revised Alaska legislation, the *Echols* court ruled that the wife’s accomplice liability could not be premised on recklessness because intent to commit the crime was an element of the substantive offense.¹⁰²¹ Rather, the court held that the wife could only be accountable for first degree assault if the State could establish that she *intended* the child suffer physical injury through the use of a weapon.¹⁰²² In other words, because the Alaska statute contained only the “purpose of promoting or facilitating the commission of the offense” language found in section 2.06(3) of the Model Penal Code, the court felt compelled to follow the Category I approach.¹⁰²³

1014. 512 P.2d 923 (Alaska 1973).

1015. *Id.* at 928.

1016. *See* ALASKA STAT. § 11.16.110 (2006) (“A person is legally accountable for the conduct of another constituting an offense if (1) the person is made legally accountable by a provision of law defining the offense; (2) with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense; or (3) acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct.”).

1017. *See id.*

1018. 818 P.2d 691 (Alaska Ct. App. 1991), *overruled by* *Riley v. State*, 60 P.3d 204 (Alaska Ct. App. 2002).

1019. *Id.* at 691.

1020. *Id.* at 692.

1021. *Id.* at 695.

1022. *Id.*

1023. *Id.*

In *Riley v. State*¹⁰²⁴ the Alaska Court of Appeals rejected its previous approach requiring the accomplice to have a mental state of criminal purpose to achieve a particular criminal result.¹⁰²⁵ In *Riley*, the defendant and another individual opened fire on an unsuspecting crowd but there was no evidence to show who fired the shots that ultimately wounded the victims.¹⁰²⁶ A jury convicted the defendant of, among other crimes, first degree assault, which required proof that he recklessly caused serious physical injury with a dangerous instrument.¹⁰²⁷ The defendant claimed on appeal that the State needed to prove he intended to inflict injuries on the victims.¹⁰²⁸ The appellate court disagreed and held that the law requires the *same culpable mental state* of all participants whether they act as principals or accomplices.¹⁰²⁹ The *Riley* court held, contrary to the holding in *Echols*, that the law did not require intent to inflict injury.¹⁰³⁰ In a less than convincing argument, the court concluded that the Alaska legislature omitted language following section 2.06(4) of the Model Penal Code “because they considered it superfluous.”¹⁰³¹ Even though the Alaska law contains no provision like section 2.06(4), the *Riley* court cited subsection (4) and its commentary to support the accomplice’s conviction for crimes requiring recklessness on the part of the actual perpetrator.¹⁰³² In other words, even though the plain reading of the Alaska statute follows the Category I approach, the *Riley* court applied the Category II model to justify its result.

If one considers this apparent flip-flop on the part of the Alaska Court of Appeals and the absence of any statement about the mental state requirement for accomplice liability from the Alaska Supreme Court since the Alaska legislature’s revisions to the statute, Alaska’s approach cannot be neatly categorized. Thus, like Montana, Alaska’s mental state requirement for accomplice liability is not entirely apparent.

b. Montana

Montana is perhaps the best example of this subcategory. The Montana courts have only looked at accomplice liability in a handful of narrow settings.

1024. 60 P.3d 204 (Alaska Ct. App. 2002).

1025. *Id.* at 206–07.

1026. *Id.* at 205–06.

1027. *Id.* at 205.

1028. *Id.* at 206–07.

1029. *See id.* at 221.

1030. *Id.*

1031. *Id.* at 220.

1032. *Id.*

Although Montana's statute reflects both Category I and Category II language,¹⁰³³ its case law is less clear.

In *State v. Powers*,¹⁰³⁴ the trial court had convicted four defendants of deliberate homicide in the death of a five-year-old child.¹⁰³⁵ The defendants were members of a church that believed in severe physical discipline of children.¹⁰³⁶ The State relied upon accountability principles in finding criminal responsibility on the part of each of the defendants, including the mother of the victim who stood by while her defendant-husband repeatedly beat their child with a belt.¹⁰³⁷ Specifically, the State claimed "they need not prove a specific intent to kill . . . , reasoning that the defendants engaged in a common design or course of conduct to accomplish an unlawful purpose"—child abuse or assault.¹⁰³⁸ The State further contended that the Montana accountability law was patterned after the Illinois accountability statute and its interpretations, which "indicate that where codefendants undertake a course of conduct or common design which results in a person's death, all can be held criminally responsible."¹⁰³⁹ The Montana Supreme Court agreed with the State and followed the Illinois common design theory of accomplice liability.¹⁰⁴⁰ Illinois's theory follows the Category III model.¹⁰⁴¹ Here, the court found that the respective defendants' adherence to a church's policy of imposing severe discipline, which led to the child's death, was sufficient to show a common design between the church members.¹⁰⁴² As to the victim's mother, she "aided and abetted the other defendants in causing the victim's death by her failure or refusal to perform her duties as a parent, terminate the beatings and discipline, and provide the victim with needed medical care and attention."¹⁰⁴³ Obviously, the *Powers* court relied on a Category III analysis in their resolution of this case.

1033. See MONT. CODE ANN. § 45-2-302 (2007) ("A person is legally accountable for the conduct of another when: (1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; (2) the statute defining the offense makes him so accountable; or (3) either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense.").

1034. 645 P.2d 1357 (Mont. 1982).

1035. *Id.* at 1359.

1036. *Id.* at 1362.

1037. *Id.*

1038. *Id.* at 1362.

1039. *Id.* (citing *People v. Johnson*, 221 N.E.2d 662, 663 (Ill. 1966); *People v. Richardson*, 207 N.E.2d 478, 481 (Ill. 1965); *People v. Spagnola*, 260 N.E.2d 20, 27 (Ill. App. Ct. 1970)).

1040. *Id.*

1041. See *supra* notes 806–28 and accompanying text.

1042. See *id.*

1043. *Id.*

However, in *State ex rel. Keyes v. Montana Thirteenth Judicial District Court*,¹⁰⁴⁴ the Montana Supreme Court avoided the common design theory while stating that it was faced with a case of first impression.¹⁰⁴⁵ In this case, the defendant and the first victim exchanged gunfire from their respective vehicles in a parking lot.¹⁰⁴⁶ The second victim killed in the shootout was a passenger in the vehicle driven by the first victim.¹⁰⁴⁷ The State did not have conclusive evidence that the bullet from the defendant's gun killed the second victim.¹⁰⁴⁸ The court charged the defendant with, among other things, "deliberate homicide by accountability."¹⁰⁴⁹ In concluding that this charge was not an offense under Montana law, the court did not state clearly what mental state the law requires for accomplice liability.¹⁰⁵⁰ The court did, however, state that "Montana's accountability statute does not extend criminal liability to unintended, yet reasonably foreseeable deaths, such as the death of [the victim], that result as a consequence of committing the agreed upon offense. In other words, Montana's accountability statute does not provide for transferred intent."¹⁰⁵¹ Thus, it appears *Keyes* rejects the Category III approach. After reviewing the few Montana decisions on the subject, the actual mental state requirement in Montana is unclear due to a lack of definitive case law.

c. North Dakota

The North Dakota statute contains both Category I and Category II language.¹⁰⁵² As to case law, one North Dakota case involving a novel evidentiary issue clearly reflects North Dakota's adherence to the specific intent requirement for accomplice liability. In *State v. Deery*,¹⁰⁵³ a jury convicted the principal of driving with a suspended license primarily on the testimony of the

1044. 955 P.2d 639 (Mont. 1998).

1045. *See id.* at 640.

1046. *Id.* at 639.

1047. *Id.*

1048. *Id.*

1049. *Id.* at 642.

1050. *See id.* at 642-43.

1051. *Id.* at 640.

1052. N.D. CENT. CODE § 12.1-03-01(1) (1997) ("A person may be convicted of an offense based upon the conduct of another person when: . . . [a]cting with the kind of culpability required for the offense, he causes the other to engage in such conduct; . . . [w]ith intent that an offense be committed, he commands, induces, procures, or aids the other to commit it, or, having a statutory duty to prevent its commission, he fails to make proper effort to do so; or . . . [h]e is a coconspirator and his association with the offense meets the requirements of either of the other subdivisions of this subsection.").

1053. 489 N.W.2d 887 (N.D. Ct. App. 1992).

witness who had loaned him the vehicle he was driving when arrested.¹⁰⁵⁴ On appeal, the issue was whether the witness was an accomplice whose testimony the State needed to corroborate.¹⁰⁵⁵ The Court of Appeals of North Dakota concluded that the record did not establish that the witness allowed the principal to drive the vehicle with the “intent” that the principal commit the offense of driving while his license was under suspension.¹⁰⁵⁶ Accordingly, the court held that the witness was not an accomplice and, as such, the witness’s testimony did not have to be corroborated.¹⁰⁵⁷ Consequently, the court upheld the principal’s conviction.¹⁰⁵⁸

By contrast, in an earlier North Dakota Supreme Court opinion, *State v. Pronovost*,¹⁰⁵⁹ a jury convicted the defendant of aiding the principal in delivering cocaine to an undercover agent in a vehicle driven by the defendant to and from the location where the delivery was to occur.¹⁰⁶⁰ In upholding the defendant’s conviction as an accomplice to delivering a controlled substance, the court held that a court could predicate a finding of accomplice liability on the fact that a defendant was “acting with the kind of culpability required for the offense and sharing the criminal intent of the principal.”¹⁰⁶¹

In examining North Dakota case law, it is evident that decisions on the issue this Article examines are rare. Further, while *Deery* follows a Category I approach, *Pronovost* appears to rely on Category II thinking. Like an uncertain election projection, this state is “too close to call” and, as such, is not categorized.

d. *South Dakota*

South Dakota has an accountability statute that follows a Category I model.¹⁰⁶² However, case law construing the statute is sparse and somewhat conflicting. In *State v. Tofani*,¹⁰⁶³ the defendant, the victim (the defendant’s fiancée), and a male companion traveled from Florida to South Dakota and rented a motel room.¹⁰⁶⁴ Defendant and his companion left the victim at the

1054. *Id.* at 887–88.

1055. *Id.*

1056. *Id.* at 889.

1057. *Id.*

1058. *Id.*

1059. 345 N.W.2d 851 (N.D. 1984).

1060. *Id.* at 852.

1061. *Id.* at 853 (citing *Zander v. S.J.K.*, 256 N.W.2d 713, 715 (N.D. 1977)).

1062. *See* S.D. CODIFIED LAWS § 22-3-3 (2006) (“Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime.”).

1063. 719 N.W.2d 391 (S.D. 2006).

1064. *Id.* at 393.

motel and encountered the principal, whom they did not know, at a local casino.¹⁰⁶⁵ The defendant's companion observed the principal winning a large sum of money at a casino game; the companion approached the principal and engaged him in conversation.¹⁰⁶⁶ During this conversation, the defendant described his dissatisfaction with the victim and that he wanted to get away from the victim.¹⁰⁶⁷ During the course of the conversation, the terms "beaten" and "raped" were used to describe the appropriate way of treating the victim.¹⁰⁶⁸ The defendant's companion subsequently urged the defendant to go to Sioux Falls, and the principal agreed to drive them.¹⁰⁶⁹ The three men traveled to Sioux Falls, whereupon the principal left the defendant and his companion at a truck stop.¹⁰⁷⁰ The principal then returned to the motel and picked up the victim.¹⁰⁷¹ Later, on a country road, the principal pulled the victim from the car, forced her to perform oral sex, and "struck her without provocation."¹⁰⁷² The principal then choked the victim until she feigned unconsciousness.¹⁰⁷³ After an argument and a brief struggle, the principal eventually agreed to drive the victim to a location closer to her motel.¹⁰⁷⁴ When the principal stopped the vehicle to "relieve himself," the victim escaped to a nearby farmhouse and called the police.¹⁰⁷⁵ Meanwhile, the defendant and his companion had hitchhiked back to the motel.¹⁰⁷⁶ The victim subsequently called the defendant from the hospital and claimed that she had been raped.¹⁰⁷⁷

The State charged the defendant with kidnapping, rape, attempted aggravated assault, and aggravated assault, all as an accessory before the fact.¹⁰⁷⁸ At a bench trial, the defendant "was found guilty . . . of aiding and abetting [the principal] in the rape and aggravated assault of [the victim]."¹⁰⁷⁹ The defendant appealed the verdict claiming, among other things, that the trial court had relied upon insufficient evidence that he aided and abetted the principal in the crimes against the victim.¹⁰⁸⁰ The defendant asserted that (1) the

1065. *Id.* at 393–94.

1066. *Id.* at 394.

1067. *Id.*

1068. *See id.* at 394, 403–04.

1069. *Id.* at 359.

1070. *Id.*

1071. *Id.*

1072. *Id.*

1073. *Id.*

1074. *Id.* at 395–96.

1075. *Id.* at 396.

1076. *Id.*

1077. *Id.*

1078. *Id.* at 397.

1079. *Id.*

1080. *See id.* at 397–98.

evidence was insufficient to show a common design or purpose, and (2) the principal's testimony indicated that he had acted alone and failed to show any shared intent on the part of the defendant and his companion.¹⁰⁸¹

The Supreme Court of South Dakota affirmed the trial court's conviction of the defendant.¹⁰⁸² The court pointed out that while the accomplice law requires "the intent to promote or facilitate" the crime, the evidence must show that [the defendant] "knowingly did something to assist" in its commission."¹⁰⁸³ Here, because the evidence established that the defendant (1) informed the principal that the victim was "alone and vulnerable"; (2) advised the principal of his desire to be rid of the victim and stated the victim was a "crack whore," who was "available for easy sex, someone to be 'roughed up and sent out of town'"; and (3) showed the principal where the victim was staying and gave the principal the victim's room key, the court concluded that the direct and circumstantial evidence supported the trial court's verdict finding that the defendant "knowingly assisted" the principal in the commission of the crimes.¹⁰⁸⁴

Other opinions in South Dakota, like *Tofani*, follow the reasoning that though the state accountability law on its face requires "intent to promote or facilitate,"¹⁰⁸⁵ in actuality the State need not establish "specific intent" to promote or facilitate; rather, the State must show the defendant "knowingly acted."¹⁰⁸⁶ On the other hand, at least one other decision by the Supreme Court of South Dakota reflects a tone more akin to Category III. *State v. Shearer*¹⁰⁸⁷ held that where a defendant-accomplice who knew the principal wanted to purchase marijuana introduced the principal to a drug source, and where the principal "unexpectedly purchased methamphetamine in addition to marijuana," the defendant was "not absolved[d] of responsibility as an accomplice to the crime of possession of methamphetamine" even though he did not expect the purchase.¹⁰⁸⁸ Be that as it may, because South Dakota's stance on the *mens rea* requirement for accomplice liability is unusual, if not uncertain, this state is not categorized in this Article either.

1081. *Id.* at 400.

1082. *Id.* at 405.

1083. *Id.* at 400 (quoting *State v. Brings Plenty*, 490 N.W.2d 261, 268 (S.D. 1992)).

1084. *Id.* at 405.

1085. S.D. CODIFIED LAWS § 22-3-3 (2006) (emphasis added).

1086. *See, e.g., Brings Plenty*, 490 N.W.2d at 268 ("[K]nowingly does not encompass a specific intent or special mental state over and above a doing of the actual act." (citing *State v. Barrientos*, 444 N.W.2d 374, 376 (S.D. 1989))); *State v. Schafer*, 297 N.W.2d 473, 476 (S.D. 1980) (stating that when defendant "knowingly did something to assist in the commission of a crime, then his status changes" to an accomplice).

1087. 548 N.W.2d 792 (S.D. 1996).

1088. *Id.* at 797-98.

2. *Divergent Case Law*

In regards to accomplice liability mental state requirements, a few states show inconsistencies of reasoning between districts. These states, Missouri, Ohio, and West Virginia, form another subcategory.

a. *Missouri*

Although Missouri's statute reflects a Category I approach,¹⁰⁸⁹ the case law does not necessarily follow suit. In Missouri, there is an apparent split in reasoning between the two appellate districts that the Missouri Supreme Court has yet to resolve. In *State v. Logan*,¹⁰⁹⁰ a case from the Missouri Court of Appeals for the Western District, four people decided to rob a service station.¹⁰⁹¹ Because the service station employees might have recognized the defendant's van, the defendant's role was to locate another vehicle to use in the robbery.¹⁰⁹² After an unsuccessful attempt at finding a new vehicle, the group decided to approach the service station on foot, rob the store, and then escape in the service station attendant's car.¹⁰⁹³ Two members of the group then robbed the store, escaped in a customer's vehicle, and met up with the defendant and another member of the group.¹⁰⁹⁴ The court stated that Missouri's law limited the "defendant's liability for . . . other conduct, however, with its ubiquitous requirement of a 'culpable mental state.'"¹⁰⁹⁵ The court found that the defendant was liable because he had the "'knowledge' that the second robbery could result from the conduct he purposefully promoted."¹⁰⁹⁶ The court specifically rejected the defendant's claims that the law required a specific "'purpose to promote'" for the secondary offense but also rejected the State's argument for liability under a "natural and probable consequences" rule.¹⁰⁹⁷

However, in *State v. Workes*,¹⁰⁹⁸ a rape case from the Missouri Court of Appeals for the Eastern District, the court used a broader approach than that of

1089. See MO. ANN. STAT. § 562.041.1(2) (West 1999) ("A person is criminally responsible for the conduct of another when . . . [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.").

1090. 645 S.W.2d 60 (Mo. Ct. App. 1982).

1091. *Id.* at 61.

1092. *Id.*

1093. *Id.*

1094. *Id.* at 61–62.

1095. *Id.* at 65 (citing MO. ANN. STAT. §§ 562.016.1, 562.036 (West 1999)).

1096. *Id.*

1097. *Id.* at 65.

1098. 689 S.W.2d 782 (Mo. Ct. App. 1985).

the *Logan* court.¹⁰⁹⁹ Here, the defendant and the principal forcibly took the victim into a vehicle and forced her to perform fellatio on the defendant and principal.¹¹⁰⁰ Later, they drove her to a park where the principal raped her while the defendant was not present.¹¹⁰¹ The defendant argued that he and the principal intended to commit sodomy in the park, not rape; therefore, the defendant claimed he did not have the requisite intent to aid and abet a rape.¹¹⁰² While this Missouri appellate court did not use the “natural and probable consequences” language explicitly rejected in *Logan*, it did comment that the defendant would be responsible for those crimes he could “reasonably anticipate” from the underlying criminal conduct.¹¹⁰³ The court ruled that the defendant had the intent to assist the principal in the sexual assault despite the fact that he believed the assault would be of a “different orifice.”¹¹⁰⁴ In any event, the “reasonably anticipate” nomenclature in *Workes* sounds remarkably similar in scope to the “natural and probable consequences” test *Logan* explicitly rejected.¹¹⁰⁵

b. Ohio

Ohio courts that have analyzed the requisite mental state for accomplice liability found in Ohio’s “complicity” statute¹¹⁰⁶ also seem to have differing approaches. In *State v. Johnson*,¹¹⁰⁷ a group from the Crips street gang stole two vehicles to commit a drive-by shooting on a member of the Bloods street gang in retaliation for previous drive-by shootings the Bloods had committed.¹¹⁰⁸ While looking for a Bloods gang member, the defendant accompanied the group to an apartment building where one of the Crips shot into an apartment, killing a small girl and injuring three others, despite the fact an individual had told one of the group that the Bloods member did not live there.¹¹⁰⁹ A jury convicted the defendant as an accomplice to one count of aggravated murder and three counts

1099. *See id.* at 785.

1100. *Id.* at 784.

1101. *Id.*

1102. *Id.* at 785.

1103. *Id.* (citing *State v. Logan*, 645 S.W.2d 60, 65–66 (Mo. Ct. App. 1982)).

1104. *Id.*

1105. *See Logan*, 645 S.W.2d at 65.

1106. OHIO REV. CODE ANN. § 2923.03(A) (LexisNexis 2006) (“No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense; (2) Aid or abet another in committing the offense; (3) Conspire with another to commit the offense . . .”).

1107. 754 N.E.2d 796 (Ohio 2001).

1108. *Id.* at 797–98.

1109. *Id.*

of attempted aggravated murder.¹¹¹⁰ In this 2001 case, the Ohio Supreme Court held that

to support a conviction for complicity by aiding and abetting . . . the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and *that the defendant shared the criminal intent of the principal*. Such intent may be inferred from the circumstances surrounding the crime.¹¹¹¹

Here, the court concluded that the defendant was part of a “calculated plan to kill” the Bloods gang member but killed and injured others instead; as such, he was criminally “responsible as a complicitor” for the offenses.¹¹¹²

In *State v. Jackson*,¹¹¹³ the Ohio Court of Appeals in 2003 attempted to clarify the mental state requirement for complicity for secondary crimes.¹¹¹⁴ Here, the victim agreed to sell marijuana to the defendant in a parking lot.¹¹¹⁵ The defendant approached the victim’s car, examined the marijuana, and asked the victim if he could show a portion of it to the principal; the victim agreed, and the defendant then returned with the principal to complete the sale.¹¹¹⁶ The principal entered the victim’s vehicle, pulled out a gun, and when the victim went to reach for his own gun, the principal shot him.¹¹¹⁷ The defendant later claimed that the victim was a business associate with whom he shared drug profits, and as such, he had no intention to be involved in a robbery.¹¹¹⁸ Nevertheless, a jury convicted the defendant of aggravated robbery and felonious assault.¹¹¹⁹ The appellate court stated:

[T]he culpability necessary to sustain the conviction of an aider and abettor “will be presumed where the crime committed by a principal in furtherance of a common design to commit a criminal offense reasonably could have been contemplated by the aider and abettor as a

1110. *Id.* at 798–99.

1111. *Id.* at 801 (emphasis added).

1112. *Id.* at 801–02.

1113. No. 03AP-273, 2003 WL 22511528 (Ohio Ct. App. Nov. 6, 2003).

1114. *See id.* at *7.

1115. *Id.* at *1.

1116. *Id.*

1117. *Id.*

1118. *Id.* at *3.

1119. *Id.* at *4.

natural and probable consequence of the commission of that criminal offense.”¹¹²⁰

Here, the appellate court concluded there was evidence to support that (1) defendant had intended to participate in a robbery of the victim, and (2) “the serious physical harm caused to the victim[, the felonious assault,] was a natural and probable consequence of the plan.”¹¹²¹ Thus, while *Johnson* follows the Category II approach as codified in the Ohio accomplice statute,¹¹²² the *Jackson* opinion obviously reflects a Category III analysis. Consequently, it is difficult to categorize Ohio.

c. *West Virginia*

West Virginia’s statute does not address an accomplice’s mental state.¹¹²³ The Supreme Court of West Virginia has relied on its “concerted action principle,” which does not use standard Category III language in describing the scope of its accomplice law but seems to follow a somewhat comparable analysis.¹¹²⁴ For example, in *State v. Fortner*,¹¹²⁵ the Supreme Court of Appeals of West Virginia affirmed the defendant’s conviction for multiple sexual crimes on a theory of accomplice liability.¹¹²⁶ In this case, the defendant and four other men were driving around when they spotted a twenty-three-year-old woman using a pay phone.¹¹²⁷ One participant “grabbed the woman, told her he had a gun, and forced her into the car.”¹¹²⁸ A second participant drove “the group three or four miles to a wooded area at the end of a dirt road.”¹¹²⁹ For around two hours, “the five men forced the woman to engage in multiple acts of sexual

1120. *Id.* at *7 (quoting *State v. Hendrick*, No. 53422, 1988 WL 18767, at *4 (Ohio Ct. App. Feb. 18, 1988)).

1121. *Id.*

1122. See OHIO REV. CODE ANN. § 2923.03 (2007).

1123. See W. VA. CODE ANN. § 61-11-6 (LexisNexis 2005) (“In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree . . .”). However, the statute does require that the defendant “knowingly aid and abet” a few crimes. *Id.* § 61-2-14e (listing kidnapping, holding hostage, demanding ransom, concealment of a minor child, and several other crimes).

1124. See *State v. Foster*, 656 S.E.2d 74, 80–81 (W. Va. 2007) (stating that under the “concerted action” principle the defendant must have “shared the criminal intent of the principal” but is “not required to have intended the particular crime . . . but only to have knowingly intended to assist . . . the design” of the principal (quoting *State v. Fortner*, 387 S.E.2d 812, 823 (W. Va. 1989))).

1125. *State v. Fortner*, 387 S.E.2d 812 (W. Va. 1989)

1126. *Id.* at 822–26, 832.

1127. *Id.* at 817.

