STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

For CSM Use Only
Filing Date:
RECEIVED December 31, 2019 *Commission on State Mandates*
Test Claim #: 19-TC-02

TEST CLAIM FORM

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
(213) 974-8301	(213) 626-5427	abarrera@auditor.lacounty.gov

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
(213) 974-9653	(213) 617-8106	hyaghobyan@auditor.lacounty.gov

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	Auditor-Controller
Name of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)	**Print or Type Title**
Arlene Barrera	2-19-20
Signature of Authorized Local Government Official pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)	**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:1,798,780Following 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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SECTION 5: WRITTEN NARRATIVE
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ACCOMPLICE LIABILITY FOR FELONY MURDER

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I. STATEMENT OF THE TEST CLAIM

California law defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought[1]." 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 felony[2].

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.

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[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 Defender[4], 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 case[5].

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 $1,000[6], for Fiscal Years (FY) 2018-19 and 2019-20, are detailed in Exhibits A and B[7], 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 shall[8]:

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))

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[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 petition[9].

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 $1,000[10]. Such actual costs for FYs 2018-19 and 2019-20 are detailed in Exhibits C and D[11], 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 life[12].

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 $1,000[13].

FY 2018-19 is the FY the TC was filed for. The claimant incurred actual cost of $1,798,780 in FY 2018-19[14].

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 2019-20[15].

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

According to the Senate Committee on Appropriation: "CDCR[16] 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

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[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 million[17]."

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 $18,153,459[18].

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 appropriations[19].

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 Mandates[20].

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 §17573[21].

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

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[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 state[22].

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

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[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 revenues[24]." In order to implement § 6, the Legislature enacted a comprehensive administrative scheme to define and pay mandate claims[25]. 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 Constitution[26].

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.

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[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.

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.

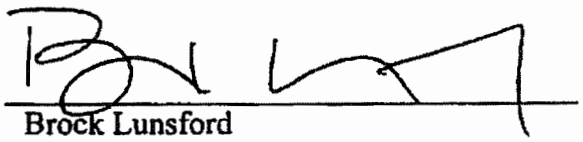
21. I have examined the SB 1437 test claim prepared by the Claimant and based on my personal knowledge, information, and belief, the costs incurred in this Test Claim were incurred to implement SB 1437. Based on my personal knowledge, information, and belief, I find such costs to be correctly computed 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 $1,000[1].

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: "CDCR[2] 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 million[3]"

   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 matter[4].

10) Public Defender is not aware of any legislatively determined mandate related to SB 1437, Chapter 1015, Statutes of 2018[5].

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:

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[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] Total Months Worked	[b] Total Salary Worked	[c] Actual Hours Worked	[d] Standard Productive	[e] Productive Hours Used (larger of "c" or "d")	[f] Productive Hourly Rate Used (b / e)	[g] Salary (c * f)	[h] Reimbursable Costs: Employee Benefits (g * 58.87%)	[i] Reimbursable Costs: Indirect Cost (g * 33.10%)	[j] Reimbursable Costs: Travel	[k] Reimbursable Costs: Mileage	[l] TOTAL (g + h + i + j + k)
Adams, Larissa	LOSA	3	15,728.00	229.50	435.75	435.75	36.09	8,283	4,876	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
Dowdell, Erika	DPD III	4	52,073.12	120.50	581.00	581.00	89.63	10,800	6,358	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	DPD IV	4	61,581.84	194.75	581.00	581.00	105.99	20,642	12,152	6,833			39,627
TOTAL				1392.00				107,557	63,325	35,606	-	-	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	**3,061.50**	**Total Costs**	**$471,595**	**Last Stats Received :**	**7/2019-11/2019**			
		[a]	[b]	[c]	[d]	[e]	[f]	[g]	[h]	[i]	[j]	[k]	[l]
								Reimbursable Costs					
Employee	**Title**	**Total Months Worked**	**Total Salary Worked**	**Actual Hours Worked**	**Standard Productive Work Hours (1744 / 12 * Total Months Worked)**	**Productive Hours Used (larger of "c" or "d")**	**Productive Hourly Rate Used (b / e)**	**Salary (c * f)**	**Employee Benefits (g * 60.37%)**	**Indirect Cost (g * 31.37%)**	**Travel**	**Mileage**	**TOTAL (g + h + i + j + k)**
Adams, Larissa	LOSA	5	26,470.72	317.50	726.67	726.67	36.43	11,566	6,982	3,628			22,176
Cruz, Jonathan	DPD III	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	31,028	18,732	9,733			59,493
Dudeck, Rebecca	Paralegal	5	30,992.28	317.50	726.67	726.67	42.65	13,541	8,175	4,248			25,964
McDermott, Timothy	DPD III	5	80,838.84	658.00	726.67	726.67	83.72	55,090	33,258	17,282			105,629
Reed-Mclean, Keisha	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	79,296.10	392.25	726.67	726.67	109.13	42,805	25,841	13,428			82,074
TOTAL				**3061.50**				**245,958**	**146,483**	**77,156**	**-**	**-**	**471,595**

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 $1,000[1].