1128. *Id.*

1129. *Id.*

intercourse.”¹¹³⁰ The woman begged for release but was “forced back into the car and driven around [the town] while her assailants discussed what to do with her.”¹¹³¹ Eventually, the group drove to a tavern in another town, where a participant led the woman “to a [nearby] creek bank, sexually assaulted her, and attempted to choke her.”¹¹³² After about an hour the woman succeeded in convincing the participant to take her home.¹¹³³ When they arrived at the woman’s apartment, they found her husband waiting and the participants fled.¹¹³⁴ The police caught the men shortly thereafter.¹¹³⁵

At trial, the defendant admitted participating in two separate sexual acts with the victim but insisted “that he had participated only because he feared what his companions might do or say if he intervened on her behalf or refused to go along.”¹¹³⁶ The defendant denied that he “encouraged or assisted the others in committing [the] offenses against the victim.”¹¹³⁷ In addition, the defendant was able to establish that he was not present during several of the later sexual assaults committed by the other participants.¹¹³⁸ Nevertheless, a jury convicted the defendant of ten counts of sexual assault and ten counts of sexual abuse, with sixteen of these counts as an aider and abettor.¹¹³⁹

In affirming the convictions, the Supreme Court of Appeals of West Virginia noted:

To be convicted as an aider and abettor, the law requires that the accused “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” The State must demonstrate that the defendant “*shared the criminal intent of the principal in the first degree.*” In this regard, the accused is *not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage, or facilitate the design of the criminal actor.* The intent requirement is relaxed somewhat where the defendant’s physical participation in the criminal undertaking is substantial.

....

1130. *Id.*

1131. *Id.*

1132. *Id.*

1133. *Id.*

1134. *Id.*

1135. *Id.*

1136. *Id.*

1137. *Id.*

1138. *See id.* at 824–25.

1139. *Id.* at 821–22.

Thus, under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.¹¹⁴⁰

Here, the defendant actively participated in the criminal venture including removing the victim's clothes and otherwise "shared the festive and boisterous attitude of his companions towards the entire episode."¹¹⁴¹ Further, the court ultimately concluded that there was "no evidence that the defendant ever disassociated himself from the criminal enterprise, much less expressed any disapproval of or opposition to the acts of his companions."¹¹⁴² Accordingly, the Supreme Court of Appeals of West Virginia held the defendant liable for all of the sex crimes committed by the actual perpetrators.¹¹⁴³

In a later Supreme Court of Appeals of West Virginia decision, the court relied on a standard Category II "shared intent" analysis. In *State v. Deem*,¹¹⁴⁴ the defendant was with a group of people when they allegedly heard a person on the street shout a derogatory term.¹¹⁴⁵ The term provoked the defendant's group to pull over, get out of their cars, and grab clubs from their trunks.¹¹⁴⁶ Subsequently, one member of the defendant's group assaulted the victim.¹¹⁴⁷ A jury convicted the defendant of aiding and abetting the assault based on the State's theory that the defendant provided "moral support" to the codefendant.¹¹⁴⁸ While the defendant testified that he had a club with him, there was undisputed testimony that he never spoke to the victim or the principal before the assault.¹¹⁴⁹

The Supreme Court of Appeals of West Virginia indicated in *Deem* that the "State must demonstrate that the defendant '*shared the criminal intent* of the principal in the first degree."¹¹⁵⁰ Here, the defendant "associated himself with the criminal venture perpetrated" by the principal and "shared in [the principal's] criminal intent by supporting, encouraging and facilitating [the principal's] assault on the victim."¹¹⁵¹ The court concluded that although the

1140. *Id.* at 823–25 (emphasis added) (citations omitted) (internal quotation marks omitted).

1141. *Id.* at 824.

1142. *Id.* at 826.

1143. *Id.* at 817, 832.

1144. 456 S.E.2d 22 (W. Va. 1995) (per curiam).

1145. *Id.* at 24.

1146. *Id.*

1147. *Id.* at 25.

1148. *Id.*

1149. *Id.*

1150. *Id.* at 26 (emphasis added) (quoting *State v. Harper*, 365 S.E.2d 69, 74 (W. Va. 1987)).

1151. *Id.* at 27.

defendant did not expect or intend that the victim be assaulted, he “admittedly knew that trouble was likely to occur,” and “[r]ather than disassociating himself from the group . . . , the [defendant] chose to participate with the group in the ensuing confrontation which resulted in the assault.”¹¹⁵²

At first blush, West Virginia seems to be a Category II state. However, when West Virginia courts invoke the “knowingly assist a design of the perpetrator” approach, as they did in *State v. Fortner*¹¹⁵³ and other opinions,¹¹⁵⁴ it is unclear whether they are following a Category I purposive approach or Category III common design thinking, like that found in Illinois.¹¹⁵⁵ West Virginia courts have not adopted the classic natural and probable consequences thinking of the Category III model, consistently followed a pure shared intent analysis like the other Category II jurisdictions, or demanded specific intent to aid and abet as in the Category I model. Because of the lack of clarity reflected in the West Virginia decisions, it is impossible to categorize this state.

B. *Nonuniform Rules*

The final group of cases in this Part of the Article reflects states with novel or unusual approaches in determining their mental state requirement for aiding and abetting—Colorado, Nevada, and Washington.

1. *Colorado*

Colorado, similar to Nevada (discussed below),¹¹⁵⁶ casts a wide net regarding unintended crimes requiring recklessness or negligence, but it follows a narrow approach akin to Category I when the principal offense requires either intent or knowledge.¹¹⁵⁷ If one examines the face of the Colorado complicity statute, it requires no less than “intent to promote or facilitate the commission of

1152. *Id.* at 27–28.

1153. 387 S.E.2d 812, 823 (W. Va. 1989) (citing *Harper*, 365 S.E.2d at 73; *State v. West*, 168 S.E.2d 716, 721–22 (W. Va. 1969)).

1154. *See State v. Foster*, 656 S.E.2d 74, 84 (W. Va. 2007) (quoting *Fortner*, 387 S.E.2d at 823); *State v. Wade*, 490 S.E.2d 724, 737 (W. Va. 1997) (quoting *State v. Kirkland*, 447 S.E.2d 278, 284 (W. Va. 1994)).

1155. *See People v. Kessler*, 315 N.E.2d 29, 33 (Ill. 1974) (quoting *People v. Armstrong*, 243 N.E.2d 825, 830 (Ill. 1968)).

1156. *See infra* Part IV.B.2.

1157. *Compare Bolden v. State*, 124 P.3d 191 (Nev. 2005) (rejecting the natural and probable consequences doctrine for specific intent crimes, but declining to reject it with respect to general intent crimes), *with Grissom v. People*, 115 P.3d 1280, 1288 (Colo. 2005) (holding that knowledge is the required mental state for reckless manslaughter), *and People v. Bass*, 155 P.3d 547, 551 (Colo. Ct. App. 2006) (holding that intent is the required mental state for attempted robbery).

the offense.”¹¹⁵⁸ When one studies the Colorado case law, the matter becomes more complicated.

In *People v. Wheeler*,¹¹⁵⁹ the Colorado Supreme Court stated the “‘intent’ referred to in the complicity statute is not defined according to [the statutory provision], which defines ‘intentionally’ and ‘with intent’ as those terms are used in the ‘offenses’ set forth in the criminal code.”¹¹⁶⁰ Instead, in the context of a negligent homicide prosecution, the court concluded the following:

This language does not require that the complicitor intend for the principal to cause death. The complicitor also need not intend for the principal to act in a criminally negligent manner. This language only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, criminal conduct. Thus, the jury could find [the defendant] guilty of criminally negligent homicide on a theory of complicity if it believed that she knew . . . the principal[] was about to engage in conduct that was a gross deviation from the standard of care that a reasonable person would exercise.¹¹⁶¹

One should note that a dissenting justice in *Wheeler* criticized “[t]he majority’s statement that the defendant is guilty if she knew the principal was going to engage in *any criminal conduct whatsoever*.”¹¹⁶²

Later, in *Bogdanov v. People*,¹¹⁶³ the court clarified that “the rule of *Wheeler* should only be applied to crimes defined in terms of recklessness or negligence, and should not be applied to dispense with the requirement that the complicitor have the requisite culpable mental state of the underlying crime with which he is charged.”¹¹⁶⁴ For example, the *Bogdanov* court said, “[T]he rule of *Wheeler* does not apply when aggravated robbery is the underlying crime because it is not a crime of recklessness or negligence.”¹¹⁶⁵ Here, the court was careful to point out that it was not inclined to accept wholesale the Category III approach when it noted, “The Colorado General Assembly chose not to extend accomplice liability to reasonably foreseeable crimes, but rather limited such

1158. COLO. REV. STAT. § 18-1-603 (2008) (“A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.”).

1159. 772 P.2d 101 (Colo. 1989).

1160. *Id.* at 103 (citing *People v. R.V.*, 635 P.2d 892, 894 (Colo. 1981)).

1161. *Id.* at 103–04 (citations omitted).

1162. *Id.* at 107 (Erickson, J., dissenting) (emphasis added).

1163. 941 P.2d 247 (Colo. 1997), *overruled on other grounds by* *Griego v. People*, 19 P.3d 1, 7–8 (Colo. 2001).

1164. *Id.* at 251.

1165. *Id.* at 251 n.9.

liability to those particular crimes which the accomplice intended to promote or facilitate.”¹¹⁶⁶

In *Grissom v. People*,¹¹⁶⁷ a Colorado trial court, “after deliberation under a theory of complicity,” convicted the defendant of vehicular eluding and first degree murder.¹¹⁶⁸ In this case, the principal won a dice game against the victim and then “became angry when [the victim] refused to pay him.”¹¹⁶⁹ The defendant observed the game, “later agreed to help [the principal] find [the victim] to collect the alleged debt,” and, in fact, “drove [the principal] to several locations in the next few days in search of [the victim].”¹¹⁷⁰ About “one week after the dice game, [the victim] was fatally shot near the motel where he had been staying. . . . The police responded to the crime scene, saw a [suspect car] and pursued it.” Following a car chase, the suspects wrecked their car, the defendant and the principal fled from the vehicle, and the police arrested them during a chase on foot.¹¹⁷¹ The police found two handguns and jewelry, all stained with blood, in the general area.¹¹⁷² After testing the clothing of the defendant and the principal, the police determined that the principal had been the shooter.¹¹⁷³

At trial, the defendant argued that he “did not know what [the principal] intended and that [he] merely intended to help [the principal] recover his gambling debt.”¹¹⁷⁴ The defendant also argued that he was “very close” to the victim and consequently would not have helped the principal kill the victim.¹¹⁷⁵ The defendant requested an instruction on reckless manslaughter as a lesser included offense of first degree murder, but the trial court refused; instead, it provided instructions on complicity, first degree murder, robbery, and vehicular eluding.¹¹⁷⁶

The defendant appealed his convictions, arguing again for the inclusion of the lesser included offense instruction, but the Colorado Court of Appeals rejected his argument, holding that there “must be evidence that the principal committed the lesser crime” for the defendant to receive the lesser included offense instruction.¹¹⁷⁷ Defendant then brought his same argument before the

1166. *Id.* at 251 n.8.

1167. 115 P.3d 1280 (Colo. 2005).

1168. *Id.* at 1282.

1169. *Id.*

1170. *Id.*

1171. *Id.*

1172. *Id.*

1173. *Id.*

1174. *Id.*

1175. *Id.*

1176. *Id.* at 1282–83.

1177. *Id.* at 1283 (citing *People v. Grissom*, No. 00CA1407, 2003 WL 22113721, at *1 (Colo. Ct. App. Sept. 11, 2003), *rev'd*, 115 P.3d 1280, 1288 (Colo. 2005)).

Supreme Court of Colorado, which held that the trial court should have included the instruction.¹¹⁷⁸ In reaching this conclusion, the court examined liability for unintentional crimes, citing *People v. Wheeler*,¹¹⁷⁹ in which the Supreme Court of Colorado held that Colorado's complicity statute "only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, *criminal conduct*."¹¹⁸⁰ The court then provided the following explanation:

Wheeler is consistent with cases from other states holding that accomplice liability extends to *unintentional* crimes committed by the principal when the complicitor and the principal are acting in a "common enterprise." . . .

. . . .

In these "common enterprise" cases, where both parties [act] in concert to commit a threshold crime, but the principal ultimately commits a more serious crime than the complicitor initially intended, the complicitor can be held liable for the crime committed by the principal.¹¹⁸¹

The court went on to examine the intent requirement expressly written into the Colorado complicity statute:

We observed in *Wheeler* that the General Assembly defined complicity liability to extend to those acts done with the "intent to promote or facilitate" criminal conduct, but that in the complicity context as articulated in [the complicity statute], "intent" retains its "common meaning" and is not synonymous with the statutory definition of "intent" which applies to other crimes.

. . . [W]e do not require that the complicitor himself intend to commit the crime that the principal commits for crimes defined in terms of recklessness and negligence. In those cases, the complicitor must only intend to aid or assist the principal to engage in conduct that "grossly deviates from the standard of reasonable care and poses a substantial and unjustifiable risk of death to another."

Some commentators have argued that accomplice liability should extend only to those specific and intentional crimes that the complicitor intended to facilitate and that the principal committed. Under this

1178. *Id.* at 1288.

1179. 772 P.2d 101 (Colo. 1989).

1180. *Grissom*, 115 P.3d at 1283 (quoting *Wheeler*, 772 P.2d at 104) (emphasis added) (internal quotation marks omitted).

1181. *Id.* at 1284 (emphasis added).

alternative interpretation, one cannot be a complicitor to the principal's commission of a crime requiring the mental states of recklessness or negligence. One commentator lamented that this court's "extension of accomplice liability for unintended crimes is too broad."

The Model Penal Code does not extend accomplice liability to the principal's unintentional acts based on a concern that imposing accomplice liability in this context is only appropriate when the accomplice shares the principal's mental state and facilitates the principal's conduct. . . .

Under the Model Penal Code's formulation, accomplice liability is not imposed even when . . . the party to be charged as an accomplice has actual knowledge that criminal activity will occur. Although the Colorado General Assembly has incorporated many of the Model Penal Code provisions into [the] criminal code, the legislature has adopted a complicity statute that is substantially different from the Model Penal Code formulation. . . .

. . . .

We decline to adopt the theory of complicity liability discussed in the Model Penal Code.¹¹⁸²

Thus, the Supreme Court of Colorado established that in Colorado, "accomplice liability tracks that degree of knowledge which the complicitor's actions of aiding and abetting evince and where the complicitor is engaged in a common enterprise with the principal, he or she may be held liable as a complicitor for reckless crimes."¹¹⁸³ Reiterating *Wheeler*, the *Grisson* court held that in cases of reckless and negligent crimes, the mental state necessary for conviction as an accomplice or complicitor "only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, *criminal conduct*" of some sort.¹¹⁸⁴ Here, the court limited the *Wheeler* holding to common enterprise cases, stating that "[u]nder such circumstances, a defendant can be held liable for reckless manslaughter as a complicitor."¹¹⁸⁵ The court made the following determination:

Based on the evidence in this case, the jury could reasonably have accepted the evidence [offered by the defense] that [the defendant] merely intended to help [the principal] find [the victim] to collect the

1182. *Id.* at 1284–86 (citations omitted).

1183. *Id.* at 1286.

1184. *Id.* at 1283 (quoting *People v. Wheeler*, 772 P.2d 101, 104 (Colo. 1989)) (emphasis added) (internal quotation marks omitted).

1185. *Id.* at 1288.

alleged debt, and that [the defendant] believed he was helping [the principal] collect his debt by a means short of murder. At the same time, the jury could have reasonably believed that both [the defendant] and [the principal] engaged in reckless conduct.

. . . From this evidence, the jury could have concluded that [the defendant] and [the principal] were engaged in a common enterprise to at least assault [the victim] in the course of collecting the debt, thereby exposing [the defendant] to liability for reckless manslaughter¹¹⁸⁶

Thus, while the Colorado accomplice law accepts a broad approach when it examines unintended crimes requiring recklessness or negligence, post-*Grissom* appellate cases involving crimes requiring specific intent, such as attempted robbery, state that the defendant “must intend for his or her own conduct to further the principal’s crime,” with no mention made of the *Wheeler-Grissom* doctrine.¹¹⁸⁷

2. Nevada

The Nevada accomplice statute contains no explicit mental state.¹¹⁸⁸ However, the Nevada case law interprets the state’s accomplice law as requiring proof of a mental state that is different for specific intent crimes than it is for general intent crimes.¹¹⁸⁹ For example, in *Sharma v. State*,¹¹⁹⁰ the State charged the defendant with attempted murder.¹¹⁹¹ At trial, the defendant claimed that although he knew a companion had a gun during a dispute among a group of several men, he never intended that one of the group shoot the victim.¹¹⁹² The trial court “failed to inform the jury that to convict [the defendant] of aiding and abetting an attempted murder, [the defendant] must have aided and abetted . . .

1186. *Id.* at 1287.

1187. *See, e.g.*, *People v. Bass*, 155 P.3d 547, 551 (Colo. Ct. App. 2006) (affirming an attempted robbery conviction).

1188. *See* NEV. REV. STAT. ANN. § 195.020 (LexisNexis 2006) (“Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.”).

1189. *See* *Bolden v. State*, 124 P.3d 191, 201 (Nev. 2005).

1190. 56 P.3d 868 (Nev. 2002).

1191. *Id.* at 869.

1192. *Id.*

with the specific intent to kill.”¹¹⁹³ The Nevada Supreme Court reversed,¹¹⁹⁴ assuming the jury relied on a natural and probable consequence analysis in arriving at its verdict.¹¹⁹⁵ The court provided the following reasoning:

[The natural and probable consequences] doctrine has been harshly criticized by “[m]ost commentators . . . as both ‘incongruous and unjust’ because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal.” It permits criminal “liability to be predicated upon negligence even when the crime involved requires a different state of mind.” Having reevaluated the wisdom of the doctrine, we have concluded that its general application in Nevada to *specific intent crimes* is unsound precisely for that reason: it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime. . . .

. . . [T]he doctrine thus “allows a defendant to be convicted for crimes the defendant may have been able to foresee but never intended.”

. . . Because the natural and probable consequences doctrine permits a defendant to be convicted of a specific intent crime where he or she did not possess the statutory intent required for the offense, we hereby disavow and abandon the doctrine.

. . . .

Accordingly, we . . . hold that in order for a person to be held accountable for the *specific intent crime* of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.¹¹⁹⁶

Thus, the *Sharma* court was clearly insisting on a Category I analysis for *specific intent* crimes.

In *Bolden v. State*,¹¹⁹⁷ the defendant and four other masked men “broke into [a family’s] apartment looking for drugs and money.”¹¹⁹⁸ Some or all of the men robbed the family while brandishing weapons; however, the police apprehended

1193. *Id.* at 873.

1194. *Id.* at 875.

1195. *See id.* at 873.

1196. *Id.* at 871–72 (second alteration in original) (emphasis added) (citations omitted) (footnote call numbers omitted).

1197. 124 P.3d 191 (Nev. 2005).

1198. *Id.* at 193.

all of the men at the scene.¹¹⁹⁹ The State charged the defendant with burglary, home invasion, kidnapping, robbery, and conspiracy.¹²⁰⁰ The State alleged three alternative theories to support the defendant's liability: (1) direct involvement in the crimes, (2) aiding and abetting his cohorts, and (3) vicarious co-conspirator liability.¹²⁰¹ A jury convicted the defendant of all counts,¹²⁰² but it was unclear upon which theory the jury relied.¹²⁰³

The Nevada Supreme Court began its analysis by pointing out the following:

When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories. When any one of the alleged theories is legally erroneous, however, reversal of a general verdict is [generally] required. . . .¹²⁰⁴

The supreme court concluded that “the State presented sufficient evidence for the jury to convict [the defendant] under all of its theories of culpability.”¹²⁰⁵ First, the court felt that there was evidence that would allow the jury to find liability under a direct involvement analysis.¹²⁰⁶ Second, the court felt there was a basis for finding the defendant had “knowingly and with criminal intent aid[ed] and abet[ted] in [the offense’s] commission.”¹²⁰⁷ Here, the court noted the trial court’s instruction had insisted on proof of specific intent for any aiding and abetting.¹²⁰⁸ However, the court “call[ed] into question the legal viability of the State’s remaining theory of vicarious coconspirator liability” because the trial court had instructed the jury on that theory using a “probable and natural consequences of the object of the conspiracy” instruction for the specific intent crimes of burglary and kidnapping.¹²⁰⁹ The Nevada Supreme Court concluded that a court may not hold a defendant criminally liable for a specific intent crime a coconspirator commits because that crime was a natural and probable result of the object of the conspiracy.¹²¹⁰ The court reached the following conclusion:

1199. *Id.*

1200. *Id.*

1201. *Id.* at 194.

1202. *Id.* at 192–93.

1203. *See id.* at 201.

1204. *Id.* at 194–95 (citing *Phillips v. State*, 119 P.3d 711, 716 (Nev. 2005)).

1205. *Id.* at 195.

1206. *Id.*

1207. *Id.*

1208. *Id.*

1209. *Id.* at 196 (emphasis omitted).

1210. *Id.* at 200.

Although we refuse to adopt the natural and probable consequences doctrine in general, our decision is limited to vicarious coconspirator liability based on that doctrine for specific intent crimes only. The mental state required to commit a general intent crime does not raise the same concern as that necessary to commit a specific intent crime. . . . To hold a defendant criminally liable for a specific intent crime, Nevada requires proof that he possessed the state of mind required by the statutory definition of the crime. Although we affirm [the defendant's] conviction for the general intent crimes of home invasion and robbery, we conclude that in future prosecutions, vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy.¹²¹¹

Thus, the court felt compelled to reverse the specific intent crimes of burglary and kidnapping but not the general intent crimes of home invasion and robbery.¹²¹²

In conclusion, in *Sharma*, the Nevada Supreme Court explicitly rejected the Category III approach for aiding and abetting specific intent crimes without comment about its feelings toward general intent offenses.¹²¹³ In *Bolden*, the court rejected the natural and probable consequences approach in connection with vicarious co-conspirator liability in prosecutions of specific intent crimes but accepted it for general intent crimes, which suggests the court would follow the same dichotomy in aiding and abetting cases.¹²¹⁴

3. *Washington*

Washington's accomplice liability law reflects yet another unique approach. Washington's courts appear to follow a traditional Category I approach to accomplice liability with the exception of requiring knowledge on the part of the accomplice rather than intent, which is consistent with Washington's complicity statute.¹²¹⁵ In *State v. Stein*,¹²¹⁶ the defendant, a delusional paranoiac,

1211. *Id.* at 201 (footnote call numbers omitted).

1212. *Id.*

1213. *See Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002).

1214. *See Bolden*, 124 P.3d at 201.

1215. *See WASH. REV. CODE ANN.* § 9A.08.020(3)(a) (West 2000) ("A person is an accomplice of another person in the commission of a crime if: . . . With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it . . ."); *see also State v. Roberts* 14 P.3d 713, 735 (Wash. 2001) ("The language of the accomplice liability statute establishes a mens rea requirement of 'knowledge' of 'the

asked the principal to “arrange ‘accidents’ for people [he] believed were depriving him of his inheritance” in exchange for \$10,000 for each person eliminated.¹²¹⁷ One victim was killed, and though another targeted person resigned as caretaker of the defendant’s father’s estate, the defendant stated he wished to see that person dead anyway.¹²¹⁸ The court instructed the jury that it could convict the defendant either as (1) an accomplice if he had “knowledge” his actions would facilitate a crime, or (2) as a coconspirator if it was “reasonably foreseeable” his agreement would lead to such a crime.¹²¹⁹ The jury convicted the defendant of murder and attempted murder but acquitted the defendant of conspiracy.¹²²⁰ The trial court’s jury instructions allowed the jury to convict him vicariously of his co-conspirators’ crimes without proof of knowledge.¹²²¹ The Supreme Court of Washington affirmed an appellate court reversal of the conviction, holding that despite the fact that the crime was reasonably “foreseeable,” a court cannot hold a defendant liable under Washington complicity law without a finding of the requisite knowledge.¹²²² In this case, the court categorically rejected a Category III analysis for both conspiracy and accomplice liability.¹²²³

The Supreme Court of Washington applied this same analysis two years later. In *State v Berube*,¹²²⁴ a jury convicted two parents of homicide by abuse when their child died from injuries they allegedly inflicted.¹²²⁵ The mother of the child challenged her conviction based on accomplice liability, claiming that evidence of her complicity in the child’s death was insufficient to warrant instructions for accomplice liability.¹²²⁶ The Supreme Court of Washington

crime.’ The statute’s history, derived from the Model Penal Code, establishes that ‘the crime’ means the charged offense. The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has ‘knowledge’ . . .” (citations omitted)). Although a footnote in *Roberts* suggests that Washington law is consistent with Model Penal Code § 2.06(4) as well as § 2.06(3), *Roberts*, 14 P.3d at 735 n.13, the *Roberts* court interpreted the Washington accomplice statute as requiring the State to prove the accused knew his conduct would aid and abet the charged offense rather than requiring it to prove he acted with the culpability required for the commission of the offense, *id.* at 736, which offense could conceivably require a lesser mental state such as recklessness. Therefore, the author chose not to categorize Washington as a Category II jurisdiction.

1216. 27 P.3d 184 (Wash. 2001).

1217. *Id.* at 185.

1218. *Id.* at 185–86.

1219. *Id.* at 188.

1220. *Id.* at 186.

1221. *Id.* at 188–89.

1222. *Id.*

1223. *Id.*

1224. 79 P.3d 1144 (Wash. 2003).

1225. *Id.* at 1146–47.

1226. *Id.* at 1151.

disagreed, stating that although an accomplice must know one's assistance might promote a crime, the defendant "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal."¹²²⁷ The court sustained the defendant's conviction, stating that the evidence clearly showed she "knew her actions would promote the abuse and that she encouraged the abusive behavior."¹²²⁸ Therefore, it appears Washington essentially follows an approach analogous to Category I in that it requires a mental state carrying a higher degree of culpability than that required under either the Category I or the Category II model, yet this mental state is knowledge rather than specific intent.

VII. CONCLUSION

A study of the criminal accomplice liability statutes and case law interpretations of this legislation in the fifty American states reveals a variety of approaches regarding the mental state required for conviction of the person traditionally described as the aider and abettor. This Article shows that ten states have case law reflecting either (1) a very novel approach not followed elsewhere, (2) conflicting views between appellate districts, or (3) very few opinions, perhaps quite dated, which made generalizations about these states impossible. However, while all fifty states were examined both in terms of their accomplice liability legislation and case law, forty states have a sufficient number of judicial decisions which allow for some conclusions regarding their particular stance on the accomplice's mental state requirement. After a collective study of these forty states, some patterns emerged, reflecting essentially three different approaches to the subject.

The perspective that a person should not be saddled with criminal liability as an accomplice unless that person specifically intended to promote or facilitate the actual perpetrator's commission of the offense charged is not the prevailing view in the majority of states. If one focuses on the accomplice legislation of the respective states, a significant minority of states follow this view, described in this Article as a Category I approach;¹²²⁹ however, if one then examines the case law of these as well as the other jurisdictions, one finds that little more than a handful of states follow this view.¹²³⁰

The Model Penal Code defines an accomplice as one who either (1) acts with "the purpose of promoting or facilitating the commission of the [particular]

1227. *Id.* (citing *State v. Sweet*, 980 P.2d 1223, 1230 (Wash. 1999); *State v. Hoffman*, 804 P.2d 577, 605 (Wash. 1991)).

1228. *Id.*

1229. *See supra* Part II.A.

1230. *See supra* Part III.

offense” charged, or (2) “[w]hen causing a particular result is an element of an offense,” acts with the kind of mental culpability required for conviction of the substantive offense.¹²³¹ However, most states do not follow this dual scheme of accomplice law in their “accomplice,” “complicity,” or “aiding or abetting” legislation¹²³² or in their case law.¹²³³ On the other hand, a significant minority of states do, in fact, predicate accomplice liability on some variation of the Model Penal Code’s second prong—sharing with the principal the mental state required for actual commission of the substantive crime—but on the whole, do not limit this approach to result-based crimes as does the Model Penal Code. Thus, these states, which comprise what this Article describes as the Category II approach, follow a statutorily prescribed mental state model that simply looks to the *mens rea* required of the substantive crime charged.

Finally, there exists a third grouping of states that have the most far reaching mental state requirement for accomplice liability: it neither requires the accomplice to have intended the criminal result carried out by the actual perpetrator nor have shared with the perpetrator the mental state required for commission of the substantive crime charged. Instead, the accomplice laws of these states reach offenses that accomplices did not intend or contemplate but that were “natural and probable,” “natural and foreseeable,” or “reasonably anticipated” consequences, or the like, of lesser criminal wrongdoing that the alleged accomplice actually had in mind. These twenty states, which make up the Category III jurisdictions for purposes of this Article, have the largest following with regards to this thorny, but critical, component of American criminal law.¹²³⁴ While scholars may criticize this approach,¹²³⁵ as was the case when the American Law Institute prepared the Model Penal Code,¹²³⁶ those who are disciples of the Category III thinking believe substantive criminal law must send a strong message of deterrence. History has shown that those inclined to urge or assist others, perhaps in only some peripheral way, to hop the train traveling in the direction of some form of criminality may eventually find that they have facilitated a runaway train. Consider the now convicted youngster in Illinois who joined another bent on merely “kicking the ass” of someone, only to see the perpetrator lose total control of his emotions and kill another human being.¹²³⁷ Thus, the message seems clear: don’t hop that train.

1231. MODEL PENAL CODE § 2.06(3)–(4) (1962)

1232. See *supra* Part IV.A.

1233. See *supra* Part IV.B.

1234. See *supra* Part V.

1235. See LAFAVE, *supra* note 1, § 13.3, at 688; Rogers, *supra* note 23, at 1360–61.

1236. See *id.* cmt. b n.42.

1237. See *People v. Duncan*, 698 N.E.2d 1078, 1080–81 (Ill. App. Ct. 1998).

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2016

Accidental Vitiating: The Natural and Probable Consequence of *Rosemond v. United States* on the Natural and Probable Consequence Doctrine

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**ACCIDENTAL VITIATION:
THE NATURAL AND PROBABLE CONSEQUENCE
OF ROSEMOND V. UNITED STATES
ON THE NATURAL AND PROBABLE
CONSEQUENCE DOCTRINE**

*Evan Goldstick**

*Actus non facit reum nisi mens sit rea.*¹

Anglo-American criminal law defines a crime as the concurrence of an actus reus and a mens rea. This basic definition of a crime remains unchanged when a defendant is prosecuted as an accomplice, rather than a principal. However, the natural and probable consequence doctrine, an accomplice law doctrine, allows for accomplice liability to exist in the absence of sufficient proof of mens rea. The doctrine came from the common law and, as a result, has seen disparate application among both state and federal courts. To date, the U.S. Supreme Court has not issued a ruling on the wisdom, legality, or constitutionality of the doctrine.

Recently, the Court decided Rosemond v. United States. In Rosemond, the Court had to determine the requisite mental state for aiding and abetting a particular federal crime. While the Court had the opportunity to weigh in on the natural and probable consequence doctrine in Rosemond, it declined to do so in footnote 7.

This Note reviews the natural and probable consequence doctrine, its reception by courts and commentators, and the Court's holding in Rosemond. This Note then applies the holding of Rosemond to several federal cases that employed the doctrine to determine whether, despite footnote 7, the doctrine survives Rosemond. Ultimately, this Note concludes the doctrine does not survive and that such a result is desirable

* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2013, University of Michigan. I would like to thank Professor Ian Weinstein for his wisdom, which knows no bounds, and for taking the time to carefully discuss the reasoning of this Note. I would also like to thank Alyssa Wanderon and the entire *Fordham Law Review* staff for their help in preparing this Note.

1. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). One legal scholar has glossed this adage of criminal law in the following way: "It is a principle of natural justice, and of our law, that the intent and the act must both concur to constitute the crime." See HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 109 (1845) (quoting *Fowler v. Padget* (1798) 7 TR 514 (Lord Kenyon, C.J.)).

in light of the doctrine's incompatibility with basic principles of Anglo-American criminal law.

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INTRODUCTION

Thomas Gaetano Phillip Luparello was involved in a love triangle with his wife and his client turned receptionist, Terri Cesak, who was also married.² Both married couples had experienced turmoil, resulting in the separation of Luparello and his wife but not of Cesak and her husband.³ Cesak, who was pregnant with Luparello's child, decided to remove herself from Luparello's life.⁴ After Luparello was informed of Cesak's departure from his apartment, where she had been living, he began a search for her, seeking to contact anyone who may have known her whereabouts.⁵ Luparello asked several of his acquaintances, including Carlos Orduna and Johnny Salmon, to aid him in his endeavor.⁶ When Orduna and Salmon went to meet Luparello at his apartment, they carried a sword and nunchuks, but they did not have guns.⁷ Luparello then asked the two men to go elicit information from Mike Martin, a friend of Cesak's, to which the friends acquiesced.⁸ Upon arrival at Martin's house, Orduna approached the house and knocked on the front door.⁹ Once Orduna succeeded in getting Martin to step outside on false pretenses, Orduna stepped aside and Salmon gunned Martin down on his porch.¹⁰ Luparello was not present, did not believe Orduna and Salmon were armed with guns (because they did not have any when they left his apartment), and was unaware of the plan or tactics the two men intended to employ in visiting Martin.¹¹

Luparello was convicted at trial on two counts: one for conspiracy to commit an assault by means of force likely to produce great bodily injury and a second for murder.¹² On appeal, Luparello argued that the murder was a result of an unintended act committed by his codefendant, Orduna.¹³ In affirming his conviction, the court held that Luparello was liable for the crimes that he "naturally, probably and foreseeably put in motion," regardless of the crime he actually intended his confederates to commit.¹⁴ Thus, the court held Luparello liable despite the absence of any proof regarding his *mental state* toward the murder; instead, the court used the natural and probable consequence doctrine to hold evidence of his encouragement to commit any crime sufficient for the unintended crime that was committed.¹⁵

2. People v. Luparello, 231 Cal. Rptr. 832, 835 (Ct. App. 1986).

3. *Id.*

4. *Id.*

5. *Id.* at 835–36.

6. *Id.* at 836.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 835–36.

12. *Id.* at 836.

13. *Id.* at 848.

14. *See id.* at 849. While the conviction discussed here was for conspiracy, the court noted that the analysis was the same under conspiracy and aiding and abetting liability, both of which are types of complicity theories. *See id.* at 848 n.8.

15. *See id.* at 849.

The U.S. Supreme Court, echoing the *actus non facit reum nisi mens sit rea* adage, has stated that crime is a compound concept, requiring the concurrence of a proscribed act and a guilty mind.¹⁶ This conception of crime has long been present in American criminal law.¹⁷ However, *People v. Luparello*¹⁸ employed the natural and probable consequence doctrine to reach a result that is inconsistent with this fundamental principle of criminal law.

There are two distinct ideas embedded within the *actus non facit* adage, as well as the Supreme Court's parallel formulation: *actus reus* and *mens rea*, both of which remain at the core of Anglo-American criminal law.¹⁹ The vast majority of federal crimes, with the exception of strict liability crimes,²⁰ are defined by the concurrence of prohibited conduct—*actus reus*—and a culpable state of mind—*mens rea*.²¹ *Actus reus*, Latin for “guilty act,” while not susceptible to a precise definition, can be defined as voluntarily committed conduct that gives rise to the harm which the crime aims to prevent or redress.²² *Mens rea*, Latin for “guilty mind,” looks to the defendant's mental state at the time of the conduct and asks if the conduct and state of mind together deem the defendant culpable.²³ This joint inquiry seeks to determine whether the defendant's conduct and state of mind render him or her worthy of condemnation or blame. However, the employment of the natural and probable consequence doctrine, as described in the above example, allows for liability to attach in the absence of the requisite *mens rea*.²⁴

These two core ideas of criminality have many straightforward applications to individual defendants. Nonetheless, complexity arises when

Luparello errs when he concludes the perpetrator and accomplice must “share” an identical intent to be found criminally responsible for the same crime. Technically, only the perpetrator can (and must) manifest the *mens rea* of the crime committed. Accomplice liability is premised on a different or, more appropriately, an equivalent *mens rea*. This equivalence is found in *intentionally* encouraging or assisting or influencing the nefarious act. “[B]y intentionally acting to further the criminal actions of another, the [accomplice] voluntarily identifies himself with the principal party.”

Id. (alterations in original) (quoting Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 349 n.51 (1985)).

16. See *Morrisette v. United States*, 342 U.S. 246, 251–52 (1952) (“Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, . . . took deep and early root in American soil.”).

17. *Id.*

18. 231 Cal. Rptr. 832 (Ct. App. 1986).

19. See Sayre, *supra* note 1, at 974 n.3.

20. See 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 5.5, at 381 (2d ed. 2003) (describing strict liability crime as “statutory crime-without-fault”). These crimes tend to carry with them small penalties and tend to be misdemeanors. See *id.*

21. See *id.* § 1.2, at 14; see also *Dennis v. United States*, 341 U.S. 494, 500 (1951) (noting that a survey of Title 18 of the U.S. Code reveals a vast majority of crimes to have a statutory mental state).

22. See SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 205–06 (9th ed. 2012).

23. See 1 LAFAYE, *supra* note 20, § 5.1, at 332.

24. See *infra* Part II.A.1–4 (discussing four federal cases that circumvent the *mens rea* requirement in their use of the doctrine).

two or more individuals combine, through plan or happenstance, to commit a crime and one is liable for the act(s) of another. Whether the government pursues a theory of complicity that the defendant was a principal, conspirator, or accomplice, the law must provide a just and reliable way to impose liability on culpable individuals for the conduct and mental states of others.²⁵ As a general rule, an accomplice is liable when he or she provides aid to another, or in some way counsels or procures another, in the commission of a crime.²⁶ But what happens when, for example, an accomplice aids, counsels, or procures another with the intent to facilitate one crime, but, unbeknownst to the accomplice, a confederate intends and commits a wholly different crime? As seen in *Luparello*, when the natural and probable consequence doctrine is applied, an accomplice may be held liable for a crime he or she did not intend to be committed. Numerous courts and commentators have stated that the natural and probable consequence doctrine is inconsistent with basic understandings and principles of Anglo-American criminal law.²⁷ Not only has this inconsistency been noted, but the doctrine's viability as a whole has been called into question.²⁸

The Supreme Court recently took a rare plunge into federal accomplice liability, revisiting its foundations in *Rosemond v. United States*²⁹ for the first time in roughly thirty years.³⁰ This decision clarifies aspects of accomplice liability that have been treated inconsistently³¹ and should ideally lead to more consistent results in cases involving conduct which was

25. See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 589 (8th ed. 2007) (excerpting Sanford H. Kadish, *A Theory of Complicity*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 288 (Ruth Gavison ed. 1987)).

26. See 18 U.S.C. § 2 (2012).

27. For an example of this criticism by a state court, see *infra* notes 108–10 and accompanying text. For an example of this criticism by a federal court, see *infra* notes 246–54 and accompanying text. For an example of this criticism in scholarship, see *infra* notes 283–90 and accompanying text.

28. See *infra* Part II.B (discussing three federal courts that have rejected the doctrine); see also *infra* Part II.C (discussing various scholars' and the Model Penal Code's rejection of the doctrine).

29. 134 S. Ct. 1240 (2014).

30. See Rory Little, *Opinion Analysis: Justice Kagan Writes a Primer on Aiding and Abetting Law*, SCOTUSBLOG (Mar. 6, 2014, 9:04 AM), <http://www.scotusblog.com/2014/03/opinion-analysis-justice-kagan-writes-a-primer-on-aiding-and-abetting-law/> (noting that the Court has not addressed federal accomplice liability since *Standefer v. United States*, 447 U.S. 10 (1980)) [<https://perma.cc/GHT3-LGHA>]. While there have been cases involving criminal accomplice liability that have reached the Court, these cases have been adjudicated without reaching the foundations of accomplice liability or have been based on state law versions of accomplice liability. See, e.g., *Waddington v. Sarausad*, 555 U.S. 179 (2009) (basing the holding on the clarity of a state court jury instruction and standards of review for habeas proceedings); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that an accomplice to felony murder is not subject to capital punishment under the Eighth Amendment).

31. Compare *infra* Part II.A (discussing cases that use the doctrine and as a result, do not require proof of an accomplice's mental state for all crimes), with *infra* Part II.B. (discussing cases that reversed convictions, when those convictions were predicated on the doctrine, due to the lack of proof of the accomplice's mental state for all crimes).

unanticipated by the accomplice.³² However, because neither party put forth the natural and probable consequence doctrine as part of their argument in *Rosemond*, the Court did not have an opportunity to weigh in on the viability of the doctrine in federal criminal law and explicitly left this question open in footnote 7 of Justice Kagan's majority opinion.³³ As this Note shows, the Court's recent decision in *Rosemond* should lead to more consistent results in cases that have traditionally applied the natural and probable consequence doctrine.³⁴

Part I of this Note describes accomplice liability, the natural and probable consequence doctrine, and the Court's recent holding in *Rosemond*. Part II reviews the doctrine's reception in federal courts and then turns to scholarly critiques of the doctrine. Finally, Part III applies *Rosemond*'s holding to federal criminal cases that have invoked the natural and probable consequence doctrine to determine whether the doctrine survives *Rosemond*. This Note concludes that, despite *Rosemond*'s footnote 7, which explicitly expressed no view on the natural and probable consequence doctrine, *Rosemond* consumes and eliminates the doctrine as a viable complicity theory in federal criminal law. *Rosemond* should, therefore, guide courts in confining accomplice liability to only those who are truly culpable, which is the ultimate goal of Anglo-American criminal law.

I. ROSEMOND V. UNITED STATES AND AN OVERVIEW OF THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE

Before this Note can critique the natural and probable consequence doctrine, it is necessary to locate the doctrine within the context of criminal law and accomplice law. Part I.A reviews the history and development of accomplice law and liability. Part I.B examines the natural and probable consequence doctrine and discusses its treatment in state courts. Then, Part I.C explains the Court's recent decision in *Rosemond* before turning to footnote 7 of the opinion, which declined to pass judgment on the natural and probable consequence doctrine.

32. See *infra* Part III.B.

33. *Rosemond*, 134 S. Ct. at 1248 n.7.

34. While this Note focuses on federal criminal law, and while *Rosemond*'s holding is not binding on the states, the clarification of the mental state for federal accomplice liability may very likely affect how states view accomplice law. See Wesley M. Oliver, *Limiting Criminal Law's "In for a Penny, in for a Pound" Doctrine*, 103 GEO. L.J. ONLINE 8, 10 (2013) (discussing the Court's influence on state criminal law). However, whether proof of mens rea is constitutionally required is beyond the scope of this Note, and this Note presumes there is no such constitutional requirement. *But see* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683–84 (1983) (speculating that the Model Penal Code's requirement of element analysis, which necessarily includes mental states as an element of criminal liability analysis, may have constitutional significance).

A. *Accomplice Liability 101*

Accomplice liability permits a person to be held liable for the acts of another.³⁵ This concept comes from the common law and dates back to at least the fourteenth century.³⁶ At common law, there were distinctions between different types of accomplices, which turned on how directly they were involved with the commission of a crime. In contrast, today's accomplice law holds all accomplices liable as principals.³⁷ Today, for criminal liability to attach, accomplice law only requires proof that an accomplice provided some type of aid to another in furtherance of a crime—by definition, the accomplice need not, and does not, directly commit the crime.³⁸

The modern formulation of accomplice liability, which was adopted by the Court, states that, for an accomplice to be liable, the individual must participate in the charged crime as “something that he wishes to bring about, that he seek by his action to make it succeed.”³⁹ Interestingly, the federal statute codifying accomplice liability, 18 U.S.C. § 2(a), is quite sparse and offers little in terms of the elements the government must prove for accomplice liability to attach.⁴⁰ Further, the statute is silent as to the requisite quantity or quality of the aid or encouragement that must be provided for an accomplice to be liable.⁴¹ The general understanding is an accomplice may be held liable as a principal for aiding any element or aspect of a crime without the need for the government to prove that aid was provided for each element of the crime.⁴²

While the necessity for accomplice liability is not often questioned,⁴³ § 2(a)'s silence on the requirements to convict an accomplice has prompted

35. See 2 LAFAVE, *supra* note 20, § 13.2, at 337.

36. See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

37. See Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 137–38 (2013). However, accomplices at common law who were considered “accessor[ies] after the fact” remained separate from the other condensed common law accomplice classes. *Id.* at 138.

38. See 2 LAFAVE, *supra* note 20, § 13.2, at 337; see also *United States v. Wesson*, 889 F.2d 134, 135 (7th Cir. 1989) (“Aiding and abetting is nothing if not a crime you may commit without performing all of the elements of the substantive offense.”).

39. *Peoni*, 100 F.2d at 402; see also *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006). The Court cited the quoted language from *Peoni* in such a way as to make it not just a concept of accomplice liability but also a requirement. See *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (using language such as “[i]n order to” and “it is necessary” before citing *Peoni*).

40. See 18 U.S.C. § 2(a) (2012). (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

41. See *id.*

42. See *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (compiling scholarly works to support the proposition that any aid provided to another in furtherance of a crime is sufficient for accomplice liability); *United States v. Woods*, 148 F.3d 843, 850 (7th Cir. 1998). This view of accomplice liability, which predates § 2, remained unchanged by the codification of § 2 and is not disputed among the federal circuits. See *Rosemond*, 134 S. Ct. at 1246–47, 1246 n.5.

43. But see Heyman, *supra* note 37, at 129–33.

significant discussion in the courts and in legal scholarship.⁴⁴ As made explicit in *In re Winship*,⁴⁵ criminal law requires proof beyond a reasonable doubt as to each and every element of the crime charged.⁴⁶ “Element” includes both the proscribed conduct as well as a mental state the defendant must have had when committing the proscribed conduct.⁴⁷ However, so long as a crime has been committed,⁴⁸ accomplice law allows for liability to attach when there is proof that an individual has committed a *single* element of the charged crime.⁴⁹ But how can *Winship* be satisfied for an accomplice when an element of the charged crime includes a mental state, but, as to that single element, the accomplice did not share that mental state in providing aid or encouragement?⁵⁰ The tension between accomplice liability and *Winship* exposes the incongruity between the work that the actus reus and the requisite mens rea do during the prosecution of principals, as compared to the prosecution of accomplices, and has resulted in disagreement over the elements of accomplice liability.⁵¹ While the actus reus can be located without too much difficulty in the aid or encouragement provided by an accomplice, the mens rea required for an accomplice in providing such aid is unclear—can the aid be provided negligently or recklessly or must it be provided knowingly or intentionally?⁵² Because § 2(a) does not announce or imply a requisite mental state for accomplice liability, there has been disparate application of the mens rea element to accomplice defendants in our courts.⁵³

44. See *Wilson-Bey*, 903 A.2d at 831–32 & nn.27–28 (D.C. Cir. 2006); *Woods*, 148 F.3d at 847–48 (7th Cir. 1998); *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972); MODEL PENAL CODE § 2.06 cmt. 6(b)–(c) (AM. LAW INST., Official Draft and Revised Comments 1985); 2 LAFAVE, *supra* note 20, § 13.2, at 337; Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1373 (2002).

45. 397 U.S. 358 (1970).

46. See *id.* at 364 (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

47. See *Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000) (“[I]ntent in committing a crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’”).

48. While accomplice liability, by its very nature, requires a crime to have been committed, the Supreme Court has held that an accomplice may be held liable even in the absence of his or her confederate principal’s conviction, and thus, an accomplice’s liability is not dependent on a principal’s liability. See *Standefer v. United States*, 447 U.S. 10, 19–20 (1980).

49. See *supra* note 42 and accompanying text.

50. See *infra* Part I.C (explaining the Court’s holding in *Rosemond*, which answers this question).

51. See *supra* note 44.

52. See 2 LAFAVE, *supra* note 20, § 13.2(b), at 343 (“Considerable confusion exists as to what the accomplice’s mental state must be”); see also *Rosemond v. United States*, 134 S. Ct. 1240, 1253 (2014) (Alito, J., dissenting) (referring to the messiness of the case law surrounding the mens rea required for accomplice liability: “There is some tension in our cases on this point”).

53. Compare *infra* Part II.A.1 (discussing a case in which the defendant was convicted as an accomplice to a § 924(c) violation—for possessing a firearm and explosive device during the commission of a crime of violence—on a natural and probable consequence theory), with *infra* Part II.B.2 (discussing a case where the defendant’s conviction as an

*B. The Natural and Probable Consequence Doctrine:
An Overview*

The natural and probable consequence doctrine is used to hold individuals criminally liable when they intend to aid in a particular crime but, instead, unintentionally provide aid for a different crime.⁵⁴ Part I.B.1 introduces and describes the doctrine, and Part I.B.2 explores its reception by state courts.

1. What Is the Natural and Probable Consequence Doctrine?

The natural and probable consequence doctrine is an exception to a general rule of accomplice liability.⁵⁵ This general rule of accomplice liability states that the intent to aid one crime is insufficient as proof of intent to aid a different crime.⁵⁶ However, once an accomplice's intent to commit one crime has been established, the natural and probable consequence doctrine allows for that initial intent to be imputed to a subsequent crime if the subsequent crime is deemed a natural and probable consequence of the initial crime, thus providing an exception to the general rule.⁵⁷

The phrase “natural and probable consequence” is used in two distinct ways, which must be distinguished from each other. First, there is the permissive common law presumption, or more accurately stated, a permissive common law *inference*, that one intends the natural and probable consequences of voluntarily committed acts.⁵⁸ This distinction between a presumption and an inference is crucial; if the judge allows the jury to *presume* the intent of the defendant, thus shifting the burden to the defendant to prove that he did not intend the natural and probable consequences of his voluntary acts, the defendant's due process rights are violated.⁵⁹ However, a judge may instruct the jury, without violating the defendant's right to due process, that they *may* draw this inference but are not required to do so.⁶⁰ Second, a prosecutor may employ the doctrine to show that an accomplice's initial conduct naturally and probably resulted in

accomplice to a § 924(c) violation was overturned due to the court's rejection of the natural and probable consequence theory used at trial).