[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: "CDCR[2] 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 million[3]"

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 matter[4].

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[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 2018[5].

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
5B50 - 1437 Penal Code Section 1170.95 Petitions
FISCAL YEAR 2018 -2019
Period 01/01/19 - 06/30/19

										Branch & Area Operation	Special Operations	Central Operations	
Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	EB 60.866%	ICRP 56.781%	ICRP 63.125%	ICRP 59.086%	TOTAL
Adorman, Natalie	449655	DPY D.A. IV	Central Operations	Jan 2019	15,395.46	105.93	15.60	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, Hoon	430496	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	24.50	2,595.29	1,580.17		1,638.28		5,813.74
Debbaudt, 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		355.96
Lunsford, Block	472685	DPY D.A. IV	Special Operations	Jan 2019	15,395.46	105.93	168.00	17,796.74	10,835.42		11,233.88		39,866.54
Mejia, 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
Nison, Edward	239987	DPY D.A. IV	Branch & Area Operations	Jan 2019	15,395.46	105.93	8.70	921.59	561.12	523.29			2,006.00
Rai, Grace	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	0.25	26.48	16.12	15.03			57.64
Jimenez, Alberto	473829	DPY D.A. IV	Special Operations	Jan 2019	12,669.74	87.18	0.45	39.23	23.89		24.76		87.88
Carter, Santaila	489755	Sr Paralegal	Special Operations	Jan 2019	6,840.00	47.06	143.00	6,729.58	4,097.37		4,248.05		15,075.00
Shaffer, Steven	287945	Paralegal	Special Operations	Jan 2019	6,137.00	42.23	160.00	6,756.80	4,113.95		4,265.23		15,135.98
Adorman, Natalie	449655	DPY D.A. IV	Central Operations	Feb 2019	15,702.82	108.05	12.90	1,393.85	848.66			823.57	3,066.08
Arias, Jose	419629	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	4.20	453.81	276.31		286.47		1,016.59
Chun, Hoon	430496	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	17.00	1,836.85	1,118.36		1,159.51		4,114.74
Debbaudt, 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, Bjorn	459597	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	8.30	896.87	546.01		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		17.05		60.51
Kranze, 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	3,226.87		3,345.53		11,872.25
Lunsford, 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	2,928.71	1,783.17	1,662.95			6,374.83
Mejia, Juan	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	443376	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	47.00	5,078.35	3,092.00		3,206.71		11,376.06
Musso, Josph	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
Nison, Edward	239987	DPY D.A. IV	Branch & Area Operations	Feb 2019	15,702.82	108.05	4.55	491.63	299.33	279.15			1,070.11
Rai, Grace	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	250010	DPY D.A. IV	Special Operations	Feb 2019	15,702.82	108.05	1.00	108.05	65.79		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
Borghi, Samantha	543054	DPY D.A. III	Special Operations	Feb 2019	12,576.46	86.54	5.50	475.97	289.80		300.46		1,066.23
Erlich, Ryan	600448	DPY D.A. III	Branch & Area Operations	Feb 2019	10,406.41	71.60	5.25	375.90	228.87	213.44			818.21
Holtz Jr., Lou	419636	DPY D.A. III	Branch & Area Operations	Feb 2019	13,278.10	91.36	8.50	776.56	472.82	440.94			1,690.32
Urman, Renee	249977	DPY D.A. III	Special Operations	Feb 2019	13,278.10	91.36	22.00	2,009.92	1,223.76		1,268.76		4,502.44
Carter, Santaila	489755	Sr Paralegal	Special Operations	Feb 2019	6,840.00	47.06	154.00	7,247.24	4,412.55		4,574.82		16,234.61
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
Beaart, 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		5,082.92
Burnley, Mark	464159	DPY D.A. IV	Special Operations	Mar 2019	15,702.82	108.05	13.50	1,437.07	874.97		907.15		3,219.19
Chun, Hoon	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		4,356.79
Dodd, Bjorn	459597	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		686.84		2,437.38
Lunsford, 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
Nison, Edward	239987	DPY D.A. IV	Branch & Area Operations	Mar 2019	15,702.82	108.05	17.50	1,890.88	1,151.28	1,073.66			4,115.82