54. See Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1360 (1998).

55. See 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 35, at 209 (15th ed. 1993).

56. See *id.*

57. See Michael G. Heyman, *Due Process Limits on Accomplice Liability*, 99 MINN. L. REV. 131, 131 (2015). While not the focus of this Note, the doctrine is also in contravention of Anglo-American criminal law's traditional understanding of actus reus. Because no additional action beyond the initial aid provided for the initial crime is required to convict a defendant when the doctrine is employed, the doctrine effectively eliminates the act requirement. See Weiss, *supra* note 44, at 1425; see also *infra* Part II.C.

58. See 22 C.J.S. *Criminal Law: Substantive Principles* § 39 (2016); see also Wilson-Bey v. United States, 903 A.2d 818, 839 n.38 (D.C. 2006). For an example of this version of a natural and probable consequence theory used in a case, see *People v. Conley*, 543 N.E.2d 138, 143–44 (Ill. App. Ct. 1989).

59. See *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

60. See *id.* at 515.

a subsequent crime.⁶¹ It is through the latter use that this Note uses the natural and probable consequence doctrine.

The Supreme Judicial Court of Maine applied the doctrine in the commonly cited case of *State v. Linscott*.⁶² In *Linscott*, the defendant, William Linscott, along with three other men, decided to rob a known drug dealer.⁶³ After arriving at the drug dealer's home, Linscott, armed with knives, and one of his confederates, armed with a shotgun, exited the car and approached the house.⁶⁴ The two men planned for Linscott to smash the front window and then for the confederate to thrust his shotgun through the window as a threat to the dealer sitting within, with the hope that the firearm would deter the dealer from defending himself.⁶⁵ After Linscott broke the window as planned, the confederate immediately fired his shotgun into the room, striking, and ultimately killing, the dealer.⁶⁶

Linscott was found guilty of robbery, as a principal, and of murder, as an accomplice.⁶⁷ The court held that the murder of the dealer was a "reasonably foreseeable consequence" of the robbery.⁶⁸ The court disagreed with Linscott's challenge that the use of the natural and probable consequence doctrine was a violation of his right to due process and affirmed the conviction.⁶⁹ In affirming the trial court's judgment, the court reasoned the doctrine was predicated on an objective standard of accomplice liability and that proof of the defendant's subjective mental state for the robbery was sufficient, without requiring further proof of Linscott's state of mind as to the murder.⁷⁰

While *Linscott* provides an example of the doctrine at work, it does not discuss when use of the doctrine is apt, or even how the doctrine is invoked. Generally speaking, there are three ways in which the doctrine is used. First, it can be used as a prosecution theory at trial.⁷¹ Second, it can be incorporated into jury instructions at trial.⁷² Third, and most commonly

61. See *supra* note 57 and accompanying text. All references in this Note to the natural and probable consequence doctrine, unless otherwise noted, refer only to the second use as just described above.

62. 520 A.2d 1067 (Me. 1987).

63. *Id.* at 1067–68.

64. *Id.* at 1068.

65. *Id.*

66. *Id.*

67. *Id.* Discussion of why the defendant was not charged as a conspirator or with felony-murder is conspicuously absent from the opinion.

68. *Id.* "Reasonably foreseeable" consequence is a synonymous articulation of the "natural and probable" consequence doctrine. See *People v. Woods*, 11 Cal. Rptr. 2d 231, 239–40 (Ct. App. 1992). There exists a third articulation of this doctrine, albeit a much less common one—common design—which this Note does not discuss. See Heyman, *supra* note 37, at 132 (discussing common design).

69. *Linscott*, 520 A.2d at 1070–71.

70. *Id.* at 1070.

71. See, e.g., *Waddington v. Sarausad*, 555 U.S. 179, 202 (2009) (Souter, J., dissenting) (quoting the prosecutor's closing argument, which implicitly invoked the doctrine by use of the idiom, "in for a dime, in for a dollar").

72. See, e.g., *Wilson-Bey v. United States*, 903 A.2d 818, 826 (D.C. 2006). For the text of the instruction, see *infra* note 111.

seen in case law, an appellate court may employ the doctrine to combat a sufficiency-of-the-evidence appeal.⁷³ As to the two uses at trial, today its use is generally acceptable so long as it is not conveyed to the jury as a conclusive presumption, which would invade the jury's exclusive role as the trier of fact and impermissibly relieve the government of its burden of proof for the requisite mental state.⁷⁴

Furthermore, a California court has proffered a four-step inquiry to determine when the use of the doctrine is appropriate.⁷⁵ This approach illustrates the parameters of the doctrine on a practical level. First, a principal must have committed an initial offense.⁷⁶ Second, the accomplice must have aided in the initial offense.⁷⁷ Third, the same principal must have committed a subsequent offense.⁷⁸ Fourth, the subsequent offense must be a reasonably foreseeable, or a natural and probable, consequence of the accomplice's aid for the initial offense.⁷⁹ If an affirmative answer can be given, beyond a reasonable doubt, to each of these four prongs, this inquiry suggests that a jury may convict an accomplice defendant on a natural and probable consequence theory and an appellate court may affirm such a conviction.⁸⁰

2. Treatment of the Doctrine Among the States

There is much uncertainty about the exact number of jurisdictions that have either adopted or rejected the natural and probable consequence doctrine. Some sources suggest a minority of jurisdictions have adopted the doctrine,⁸¹ while other sources say the doctrine has been adopted by most jurisdictions.⁸² Regardless of the correct position, there are several certainties regarding the doctrine: it has not been rejected by a majority of

73. See *infra* Part II.A–B (describing seven circuit court cases that all discuss or use the doctrine with respect to a sufficiency of the evidence appeal).

74. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 446 (1978) (“[T]he issue of intent must be left to the trier of fact alone.”); *Morissette v. United States*, 342 U.S. 246, 275 (1952) (“A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.”).

75. *People v. Woods*, 11 Cal. Rptr. 2d 231, 239 (Ct. App. 1992). Because California courts are some of the most frequent users, and strongest supporters, of the doctrine, this four-step inquiry is illustrative of how to properly use the doctrine. See John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 329 (2008) (stating California's repetitive use of the doctrine, as well as putting forward a largely similar five-step analysis for the doctrine).

76. See *supra* note 75.

77. See *supra* note 75.

78. See *supra* note 75.

79. See *supra* note 75.

80. See *Woods*, 11 Cal. Rptr. 2d at 239.

81. See *Wilson-Bey v. United States*, 903 A.2d 818, 833 n.28 (D.C. 2006) (stating a minority of jurisdictions adhere to the doctrine); Decker, *supra* note 75, at 312 (stating that there are twenty states that have adopted the natural and probable consequence doctrine).

82. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05, at 475 (6th ed. 2012). But see *Wilson-Bey*, 903 A.2d at 831–32, 831 n.27.

jurisdictions,⁸³ there is resounding criticism of the doctrine,⁸⁴ and the number of jurisdictions rejecting it has been consistently increasing.⁸⁵ Because the doctrine comes from the common law,⁸⁶ courts' rejections of it tend to be more readily identifiable than adoptions. However, this discussion will begin by turning to supporters of the doctrine.⁸⁷

Texas has supported the use of the natural and probable consequence doctrine since 1892.⁸⁸ In *Lyons v. State*,⁸⁹ the Texas Court of Appeals held that a defendant may be liable as an accomplice to a homicide if the defendant intentionally encouraged an assault that ultimately leads to death.⁹⁰ By the court's language, the doctrine was to be used separately from, and in the absence of, proof that the accomplice had knowledge of his or her confederate's subsequent crime(s).⁹¹ In citing *Lyons*, the California Supreme Court adopted the doctrine in 1910.⁹² In 1996, the Supreme Court of California issued a comprehensive decision in *People v. Prettyman*,⁹³ reaffirming its support for the doctrine.⁹⁴ In *Prettyman*, the court stated the doctrine was an "established rule" of American jurisprudence⁹⁵ and that it had been part of California's pattern jury instructions since 1976.⁹⁶ The court reasoned that "[i]t is the intent to encourage and bring about conduct that is criminal," and, therefore, an accomplice should be liable for the foreseeable consequences he or she has set in motion as a result of any intentionally provided aid or encouragement.⁹⁷ There are several other

83. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190–91 (2007); DRESSLER, *supra* note 82.

84. For further doctrinal criticism, see *infra* Part II.B–C.

85. See *Duenas-Alvarez*, 549 U.S. at 196 (compiling cases).

86. See TORCIA, *supra* note 55, § 35, at 209.

87. While the focus of this Note is on the doctrine's use in federal criminal law, there is a greater quantity of case law on the doctrine at the state level, simply because there are many more state jurisdictions than federal ones. As a result, the discussion in this subsection centers on state courts. However, because the doctrine, in the context this Note uses it, is the same regardless of the locus of the court, the reasoning behind state courts' adoptions and rejections of the doctrine is equally relevant and applicable as federal case law is to the analysis of this Note. Compare *Decker*, *supra* note 75, at 249–50 (focusing on the doctrine in the state context), with *Weiss*, *supra* note 44, at 1424–35 (focusing on the doctrine in the federal context).

88. See *Lyons v. State*, 18 S.W. 416, 417 (Tex. Ct. App. 1892).

89. 18 S.W. 416 (Tex. Ct. App. 1892).

90. *Id.* at 417.

91. See *id.*

92. See *People v. Bond*, 109 P. 150, 155 (Cal. Ct. App. 1910).

93. 926 P.2d 1013 (Cal. 1996).

94. *Id.* at 1019.

95. *Id.* (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 6.8(b), at 158 (1986)).

96. See *id.* at 1021.

97. *Id.* at 1020 (quoting *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985)). Notice the similarity between the language used by the *Prettyman* Court and the language used by the *Luparello* Court. See *supra* note 14 and accompanying text (discussing how the court held *Luparello* liable for foreseeable crimes committed as a result of actions he set in motion).

jurisdictions that support the doctrine, including Arizona,⁹⁸ Iowa,⁹⁹ Maine,¹⁰⁰ and Wisconsin.¹⁰¹

Some states have rejected the doctrine and stand in stark contrast to the above supporters. In 1973, Massachusetts rejected the doctrine on the ground that “[o]ne is punished for his own blameworthy conduct, not that of others.”¹⁰² The court held that accomplice liability is established by proof that the accomplice’s mental state, at the time the accomplice provided his or her aid, was equivalent to the mental state required for the principal.¹⁰³ This holding’s stance on culpability is in direct opposition to the natural and probable consequence doctrine.¹⁰⁴

In 1997, New Mexico rejected the doctrine in *State v. Carrasco*.¹⁰⁵ For accomplice liability to exist, New Mexico law requires proof that the accomplice “share[d] the criminal intent of the principal.”¹⁰⁶ In rejecting the doctrine, the court disapproved of its ability to allow for liability to attach to foreseen but unintended consequences, holding it to be inconsistent with the criminal law of New Mexico.¹⁰⁷

In 2002, the Nevada Supreme Court emphatically rejected the doctrine.¹⁰⁸ In its abandonment of it, the court stated that the doctrine is not reconcilable with some of the basic tenets of criminal law because it allows for liability to attach without proof that the accomplice possessed the requisite statutory mental state.¹⁰⁹ Furthermore, the court stated the doctrine allows for liability to extend to crimes that may have been

98. See ARIZ. REV. STAT. ANN. § 13-303(A)(3) (2008) (“The person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice.”).

99. See *State v. Husted*, 538 N.W.2d 867, 870 (Iowa Ct. App. 1995) (“[A]n aider and abettor is liable for any criminal act which in the ordinary course of events was the natural and probable consequence of the criminal act encouraged.”).

100. See *supra* notes 62–70 and accompanying text (discussing the Supreme Judicial Court of Maine’s use of the doctrine in *Linscott*).

101. See *State v. Ivy*, 350 N.W.2d 622, 626 (Wis. 1984) (“[A]n aider and abettor may be guilty . . . for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged.”).

102. *Commonwealth v. Richards*, 293 N.E.2d 854, 859 (Mass. 1973) (quoting *Commonwealth v. Stasiun*, 206 N.E.2d 672, 679 (Mass. 1965)). In *Stasiun*, Massachusetts rejected the use of the *Pinkerton* doctrine (although the court did not name it), which is to conspiracy law what the natural and probable consequence doctrine is to accomplice law. See *Stasiun*, 206 N.E.2d at 679.

103. *Richards*, 293 N.E.2d at 860.

104. Compare *id.*, with *supra* note 57 and accompanying text (describing how the doctrine allows for a principle’s mental state to be imputed to an accomplice).

105. 946 P.2d 1075 (N.M. 1997).

106. *Id.* at 1079.

107. *Id.* at 1079–80. The court supported its reasoning with both scholarly criticism of the doctrine and the Model Penal Code’s criticism of the doctrine. *Id.* at 1079 (citing 2 LAFAYETTE & SCOTT, JR., *supra* note 95, § 6.8(b), at 157–59, and MODEL PENAL CODE § 2.06 cmt. 6(b) (AM. LAW INST., Official Draft and Revised Comments 1985)); see also *infra* Part II.C (elaborating on these criticisms).

108. *Sharma v. State*, 56 P.3d 868, 872 (Nev. 2002) (stating “we hereby disavow and abandon the doctrine”).

109. *Id.* at 871–72 (referring to specific intent crimes).

foreseeable but which the accomplice never intended and is thus inconsistent with Nevada law and fundamental principles of Anglo-American criminal law.¹¹⁰

In 2006, the District of Columbia Court of Appeals also rejected the doctrine in a case involving premeditated murder.¹¹¹ The court cited to numerous sources to support its rejection, including case law, legal treatises, and the Model Penal Code (MPC).¹¹² The court reasoned that allowing a defendant to be convicted without proof of premeditation or intent to kill “dilute[s] the principle that the *mens rea* required” for the crime must be proven and is thus unacceptable.¹¹³ However, this holding goes beyond just premeditated murder and applies to all specific intent crimes, that is, a crime with a requisite mental state.¹¹⁴

Several other states have rejected the doctrine, or at minimum, have spoken skeptically of it, including Alaska,¹¹⁵ Colorado,¹¹⁶ Maryland,¹¹⁷ Montana,¹¹⁸ and Vermont.¹¹⁹ The remaining state courts’ reasoning for rejecting the doctrine is consistent with the cases discussed above, often relying on the same sources.¹²⁰ Most notable of these sources, and

110. *Id.* at 872 (citing *Carrasco*, 946 P.2d at 1079–80; WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.7(b), at 579 (2d ed. 1986)).

111. *See Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006). The court’s holding was predicated on the jury instruction for premeditated murder being erroneous. *See id.* at 822. The jury instruction issued at trial read as follows:

It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed or *that she have intended to commit the particular crime by the principal offender*. An aider and abett[o]r is legally responsible for the acts of other persons *that are the natural and probable consequences of the crime or criminal venture in which she intentionally participates*.

Id. at 826 (alteration in original).

112. *Id.* at 831, 837.

113. *See id.* at 836, 838.

114. *See id.* at 837–38.

115. *See, e.g., Riley v. State*, 60 P.3d 204, 221 (Alaska Ct. App. 2002) (relying on the MPC’s sections on mental states and complicity in reaching its conclusion that an accomplice’s culpable mental state must be assessed separately from the principal’s).

116. *See, e.g., Bogdanov v. People*, 941 P.2d 247, 251 n.8 (Colo. 1997) (stating that Colorado’s accomplice statute does not allow for accomplice liability to extend to the reasonably foreseeable consequences of an accomplice’s intentionally provided aid or encouragement), *disapproved of on other grounds by Griego v. People*, 19 P.3d 1 (Colo. 2001).

117. *See Sheppard v. State*, 538 A.2d 773, 775 n.3 (Md. 1988) (expressing disapproval of allowing foreseeability to be used in accomplice law while not outright rejecting the doctrine), *abrogated on other grounds by State v. Hawkins*, 604 A.2d 389, 501 (Md. 1992).

118. *See State ex rel. Keyes v. Mont.* Thirteenth Judicial Dist. Court, 955 P.2d 639, 643 (Mont. 1988) (rejecting criminal liability for foreseeable yet unintended deaths, stating it as a rejection of transferred intent while not naming the doctrine explicitly).

119. *See State v. Bacon*, 658 A.2d 54, 62 (Vt. 1995) (rejecting felony murder, a form of the doctrine, for violating the basic principle of criminal law that a defendant cannot be convicted absent a culpable mental state).

120. Compare the cases compiled in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 196 (2007), with the cases discussed in *supra* notes 115–19 and accompanying text.

probably most influential, is the MPC.¹²¹ While some courts explicitly cite the MPC in their rejections of the doctrine, many of the abovementioned courts were likely influenced by it in their rejections, as evidenced by their apprehension toward allowing foreseeability to support accomplice liability.¹²²

C. *Rosemond v. United States: The “Basics”*
of the Intent Requirement in Accomplice Law and Footnote 7

In light of the relatively recent trend toward courts’ focus on, and scrutiny of, the mens rea component of accomplice liability—as evidenced by the increasing rejections of the natural and probable consequence doctrine—the Supreme Court decided to weigh in on the matter. In March 2014, the Court decided *Rosemond v. United States*,¹²³ where it resolved the issue of how one aids and abets the distinct crime of using a gun in connection with a drug crime or crime of violence.¹²⁴ The facts are as follows: Vashti Perez planned to engage in the sale of one pound of marijuana along with Justus Rosemond and Ronald Joseph, two individuals Perez had enlisted.¹²⁵ Unfortunately for Perez, the sale did not go as she hoped. After entering Perez’s car to conduct the transaction, the would-be buyer attacked the sellers and fled with the marijuana.¹²⁶ Following the assault, one of the sellers—whether it was Rosemond or Joseph was never determined—got out of the car and futilely fired a handgun at the fleeing buyers.¹²⁷ When the shooter reentered the car, all three sellers chased the buyers but were stopped by police officers before they could reach them.¹²⁸

The government drew up a four-count indictment, charging Rosemond with, inter alia, violating 18 U.S.C. § 924(c), which forbids the carrying of a firearm during the commission of a drug crime.¹²⁹ Because the government anticipated having difficulty proving the identity of the shooter, the

121. See Robinson & Grall, *supra* note 34, at 683 (stating that a majority of states have adopted MPC-influenced criminal codes). The MPC’s rejection of the natural and probable consequence doctrine will be discussed in more detail in Part II.C.

122. See *supra* notes 107, 110, 119 and accompanying text.

123. 134 S. Ct. 1240 (2014).

124. *Id.* at 1243. More specifically, the circuit courts were split between those that required intentional facilitation or encouragement of the gun use by the accomplice versus those that only required the accomplice to have knowledge of a confederate’s gun possession. *Id.* at 1244–45.

125. *Id.* at 1243.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; see also *United States v. Rosemond*, 695 F.3d 1151, 1153 (10th Cir. 2012), *vacated and remanded by* 134 S. Ct. 1240. Section 924(c) is a criminal statute, stating in pertinent parts:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c) (2012).

government pursued the § 924(c) charge against Rosemond on a principal theory and an accomplice theory under 18 U.S.C. § 2.¹³⁰ At the conclusion of the trial, the jury issued a general verdict form, finding Rosemond guilty on all counts, but, due to the nature of a general verdict form, the jury did not specify if it found Rosemond guilty of the § 924(c) charge as a principal or an accomplice.¹³¹ Rosemond appealed his conviction, claiming error in the aiding and abetting jury instructions given at trial.¹³² Rosemond argued the district court should have instructed the jury that the government must prove Rosemond intended to provide aid in furtherance of his confederate's gun use or had encouraged the gun use.¹³³ The Tenth Circuit affirmed Rosemond's conviction while acknowledging the circuit split regarding the elements for aiding and abetting a § 924(c) violation.¹³⁴

The Supreme Court vacated the Tenth Circuit's judgment and remanded the case, holding the district court's jury instructions to be erroneous.¹³⁵ The Court began its analysis by describing how an individual is held liable under § 2.¹³⁶ There, the Court stated that, to be liable as an accomplice, a person must aid¹³⁷ at least one element of the predicate offense, and such aid must be given with the intent to aid that offense.¹³⁸ The Court rejected Rosemond's argument as to the first element, that he should escape liability because the act or aid "must be directed at the use of the firearm,"¹³⁹ holding Rosemond could have aided either the predicate offense or the gun use to satisfy the act element of § 2.¹⁴⁰

The Court then turned to the thornier issue of the requisite intent for aiding and abetting a § 924(c) violation.¹⁴¹ The way in which the Court defined the second element of § 2 liability—mental state—is in stark contrast to the first element of § 2 liability—the act—which the Court stated only requires a person to aid *one* element of the crime.¹⁴² As for the mental state, the Court held that the defendant's "intent must go to the specific and entire crime charged."¹⁴³ The Court then defined "intent," in

130. *See Rosemond*, 134 S. Ct. at 1243; *see also supra* note 40 (quoting the pertinent language of § 2).

131. *See Rosemond*, 134 S. Ct. at 1244.

132. *Id.*; *see also* *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) ("A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one.").

133. *See Rosemond*, 134 S. Ct. at 1244; *Rosemond*, 695 F.3d at 1155.

134. *Rosemond*, 134 S. Ct. at 1244–45.

135. *Id.* at 1245.

136. *See id.*

137. Or "abet[], counsel[], command[], induce[] or procure[]." 18 U.S.C. § 2 (2012).

138. *Rosemond*, 134 S. Ct. at 1245 (citing 2 LAFAVE, *supra* note 20, § 13.2, at 337). The Court's reading of § 2 reflects the traditional concepts of criminal liability, which require proof of a mens rea and an actus reus. *See supra* note 16 and accompanying text.

139. *Rosemond*, 134 S. Ct. at 1247.

140. *Id.* at 1245–48.

141. *Id.* at 1248–51.

142. *See supra* notes 138–40 and accompanying text.

143. *Rosemond*, 134 S. Ct. at 1248. In the preceding sentence, the Court stated, "An intent to advance some different or lesser offense is not, or at least not usually, sufficient." *Id.*

the context of § 2, to mean knowledge of the criminal scheme.¹⁴⁴ Knowledge of the criminal scheme, for purposes of § 924(c), does not simply require knowledge of a confederate's possession of the gun in relation to the crime—as the government argued—but foreknowledge of the gun possession.¹⁴⁵ The Court further explained its holding with a metaphor: “[S]o long as the player knew the heightened stakes when he decided to stay in the game,” that “player,” or accomplice, may be held liable for his confederate's conduct.¹⁴⁶ This is so because the conscious decision to remain in the game, with full knowledge of the crime, evidences the accomplice's desire for the criminal venture to succeed, or to further the metaphor, to play the hand until the bitter end.¹⁴⁷

In addition to resolving the circuit split, *Rosemond* is significant because it had been more than thirty years since the Court last considered the foundations and parameters of accomplice liability.¹⁴⁸ Tellingly, Wayne LaFave, one of the authorities the Court relied on for the black letter law of accomplice liability, has noted the uncertainty as to the requisite mental state for accomplice liability.¹⁴⁹ *Rosemond* is, therefore, quite significant because it addresses the divergent opinions of the legal community as to the requisite mental state required for accomplice liability.¹⁵⁰ Assuming *Rosemond*'s holding is applicable to accomplice liability generally, proof of an accomplice's intent to aid an initial crime is no longer sufficient to convict that same accomplice of a subsequent crime to which the accomplice provided no further aid.¹⁵¹ Now, under *Rosemond*, proof of the accomplice's mental state must show that the accomplice both intentionally provided aid or encouragement that furthered the commission of the crime *and* intended the full scope of the crime to be committed.¹⁵² To bolster this formulation of the requisite mental state for an accomplice, the Court cited the *Peoni* standard, laid out in *United States v. Peoni*,¹⁵³ which demands that the accomplice subjectively want the crime to succeed.¹⁵⁴ The Court then stated that an accomplice intends the crime's commission when he or she “actively participates in a criminal scheme knowing its extent and

144. *Id.* at 1248–49.

145. *Id.* at 1249–51.

146. *Id.* at 1250.

147. *See id.*

148. *See supra* note 30 and accompanying text.

149. 2 LAFAVE, *supra* note 20, § 13.2, 337 (“There is a split of authority as to whether some lesser mental state will suffice for accomplice liability, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct which may produce a criminal result.”).

150. *See Rosemond*, 134 S. Ct. at 1248–51. Despite the Court stylizing the discussion in this section as a review of “some basics,” the Court actually clarified the requisite mental state for accomplice liability, which case law has not treated uniformly. *See id.* at 1248.

151. *See id.* (“[T]he intent must go to the specific and entire crime charged—so here, to the full scope (predicate crime plus gun use) of § 924(c).”).

152. *See id.*

153. 100 F.2d 401 (2d Cir. 1938).