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										Branch & Area Operation	Special Operations	Central Operations	
Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	EB 60.886%	ICRP 56.781%	ICRP 63.125%	ICRP 59.086%	TOTAL
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Mar 2019	14,873 82	102 34	142.00	14,532 28	8,848.12		9,173 50		32 553 90
Ral, 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
Reif, Judith	250010	DPY D A IV	Special Operations	Mar 2019	15 702 82	108 05	1 50	162 08	98 68		102 31		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	204157	DPY D A IV	Special Operations	Mar 2019	15,702 82	108 05	3.00	324 15	197.36		204.62		726 13
Borgio, Samantha	543054	DPY D A III	Special Operations	Mar 2019	12,576 46	86 54	2.80	242.31	147.53		152 96		542 80
Duckett, Keith	507106	DPY D A III	Special Operations	Mar 2019	13,278.10	91.36	160 00	14,617 60	8,900.07		9,227.36		32 745 03
Erich, Ryan	600448	DPY D A III	Branch & Area Operations	Mar 2019	10,688 82	73 55	2.50	183.88	111 96	104 41			400 25
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
Gonzalez, Jose	516866	DPY D A III	Special Operations	Mar 2019	13 278 10	91 36	169 00	15,439 84	9 400.70		9 746.40		34 586 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		31,107 78
Yun, Hubert	519572	DPY D A III	Special Operations	Mar 2019	13,278.10	91 36	151.00	13,795 36	8,399 44		8,708 32		30,903 12
Carter, Santaba	489755	Sr Paralegal	Special Operations	Mar 2019	6 840 00	47 06	142.00	6,729 58	4,097.37		4 248.05		15 075 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	287945	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, Susmita	625866	Paralegal	Special Operations	Mar 2019	5,078 00	34 94	139.02	4,857 36	2,957 45		3,066.71		10,881 02
Morales, Alissa	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, Hoon	430496	DPY D A IV	Special Operations	Apr 2019	15,702 82	108 05	13.00	1,404 65	855.24		886.69		3 146 58
Dyer, Rob	236081	DPY D A IV	Branch & Area Operations	Apr 2019	15,702 82	108 05	16 00	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, Tina	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
Kelberg, Brian	119640	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	3,055 16		3,167 51		11,240 53
Lunsford, Block	472685	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		1 023 10		3,630 66
Nixon, Edward	239987	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	15,782 82	105 16	178.00	18,718 48	11,396 93		11,816 04		41,931 45
Ral, Grace	449660	DPY D A IV	Special Operations	Apr 2019	15,702 82	108 05	17 40	1,880 67	1,144 70		1,186.79		4,211 56
Rose, Renee	431134	DPY D A IV	Special Operations	Apr 2019	15,702 82	108.05	7 50	810 38	493 41		511.55		1,815 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
Raek, Douglas	607276	DPY D A III	Branch & Area Operations	Apr 2019	10,174.00	69 66	14.05	978 72	595 90	555 73			2,130 35
Borgio, Samantha	543054	DPY D A III	Special Operations	Apr 2019	12,576 46	86 54	2 80	242 31	147 53		152 96		542 80
Duckett, Keith	507106	DPY D A III	Special Operations	Apr 2019	13,278 10	91 36	160.00	14,617 60	8,900 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	9,902 33		10,265 44		36,428 85
Gonzalez, Jose	516866	DPY D A III	Special Operations	Apr 2019	13,278 10	91 36	107 00	9,775 52	5,953 92		6,170 60		21,898 24
Henry, Candice	505049	DPY D A III	Special Operations	Apr 2019	13 278 10	91 36	136 00	12,424 96	7,565 06		7,843 26		27,833 28
Manaktala, Shalini	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
Ostrowaski, 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
Neff, Eric	616963	DPY D A II	Branch & Area Operations	Apr 2019	10,688 82	73 55	16 00	1,176 80	716.51	668 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	392 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	4 432 00	30 50	160 00	4 880 00	2,971.24		3,080 50		10,931 74
Shaffer, Steven	287945	Paralegal	Special Operations	Apr 2019	6 137 00	42 23	178 00	7,516 94	4,576 76		4,745 07		16 838 77

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Name	Employee Number	Title	Bureau	Months	Gross	Hourly Rate 1744	Hours per Month	Claimable Salary	EB 60.886%	Branch & Area Operation ICRP 56.781%	Special Operations ICRP 63.125%	Central Operations ICRP 59.086%	TOTAL
Sripata, Susmita	625865	Paralegal	Special Operations	Apr 2019	5,216 00	35 89	176 00	6,316 64	3,845 95		3,987 38		14,149 97
Morales, Alissa	479785	STAFF ASST. II	Special Operations	Apr 2019	5,813 00	40 00	142 00	5,660 00	3,458 32		3,585 50		12,723 82
Chun, Hoon	430496	DPY D.A. IV	Special Operations	May 2019	15,702 82	108 05	21 00	2,269 05	1,381 53		1,432 34		5,082 92
Kato, Warren	460945	DPY D.A. IV	Special Operations	May 2019	15,282 82	105 16	8 00	841 28	512 22		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 05		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		4,858 47
Nilson, Edward	239987	DPY D.A. IV	Branch & Area Operations	May 2019	15,702 82	108 05	6 30	680 72	414.46	386 52			1,481 70
O'Crowley, Patrick	460951	DPY D.A. IV	Special Operations	May 2019	15,282 82	105 16	106 00	11,146 96	6,786 94		7,036 52		24,970 42
Ral, Grace	449660	DPY D.A. IV	Special Operations	May 2019	15,702 82	108 05	4.20	453 81	276 31		286 47		1,016 59
Reif, Judith	250010	DPY D.A. IV	Special Operations	May 2019	15,702 82	108 05	1 80	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
Duckett, 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		29,470 52
Garmo, 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 40		34,586 94
Gonzalez, Jose	510866	DPY D.A. III	Special Operations	May 2019	13 278 10	91 36	187.00	17,084 32	10,401 96		10 784 48		38,270 76
Henry, Candice	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
Manaktala, 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
Orman, Renee	249977	DPY D.A. III	Special Operations	May 2019	13,278 10	91 36	2.00	182 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	16,170 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	629876	Paralegal	Special Operations	May 2019	4,432 00	30 50	174 00	5,307 00	3,231 22		3,350 04		11,888 26
Shaffer, Steven	287945	Paralegal	Special Operations	May 2019	6,137 00	42 23	169.00	7,136 67	4,345 35		4,505 15		15,987 37
Sripata, Susmita	625865	Paralegal	Special Operations	May 2019	5 216 00	35 89	159 04	5,707 95	3,475 34		3,603 14		12,786 43
Morales, Alissa	479785	STAFF ASST. II	Special Operations	May 2019	5 813 00	40 00	142 00	5,680 00	3,458 32		3,585 50		12,723 82
Arias, 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	15 282 82	105 16	7.50	788 70	480 21		497 87		1,766 78
Chun, Hoon	430496	DPY D.A. IV	Special Operations	Jun 2019	15,702 82	108 05	21 00	2,269 05	1,381 53		1,432 34		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, Candice	505049	DPY D.A. IV	Special Operations	Jun 2019	13,561 73	93 31	120 00	11,197 20	6,817 53		7,068 23		25,082 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
Nilson, Edward	239987	DPY D.A. IV	Branch & Area Operations	Jun 2019	15 702 82	108 05	6 70	723 94	440 78	411 06			1,575 78
O'Crowley, Patrick	460951	DPY D.A. IV	Special Operations	Jun 2019	15,282 82	105.16	160.00	16,825 66	10,244 83		10,621 16		37,691 19
Ral, 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 15
Duckett, 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 92		24,558 77
Garmo, Evelis	466276	DPY D.A. III	Special Operations	Jun 2019	13,278 10	91 36	160 00	14,617 60	8,900 07		9,227 36		32,745 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		9,227 36		32,745 03
Hatami Jonathan	517053	DPY D.A. III	Special Operations	Jun 2019	13,278.10	91.36	1 00	91 36	55 63		57 67		204 66
Ostrowaski, Allyson	507113	DPY D.A. III	Branch & Area Operations	Jun 2019	14,088 46	96 94	3.50	339 29	206.58	192 65			738 52
Yun, Hubert	519572	DPY D.A. III	Special Operations	Jun 2019	13,278 10	91 36	160 00	14,617 60	8,900 07		9,227 36		32,745 03
Carter, Santalia	489755	Sr Paralegal	Special Operations	Jun 2019	6,840 00	47 06	132 00	6,211 92	3 782 19		3,921 27		13,915 38
Romero, Eileen	629876	Paralegal	Special Operations	Jun 2019	4,432 00	30 50	160 00	4,880 00	2,971 74		3,080 50		10 932 24
Shaffer, Steven	287945	Paralegal	Special Operations	Jun 2019	6,137 00	42 23	142 00	5,996 66	3 651 13		3 785 39		13 433 18
Sripata, Susmita	625865	Paralegal	Special Operations	Jun 2019	5,216 00	35 89	143 00	5,132 27	3 124 89		3 239 75		11 496 85

DISTRICT ATTORNEY'S OFFICE
5890 - 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	EB 60.886%	Branch & Area Operation ICRP 56.781%	Special Operations ICRP 63.125%	Central Operations ICRP 59.086%	TOTAL
Moraes Alissa	479785	STAFF ASST	Special Operations	Jun 2019	5,813.00	40.00	147.30	5,892.00	3,587.40		3,719.33		13,198.73
						TOTAL	9,391.10	711,827.44	433,403.18	18,792.98	425,503.38	2,757.61	1,592,283.59

Averagae cost per hour= $1,592,283/9,391= $169.56/houlr
Average 30/hr per case= 25 hour x $169.56= $4,239 per case
Statewide cost estimate = 7,177 x $4,239 = $9,228,303