154. *Id.* (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). As discussed above, the Court adopted the *Peoni* standard for accomplice liability in *Nye & Nissen*. *See supra* note 39 and accompanying text.

character.”¹⁵⁵ Thus, an accomplice may no longer be held liable when there is sufficient proof of aid or encouragement, but proof as to the accomplice’s mental state is either lacking or does not meet the requisite mental state.¹⁵⁶

It is true the Court granted *Rosemond*’s petition for certiorari to resolve the circuit split regarding the elements of aiding and abetting a § 924(c) violation, and that a narrow reading would limit *Rosemond*’s holding to § 924(c) cases.¹⁵⁷ However, the Court’s discussion of the mental state component will likely have a more extended application and impact.¹⁵⁸ This Note focuses on the impact the Court’s logic from *Rosemond* should have on the natural and probable consequence doctrine, notwithstanding footnote 7.

In footnote 7, the Court explicitly declined to pass judgment on whether the natural and probable consequence doctrine may have been used by the government as an accomplice liability theory:

Some authorities suggest an exception to the general rule when another crime is the “natural and probable consequence” of the crime the defendant intended to abet. . . . That question is not implicated here, because no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue.¹⁵⁹

However, the phrase “no one contends”¹⁶⁰ leaves the footnote susceptible to two readings.¹⁶¹ On the one hand, it could be read as stating that because neither party invoked the natural and probable consequence doctrine, the Court will not address it.¹⁶² Alternatively, it could be read to mean that no reasonable person would, or could, argue that gun use is a natural and probable consequence of a “simple drug trafficking”¹⁶³ crime.¹⁶⁴ The first reading is in line with the Court’s policy not to address topics *sua sponte*¹⁶⁵ and suggests the Court did not consider the doctrine at all because neither party raised the issue. The second reading gives rise to the opposite implication, suggesting the Court did consider the doctrine in the context of § 924(c) and decided the doctrine was unavailable based on the record. Either way, if lower courts extend the logic of *Rosemond* beyond § 924(c),

155. *Rosemond*, 134 S. Ct. at 1249.

156. *See id.* at 1248.

157. *See id.* at 1245.

158. *See* Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 244 n.45 (2014); Oliver, *supra* note 34, at 12–13.

159. *Rosemond*, 134 S. Ct. at 1248 n.7.

160. *Id.*

161. *See, e.g.*, Garvey, *supra* note 158, at 238 n.20.

162. *See, e.g., id.* This reading would be in line with the Court’s general rule of only considering questions or issues that were raised by the parties in their petitions to the Court. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 82 (1938) (Butler, J., dissenting).

163. *Rosemond*, 134 S. Ct. at 1248 n.7.

164. *See* Garvey, *supra* note 158, at 238 n.20.

165. *See* Quong Wing v. Kirkendall, 223 U.S. 59, 63–64 (1912). “[T]here are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account.” *Id.* at 64.

the Court may well have significantly impacted the viability of the natural and probable consequence doctrine in federal criminal law, regardless of footnote 7.¹⁶⁶

While this Note is not the first academic work to take notice of footnote 7,¹⁶⁷ this Note is the first attempt to draw out the implications of *Rosemond*'s holding to determine the impact, if any, on the natural and probable consequence doctrine. While the doctrine is only a subsection of accomplice liability as a whole, it is invoked often enough that its elimination would have a real impact on prosecutors' strategies as well as district court jury instructions.¹⁶⁸ More immediately, the elimination of the doctrine would prevent the community of defendants, who may have been convicted solely on a natural and probable consequence theory, from being held liable for crimes they did not commit nor intend to commit.¹⁶⁹ This Note seeks to take *Rosemond*, read generally, to its logical conclusion in an effort to identify the repercussions it may have on the natural and probable consequence doctrine.

II. THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE: FEDERAL COURTS AND COMMENTATORS

The natural and probable consequence doctrine has generated some harsh criticism from courts and commentators alike, while lacking equally strong support. This is not to say the doctrine has no supporters but only that the critics of the doctrine are far more vocal.¹⁷⁰ This part analyzes the treatment of the natural and probable consequence doctrine in federal courts. Part II.A discusses four federal cases that used the doctrine to affirm convictions. Part II.B then discusses three federal cases that rejected a use of the doctrine. Finally, Part II.C reviews the scholarly criticism and rejections of the doctrine as well as the MPC's reaction to the doctrine.

A. *Federal Cases Deploying the Doctrine to Avoid Proof of Mens Rea for All Crimes Charged*

Part II.A introduces the facts and holdings of several federal criminal cases that have upheld appeals in reliance on the natural and probable consequence doctrine.

166. See, e.g., Garvey, *supra* note 158; Oliver, *supra* note 34, at 11. Interestingly, Justice Scalia joined the majority opinion, with the exception of footnote 7 (and 8). Stephen Garvey has guessed that a reason Scalia may not have joined footnote 7 is because he may have believed the footnote could be read as eliminating the natural and probable consequence doctrine. See Garvey, *supra* note 158, at 238 n.20.

167. See, e.g., Garvey, *supra* note 158, at 238 n.20; Oliver, *supra* note 34, at 12–13, 13 n.42.

168. See *infra* Part II.A–B (discussing the doctrine's use in seven federal cases).

169. See *infra* Part III.B.

170. Compare *infra* Part II.A, with *infra* Part II.B–C.

1. *United States v. Wills*

*United States v. Wills*¹⁷¹ involved the use of a destructive device in connection with a bank robbery.¹⁷² Following the trial, a jury found defendant Eural Wills II guilty on four counts, including armed bank robbery and violation of § 924(c).¹⁷³ Wills was found guilty as a principal to the robbery¹⁷⁴ and as an accomplice to the § 924(c) charge.¹⁷⁵

The robbery began when Wills entered the bank via its roof, armed with a handgun, a backpack, and a radio.¹⁷⁶ Sometime after, Wills's accomplice, who was stationed on the roof as a lookout, radioed Wills that the police had arrived, prompting Wills to flee the bank.¹⁷⁷ During Wills's exit from the bank, his accomplice threw a destructive device at the arriving police.¹⁷⁸

On appeal, Wills contested the sufficiency of the evidence supporting his conviction for aiding and abetting the use of the destructive device.¹⁷⁹ In rejecting his contention, the Ninth Circuit reasoned that the evidence supported a finding that Wills "could have reasonably foreseen" his accomplice's use of the destructive device.¹⁸⁰ The court predicated its holding on the following four facts, believing that, together, they formed sufficient evidence upon which the jury could base an inference as to Wills's guilt: (1) Wills possessed a radio during the bank robbery, (2) Wills used the radio to communicate with his accomplice on the roof, (3) the accomplice told Wills to "hurry up" because the police were arriving, and (4) Wills responded to the accomplice's warning that he was hurrying.¹⁸¹

171. 88 F.3d 704 (9th Cir. 1996).

172. *Id.* at 708.

173. *Id.* The jury was instructed that, to hold Wills guilty of aiding and abetting, the government must prove beyond a reasonable doubt that

the defendant knowingly and intentionally aided, counseled, commanded, induced or procured someone to commit the crime; . . . [i]t is not enough that the defendant merely associated with whomever committed the crime, or was present at the scene of the crime, or unknowingly or unintentionally did things that were helpful to the principal.

Id. at 720.

174. *See id.* at 719–20.

175. *See id.* at 719. There were actually two § 924(c) charges in this case: one for Wills's use of a firearm during the commission of the bank robbery, which this Note is unconcerned with, and the other, which this Note is concerned with, for his accomplice's use of a destructive device during the commission of the bank robbery. *See id.* at 708.

176. *Id.*

177. *Id.*

178. *Id.* The destructive device is also referred to as an "incendiary device" throughout the opinion. *Id.*

179. *Id.* at 720. Wills made numerous objections to the trial court on appeal, although not a single objection was directed at his guilt as to the robbery itself but rather to various procedural aspects of the trial. *See id.* (the court does not describe each objection in any one place of the opinion, but rather, begins each new section of the opinion with a new objection raised on appeal).

180. *Id.* at 720–21. Despite the Ninth Circuit's conclusion that Wills could have "reasonably foreseen" his accomplice's use of the destructive device, and therefore his conviction must stand, the jury was actually instructed that the government must prove that Wills "knowingly and intentionally aided . . . someone to commit the crime." *Id.* at 720.

181. *Id.* at 721.

Without inquiring into Wills' mental state with respect to the use of the destructive device, the court held that the four abovementioned facts were sufficient to uphold Wills's conviction for aiding and abetting the use of the destructive device.¹⁸²

Although the Ninth Circuit used the phrase "reasonably foreseen" instead of natural and probable language, its holding was nonetheless grounded in the natural and probable consequence doctrine.¹⁸³ The court's reasoning underlying its holding was that the accomplice's use of the destructive device was a natural and probable consequence of Wills's bank robbery, of which he was the "mastermind," and to which his accomplice was an aider and abettor.¹⁸⁴ Because the court held that the accomplice's use of the destructive device was foreseeable in the context of the criminal scheme, the court affirmed Wills's conviction for aiding and abetting the § 924(c) crime.¹⁸⁵

2. *United States v. Vaden*

In *United States v. Vaden*,¹⁸⁶ the Fifth Circuit affirmed correctional guard Troy Vaden's conviction on all three counts.¹⁸⁷ The first count charged the defendant with conspiring to violate an inmate's rights.¹⁸⁸ The second and third counts charged the defendant with aiding and abetting the assault of the same inmate and the assault of the defendant's fellow guard.¹⁸⁹ Vaden contested the aiding and abetting charge, arguing the evidence was insufficient to support his conviction.¹⁹⁰

Vaden, a guard at the Texas Department of Corrections, conspired with several inmates to kill inmate Juan Rivera.¹⁹¹ On the day in question, Vaden and his colleague Officer Slater were responsible for escorting Rivera from the showers back to his cell.¹⁹² Prior to passing by the cells of his coconspirators, Vaden ditched the escort without warning Officer Slater.¹⁹³ Once the one-man escort reached the coconspirators' cells, the attack commenced, resulting in the stabbing of Rivera and an assault on Officer Slater.¹⁹⁴

On appeal, the Fifth Circuit rejected Vaden's argument that the assault on Officer Slater was not a natural and probable consequence of the initial

182. *See id.* ("The record supports an inference that Wills was the mastermind of the crime. As such, he was liable for the conduct of his accomplice.")

183. *See id.* at 720–21; *see also supra* note 68 and accompanying text (explaining that "reasonably foreseeable" and "natural and probable" are synonymous).

184. *See Wills*, 88 F.3d at 720–21.

185. *See id.*

186. 912 F.2d 780 (5th Cir. 1990).

187. *See id.* at 781.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* Officers Slater and Vaden worked in the protective custody unit, which had a policy requiring two-guard escorts for inmates. *Id.*

193. *Id.*

194. *Id.*

crime and confirmed his conviction on all counts.¹⁹⁵ In coming to its holding, the court put forward two elements of accomplice liability. First, in language closely resembling *Peoni*'s formulation of accomplice liability, the court stated an accomplice must "seek[] by his actions to make" the criminal venture succeed.¹⁹⁶ Second, the court stated an accomplice is liable for the natural and probable consequences of the crime to which aid was provided.¹⁹⁷

Here, the initial crime that Vaden aided was the conspiracy to assault Rivera.¹⁹⁸ The court, in rejecting Vaden's argument, held Vaden's deliberate action to ditch the escort, which allowed his coconspirators to assault Rivera, naturally and probably resulted in the subsequent crime, which was the assault on Officer Slater.¹⁹⁹ The court reasoned that the ultimate result was foreseeable because Vaden "knew" that the two-man escort policy existed for the protection of the escortee.²⁰⁰ Therefore, Vaden's aid to the initial crime naturally and probably resulted in the subsequent crime because Vaden's unannounced departure from the escort enabled the attack on Rivera, which then required Officer Slater to protect Rivera, and thus naturally and probably caused the assault on Officer Slater.²⁰¹ However, the opinion lacks any substantive discussion of Vaden's mental state with respect to the assault on Officer Slater other than the court's statement that because he knew of the purpose behind the escort he knew his actions would result in the assault on Officer Slater.²⁰²

3. *United States v. Jones*

In *United States v. Jones*,²⁰³ the D.C. Circuit affirmed the defendant's conviction for armed robbery and assault with a deadly weapon.²⁰⁴ A group of four men, including the defendant, planned and executed a bank robbery.²⁰⁵ During the course of the robbery, Police Officer Furr was alerted to its commission and approached the bank.²⁰⁶ When he approached, he saw the four men, one of whom possessed a gun, and an exchange of gunfire ensued.²⁰⁷ According to three eyewitnesses, the man

195. *Id.* at 783.

196. *Id.*

197. *Id.*

198. *Id.* at 781.

199. *Id.* at 783.

200. *Id.* In stating that Vaden "knew that the job of an escorting guard was to protect the inmate from attack," the court did not provide any evidence of Vaden's intent to cause harm to Slater. *Id.*

201. *Id.*

202. *Id.* This opinion also is problematic because the court never states the requisite mental state for the assault on Slater.

203. 517 F.2d 176 (D.C. Cir. 1975).

204. *Id.* at 177.

205. *Id.*

206. *Id.*

207. *Id.*

in possession of the gun wore a white trench coat and was later identified as the defendant by one of these witnesses.²⁰⁸

On appeal, the defendant claimed there was insufficient evidence to support his conviction for assault with a deadly weapon.²⁰⁹ First, the court rejected appellant's arguments as to the sufficiency of the evidence with respect to the armed robbery charge.²¹⁰ Next, relying on the natural and probable consequence doctrine, the court stated there is no "more natural and probable consequence of armed robbery than that the arms will be used and someone injured."²¹¹ Further, while recognizing "the primary objection" to the doctrine—"that it imputes guilt for a crime for which the necessary mental state may be lacking"—the court reasoned that this objection was not persuasive in the context of this trial because the defendant was the only robber identified with a gun.²¹² Therefore, the court held that the subsequent crime—assault with a deadly weapon—was a natural and probable consequence of armed robbery, the initial crime.²¹³ Other than the brief mention of mental state in discussing the primary objection to the doctrine, the court made no inquiries into the defendant's mental state for the assault with a deadly weapon.²¹⁴

4. *United States v. Miller*

In *United States v. Miller*,²¹⁵ the Eleventh Circuit affirmed Jessie Miller Jr.'s convictions for, inter alia, conducting an illegal gambling business²¹⁶ and aiding and abetting the interstate telephonic transmission of wagering information.²¹⁷ The trial court found Miller to be a "sub-bookie" of the gambling business.²¹⁸ As a sub-bookie, Miller was responsible for relaying the wagering information provided to him by Doolittle, the head of the gambling operation, to Miller's bettors.²¹⁹ Once the bettors decided their wager, Miller was responsible for collecting the wagers and reporting back to Doolittle.²²⁰

208. *Id.* at 177–78.

209. *Id.* at 180–81. The defendant actually contested the sufficiency of the evidence as to both counts, but this Note is only concerned with his appeal of the assault with a deadly weapon charge. *Id.*

210. *Id.* at 180.

211. *Id.* at 181.

212. *Id.* (citing *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 515–17 (1972)).

213. *Id.*

214. *Id.*

215. 22 F.3d 1075 (11th Cir. 1994).

216. *Id.* at 1077.

217. *Id.* at 1078.

218. *Id.* at 1077.

219. *Id.*

220. *Id.*

Section 1084 of Title 18 of the U.S. Code prohibits individuals from “knowingly” transmitting sports betting information across state lines.²²¹ On appeal, Miller contested his aiding and abetting conviction on the ground that the evidence was insufficient to prove he knew that Doolittle’s wager information was the fruit of interstate telephonic transmissions.²²² In affirming his conviction, the Eleventh Circuit held it was unnecessary for the prosecution to prove that Miller had personal knowledge of Doolittle’s source of the wagering information.²²³ The court then applied the natural and probable consequence doctrine, reasoning that the interstate receipt of wagering information was a natural and probable consequence of conducting an illegal gambling business, thus making Miller an accomplice to Doolittle’s violation of § 1084.²²⁴ Unlike the previous three examples, where the courts were largely silent as to the mental state needed for the subsequent crime,²²⁵ the Eleventh Circuit explicitly held that proof of the defendant’s mental state for the subsequent crime was unnecessary.²²⁶

*B. Federal Cases Rejecting the Doctrine
to Ensure Proof of Mens Rea Exists for All Crimes Charged*

Part II.B introduces three federal cases that have either refused to apply the natural and probable consequence doctrine or reversed convictions on grounds that are inherently at odds with the doctrine.

1. *United States v. Greer*

In *United States v. Greer*,²²⁷ the Seventh Circuit sought to determine the extent of accomplice liability required in situations when unintended crimes are committed subsequent to intended crimes.²²⁸ The initial and subsequent crimes in *Greer* were a conspiracy to violate three separate federal laws and the interstate transportation of stolen goods, respectively.²²⁹ The trial court established that defendant Edward Greer informed several confederates of a load of copper located in a nearby town in Indiana that was ripe for the (illegal) taking.²³⁰ The confederates successfully committed the theft, returned to Chicago, and stored their copper haul in several locations.²³¹ One confederate testified to speaking with Greer twice after the heist: first,

221. *Id.* at 1078; *see also* 18 U.S.C. § 1084(a) (2012). The trial court found that Doolittle received his wagering information by placing calls to Nevada from his native Georgia, thus creating liability under § 1084. *See Miller*, 22 F.3d at 1077.

222. *Miller*, 22 F.3d at 1078.

223. *Id.*

224. *Id.* at 1078–79.

225. *See supra* Part II.A.1–3.

226. *Miller*, 22 F.3d at 1078–79.

227. 467 F.2d 1064 (7th Cir. 1972).

228. *See id.* at 1069.

229. *See id.* at 1066–67.

230. *Id.* at 1067.

231. *Id.*

regarding the location of the proceeds from the heist and second, to arrange a meeting to distribute them.²³²

Greer appealed his conviction for aiding and abetting the interstate transportation of the stolen copper, arguing the evidence to be insufficient.²³³ In reversing the conviction on this charge, the Seventh Circuit rejected the government's natural and probable consequence argument that Greer's aiding of the theft was sufficient to support his conviction for aiding the subsequent interstate transportation of the copper.²³⁴ The Seventh Circuit stated that adopting the government's argument would make accomplice liability "far too broad."²³⁵ Because transportation of stolen items will always be a "likely" consequence of theft, the government's position would "effectively obliterate [the] distinctions" between the two separate crimes of theft and interstate transportation of stolen goods.²³⁶

The court then turned to a broader discussion of accomplice liability, including a discussion of *Peoni*.²³⁷ The Seventh Circuit read *Peoni* as putting forth two elements of accomplice liability: an act of aid and the requisite intent.²³⁸ Commenting on the natural and probable consequence doctrine, the court stated that allowing a jury to impute an accomplice's intent from an initial crime to a subsequent crime, merely because the subsequent crime was "a foreseeable consequence" of the initial crime, would be to predicate accomplice liability on "negligence rather than criminal intent."²³⁹ Before concluding its discussion on accomplice liability, the court stated that it would allow for an application of the doctrine in certain scenarios, such as when there is proof that the accomplice was "substantially involved in the chain of events leading immediately to" the subsequent crime.²⁴⁰ However, when the initial and subsequent crimes are too far attenuated, as they were in *Greer*, the doctrine is unavailable.²⁴¹

2. *United States v. Powell*

In *United States v. Powell*,²⁴² the D.C. Circuit dealt with a case consisting of an undercover operation that led a police officer into an apartment building basement where a significant amount of base cocaine

232. *Id.*

233. *Id.* (Greer had been held liable under 18 U.S.C. § 2).

234. *See id.* at 1068.

235. *Id.*

236. *Id.*

237. *Id.* at 1068–69.

238. *Id.*

239. *Id.* at 1069 (citing MODEL PENAL CODE § 2.04 cmt. (AM. LAW INST., Tentative Draft No. 1, 1953)). Although *Greer* does not call the natural and probable consequence doctrine by name, a "foreseeable consequence" is synonymous with a "natural and probable consequence," as discussed in Part I.B.1. *See supra* note 68 and accompanying text.

240. *Greer*, 467 F.2d at 1069.

241. *Id.*

242. 929 F.2d 724 (D.C. Cir. 1991).

was discovered.²⁴³ In addition to the drugs, the officer also identified a man in the basement who possessed a gun.²⁴⁴ Defendant Powell, who led the officer downstairs, was subsequently convicted at trial for possessing cocaine with intent to distribute and for aiding and abetting a § 924(c) violation.²⁴⁵

In reversing the latter conviction,²⁴⁶ the D.C. Circuit rejected an application of the natural and probable consequence doctrine and held that the government must prove an accomplice had knowledge of a confederate's gun use before he can be held liable as an accomplice to a § 924(c) violation.²⁴⁷ Similar to the Seventh Circuit in *Greer*,²⁴⁸ the D.C. Circuit held that an application of the doctrine to the case at hand would obliterate the distinctions Congress had created between the separate crimes of possessing drugs with intent to distribute and § 924(c).²⁴⁹ In criticizing the doctrine, one objection the court raised was the uncertainty of "how likely the forbidden act must have appeared to the accomplice" to be considered a natural and probable consequence of the initial crime.²⁵⁰ In the court's view, the degree of probability that courts have required when using this objectionable analysis has varied depending on the circumstances.²⁵¹ The court ultimately held that in the context of a § 924(c) violation, the circumstances were irrelevant—the same degree of knowledge as to the likelihood the subsequent forbidden act will occur is required whether the underlying crime was, for example, a bank robbery or a drug deal.²⁵² This then "puts the accomplice on a level with the principal, requiring the same knowledge for both."²⁵³ Thus, for the doctrine to apply to a fact pattern such as that in *Powell*, the evidence must show that the accomplice had knowledge of a confederate's possession of a gun at the time the accomplice aided an initial crime.²⁵⁴

243. *Id.* at 724–25.

244. *Id.* at 725.

245. *Id.* For the pertinent language of § 924(c), see *supra* note 129.

246. *Powell*, 929 F.2d at 725.

247. *Id.* at 727–28. At this point, it may seem contradictory that this Note uses the D.C. Circuit to show federal cases both supporting the doctrine, see *supra* Part II.A.3, and rejecting the doctrine, as discussed in Part II.B.2. However, this Note does not argue that a circuit split, with regard to the use of the doctrine, exists. Rather, this Note argues the foundations which the doctrine has been premised on have been criticized by courts and commentators and that the Court's decision in *Rosemond* may provide a strong basis upon which rejection of the doctrine may be based. As a result, the fact that the same circuit, in two cases decided sixteen years apart from each other, used the doctrine in one case and rejected the doctrine's use in the other is not contradictory and does not detract from the value of either D.C. Circuit case discussed.

248. See *supra* note 236 and accompanying text.

249. See *Powell*, 929 F.2d at 725.

250. *Id.* at 726. Although the court did not provide a citation for this proposition, the language closely parallels that in *United States v. Peoni*, 100 F.2d 401 (1938), which reads, "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct." *Id.* at 402.

251. *Powell*, 929 F.2d at 726.

252. *Id.* at 726–27.

253. *Id.* at 727.

254. See *id.*

3. *United States v. Andrews*

In *United States v. Andrews*,²⁵⁵ the Ninth Circuit rejected an application of the natural and probable consequence doctrine in its reversal of multiple aiding and abetting convictions of defendant Ivan Andrews.²⁵⁶ After being woken and informed of a recent altercation between his sister, Paula Andrews, and Stephen Lowery, Ivan accompanied his sister and friends back to the site of the altercation to “get” Lowery and “trash” his car.²⁵⁷ Upon arriving, Ivan exited his car and Lowery exited his.²⁵⁸ Ivan then approached Lowery and shot him dead.²⁵⁹ After the initial shooting, Paula exited the car she was in and opened fire on Lowery’s car, striking two individuals within Lowery’s car and killing a third, Steven Williams.²⁶⁰ Ivan was convicted for, inter alia, the murder of Lowery, aiding and abetting the murder of Williams, and aiding and abetting attempted voluntary manslaughter of the two individuals in Lowery’s car.²⁶¹

Unlike the courts discussed in Part II.A, the Ninth Circuit focused its analysis of the aiding and abetting convictions on Ivan’s mental state.²⁶² First, the court stated that Ivan “must have ‘knowingly and intentionally aided and abetted’ Paula in each essential element of the crimes.”²⁶³ The court then held there was no evidence showing Ivan intended for Paula to open fire on Lowery’s car.²⁶⁴ Second, the court turned to the natural and probable consequence doctrine, stating it was unconvinced that a rational juror could infer the requisite mental state for Ivan by applying the doctrine to the evidence.²⁶⁵ To the Ninth Circuit, an application of the doctrine that would allow a juror to infer that Ivan’s involvement naturally and probably led to Paula opening fire on the car would contradict basic principles of criminal law.²⁶⁶ No rational juror could find that Ivan met the *Peoni* standard—there was insufficient evidence for a juror to conclude that Ivan’s

255. 75 F.3d 552 (9th Cir. 1996).