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	EB	Branch & Area Operation ICRP	Special Operations ICRP	Central Operations ICRP	TOTAL
									65.623%	60.700%	64.768%	64.381%	
Chun, Hyon	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	16,285 92	10,687 31		10,551 32		37,524 55
Garcia, Manuel Jr	250002	DPY D.A. IV	Special Operations	Jul-19	15,702 82	108 05	1 00	108 05	70 91		70 00		248 96
Gonzalez, Jose	510866	DPY D A. IV	Special Operations	Jul-19	14,088 46	96 94	141 00	13,669 54	8,969 71		8,855 57		31,493 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		39,311 44
Jeret, Erika	507100	DPY D A. IV	Special Operations	Jul-19	14,088 46	96.94	3 25	315 06	206 75		204 12		725 93
Lunsford, Block	472685	DPY D A. IV	Special Operations	Jul-19	15,702 82	108 05	176 00	19,016 80	12,479 39		12,320 50		43,816 79
Nixon, 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		12,127 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 67		280 07		995 83
Schwartz, Susan	260110	DPY D A IV	Central Operations	Jul 19	15,702 82	108 05	14 00	1,512.70	992 68			973 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		1,742 71
Dominquez, Shelly	475005	DPY D A [illegible]	Special Operations	Jul 19	14,088 46	96.94	1 00	96.94	63 61		62 81		223.36
Garmo, Evelis	466276	DPY D.A. II	Special Operations	Jul 19	13,278 10	91 36	80 00	7,308.80	4,796 25		4,735 23		16,840 28
Manaktala, Shabri	460791	DPY D.A. IR	Special Operations	Jul 19	13,278 10	91 36	26 50	2,421 04	1,588 76		1,568 54		5,578 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		19,192.35
Romero, Eileen	629876	Paralegal	Special Operations	Jul-19	4,432.00	30.50	160 30	4,889 15	3,208 41		3 167.58		11,265 14
Shaffer, Steven	287945	Paralegal	Special Operations	Jul-19	6,137 00	42 23	160 00	6,756 80	4,434.01		4,377 60		15,568 41
Srpala, Susmita	625865	Paralegal	Special Operations	Jul-19	5,236 00	35 89	176 00	4,593 92	3,014 67		2,976 31		10,584 90
Bevare, Marc	443448	DPY D.A. IV	Special Operations	Aug-19	15,702 82	108 05	3 00	324 15	212 72		210 01		746 88
Burnley, Mark	464159	DPY D.A. IV	Special Operations	Aug-19	15,702 82	108 05	3 00	924 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		39,311 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	510866	DPY D.A. IV	Special Operations	Aug-19	14,088 46	96.94	160 00	15,510 40	10,178.39		10,048 88		35,737 57
Hanusee, Michele	454500	DPY D A. IV	Special Operations	Aug-19	15,702 82	108 05	5 80	626 69	411.25		406 07		1,443 96
Henry, Candice	505049	DPY D.A. IV	Special Operations	Aug-19	14,088 46	96 94	135 00	13,083 84	8,651 63		8,541 55		30,377 02
Lunsford, Block	472685	DPY D A. IV	Special Operations	Aug-19	15,702 82	108 05	176 00	19,016 80	12,479 39		12,320 60		43,816 79
Nixon, Edward	239982	DPY D.A. IV	Branch & Area Operations	Aug-19	15,702.82	108 05	13 30	1,437 07	943.05	872 30			3,252 42
O'Crowley, Patrick	460951	DPY D A IV	Special Operations	Aug-19	15,282 82	105 16	169 00	17,772 04	11,662 55		11,514 15		40,948 74
Silverman, Beth	407888	DPY D A. IV	Special Operations	Aug-19	15,702 82	108.05	5 00	540 25	354.53		350 02		1,244 80
Garmo, Evelis	466276	DPY D A. III	Special Operations	Aug-19	13,278 10	91 36	177 00	16,170 72	10,613 73		10,476 69		37,259 12
Kassabian, Lisa	500594	DPY D A. III	Special Operations	Aug-19	13,278 10	91.36	3 00	274 08	179 86		177 57		631 51
Yun, Hubert	519572	DPY D A. IB	Special Operations	Aug-19	13,278 10	91.36	89 00	8,131 04	5,335 83		5,267 94		18,734 81
Carter, Santalia	489755	Sr Paralegal	Special Operations	Aug 19	6,840 00	47 06	106 00	4,988 36	3,273.51		3,231 86		11,493 73
Romero, Eileen	629876	Paralegal	Special Operations	Aug-19	4,432.00	30.50	158 30	4,828 15	3,168.38		3,126 06		11,124 59
Shaffer, Steven	287945	Paralegal	Special Operations	Aug-19	6,137 00	42.23	160 00	6,756.80	4,434.01		4,377 60		15,568 41
Srpala, Susmita	625865	Paralegal	Special Operations	Aug-19	5,236 00	35 89	176 00	6,316 64	4,145.17		4,092 42		14,554 23
Dodd, Bjorn	459597	DPY D A IV	Special Operations	Sep-19	15,702.82	108 05	3 00	324 15	212 72		210 01		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	EB 65.623%	Branch & Area Operation ICRP 60.700%	Special Operations ICRP 64.788%	Central Operations ICRP 64.382%	TOTAL
Duckett, Keith	507106	DPY D.A. IV	Special Operations	Sep 19	14,088.46	96.94	160.00	15,510.40	10,178.39		10,048.88		35,737.67
Gonzalez, Jose	510866	DPY D.A. IV	Special Operations	Sep-19	14,056.46	96.94	160.00	15,510.40	10,178.39		10,048.88		35,737.67
Hansee, Michele	454500	DPY D.A. IV	Special Operations	Sep-19	15,702.82	108.06	8.45	913.02	599.15		591.53		2,103.70
Henry, Candice	505049	DPY D.A. IV	Special Operations	Sep 19	14,088.46	96.94	152.00	14,734.88	9,669.47		9,546.43		33,950.78
Lumsford, 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
Nixon, 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	15,282.82	105.16	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	367.37	241.08			236.52	844.97
Dominquez, Shelly	475005	DPY D.A. IV	Special Operations	Sep-19	14,088.46	96.94	10.50	1,017.87	667.96		659.46		2,345.29
Garma, Evelis	466276	DPY D.A. IV	Special Operations	Sep-19	13,278.10	91.36	160.00	14,617.60	9,592.53		9,470.45		33,680.56
Manantala, Shaina	460791	DPY D.A. IV	Special Operations	Sep-19	13,278.10	91.36	8.00	730.88	479.63		473.52		1,684.03
Yun, Hubert	519572	DPY D.A. IV	Special Operations	Sep-19	13,278.10	91.36	160.00	14,617.60	9,592.53		9,470.45		33,680.56
Carter, Santana	489755	Sr. Paralegal	Special Operations	Sep-19	6,842.00	47.06	152.00	7,153.12	4,694.09		4,634.36		16,481.57
Romero, Eileen	629876	Paralegal	Special Operations	Sep-19	4,432.00	30.50	157.30	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		4,131.36		14,692.69
Sripata, 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
Dodd, Bjorn	459567	DPY D.A. IV	Special Operations	Oct-19	16,194.82	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		40,292.80
Garcia, Manuel Jr	250002	DPY D.A. IV	Special Operations	Oct-19	17,003.65	117.00	1.00	117.00	76.78		75.80		269.58
Gonzalez, Jose	510866	DPY D.A. IV	Special Operations	Oct 19	14,440.28	99.36	170.00	16,891.20	11,084.51		10,943.47		38,919.18
Henry, Candice	505049	DPY D.A. IV	Special Operations	Oct 19	14,440.28	99.36	160.00	15,897.60	10,432.48		10,299.74		36,629.82
Lumsford, Block	472685	DPY D.A. IV	Special Operations	Oct 19	16,094.82	110.74	176.00	19,490.24	12,790.08		12,627.34		44,907.66
O'Crowley, Patrick	460951	DPY D.A. IV	Special Operations	Oct 19	15,664.28	107.78	178.00	19,184.84	12,589.67		12,429.67		44,203.98
Schwartz, Susan	260110	DPY D.A. IV	Central Operations	Oct 19	15,355.77	105.66	3.20	338.11	221.88			217.68	777.67
Scott, Deborah	287873	DPY D.A. IV	Special Operations	Oct-19	14,440.28	99.36	5.00	496.80	326.02		321.87		1,144.69
Garmo, Evelis	466276	DPY D.A. III	Special Operations	Oct-19	13,609.92	93.65	169.00	15,826.85	10,386.05		10,253.90		36,466.80
Yun, Hubert	519572	DPY D.A. III	Special Operations	Oct 19	13,609.92	93.65	178.00	16,669.70	10,939.16		10,799.97		38,408.83
Carter, Santana	489755	Sr. Paralegal	Special Operations	Oct 19	7,010.92	48.24	129.00	8,634.96	5,666.52		5,594.42		19,895.90
Romero, Eileen	629876	Paralegal	Special Operations	Oct-19	4,542.92	31.26	166.30	5,198.54	3,411.44		3,368.05		11,978.03
Shaffer, Steven	287945	Paralegal	Special Operations	Oct 19	6,355.30	43.04	134.00	5,767.36	3,784.71		3,736.56		13,288.63
Sripata, 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
Perez, Michelle	450785	Spvg Legal Office	Special Operations	Oct-19	5,987.92	41.20	166.00	6,839.20	4,488.09		4,430.58		15,758.22
						TOTAL	7,217.30	$62,478.06	$68,114.99	2,229.94	$60,601.05	1,428.13	$1,295,852.15