256. *Id.* at 554, 556.

257. *Id.* at 554.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.* at 555 (listing four elements that the evidence must establish to uphold the aiding and abetting convictions).

263. *Id.* (quoting *United States v. Dinkane*, 17 F.3d 1192, 1196 (9th Cir. 1994)).

264. *Id.* at 556.

265. *Id.* In reasoning that Ivan’s actions fell outside the scope of the crime he intended to commit, the court compared Paula to the oft-cited robber in a hypothetical put forward by Wayne LaFave. *Id.* (citing 2 LAFAVE & SCOTT, JR., *supra* note 95, at 158). This hypothetical considers a group of robbers who plan to steal a safe, and while doing so, one of them robs the building’s watchman. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 6.8, at 636 (3d ed. 2000). LaFave concludes that the robbery of the watchman is outside the scope of the crime intended by the other robbers, therefore, preventing liability from extending to all involved. *Id.* (citing *State v. Lucas*, 7 N.W. 583, 584 (Iowa 1880), which held “if the accessory order or advise one crime, and the principal intentionally commit another . . . the accessory will not be answerable”).

266. *Andrews*, 75 F.3d at 556 (citing LAFAVE & SCOTT, JR., *supra* note 95, § 6.8, at 158; DRESSLER, *supra* note 82).

participation in the criminal venture could be evidence of a desire for Paula's shooting of the car to succeed in injuring those within.²⁶⁷

C. The Doctrine in Scholarship: An Unfavorable Reception

While criticism of the natural and probable consequence doctrine is voluminous and widespread among scholars, most, if not all, of the criticism comes in one particular flavor: a focus on the incompatibility of the doctrine with the single most important concept in criminal law: mens rea.²⁶⁸ This section explores the various scholarly works critiquing the doctrine and then turns to the MPC's criticism of the doctrine.

The incompatibility between the doctrine and mens rea can further be broken down into two parts: the negation of the mens rea requirement and the ability for a lesser mens rea to suffice for accomplice liability when the statute at issue requires more of the principal. The discussion of the former begins with Wayne LaFave, one of the most cited scholars on accomplice liability and the natural and probable consequence doctrine.²⁶⁹ LaFave states that the doctrine "tests the outer limits of the mental state requirement for accomplice liability"²⁷⁰ and that its "general application . . . is unwarranted."²⁷¹ LaFave continues his criticism by analogizing the doctrine to the widely rejected theory of imputed or transferred intent,²⁷² stating that the intent to commit one crime cannot be used as evidence of intent to commit a different crime, which is exactly what the doctrine seeks to do.²⁷³ Citing this logic, Paul Robinson also notes that most objections to the doctrine are based on "its imputation of requisite mental states."²⁷⁴ Additionally, Robinson recognizes another category of criticism, which is similar to the Seventh Circuit's view on the doctrine,²⁷⁵ and objects to the doctrine when there is a "weak causal connection" between the initial and subsequent crimes.²⁷⁶

267. *See id.*

268. *See* Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 351 (1966) ("[T]he mens rea concept has come, by an almost inexplicable course, to symbolize what is generally recognized to be the most significant exculpatory concept in criminal law theory."); *see also* Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.").

269. *See, e.g.*, *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (citing LaFave for accomplice liability intent concepts); *Sandstrom v. Montana*, 442 U.S. 510, 525–26 (1979) (citing LaFave for the intent element and its relationship to a natural and probable consequence presumption). Wayne LaFave has several individual works, and he also has collaborated with Austin Scott Jr. resulting in two additional works: *Substantive Criminal Law* and the *Handbook on Criminal Law*.

270. LAFAVE, *supra* note 265, § 6.8(b), at 636–37.

271. *Id.* § 6.8(b), at 591.

272. *See id.* § 3.11(d), at 273–74 (explaining the concept of transferred intent).

273. *See id.* § 6.8(b), at 590–91.

274. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 636 & n.98 (1984).

275. *See supra* note 241 and accompanying text (disfavoring the doctrine when the initial and subsequent crimes are too far attenuated).

276. *See* Robinson, *supra* note 274, at 636 & n.98.

Another scholar who has focused on accomplice liability and the natural and probable consequence doctrine is Michael Heyman. To him, the most disturbing aspect of the doctrine is its “rejection of [the] bedrock concept of personal responsibility.”²⁷⁷ Similarly, Audrey Rogers proclaims that the “doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness.”²⁷⁸ Furthermore, the doctrine violates both due process and the *Winship* doctrine, which states that every element of a crime must be proved beyond a reasonable doubt.²⁷⁹ According to Heyman, not only does the natural and probable consequence doctrine stretch the requirement for criminal culpability beyond its breaking point, it seemingly eliminates the requirement for proof of the defendant’s mental state.²⁸⁰

Heyman’s criticism provides a nice segue into the second aspect of the mens-rea-focused critique of the doctrine: the lowering of the statutory mental state. While Heyman argues the doctrine eliminates the need to prove mens rea, other scholars argue the doctrine impermissibly lowers the mens rea required for an accomplice relative to that required for a principal.²⁸¹ These same commentators argue that if there should be any disparity between the mental states required for accomplice liability, versus liability as a principal, an accomplice should have a *higher* requisite mental state, not a lower one than that of the principal.²⁸²

The drafters of the MPC, as alluded to in Part I.B.2, also refused to adopt the natural and probable consequence doctrine.²⁸³ While the MPC is only a model, and not a part of federal criminal law, its views on mens rea are highly touted and influential,²⁸⁴ even in the federal context.²⁸⁵ Before getting to the MPC’s comments that explicitly reject the doctrine, its rejection seems obvious in light of § 2.06(3)(a)(ii).²⁸⁶ The comments to

277. Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129, 168 (2013).

278. Rogers, *supra* note 54, at 1379.

279. See Heyman, *supra* note 57, at 135; see also *supra* note 46 (quoting the holding of *In re Winship*, 397 U.S. 358 (1970)).

280. See Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388, 395 (2010). Heyman also criticizes the doctrine for disposing of the causation analysis normally present in criminal law. *Id.* The doctrine also can be used to eliminate the actus reus requirement. See *id.*; Weiss, *supra* note 44, at 1429. While these two criticisms are consonant with the overall reasoning of this Note, they are beyond its scope and will not be discussed further.

281. See DRESSLER, *supra* note 82, at 476; LAFAVE & SCOTT, JR., *supra* note 110; Rogers, *supra* note 54, at 1361 & n.33; see also MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42 (AM. LAW INST., Official Draft and Revised Comments 1985).

282. See DRESSLER, *supra* note 82, at 476; LAFAVE, *supra* note 265, § 6.7(b), at 624–25; see also MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 n.42.

283. See MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42.

284. See Robinson & Grall, *supra* note 34, at 691–92.

285. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) (“The ALI Model Penal Code is one source of guidance upon which the Court has relied.”).

286. See MODEL PENAL CODE § 2.06(3)(a)(ii), at 296 (“A person is an accomplice of another in the commission of an offense if . . . with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it . . .”).

§ 2.06(3)(a)(ii) state that for liability to attach, an accomplice must have had the commission of the crime for which they are charged as their “conscious objective” at the time they provided aid or encouragement.²⁸⁷ The MPC then explicitly rejects the doctrine for extending accomplice liability to crimes beyond that which an accomplice intended to aid.²⁸⁸ It also takes issue with predicating accomplice liability on foreseeability, which invokes a mens rea of negligence, when the statute proscribing the conduct often will require a higher mental state.²⁸⁹ This comment section concludes that the doctrine’s ability to produce disparity between the requisite mental states required for an accomplice and a principal is “both incongruous and unjust.”²⁹⁰ As evidenced by the numerous citations to the abovementioned comment sections of the MPC, and the MPC itself, the drafters of the MPC were not alone in believing the doctrine should be rejected.²⁹¹

III. THE DOCTRINE AND ITS BLATANT CIRCUMVENTION OF PROOF OF MENS REA

The natural and probable consequence doctrine has been accused of stretching mens rea in accomplice law to its breaking point,²⁹² being incompatible with fundamental criminal law concepts,²⁹³ and being unjust.²⁹⁴ This part applies the proper requirements for an accomplice’s mental state from *Rosemond v. United States*²⁹⁵ to the doctrine to determine whether the criticism of the doctrine is valid and whether the doctrine survives *Rosemond*.²⁹⁶

Rosemond, read beyond its limited § 924(c) holding, requires the government to prove that an accomplice intended the ultimate commission of the crime, in addition to having intentionally provided aid in furtherance of the crime.²⁹⁷ Part III seeks to determine the immediate effect of the Court’s holding in *Rosemond* on the natural and probable consequence doctrine. First, Part III.A applies the cases discussed in Part II.A to *Rosemond*, and then Part III.B concludes that courts can, and should, read *Rosemond* to have provided tools with which they can reject the doctrine and that such rejection is desirable.

287. See *id.* § 2.06 cmt. 6(b), at 310; see also Robinson & Grall, *supra* note 34 at 738.

288. See MODEL PENAL CODE § 2.06 cmt. 6(b), at 312; see also Robinson & Grall, *supra* note 34, at 738.

289. See MODEL PENAL CODE § 2.06 cmt. 6(b), at 312 & n.42.

290. *Id.* § 2.06 cmt. 6(b), at 312 n.42.

291. See *supra* notes 107, 114, 118, 121, 245 and accompanying text.

292. See *supra* note 280 and accompanying text.

293. See *supra* note 27 and accompanying text.

294. See *supra* note 290 and accompanying text.

295. 134 S. Ct. 1240 (2014).

296. See *infra* Part III.A (applying *Rosemond* to the four cases from Part II.A), see also *infra* Part III.B (discussing the scholarly criticism in light of *Rosemond*).

297. See *supra* Part I.C.

A. *The Doctrine Under Rosemond*

Part III.A retroactively applies the holding of *Rosemond* to the cases discussed in Part II.A, and, in each example, this Note concludes the cases cannot withstand the holding of *Rosemond*.

1. *Wills Under Rosemond*

Defendant-Appellant Wills's appeal from his conviction for aiding and abetting the use of a destructive device, in violation of § 924(c), was unsuccessful.²⁹⁸ In rejecting Wills's arguments, the Ninth Circuit held that, because Wills was the mastermind of the bank robbery, Wills's accomplice's use of the destructive device was a reasonably foreseeable consequence of the criminal scheme.²⁹⁹ In coming to this conclusion, the court relied on four pieces of circumstantial evidence, which it believed gave rise to an inference upon which Wills's guilt could be based.³⁰⁰

Even assuming the circumstantial evidence established that Wills likely had knowledge of his accomplice's possession of the destructive device, a criminal defendant's guilt must be established beyond a reasonable doubt.³⁰¹ Because the *Wills* Court relied on the natural and probable consequence doctrine to hold that Wills's intent for the bank robbery, coupled with the circumstantial evidence, was sufficient to prove accomplice liability for the § 924(c) violation, this holding is not consistent with *Rosemond*.³⁰² Under *Rosemond*, an accomplice must have had the requisite intent for the crime charged before he or she can be held liable.³⁰³ With respect to *Wills*, this means that Wills must have intended his accomplice to use the destructive device, which logically means that Wills must have known his accomplice possessed such a device.³⁰⁴ The court made no attempt to assess whether Wills had actual knowledge of the destructive device—it simply drew an inference from the circumstantial evidence that Wills could have “reasonably foreseen” his accomplice's use of a destructive device.³⁰⁵ While drawing inferences is certainly permissible in a criminal trial, the inference drawn by the Ninth Circuit, while using the doctrine, allows for accomplice liability to attach in the

298. See *supra* notes 173–78 and accompanying text (laying out the facts of the case).

299. See *supra* notes 184–85 and accompanying text.

300. See *supra* notes 181–82 and accompanying text.

301. See *supra* note 46 and accompanying text.

302. See *supra* notes 179–85 and accompanying text (describing the court's holding and reasoning).

303. See *supra* notes 151–56 and accompanying text. One way the requisite intent may be evidenced, particularly in the § 924(c) context, is by way of the card game analogy put forward in *Rosemond*. See *supra* note 146 and accompanying text. This analogy states that, so long as the defendant continued on in the commission of the crime with knowledge of the “heightened stakes,” which in *Wills* was the accomplice's destructive device, the defendant may be held liable for his accomplice's conduct. See *supra* note 146 and accompanying text.

304. See *supra* notes 142–45 and accompanying text (describing *Rosemond*'s holding that foreknowledge is required for accomplice liability under § 924(c)).

305. See *supra* notes 179–85 and accompanying text (describing the court's holding and reasoning).

absence of proof beyond a reasonable doubt of a defendant's mental state.³⁰⁶ This violates *Rosemond*'s holding that an accomplice must have the requisite mental state as to the full scope of a crime before liability can attach.³⁰⁷

The *Wills* Court's use of the natural and probable consequence doctrine does exactly what some scholars have feared—it lowers the mental state for accomplice liability when a higher mental state is required for the principal.³⁰⁸ In this case, not only was this fear realized but an even worse transgression occurred. The jury was instructed that the government must prove that Wills “knowingly and intentionally” aided or abetted his accomplice's use of the destructive device to find Wills guilty as an accomplice.³⁰⁹ The instruction contained no natural and probable or reasonably foreseeable language.³¹⁰ Yet, by using the doctrine, the court allowed for reasonably foreseeable conduct to satisfy a crime for which the jury had been charged that the government must prove a “knowingly and intentionally” mental state.³¹¹ Thus, the Ninth Circuit affirmed a conviction when proof of the requisite mental state was insufficient.³¹²

This use of the doctrine is particularly troublesome because the jury instructions seemingly guarded against the possibility of allowing an impermissibly lower mental state to prove sufficient, yet such a result occurred nonetheless.³¹³ As the *Rosemond* Court held, the intent for one crime to be committed does not ordinarily allow for that intent to be imputed to a different crime.³¹⁴ Therefore, this impermissible lowering of the mental state cannot be rescued by the fact that Wills was undoubtedly liable as a principal for the bank robbery.³¹⁵ Ultimately, because the doctrine's use by the *Wills* Court allowed for accomplice liability to attach without sufficient proof of the mens rea required either by § 924(c)³¹⁶ or the aiding and abetting jury instruction,³¹⁷ this holding violates *Rosemond*.³¹⁸

2. *Vaden* Under *Rosemond*

The Fifth Circuit affirmed Troy Vaden's conviction for, inter alia, aiding and abetting the assault on his colleague, Officer Slater.³¹⁹ Before

306. *See supra* notes 59–60 and accompanying text (discussing permissive inferences).

307. *See supra* notes 151–56 and accompanying text (describing the Court's general holding on accomplice mental states in *Rosemond*).

308. *See supra* notes 281–82 and accompanying text.

309. *See supra* note 173 (quoting the jury instruction on aiding and abetting).

310. *See supra* note 173.

311. *See supra* notes 173, 180 and accompanying text.

312. *See supra* note 173 (quoting the jury instruction on aiding and abetting).

313. *See supra* notes 173, 180 and accompanying text.

314. *See supra* note 143 and accompanying text.

315. *See supra* note 179.

316. *See supra* notes 281–82 (describing § 924(c)'s statutory mens rea).

317. *See supra* note 173 (quoting the jury instruction that aid or encouragement must be “knowingly and intentionally” rendered).

318. *See supra* note 152 and accompanying text (describing the general holding of *Rosemond* as it relates to an accomplice's mens rea).

319. *See supra* notes 187–94 and accompanying text (laying out the facts of the case).

affirming the conviction, the court laid out two aspects of the legal standard surrounding accomplice liability: the *Peoni* formulation and the natural and probable consequence doctrine.³²⁰ The court then held Vaden's ditching of the escort, which was part of the crime Vaden intended to aid, naturally and probably led to the assault on Officer Slater.³²¹

While *Vaden* Court's use of the doctrine is less flagrant than *Wills* Court's, the holding in *Vaden* still would not stand in a post-*Rosemond* world. Admittedly, there is a degree of attraction to the doctrine's use in this context because, but for Vaden's ditching of the escort, the assault on Rivera would probably not have occurred, meaning the assault on Officer Slater would probably not have occurred.³²² Therefore, the assault on Officer Slater was a natural and probable consequence of the assault on Rivera, which Vaden aided by ditching the escort.³²³ However, in the absence of sufficient proof as to the requisite mental state, but-for causation alone does not satisfy *Rosemond*'s holding and neither does simply stating that one crime was the natural and probable consequence of another.³²⁴ Under *Rosemond*, accomplice liability requires proof that the accomplice had the statutory mens rea for the specific crime charged, thus foreclosing the possibility that sufficient proof of intent for an initial crime may be imputed to a subsequent crime.³²⁵ In this regard, the Fifth Circuit erred in two respects: first, it did not state what the requisite mental state was and second, it did not show that the government sufficiently proved the mental state.³²⁶ With respect to Vaden's mental state, the court only mentioned that, based on Vaden's knowledge of the purpose behind the two-guard escort policy, he could have foreseen that ditching the escort would result in an assault on Officer Slater.³²⁷ While this may give rise to a permissible inference of a mental state of negligence or recklessness, it does not establish the requisite mental state beyond a reasonable doubt.³²⁸ Simply

320. See *supra* notes 196–97 and accompanying text.

321. See *supra* note 199 and accompanying text.

322. See *supra* notes 191–94, 200–01 and accompanying text (describing the facts of the case and the court's natural and probable consequence reasoning).

323. See *supra* notes 192–94, 199–01 and accompanying text.

324. See *supra* notes 277–80 and accompanying text (explaining scholarly criticism that the doctrine does away with the fundamental principle of criminal law that a mens rea must be proven for all crimes); see also *supra* note 16 and accompanying text (describing the Court's statement that a guilty mind is a necessary aspect of all crimes). For the sake of argument, even if the doctrine were allowed to be used to satisfy the actus reus, the doctrine cannot be used to impute the mental state of an initial crime to a subsequent crime, and therefore, the requirement of mens rea would still remain unsatisfied. See *supra* note 273 and accompanying text.

325. See *supra* notes 143, 151–52 and accompanying text.

326. See *supra* note 202 and accompanying text.

327. See *supra* note 200 and accompanying text.

328. See *supra* note 239 and accompanying text (explaining *Greer*'s rejection of the doctrine for allowing criminal liability to be predicated on foreseeability); *supra* notes 281–82 and accompanying text (discussing several sources that object to the doctrine's ability to lower the mental state for accomplice liability when more is required of the principal); *supra* note 289 and accompanying text (discussing the MPC's rejection of negligence as a sufficient mens rea for an accomplice when a heightened mental state is required for the principal). Because the Fifth Circuit failed to mention the requisite mental state in *Vaden*,

stating that a result was the natural and probable consequence of initially wrongful conduct does not satisfy *Rosemond*'s holding, which requires the government to prove the requisite intent for each crime charged.³²⁹

3. *Jones Under Rosemond*

The defendant in *Jones* unsuccessfully appealed his conviction for aiding and abetting assault with a deadly weapon in the course of a bank robbery.³³⁰ In affirming the defendant's conviction, the D.C. Circuit reasoned that there is no more natural and probable consequence of armed robbery than the use of those firearms in the course of the robbery.³³¹

In the opinion, the D.C. Circuit noted that one of the primary objections to the natural and probable consequence doctrine is its ability to impute intent from an initial crime to a subsequent crime when the requisite mental state would otherwise be lacking.³³² However, because the court did not believe such an objection was persuasive in a trial with seemingly weighty inculpatory evidence, it dismissed the objection and proceeded to use the doctrine anyway.³³³ The court's dismissal of its objection—which was raised *sua sponte*—is notable because this objection is the very reason why this Note, in light of *Rosemond*, finds the doctrine's use in this case to be deplorable.

Rosemond held that an accomplice must have the requisite intent for the full scope of the crime(s) charged.³³⁴ When the doctrine is employed, this holding is clearly violated because imputing the intent from an initial crime to a subsequent crime effectively eliminates the need for the government to prove the requisite mental state.³³⁵ Even in this case, with an unsympathetic defendant, the basic tenets of Anglo-American criminal law remain unchanged, and the requisite mental state must still be proven beyond a reasonable doubt.³³⁶ Allowing the doctrine to fill in the gaps that a prosecutor is unable to prove is simply impermissible and, under *Rosemond*, should no longer be regarded as plausible.³³⁷ The D.C. Circuit

see supra note 202, this argument rests on the assumption that the requisite mental state for the assault on Officer Slater is something akin to knowledge or purposeful intent, which are both more demanding mental states than negligence or recklessness. *See* MODEL PENAL CODE § 2.02(2), at 225–26 (AM. LAW INST., Official Draft and Revised Comments 1985).

329. *See supra* notes 151–52 and accompanying text.

330. *See supra* notes 205–08 and accompanying text (laying out the facts of the case).

331. *See supra* note 211 and accompanying text.

332. *See supra* note 212 and accompanying text.

333. *See supra* note 214 and accompanying text.

334. *See supra* note 152 and accompanying text.

335. *See supra* note 234 and accompanying text (judicial criticism); *supra* notes 272–82 and accompanying text (scholarly criticism).

336. *See supra* note 16 and accompanying text (noting the Court's description of crime as a compound concept of evil act and an evil mind in *Morissette*); *supra* note 21 and accompanying text (describing crime as the concurrence of *actus reus* and *mens rea*); *supra* note 277 and accompanying text (explaining Heyman's view that the doctrine ignores the principle of criminal culpability).

337. *See supra* notes 71–74 and accompanying text (describing prosecutorial use of the doctrine); *see also infra* Part III.B (rejecting the doctrine in light of *Rosemond*).

erred in not heeding its noted objection to the doctrine, and so its holding would not stand in a post-*Rosemond* world.

4. *Miller* Under *Rosemond*

Miller was convicted for, inter alia, aiding and abetting the interstate transmission of wagering information.³³⁸ The Eleventh Circuit affirmed his conviction, holding Miller liable as an accomplice to the crime.³³⁹ In so holding, the court reasoned that the receipt of interstate wagering information was a natural and probable consequence of participating in the illegal gambling operation and that Miller did not need to have personal knowledge of the source of the information to be held liable as an accomplice.³⁴⁰

Of the four cases described in this section, this case is the most flagrant violation of bedrock principles of Anglo-American criminal law. *Rosemond* held that an accomplice may intend a crime's commission when he or she participates in it, knowing its full extent and character.³⁴¹ In the absence of proof that Miller knew the source of the information, or that the information crossed state lines, under *Rosemond* it would be impossible for Miller to be held liable as an accomplice because Miller could not have known the full extent of the crime.³⁴² The reasoning employed by the Eleventh Circuit completely disposed of the need to prove a mental state for the subsequent crime once proof for the initial crime was established.³⁴³ This is the exact fear of those who oppose the doctrine: its ability to negate the mens rea for every element of a crime.³⁴⁴ For the reason that the Eleventh Circuit allowed accomplice liability to attach in the absence of mens rea, the holding in *Miller* is not consistent with *Rosemond*'s holding.

B. *The Doctrine in a Post-Rosemond World: Technical Knockout*

It is impossible to know whether the Court decided not to discuss the doctrine because it was not raised below or simply because they did not believe gun use was a natural and probable consequence of a simple drug

338. See *supra* notes 215–21 and accompanying text (laying out the facts of the case).

339. See *supra* note 217 and accompanying text.

340. See *supra* notes 223–26 and accompanying text.

341. See *supra* note 155 and accompanying text (quoting the Court's "extent and character" language).

342. See *supra* notes 215–22 and accompanying text (showing that Miller had no knowledge of the source of the information); see also *supra* notes 155–56 and accompanying text (quoting the Court's "extent and character" language, which shows that in the absence of knowing the full extent of a crime, there cannot be accomplice liability).

343. See *supra* notes 223–26 and accompanying text (describing the court's holding and reasoning).

344. See *supra* notes 113, 266 and accompanying text; *supra* Part II.C; see also *supra* note 20 and accompanying text (excepting strict liability crimes from this statement).

deal.³⁴⁵ Regardless of the Court's intentions, the practical effects of footnote 7 on the opinion are the same; the Court did not believe its decision implicated the doctrine.³⁴⁶ This Note argues that, notwithstanding footnote 7, the Court's logic behind its holding, specifically the reasoning surrounding the requisite mental state for accomplice liability, extends beyond a narrow application to aiding and abetting a § 924(c) crime and actually destroys the foundation upon which the natural and probable consequence doctrine is based.³⁴⁷

The foundations of the doctrine rely on foreseeability being a sufficient basis for accomplice liability, irrespective of the statutory mens rea that the government must prove for a principal to the same crime.³⁴⁸ The logic used by the Court in *Rosemond* provides a persuasive argument that these very foundations have been eradicated.³⁴⁹ This Note argues that *Rosemond*'s holding, read as applying to federal criminal law generally, would prevent the affirmative application of the doctrine because *Rosemond*'s holding is at odds with the premises on which the doctrine is based.³⁵⁰

If the theoretical basis of the doctrine has been negated, as this Note argues it has been, federal criminal law will be directly impacted.³⁵¹ Prosecutors, defense attorneys, and even the courts will feel the effects of the doctrine's vitiation.³⁵² Prosecutors will no longer be able to rely on a natural and probable consequence theory in pursuing accomplices, forcing prosecutors to prove an accomplice had the requisite mental state for each crime charged.³⁵³ Defense attorneys will be able to better defend alleged accomplice clients, knowing that their client's liability can no longer be predicated on a lesser mental state than that which is required for the principal.³⁵⁴ Lastly, district courts will have to be wary of foreseeable and natural and probable language in their jury instructions to ensure that charges, based solely on a natural and probable consequence theory, do not

345. This ambiguity has not stopped commentators from trying to determine footnote 7's meaning. *See supra* notes 162–69 and accompanying text (discussing possible interpretations of footnote 7).