Average cost per hour= $1,295,852.15/7,217.30= $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	Narrowed by
Cases	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 2018 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.

(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

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. 281, 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 premediated killing People v. Semone (Cal. App. Aug. 4, 1934), 140 Cal. App. 318, 35 P.2d 379, 1934 Cal. App. LEXIS 432

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 26, 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

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. Ogg (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*.

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 acceptation, 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. Kenaghan (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. Wayman (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 610, 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*.

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. Goldshen (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, 1966), 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. Seaslone (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,*

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. 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.

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. 21, 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*.

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. Mathison (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*, *25*) 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. 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***, 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

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, 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

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.

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), 222 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 defintion 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.

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*

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), 182 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.

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. Cravens (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), 236 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), 236 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 taxies. 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

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. Watson (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. Taylor (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. Taylor (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

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 Genrally

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. Keefer (Cal. May 12, 1884), 65 Cal. 232, 3 P. 818, 1884 Cal. LEXIS 498*.

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 880, 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 1696.*

It is exclusively province of jury in murder case to determine degree of crime when there is any evidence to support determination. *People v. Ogg (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, 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 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. Dias (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

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.

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), 63 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 690, 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.*

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 443, 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 2506; 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 superflous 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,*

1956 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 Rosa (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. Motta (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

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. Barry (Cal. Oct. 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 167.*

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,*

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, 1868), 36 Cal. 255, 1868 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.

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. Merkouris (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, depublished, (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.

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. Covarrubias (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, 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*.

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*

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 homicde 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. Bonas (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

decedent. *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. Schader (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.*

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 4588*, 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

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

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.*

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

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.*

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.

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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

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

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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	Narrowed by
Cases	Sources: CA, Related Federal

Cal Pen Code § 189

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

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.

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).

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

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

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41.Parole

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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*

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.

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*.

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. Giles (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

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

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*.

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*.

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*.

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*.

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.*

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. Ottey (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 "willful, 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. 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*.

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. Wetmore (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 "willful, 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.*

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. Larrios (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.

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

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

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. Bealoba (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

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. Edgmon (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

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*.

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. Edgmon (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. Edgmon (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,

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 fiancéee, 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

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. Pliler (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. 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.*

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

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. 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*.

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

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.*

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

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.

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

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. 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.

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

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. McDermand (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

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

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*

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.

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.

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.

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 premediation, 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 prosection 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

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

(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.*

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

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.

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*.

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

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. Lilliock (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*.

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

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

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, 257 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

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 deaths 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*.

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*.

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.*

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, 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 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

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

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*

(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

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

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*.

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*.

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 P2d 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

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.*

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

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 P2d 473, 1961 Cal LEXIS 269*, and *People v. Talbot (1966) 64 Cal 2d 691, 51 Cal Rptr 417, 414 P2d 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

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

defendant subsequently brutally penetrated another victim with a mousse 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*.

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

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.*

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.*

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*.

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. Carnine (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.*

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*.

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. 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.*

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.

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. 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*.

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. 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*.

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. 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*.

Any murder committed in the perpetration of robbery is murder in the first degree irrespective of intention. *Sampsell 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.*

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. Carnine (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. Baglin (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

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

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

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. Perman (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

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*.

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

(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

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 delineates 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.

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*.

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.*

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. Maughs (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.

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,*

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 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

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, depublished, *(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 taxies. 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

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*.

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

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

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, 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*.

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*.

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.*

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. Zaragoza (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

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.*

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. Loggins (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

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*.

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*.

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, depublished, (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,

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. Emo (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.*

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

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*

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 in 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

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. Bymes (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*.

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.

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,

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

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.

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*.

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 that 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, depublished, *(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.*

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

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*.

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,*

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. 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.*

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.*

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

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*.

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*.

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. Stembridge (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*.

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, depublished, *(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*.

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*.

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 sed 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*

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

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, depublished, *(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*.

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. 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

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*.

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 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 willing 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

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. The 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.*

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.

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.

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Limitations on the applicability of the felony–murder rule in California. 22 Hastings L.J. 1327.

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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--Coparticpant 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.

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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
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Cal Pen Code § 1170.95

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 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

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.

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

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:

Cal Pen Code Pt. 2, Tit. 7

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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
Urgency: No
Hearing Date: May 14, 2018
Policy Vote: PUB. S. 6 - 1
Mandate: Yes
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 — 500000–500049) > 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 XIIIB 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 XIIIB 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 XIIIB 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

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
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1. *People v. Cavitt, 33 Cal. 4th 187*
   Client/Matter: -None-
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   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

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.

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, special circumstance, facilitated, causal relationship, time and place, unrelated, sheet

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.

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 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.

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

HN4[] **Sentencing, Fines**

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

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 Werdegar, 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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Paul V. Carroll, under appointment by the Supreme Court, for Defendant and Appellant Robert Nathaniel Williams.

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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 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

[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.

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

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[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 **[***291]** 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.

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[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.

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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

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[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,*

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[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.)

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[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]

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[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. 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

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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."

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 **[**236]** 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 **[****40]** 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 **[*209]** 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 **[****41]** 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 **[****42]** 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 **[*210]** 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 **[**237]** 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* formulation [1] 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 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.)