346. *See supra* notes 159–66 and accompanying text (discussing footnote 7).

347. *See supra* notes 148–56 and accompanying text (discussing the logic behind *Rosemond*'s holding); *see also supra* note 166 and accompanying text (discussing two scholars who separately raise the question, without answering it, of whether or not the Court implicated the doctrine despite footnote 7).

348. *See supra* note 79 and accompanying text.

349. *See supra* notes 148–56 and accompanying text (discussing the logic behind *Rosemond*'s holding). Because the Court granted certiorari for *Rosemond* to resolve the intent requirement for § 924(c) violations, the opinion as a whole is mens rea heavy. *See supra* notes 124, 150 and accompanying text.

350. *See supra* Part III.A.1–4.

351. *See supra* notes 71–74 and accompanying text (describing the various uses of the doctrine).

352. *See supra* notes 71–74 and accompanying text.

353. *See supra* note 71 and accompanying text (discussing how a prosecutor uses the doctrine); *supra* note 152 and accompanying text (describing *Rosemond*'s holding as to accomplice mental states).

354. *See supra* Part II.A.1–4 (describing four cases that affirmed convictions of accomplices in the absence of proof of the requisite mental state).

go to the jury.³⁵⁵ Perhaps most importantly, defendants will be positively impacted by potentially avoiding criminal liability for crimes they neither committed themselves nor intended to be committed by their confederates.³⁵⁶

The vitiating of the doctrine is desirable primarily because of the positive impact it would have on defendants who may be indirectly involved in unintended crimes but lack criminal culpability. Anglo-American criminal law is so well respected because of its focus on individual culpability.³⁵⁷ The MPC recognized this and essentially consolidated the common law principles of mens rea and actus reus into a coherent body of model law.³⁵⁸ The doctrine is simply a direct contradiction of Anglo-American criminal law's requirement for proof of a defendant's mental state with regard to the crime he or she is charged with.³⁵⁹ Whether or not the doctrine is used to lower the statutory mens rea, or to circumvent proof of mens rea entirely, its use after *Rosemond* should no longer be regarded as just or viable. While the Court in *Rosemond* did not intend to pass judgment on the doctrine,³⁶⁰ the Court's statement of the "basics" of accomplice law's mens rea—that the "intent must go to the specific and entire crime charged"³⁶¹—completely undermines the doctrine's logic, which allows for the intent as to a subsequent crime to go unproven.³⁶²

CONCLUSION

Returning to the example from the introduction, Luparello undoubtedly set in motion the events that led to Martin's death. However, this should not mean that Luparello is automatically guilty for any and all crimes committed that have a but-for causal relationship to him. To the contrary, as the Court held in *Rosemond*, an accomplice's intent must go to the whole crime charged. Thus, because Luparello only wanted his confederates to elicit information from Martin, and therefore could not have intended Martin's death, Luparello should never have been held liable for the murder. Only by invoking the natural and probable consequence doctrine could the court affirm Luparello's conviction. Despite Luparello being culpable for some crime, Luparello was not culpable for murder. In a world where the doctrine does not exist, Luparello would be punished only for those crimes that he is culpable for and not for those that may have been foreseeable but which he did not intend to occur.

355. See, e.g., *supra* note 111 (citing a natural and probable consequence jury instruction).

356. See *supra* notes 20–23 and accompanying text.

357. See *supra* note 268.

358. See *supra* note 284 and accompanying text.

359. See *supra* notes 277–79 and accompanying text.

360. See *supra* note 159 (quoting the text of footnote 7).

361. See *supra* note 143 and accompanying text.

362. See *supra* notes 142–47 and accompanying text (laying out *Rosemond*'s holding as to accomplice mental states); see also *supra* notes 55–57 and accompanying text (explaining the basic concept behind the doctrine).

While this Note undoubtedly takes a strong position as to the wisdom and viability of the doctrine, disapproval of it certainly is not unique. At least nine different states have already rejected the doctrine, many of which have done so in the last twenty years. At least three different circuits have rejected use of the doctrine, albeit some more emphatically than others. Several prominent scholars also have rejected the doctrine—often quite aggressively. In light of the foregoing, it is clear that calling for the end of the doctrine is not a radical notion.

While the Supreme Court has not yet intentionally weighed in on the legality or constitutionality of the doctrine, *Rosemond* could serve the same purpose as an opinion explicitly condemning the doctrine. Because the primary objections to the doctrine focus on its interaction (or lack thereof) with mens rea, *Rosemond*, as a mens-rea-focused opinion, does the same work the aforementioned hypothetical opinion would do.

The door is certainly open for courts to read *Rosemond* as abrogating the doctrine. To put forward an old idiom, *Rosemond* may be the proverbial straw that broke the natural and probable consequence camel's back. However, even though *Rosemond* can be read to vitiate the doctrine, in all likelihood, the absolute rejection of the doctrine will require a Supreme Court case directly on point for which certiorari was granted to address the doctrine directly. *Rosemond* certainly has laid the groundwork for the Court to grant certiorari on such a case. The natural and probable consequence doctrine has been subject to substantial criticism from courts and commentators alike, and the time is now ripe to let the doctrine go softly into the night.

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People v. Dillon: Felony Murder in California

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People v. Dillon: Felony Murder in California

INTRODUCTION

The felony murder rule allows for a conviction of murder upon a showing that a death occurred during the commission of certain felonies.¹ The rule has come into increasing disfavor with both the courts and the commentators. Many courts have limited the rule in application and only enforce it grudgingly.² The critics point out that there is not always a logical connection between the commission of a qualifying felony and a resulting death.³ Where there is no link, the rule punishes a chance occurrence.⁴

Recently in *People v. Dillon*,⁵ the California Supreme Court, in a landmark decision, determined that under certain circumstances, a life sentence imposed upon a first degree felony murder conviction may be cruel and unusual.⁶ *Dillon* raises questions about the continued viability of the felony murder doctrine in California and creates uncertainty as to what penalties will be deemed cruel and unusual.⁷ This Note will discuss the historical development and contemporary form of the felony murder doctrine. It will also relate the doctrine to the concept of cruel and unusual punishment. The facts and holding of *Dillon* will be analyzed in these contexts to determine the potential impact of the case. This Note will then conclude with an examination of needed legislative action.

I. HISTORY OF THE FELONY MURDER RULE

The felony murder doctrine is derived, in one form or another,

1. CAL. PENAL CODE § 189 (West 1983).

2. R. PERKINS, CRIMINAL LAW § 1, at 44 (2d ed. 1969) [hereinafter cited as PERKINS].

3. Felony murder is based upon the idea that the commission of felonies creates a high risk of homicide. "The problem derives from regarding the commission of the felony as conclusive on the question whether the defendant acted recklessly toward the victim." Fletcher, *Reflections on Felony Murder*, 12 SW. U.L. REV. 413, 415 (1980-1981) [hereinafter cited as Fletcher, *Reflections*].

4. Where, for example, a defendant had taken all possible precautions to avoid harm to others and an unforeseeable accidental homicide occurred.

5. 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

6. *Id.* at 450, 668 P.2d at 719, 194 Cal. Rptr. at 412.

7. The California Supreme Court somewhat narrowed this question in a case decided several months after *Dillon*. In this decision, they held that an intent to kill must be established before a defendant may be penalized under California's felony murder special circumstances provision. This holding precludes both the death penalty and life imprisonment without possibility of parole, absent such a finding. *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), *see infra* notes 129-33 and accompanying text.

from English common law.⁸ The exact origins are unclear.⁹ It was first enunciated by Lord Coke in 1797.¹⁰ Lord Coke wrote, "If the act be unlawful it is murder."¹¹ This absolute conception was successively limited in England¹² until abolished by statute in 1957.¹³ At the time of its origin, all felonies were subject to capital punishment,¹⁴ while attempted felonies were only misdemeanors.¹⁵ Thus, the rule merely placed upon the perpetrator of an attempted felony the same liability he faced if the crime had been successful. For completed felonies, where the punishment was death, he faced no additional jeopardy because of the rule. However, since today felonies are generally not capital offenses, that is no longer the case. Therefore, the original purpose of the rule appears no longer to exist.¹⁶

II. CONTEMPORARY TREATMENT OF FELONY MURDER

A majority of American jurisdictions observe some form of the felony murder doctrine.¹⁷ Widespread criticism has, however, resulted in substantial limitation of the rule in many states. Three states have abolished it altogether, Hawaii and Kentucky by statute¹⁸ and Michigan by judicial abrogation.¹⁹ A number of other states have retained the rule, but considerably lessened its impact by reducing the resulting degree of homicide.²⁰ Under these schemes

8. Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony Murder Rule*, 46 Miss. L.J. 1021 (1975).

9. *People v. Aaron*, 409 Mich. 672, 689, 299 N.W.2d 304, 307 (1980).

10. *Id.* at 692-93, 299 N.W.2d at 309.

11. Lord Coke wrote, "If the act be unlawful it is murder. As if A meaning to steale a Deere in the Park of B, shooteth at a Deere, and by the glance of the arrow killeth a boy, that is hidden in a bush: this is murder, for that the act was unlawfull" E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 56 (1797 & photo. reprint 1979).

12. PERKINS, *supra* note 2, at 38-39.

13. Fletcher, *Reflections*, *supra* note 3, at 415.

14. Under English common law a felony was defined in terms of which crimes were punished by forfeiture. The felon lost "life and member and all he had." The common law felonies were felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon. PERKINS, *supra* note 2, at 11.

15. Under English common law a misdemeanor was defined as a crime that was not a felony or treason. Therefore, a failed felony, by itself, would not subject the defendant to the death penalty. PERKINS, *supra* note 2, at 11.

16. PERKINS, *supra* note 2, at 44.

17. Adlerstein, *Felony Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 250 (1975-1976) [hereinafter cited as Adlerstein, *Criminal Codes*]; Comment, *Michigan Supreme Court Abrogates Common Law Felony Murder Rule*, 15 SUFFOLK U.L. REV. 1306, 1311 (1981); Note, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 (1978) [hereinafter cited as Note, *Felony Murder*].

18. Note, *Felony Murder*, *supra* note 17, at 137.

19. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

20. Louisiana, New Hampshire, New York, and Pennsylvania have reduced felony murder to second degree murder, Maine and Wisconsin to third degree murder, and

the defendant may only be liable for second degree murder,²¹ third degree murder,²² or manslaughter.²³ Other jurisdictions limit the circumstances under which the rule may be applied. Although there are many variations, three general types predominate.²⁴

The first requires that the underlying felony be dangerous to human life.²⁵ This is commonly accomplished by listing covered felonies in the statute and limiting these to dangerous offenses.²⁶ A second limitation requires that the underlying felony be independent of the felony murder.²⁷ This is to prevent an act which is actually a part of the homicide from being used as a basis for a felony murder prosecution. It has been noted that absent this qualification, every homicide could be made a felony murder on the basis of the included manslaughter.²⁸ The third type of limitation commonly placed on the felony murder rule reduces the number of situations in which a defendant is held liable for killings by third parties.²⁹ For example, under some versions of the felony murder rule, a defendant has been held liable for murder where a co-felon was killed by a police officer. These types of restrictions have all been adopted by the California Supreme Court and will be discussed further below.

III. FELONY MURDER IN CALIFORNIA

California's first degree felony murder statute reads, in part: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, . . . is mur-

Alaska and Ohio to manslaughter. See also Note, *Felony Murder*, *supra* note 17, at 141-42.

21. *Id.*

22. *Id.*

23. *Id.*

24. Note, *Felony Murder*, *supra* note 17, at 137.

25. For example, larceny would not be likely to cause danger to human life and would therefore not be a felony which would trigger the felony murder rule. See generally PERKINS, *supra* note 2, at 41; W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 547 (1972).

26. Additionally, some jurisdictions treat deaths occurring during felonies not in the first degree felony murder statute, as second degree felony murders. However, the courts often rule that this only applies to dangerous to human life felonies. Adlerstein, *Criminal Codes*, *supra* note 17, at 252. California is an example of a state which follows this pattern. See *infra* notes 30, 40-47 and accompanying text.

27. This is commonly called the merger doctrine. Note, *Felony Murder*, *supra* note 17, at 144; the California Supreme Court declined to adopt this term, but acknowledged that their objective was substantially the same. *People v. Ireland*, 70 Cal. 2d 522, 540, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969). See *infra* notes 48-51 and accompanying text (discussing the California rule).

28. PERKINS, *supra* note 2, at 43.

29. A defendant may find himself subject to a felony murder charge when a co-felon either kills or is killed or even when a third party is killed by another third party. Note, *Felony Murder*, *supra* note 17, at 152-53.

der of the first degree; and all other kinds of murder are of the second degree.”³⁰ Thus, “even without an intent to kill or injure, or an act done in wanton and willful disregard of the obvious likelihood of causing such harm, homicide is murder if it falls within the scope of the felony murder rule.”³¹ California also subscribes to a second degree felony murder rule. When a homicide occurs during the commission of a felony which is inherently dangerous to human life,³² and is not covered by the statute, it may be deemed to be second degree murder.³³ It has been held that while the first degree felony murder rule is a statutory creation, the second degree rule is a “judge-made doctrine without any express basis in the Penal Code.”³⁴ In order to appreciate the unique nature of the *Dillon* decision, it is helpful to consider here the California Supreme Court’s pre-*Dillon* position on the felony murder rule.

The court has unequivocally joined other courts in criticizing the rule.³⁵ It has stated that the rule “anachronistically resurrects from a bygone age a ‘barbaric’ concept that has been discarded in the place of its origin.”³⁶ The court has also observed “that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability.”³⁷ The California Supreme Court has also acted upon an express sentiment that the doctrine is “a highly artificial concept that deserves no extension beyond its required application.”³⁸ It has been noted, for example, that this unfavorable attitude has swayed the court’s thinking in determining just which felonies are inherently dangerous to human life.³⁹ The California court adopted a very narrow version of the rule, holding that a felony will be determined dangerous by looking at it “in the abstract” rather than at the “particular

30. CAL. PENAL CODE § 189 (West 1983).

31. PERKINS, *supra* note 2, at 37 (commenting on felony murder in general).

32. The California Supreme Court has stated that “only such felonies as are in themselves ‘inherently dangerous to human life’ can support the application of the felony murder rule.” The court directed that the assessment of the “peril to human life inherent to any given felony” be accomplished by looking “to the elements of the felony in the abstract, not the particular ‘facts’ of the case.” *People v. Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966).

33. CAL. PENAL CODE § 189 (West 1983).

34. *People v. Dillon*, 34 Cal. 3d 441, 472 n.19, 668 P.2d 697, 715 n.19, 194 Cal. Rptr. 390, 408 n.19 (1983).

35. The California Supreme Court has continued this criticism in the post-*Dillon* case *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). See *infra* notes 129-33 and accompanying text.

36. *Phillips*, 64 Cal. 2d at 583 n.6, 414 P.2d at 360 n.6, 51 Cal. Rptr. at 232 n.6.

37. *People v. Washington*, 62 Cal.2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

38. *Phillips*, 64 Cal. 2d at 582, 414 P.2d at 360, 51 Cal. Rptr. at 232. (footnote omitted).

39. Annot., 50 A.L.R. 3d 397, 409 (1973), See *infra* notes 41-47 and accompanying text (examples of this type of case).

facts of the case."⁴⁰ As an illustration, possession of a concealed firearm by an ex-felon⁴¹ and a felony false imprisonment were deemed not inherently dangerous.⁴² In *People v. Henderson*,⁴³ the court decided that false imprisonment was not "inherently dangerous to human life," within the meaning of the second degree felony murder doctrine.⁴⁴ In this case, the two defendants had held a third man at gun point. During a struggle, the gun discharged killing a woman standing nearby.⁴⁵ In determining that false imprisonment should not be used as the underlying felony for a felony murder instruction, the court looked to the statute.⁴⁶ Because the legislature, in defining the crime of false imprisonment, included conduct both violent and nonviolent, the crime "viewed as a whole in the abstract is not inherently dangerous to human life."⁴⁷

The court also limited the California felony murder rule to independent felonies in *People v. Ireland*,⁴⁸ when it held that felony murder cannot be "based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged."⁴⁹ The court refused to allow the prosecution to "bootstrap" into murder the lesser crime of assault committed when a husband shot his wife under mitigating circumstances.⁵⁰ The court also made this rule applicable to a technical burglary i.e. entering a dwelling, where the sole object of the entry was to commit the felony of assault.⁵¹

The court has additionally limited defendant liability for killings done by a third party. In *People v. Washington*⁵² they addressed liability for killings committed by a victim while resisting a crime. The defendant's accomplice had been shot and killed by the victim of the robbery. The court refused to allow this act to be tied to the

40. See *supra* note 32.

41. *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

42. *People v. Henderson*, 19 Cal. 3d 86, 560 P.2d 1180, 137 Cal. Rptr. 1 (1977).

43. *Id.*

44. *Id.* at 94, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

45. *Id.* at 91-92, 560 P.2d at 1182-83, 137 Cal. Rptr. at 3-4.

46. *Id.* at 96, 560 P.2d at 1186, 137 Cal. Rptr. at 7; See also CAL. PENAL CODE § 237 (West Supp. 1983) which provides in part: "If . . . false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison."

47. *Henderson*, 19 Cal. 3d at 94, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

48. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). A husband, distraught over his wife's affairs with other men, shot and killed her. The court refused to allow a felony murder conviction when the underlying felony relied upon was assault with a deadly weapon.

49. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

50. *Id.*

51. *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969).

52. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

defendant via the felony murder rule.⁵³ It held that such a killing could not be considered to have been "committed by him in the perpetration" of a felony within the meaning of the statute.⁵⁴ This limitation, however, was not made applicable to instances where a defendant initiated a gun battle, because there is a clear connection between this act and a resulting death.⁵⁵

The majority of the California Supreme Court has thus expressed a consistent dislike of the felony murder rule.⁵⁶ Their antipathy may explain their willingness to break new ground in the context of the doctrine. The facts of *Dillon* and the court's holding should be read with this in mind.

IV. THE FACTS OF *DILLON*

The defendant in *Dillon* was a seventeen year old rural California high school student. The deceased, Dennis Johnson, grew illegal marijuana on a farm in the area.⁵⁷ When the defendant learned of Johnson's farm he made two abortive attempts to rob him.⁵⁸ The first raid, carried out with several friends, resulted in Johnson warning the group off at gun point. The defendant and his brother abandoned a second attempt when they heard a shotgun blast.⁵⁹ The third and fatal attempt was highly organized. A total of eight boys participated; they equipped themselves with maps, harvesting tools, rope, guns, and other weapons and equipment. However, they became separated, several boys were chased by dogs, and one boy accidentally fired his shotgun.⁶⁰ During this confusion Johnson, who was carrying a shotgun approached Dillon. There is no evidence that the defendant was threatened. He testified, however, that he

53. *Id.* at 781 402 P.2d at 133, 44 Cal. Rptr at 445.

54. *Id.*

55. The court observed that when a defendant acts with "complete disregard for human life" "it is unnecessary to imply malice by invoking the felony murder doctrine." *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446 (footnotes omitted). Thus, a defendant who initiates a gun battle during a robbery will be criminally liable for any deaths even without the felony murder rule.

The court recently applied this reasoning to uphold a first degree murder conviction. The defendant's accomplice had been shot by the police following a high speed chase. The court found that the defendant's participation and use of a gun, during the chase, was malicious conduct. It was held to be the proximate cause of the accomplice's death. *People v. Caldwell*, 36 Cal. 3d 210, 681 P.2d 274, 203 Cal. Rptr. 433 (1984).

56. This dislike has again been expressed by the court, in the post-*Dillon* case *Carlos v. Superior Court* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal Rptr. 79 (1983). *See infra* notes 129-33 and accompanying text.

57. The court in *Dillon* refused to accept an argument that because marijuana was illegal, it was not subject to theft. They found that "prohibiting possession of an item . . . does not license criminals to take it . . ." *People v. Dillon*, 34 Cal. 3d 441, 456-57 n.5, 668 P.2d 697, 704 n.5, 194 Cal. Rptr. 390, 397 n.5 (1983).

58. *Id.* at 451-52, 668 P.2d at 700-01, 194 Cal. Rptr. at 393-94.

59. *Id.*

60. *Id.*

believed that his friends had been shot and he feared for his own life. He shot Johnson nine times, killing him.⁶¹

V. THE COURT'S HOLDING

The court upheld the constitutionality of the felony murder statute, rejecting the notion that the rule creates a presumption of malice, thus violating due process requirements.⁶² However, they went on to find that "in some first degree felony murder cases this Procrustean penalty may violate the prohibition of the California Constitution against cruel or unusual punishments."⁶³ *Dillon* represents a departure for the California Supreme Court. The court had previously confined its efforts to placing mechanical limitations on the rule's operation. However, in *Dillon* the court addresses one of the fundamental problems inherent in the rule itself; the rule can lead to a punishment which "not only fails to fit the crime, 'it does not fit the criminal.'"⁶⁴

The Supreme Court cited a 1976 case, as controlling.⁶⁵ In *In re Lynch*,⁶⁶ it was declared that "a punishment may violate . . . the California Constitution if . . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."⁶⁷ The *Dillon* court based its analysis for determining proportionality on two "techniques" which had been identified in *Lynch*. First, "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," must be examined.⁶⁸ The court found the following elements concerning this point of particular significance: 1) the defendant was immature and did not fully comprehend what he was doing when he shot Johnson;⁶⁹ 2) both the judge and jury felt that the punishment they were compelled to impose

61. *Id.*

62. The court held that "as a matter of law malice is not an element of felony murder," and that therefore the statute does not violate due process by creating a presumption of malice. This conceptual approach avoids the transfer of the malice from the underlying felony to the murder as done in some jurisdictions. It also makes the rule somewhat more arbitrary and subject to a cruel and unusual attack. This is because, to some extent, the culpability for the underlying felony is also isolated from the culpability for the murder. *Id.* at 475-76, 668 P.2d at 717-18, 194 Cal. Rptr. at 410-11.

63. *Id.* at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412 (citing CAL. CONST. art. 1, § 17).

64. *Id.* at 479, 668 P.2d at 721, 194 Cal. Rptr. at 414 (citation omitted).

65. *Id.* at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412.

66. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

67. *Id.* at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.

68. *Dillon*, 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413. (citation omitted)

69. A psychologist offered expert testimony that the defendant "was immature in a number of ways: intellectually, he showed poor judgment and planning; socially he functioned 'like a much younger child'; emotionally, he reacted 'again, like a much

was overly harsh and counterproductive;⁷⁰ 3) the defendant acted in a panic, responding “to a suddenly developing situation that defendant perceived as putting his life in immediate danger”;⁷¹ and 4) the defendant had not been in trouble with the law before this incident.⁷²

The second technique used by the court was a comparison of the penalty imposed in relation to “those prescribed in the same jurisdiction for more serious crimes.”⁷³ On this point, the *Dillon* court observed that when two crimes are compared, and the lesser is punished more severely, the unfairness is very clear.⁷⁴ It is, however, also unfair when crimes of varying gravity receive the same punishment. The court noted the following on this issue: 1) although there were extensive mitigating circumstances in this case, the defendant received the same punishment that he would have received for a “cold blooded” premeditated murder;⁷⁵ and 2) his accomplices, who were party to the conspiracy to commit the robbery, received only “petty chastisements.”⁷⁶

In analysing the *Lynch* techniques, the court provided additional indicators for the trial court to use in assessing the culpability of a defendant.⁷⁷ They directed the lower courts to consider the “totality of the circumstances surrounding the commission of the offense. . . including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts.”⁷⁸ In addition, a court should assess the individual, considering “such factors as . . . age, prior criminality,

younger child’ by denying the reality of stressful events and living rather in a world of make-believe.” *Id.* at 483, 668 P.2d at 723, 194 Cal. Rptr. at 416.

70. *Id.* at 484-85, 668 P.2d at 724-25, 194 Cal. Rptr. at 417-18.

71. *Id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

72. *Id.*

73. The court also found the third *Lynch* technique, comparing the sentence with penalties in other jurisdictions for the same offense, was not needed in every case. They explained that not all techniques must be invoked in order to find a sentence disproportionate. They did not apply it in *Dillon*. *Id.* at 487 n.38, 668 P.2d at 726 n.38, 194 Cal. Rptr. at 419 n.38 (citation omitted).

74. *Id.*

75. Because of the defendant’s minority, the death penalty was not a possibility. *Id.* at 487, 668 P.2d at 726, 194 Cal. Rptr. at 419.

76. The court noted that the other boys had both armed themselves and helped to plan the robbery. They were therefore “coconspirators” or “at the very least . . . aiders and abettors and hence principals in the commission of . . . the killing.” Four of the other boys merely received probation, one was placed in a juvenile education and training project, and the sole adult received one year in the county jail and three years probation. The court stated that these sentences, representing “the proverbial slap on the wrist,” underscored “the excessiveness of defendant’s punishment” *Id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

77. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413.

78. *Id.* at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413-14.

personal characteristics, and state of mind."⁷⁹

On this basis, the court ordered the conviction reduced to second degree murder.⁸⁰ Although the court identified a number of tests to guide lower courts in applying *Dillon*, it remains unclear just how those tests will apply to facts different from those in *Dillon*. The form of *Dillon*'s effect is more likely to draw from the concept of cruel and unusual punishment than from prior developments of the felony murder rule. This is because *Dillon* does not alter the mechanical application of the rule by redefining it. Instead, it prevents application of the rule when the outcome would be so unjust as to be cruel and unusual.

VI. CRUEL AND UNUSUAL PUNISHMENT

In order to anticipate *Dillon*'s ultimate impact, it is instructive to consider the history and development of the ban on cruel and unusual punishment. The phrase first appeared in 1688 in the English Bill of Rights.⁸¹ Many commentators conclude that the objective was to eliminate the then common punishments such as "branding, burning, and disemboweling."⁸² An alternate theory holds that the intent was merely to prevent the courts from exceeding their legal authority.⁸³ The American founding fathers included a prohibition against cruel and unusual punishment in the eighth amendment of the Constitution.⁸⁴ There has been considerable debate as to the intended meaning of the concept of cruel and unusual punishment.⁸⁵ However, the United States Supreme Court has generally identified four factors to be considered in determining if a sentence violates the eighth amendment. First, "whether the method of punishment is inherently cruel or severe" Second, "whether the punishment is excessive, disproportionate, or unnecessary" Third, "whether the punishment is unacceptable to society" Fourth, "whether the punishment is being inflicted arbitrarily"⁸⁶

79. *Id.* at 479, 668 P.2d at 721, 194 Cal. Rptr. at 414.

80. The court held that the second degree murder conviction was necessary because *Dillon* had intentionally killed with no adequate legal provocation. They also affirmed an attempted robbery conviction. *Id.* at 489, 668 P.2d at 727, 194 Cal. Rptr. at 420.

81. Annot. 33 A.L.R. 335, 349 (1970).

82. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 847 (1961) [hereinafter cited as Note, *Cruel and Unusual Punishment*].

83. *Furman v. Georgia*, 408 U.S. 238, 318 (1971) (Marshall, J., concurring).

84. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted."

85. This debate is however beyond the scope of this article. For a discussion of this topic see generally Note, *Cruel and Unusual Punishment*, *supra* note 82.

86. Annot. 33 L. ED. 2D 932, 942 (1972).

Despite these broad principles, the concrete application of the concept of cruel and unusual has proven elusive. As Justice Burger stated in *Furman v. Georgia*, "the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms."⁸⁷ The requirement of proportionality has been particularly difficult to pin down.⁸⁸ The *Lynch* techniques discussed above have been used to determine proportionality.⁸⁹ In *Dillon*, the court noted that what constitutes disproportionate punishment is "a question of degree. The choice of fitting and proper penalties is not an exact science."⁹⁰ In essence, the determination of disproportionality is a process of weighing the seriousness of the crime against the severity of the penalty imposed. Because an extreme imbalance is what is required, the courts have little trouble finding harsh sentences for less serious crimes cruel and unusual.

However, as the gravity of the crime increases, the margin for legislative error in determining punishment for a crime decreases. Therefore, the courts have been reluctant to second guess the lawmakers in those situations. The United States Supreme Court noted this about felony sentences in *Hutto v. Davis*,⁹¹ "the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make any constitutional distinction between one term of years and a shorter or longer term of years."⁹² In *Hutto*, two consecutive twenty year sentences meted out for an intent to distribute and the distribution of nine ounces of marijuana was held not cruel and unusual.⁹³ Although the United States Supreme Court has treated the setting of punishments up to life imprisonment⁹⁴ as largely a legislative prerogative, they have created an exception for capital punishment. This is because of the unique and irrevocable nature of the death penalty.⁹⁵ This more restrictive attitude has had an effect upon the

87. *Furman v. Georgia*, 408 U.S. 238, 376 (1971) (Burger, C.J., dissenting).

88. Note, *Cruel and Unusual Punishment*, *supra* note 82, at 850.

89. *Dillon*, 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413

90. *Id.* at 478, 668 P.2d at 720, 194 Cal. Rptr. at 413 (*citing Lynch*, 8 Cal. 3d at 423, 503 P.2d at 930, 105 Cal. Rptr. at 226).

91. 454 U.S. 370, (1982).

92. *Id.* at 373.

93. *Id.*

94. For example, the Court has held that no eighth amendment issue was raised by a life sentence imposed under the Texas recidivist law, where the defendant committed three nonviolent crimes for the amounts of \$80.00, \$28.36, and \$120.75. *Rummel v. Estelle*, 445 U.S. 263 (1980). *See contra Solem v. Helm*, 103 S. Ct. 3001 (1983) where the Supreme Court subsequently has held that a sentence of life imprisonment without possibility of parole imposed under a South Dakota recidivist statute similar to that examined by the court in *Rummel* was violative of the eighth amendment.

95. Although serious crimes generally raise little question as to the legislature's power to set punishments, the United States Supreme Court has created an exception to this for the death penalty. As Justice Stewart noted, "[t]he penalty of death differs from

felony murder doctrine. In *Enmund v. Florida*,⁹⁶ for example, the Court held that a defendant may not be condemned to death, under the felony murder rule, where the defendant "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."⁹⁷

California appears to be one of the first jurisdictions to hold that a noncapital murder sentence can be subject to a finding that the punishment was cruel and unusual.⁹⁸

VII. PROPORTIONALITY IN CALIFORNIA

California, like most states, has a constitutional provision prohibiting cruel and unusual punishments.⁹⁹ The *Dillon* decision is based on these state provisions.¹⁰⁰ Although the court in *Dillon* refers to the reasoning found in *Enmund v. Florida*,¹⁰¹ it is clear that *Enmund's* reasoning was based solely upon the unique nature of capital punishment.¹⁰² In addition to the extensive eighth amendment regulation of the death penalty, the California court has further limited capital punishment in felony murder cases.¹⁰³ Because of this, *Dillon* will impact mostly upon noncapital cases. It is therefore instructive to consider the crimes and punishments in the cases cited in *Dillon* as illustrative of the *Lynch* techniques, because all five were noncapital cases in which the sentences were deemed disproportionate.

The common thread linking these cases is that they involve relatively small crimes and most of the defendants faced long prison terms. For example, in *In re Lynch*,¹⁰⁴ the defendant served five years for exposing himself to a waitress in a drive-in restaurant. The court has also considered the circumstances of the crime when it was of a more serious nature. In *In re Foss*,¹⁰⁵ the petitioner had

all other forms of criminal punishment. . . . It is unique in its total irrevocability . . . its rejection of rehabilitation [and] its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306 (1971).

96. 458 U.S. 782 (1982).

97. *Id.* at 797. In this case the defendant had been sentenced to death on evidence that he had been waiting in a car while his companions murdered an elderly couple.

98. The Supreme Court recently applied a proportionality analysis to a life sentence without possibility of parole imposed for the commission of a nonviolent felony in *Solem v. Helm*, 103 S. Ct. 3001 (1983). See generally Note, *Solem v. Helm: The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590 (1985).

99. Annot. 33 A.L.R. 335, at 349 (1970).

100. *Dillon*, 34 Cal. 3d at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412.

101. 458 U.S. 782 (1982).

102. *Id.* at 798.

103. See *infra* notes 129-33 and accompanying text.

104. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

105. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

helped a police informant to secure heroin after the man told him that he was in pain from withdrawal.¹⁰⁶ The court felt that a sentence of ten years with no possibility of parole was excessive. Similarly, in *In re Rodriguez*,¹⁰⁷ the defendant had served twenty-two years for nonviolent child molestation.¹⁰⁸ He had an intelligence quotient of 68 and was not likely to present further danger to the community. The court found this cruel and unusual.¹⁰⁹ In *In re Grant*,¹¹⁰ the defendant had sold marijuana, with two previous convictions, and was sentenced to ten years without parole. The final case noted, *In re Reed*,¹¹¹ involved a challenge to the California requirement that sex crime offenders register with the police. The defendant had been sentenced to probation for having made a homosexual solicitation to an undercover vice officer.

Prior to the decision in *Dillon*, the California Supreme Court had thus applied California's own constitutional cruel and unusual punishment provision to cases of this nature. There are no fine distinctions involved here. The punishments are clearly disproportionate to the crimes. It is also obvious that they bear scant relation to an intentional murder. Unlike the above cases, *Dillon* involved a serious crime. As both Justice Richardson and Justice Broussard pointed out, *Dillon* armed himself for a robbery, expecting confrontation and then killed a man.¹¹² No other reported American case was found where a first degree felony murder life sentence had been deemed to be cruel and unusual. On the contrary, a number of state supreme courts have specifically found such sentences not cruel and unusual.¹¹³ Thus, *Dillon*, not only changed the felony murder rule, but also appears to carry the concept of cruel and unusual punishment into new territory.

The *Dillon* court acknowledged that "[t]he legislature is . . . accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime . . ."¹¹⁴ Indeed, because of the separation of powers,¹¹⁵ judicial discretion has been the hall-

106. *Id.* at 918, 519 P.2d at 1077, 112 Cal. Rptr. at 653.

107. 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

108. *Id.* at 644, 537 P.2d at 387, 122 Cal. Rptr. at 555.

109. *Id.* at 656, 537 P.2d at 397, 122 Cal. Rptr. at 565.

110. 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).

111. 33 Cal. 3d 914, 663 P.2d 216, 191 Cal. Rptr. 658 (1983).

112. *Dillon*, 34 Cal. 3d at 501, 504, 668 P.2d at 736, 738, 194 Cal. Rptr. at 429, 431.

113. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982); *State v. Goodseal*, 220 Kan. 487, 220 P.2d 279 (1976).

114. *Dillon*, 34 Cal. 3d at 478, 668 P.2d at 719, 194 Cal. Rptr. at 412 (quoting *People v. Anderson*, 6 Cal. 3d 628, 640, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 160 (1972)).

115. The powers of the branches of government are separate. When the courts exceed their constitutional power to review sentences, they are in effect legislating and thus encroaching upon the area of another branch. "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legis-

mark of the enforcement of the ban on cruel and unusual punishments. The United States Supreme Court recognized this when they stated that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual justices."¹¹⁶ Consequently, cruel and unusual findings have typically been found only in cases involving trivial offenses or capital punishment.¹¹⁷ *Dillon* falls into neither category and therefore raises a question of judicial overreaching. The legislature has set life imprisonment as the punishment for a *Dillon* type of felony murder. Dillon's actual sentence would have carried an enhanced base term of twenty years, with a possibility of release with parole in seven years.¹¹⁸ Such a denial of legislative discretion may well amount to what Justice Richardson characterized as an "invasion . . . of the powers of the Legislature to define crimes and prescribe punishments"¹¹⁹ *Dillon*, however, does not apply to all felony murders. The court has only limited the felony murder doctrine's application in situations where the defendant lacks culpability. An examination of this requirement reveals a possible reason for the court's action. It may be explained by the concept of *mens rea*.

VIII. *MENS REA*

Dillon applies the concept of cruel and unusual punishment to the felony murder rule for the first time. Although the facts of the case may make this particular application questionable,¹²⁰ there is a logical connection between the two. The link is found in *mens rea*.¹²¹ A cruel and unusual analysis includes consideration of the defendant's mental state¹²² and this is precisely what the felony murder rule seeks to avoid. The California rule dispenses with the need to prove malice aforethought and premeditation in first degree felony

lative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power" *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

116. *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (citing *Rummel v. Estelle*, 445 U.S. 263, 275 (1980)).

117. See *supra* notes 102-11 and accompanying text.

118. *Dillon*, 34 Cal. 3d at 499-500, 668 P.2d at 735, 194 Cal. Rptr. at 428.

119. *Id.* at 499, 668 P.2d at 734-35, 194 Cal. Rptr. at 427 (Richardson, J., concurring and dissenting).

120. There would, for example, be less of an issue of judicial overreaching if the death in *Dillon* had been accidental as opposed to willful.

121. A dictionary definition of *mens rea* is "[a] guilty mind; a guilty or wrongful purpose; a criminal intent." BLACK'S LAW DICTIONARY 889 (5th ed. 1979). It should be noted that "mens rea differs from crime to crime." For example "[i]n murder it is malice aforethought; in burglary it is the intent to commit a felony; . . . in uttering a forged instrument it is 'knowledge' that the instrument is false plus an intent to defraud." PERKINS, *supra* note 2, at 743.

122. See *supra* note 69 and accompanying text.

murder. "[T]he only criminal intent required is the specific intent to commit the particular felony."¹²³ Other jurisdictions define their statutes as including a conclusive presumption of *mens rea*, arising upon a showing that the felony was committed.¹²⁴

Both forms of the rule free the prosecution from the burden of proving *mens rea*. This has been attacked because it can create strict criminal liability.¹²⁵ It has been observed that "[t]he felony murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct" which is "the most basic principle of the criminal law"¹²⁶ The felony murder doctrine, by basing culpability for murder on liability for the underlying felony, creates "additional punishment [which] is therefore gratuitous . . . in terms of what must be proved at trial"¹²⁷

It is possible, as Justice Bird pointed out in her concurring opinion, that *Dillon* will develop into a requirement of *mens rea* for felony murder.¹²⁸ However, the court passed up an opportunity to move in this direction in their first post-*Dillon* felony murder case. In *Carlos v. Superior Court*,¹²⁹ the court specifically found that the evidence was not sufficient to prove that the defendant had an intent to kill.¹³⁰ However, no mention was made of a *Dillon* issue.¹³¹ Thus, it appears that a lack of intent alone will not trigger a finding of cruel and unusual punishment. In *Carlos*, the defendant's accomplice engaged in a gun battle during which a bystander was killed. The defendant, however, had fled the scene.¹³² The *Carlos* court held that it must be established that a defendant intended to kill before he can be sentenced to death or life imprisonment without possibility of parole for a felony murder.¹³³ Thus, while the

123. *Dillon*, 34 Cal. 3d at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411.

124. Note, *Felony Murder*, *supra* note 17, at 153.

125. *Id.* at 144.

126. *People v. Aaron*, 409 Mich. 672, 708, 299 N.W.2d 304, 316-17 (1980).

127. MODEL PENAL CODE § 210.2 Comment 6 (1980).

128. *Dillon*, 34 Cal. 3d at 495-96, 668 P.2d at 733-34, 194 Cal. Rptr. at 426-27.

129. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

130. *Id.* at 154, 672 P.2d at 877, 197 Cal. Rptr. at 95.

131. The defendant did not challenge the felony murder charge, only the felony murder special circumstances allegation. Therefore, the defendant had not raised a *Dillon* issue in his appeal. However, it would seem logical for the court to have at least commented on the issue, if they had intended that *Dillon* create a *mens rea* requirement in a *Carlos* type situation. *Id.* at 138, 672 P.2d at 866, 197 Cal. Rptr. at 83.

132. The defendant had been armed when he and his partner robbed a store. However, upon exiting the store, he fled while his partner engaged in a shoot out with an off-duty police officer. The officer's daughter was killed, evidently by a bullet from her father's gun. The defendant returned with a car and aided the partner's escape. *Id.* at 137, 672 P.2d at 865-66, 197 Cal. Rptr. at 83.

133. The defendant had been charged with first degree murder under the felony murder statute, CAL. PENAL CODE § 189 (West 1983). Additionally, the prosecution sought to subject him to enhanced punishment, death or life imprisonment without pos-

court appears committed to a continued paring away of the felony murder doctrine, *Dillon* may be only a limited means of reaching their objective.

IX. EFFECT OF *DILLON*

The key question raised by *Dillon* is what the court's new threshold of acceptable disproportionality will be. *Carlos* may indicate that proportionality may not be an issue in the majority of felony murder cases. Although the tests identified in the case provide some direction, they create no bright line. Given the court's well documented hostility to the felony murder rule, it is predictable that they will be open to a liberal construction of their opinion. In *Carlos*, they stated that their intention is to insure that the concept of "strict criminal liability incorporated in the felony murder doctrine be given the narrowest possible application consistent with [detering] those engaged in felonies from killing negligently or accidentally."¹³⁴ It would appear that although *Dillon* will give little succor to the hardened criminal, it will prevent the harshest results of the felony murder rule. The few appellate cases which have applied *Dillon* seem to be following this pattern. Only one case, *People v. Beheler*,¹³⁵ has modified a sentence as cruel and unusual. The defendant was blameless by almost every standard enumerated in *Dillon*. In the remaining cases where a *Dillon* argument has been raised, the defendant's actions or history indicated a pattern of criminality.¹³⁶ The courts found no difficulty denying relief.

sibility of parole, under CAL. PENAL CODE § 190.2 (West 1983). This section designates under what "special circumstances" a defendant may be so punished. One of the circumstances listed is felony murder. Thus, a defendant may face the underlying murder charge and also be subject to harsher punishment, on the basis of the commission of the same felony. *Id.* at 153-54, 672 P.2d at 877, 197 Cal. Rptr. at 95.

134. *Id.* at 146, 672 P.2d at 872, 197 Cal. Rptr. at 89-90.

135. 153 Cal. App. 3d 242, 200 Cal. Rptr. 195 (1984). The defendant's first degree murder conviction was reduced to voluntary manslaughter on the following facts: the defendant 1) was drunk to the point of stupor during the planning and execution of the crime, 2) may have been asleep when the triggerman, who received six years, did the shooting, 3) immediately reported the crime and cooperated with the police, and 4) had no criminal record.

136. Three of the defendants raising a *Dillon* argument patently had no legitimate claim to relief from this source. They had varying criminal records and had behaved like hardened criminals before, during and after the murders. *People v. Darwiche*, 152 Cal. App. 3d 630, 199 Cal. Rptr. 806 (1984); *People v. Munoz*, 157 Cal. App. 3d 999, 204 Cal. Rptr. 217 (1984); *People v. Harpool*, 155 Cal. App. 3d 877, 202 Cal. Rptr. 467 (1984).

The defendant in *People v. Laboa*, 158 Cal. App. 3d 115, 204 Cal. Rptr. 181 (1984) presented a closer question. He had been in another room when his accomplice accidentally shot the victim. However, the court found dispositive a knowing participation in an armed robbery coupled with a criminal record. They declined to modify the first degree murder sentence.

A final case side-stepped the *Dillon* issue by focusing on the fact that the fourteen

These cases illustrate that *Dillon* addresses what is probably the major drawback of the rule. This is that a relatively blameless defendant receives the same severe punishment as a hardened killer. Indeed, *Dillon* illustrates the truth of the saying that "hard cases make bad law," which has been identified as "[a] phrase used to indicate judicial decisions which, to meet a case of hardship to a party, are not entirely consistent with the true principle of the law."¹³⁷ In *Dillon*, neither the judge nor the jury wanted to sentence the boy to life imprisonment. The Supreme Court of California has provided a much needed safety valve. Ironically, by eliminating the rule's most unjust results, the court may have reduced legislative incentive to make needed changes. This would be unfortunate because policy considerations indicate that such action may still be needed.

X. POLICY CONSIDERATIONS

Criticism of the felony murder rule is not a new development. In 1881 Justice Holmes, commenting on the rule, declared that "it would do better to hang one thief in every thousand by lot."¹³⁸ Although unpopular, the rule has nevertheless exhibited a staying power.¹³⁹

In *Dillon*, the court once again calls for legislative reconsideration of the first degree felony murder rule.¹⁴⁰ There are a number of arguments which support this position. Even if the more extreme applications of the rule have been eliminated, the basic criticisms still apply. As Justice Bird observed, "the defendants are in reality punished for the commission of the underlying felony,"¹⁴¹ if the death was unintended, non negligent and fortuitous. In those cases where the death was otherwise, the rule is superfluous. In England,

year old defendant had been committed to the California Youth Authority. Because the actual period of confinement is set by the Youth Offender Board, the court held that review should be had by petition for writ of habeas corpus, rather than by direct appeal. *In re Deatrick A.*, 155 Cal. App. 3d 340, 202 Cal. Rptr. 64 (1984).

137. BLACK'S LAW DICTIONARY 646 (5th ed. 1979).

138. Justice Holmes posed a hypothetical situation where a man, planning to shoot chickens in order to steal them, accidentally kills the owner, whose presence was unknown to him. He stated about this, "[i]f the object of the [felony murder] rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." O. HOLMES, THE COMMON LAW 58 (1881).

139. Many states revised their homicide laws to conform to United States Supreme Court death penalty requirements. Thus, there has been a deliberate retention of the felony murder rule in many jurisdictions. Note, *Felony Murder*, *supra* note 17, at 135-36.

140. *Dillon*, 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408.

141. *Id.* at 498, 668 P.2d at 734, 194 Cal. Rptr. at 427.

the abolition of the rule had little effect on conviction rates.¹⁴² Additionally, there is no basis to believe that the commission of a specified felony increases the chance of accidental homicides.¹⁴³ Thus, the evidence tends to show that the rule serves little practical purpose.

If this is the case, the legislature would do well to follow the course suggested by the court and abolish the rule. However, this would be a politically unpopular action because it lowers criminal sanctions. A more palatable expedient has been suggested by the drafters of the Model Penal Code. They would replace the rule with a nonbinding presumption of malice when a death occurs during the commission of a felony.¹⁴⁴ Although this idea has not been well received,¹⁴⁵ California, as a leading state in legal reform, would be a logical place for it to take root.

Justice Bird also points out that the court's logical course is to do their part by eliminating the second degree felony murder rule. Having determined that it is of judicial rather than statutory origin, this action is within their power.¹⁴⁶ This would not only be consistent with their expressed sentiments, but might serve to prod legislative action by isolating the first degree rule.

CONCLUSION

This Note has described the *Dillon* holding¹⁴⁷ and discussed its potential impact on California's felony murder rule.¹⁴⁸ An examination of the history¹⁴⁹ and contemporary treatment of the rule¹⁵⁰ has revealed a pattern of criticism and successive limitation.¹⁵¹ *Dillon*, like prior limitations, will operate to remove some of the harshness from the felony murder rule.¹⁵² However, the *Dillon* court's invocation of the concept of cruel and unusual punishment in the context of the felony murder doctrine is a unique development.¹⁵³ Although there may be reason to question such an application on the facts of the case, the underlying rationale has merit.¹⁵⁴ The *Dillon* rule should provide the means for separating the relatively

142. Note, *Felony Murder*, *supra* note 17, at 159.

143. MODEL PENAL CODE § 210.2 Comment 6 (1980).

144. *Id.*

145. Note, *Felony Murder*, *supra* note 17, at 143.

146. *Dillon*, 34 Cal. 3d at 494, 668 P.2d at 731, 194 Cal. Rptr. at 424.

147. See *supra* notes 62-80 and accompanying text.

148. See *supra* notes 135-38 and accompanying text.

149. See *supra* notes 8-16 and accompanying text.

150. See *supra* notes 17-55 and accompanying text.

151. *Id.*

152. See *supra* note 135 and accompanying text.

153. See *supra* note 113 and accompanying text.

154. See *supra* note 120 and accompanying text.

blameless defendant from those deserving harsh sentences.¹⁵⁵

The felony murder doctrine is intended to deter offenders from killing negligently or accidentally during the commission of felonies.¹⁵⁶ However, the critics attack the logic of a rule which purports to deter unintended events by threat of punishment.¹⁵⁷ Indeed, studies have raised doubts as to the rule's practical effect.¹⁵⁸ The critics also argue that the rule runs counter to the American philosophy of determining criminal liability, because it tends to remove the necessity of proving an intent to kill.¹⁵⁹

A number of states have eliminated or sharply curtailed the rule.¹⁶⁰ The California Supreme Court has recommended a fresh legislative appraisal of the felony murder rule.¹⁶¹ Given the marginal utility of the rule and the many criticisms of it, such a reconsideration is warranted.

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155. *See supra* note 135 and accompanying text.

156. *See supra* note 134 and accompanying text.

157. *See supra* note 141 and accompanying text.

158. *See supra* notes 142-43 and accompanying text.

159. *See supra* notes 125-27 and accompanying text.

160. *See supra* notes 18-23 and accompanying text.

161. *See supra* note 140 and accompanying text.