[**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

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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1. *People v. Dillon, 34 Cal. 3d 441*
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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

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, attempted robbery, second degree, manslaughter, marijuana, severance, Italics

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

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

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.

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

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**

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

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*.

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]** I

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. 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

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. Coplon (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 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.

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[1] Indeed, 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.)

[2] Limited 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 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 **[****15]** 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 **[***397]** crop without vigorous resistance by the owners. Rather, they must have known **[**704]** they would probably be required to use force to reach their goal. The **[****16]** 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 **[*456]** 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]

[**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 **[****18]** 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.

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[3] As the Attorney General aptly puts it, "A person planning to 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."

[4] In 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 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 continuated 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

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[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 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 ***HN7***[↑] 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

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[7] The 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 Willke (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. Meinhart (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, 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

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[8] On 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.

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]

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[9] The 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].)

[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."

[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 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

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[18] After 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.

At this point, however, our law appears to diverge sharply from that of Pennsylvania and Michigan. *CA(16a)*[↑] **(16a)** *HN13*[↑] 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)[↑] **(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]

[**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

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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*.)

[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.

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[14] As 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 **[***406]** 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]

[**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

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[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.)

[16] In 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 (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 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*

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[19] This 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.

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***[↑]

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[20] In 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]

[**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]

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[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 (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 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

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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***.

[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 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]

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[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].)

[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 the law of this state." (*Id., at p. 653*.)

Applying this rule to the record in *Rodriquez*, 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

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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*).

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."

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 tigger 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.

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[28] In 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.

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 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

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[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[?]"

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 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

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[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.

[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)[↑] **(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 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

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[37] We 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).

[38] This 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 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.)

[39] The 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.

[40] The 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. **[**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.

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[1] For diverse views on the subject of jury nullification, see, e.g., Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy* (1980) 43 Law & Contemp. Probs. No. 4, p. 51; Scheflin, *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.

[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 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

[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.)

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 formalistic [1] 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* (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]**

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[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].)

[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

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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 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]*.)

[4] It 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."

[5] This 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)

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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.

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

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[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.

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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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.

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1. *County of San Diego v. State of California, 15 Cal. 4th 68*
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   Search Terms: County of San Diego v. State of California, 15 Cal. 4th 68
   Search Type: Natural Language
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Content Type	Narrowed by
Cases	-None-

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, 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

* Retired judge of the San Diego Superior Court assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

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

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.

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

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

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

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

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

* Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

** 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.

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

rules (*Welf. & Inst. Code, § 14000.2*), and Medi-Cal was administered by state departments and agencies.

[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-Cal.)

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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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]henever 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.

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*

* 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.

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

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[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).)

[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.)

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]

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[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.

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]

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[6] San Diego lodged with the trial court a copy of the Commission's decision in the Los Angeles action.

[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

[**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 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]**

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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.

[9] The 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.

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***[↑] **[****33]** 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

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 [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

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[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."

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*

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[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]

[**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

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[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 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] (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

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[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 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

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[20] In 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 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.)

[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 "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

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[23] We 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.

[24] Our 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.

[25] The 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, 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,

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[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.)

[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.

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. [**336] [***158] 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 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*

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[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.

[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 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

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[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 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*.)

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[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 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].)

* 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.

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. Viloria (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 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*

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[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.

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 Neary 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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1. *County of Fresno v. State, 53 Cal. 3d 482*
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   Search Type: Natural Language
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Content Type	Narrowed by
Cases	-None-

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

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 & Powers

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. XIIIA, XIIIB 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. XIIIB 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. XIIIB, § 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. XIIIB, § 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. XIIIB, § 6 is included in recognition that Cal. Const. art. XIIIA 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, JJ., and Best (Hollis G.), J., * concurring. Separate concurring opinion by Arabian, J.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

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.]

Counsel: Max E. Robinson, County Counsel, and Pamela A. Stone, Deputy County Counsel, for Plaintiff and Appellant.

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, subds. (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, subds. (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

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[2] This 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 divers 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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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.

Disposition: The judgment of the Court of Appeal is reversed.

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 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.

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.

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.

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

HN3 **Local Governments, Finance**

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

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

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

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]

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

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[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., § 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] 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

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[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.)

[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, subds. (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]

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]

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[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 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 plaintiff's 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

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[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 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

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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].)

[3] The 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.

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

[4] The 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 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

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.

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 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

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[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.)

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 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]

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[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. Honig (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.

[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 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

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"[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."

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]

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[8] Article 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."

[9] Section 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. . . ."

[10] Section 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 XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, 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 XIIIB 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 XIIIB, 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. 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

[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.

[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-
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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

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 repeal, increased cost, new program, incidental, workers' compensation benefits, cost of living, state-mandated, discipline, effected

Case Summary

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).

Governments > State & Territorial
Governments > Relations With Governments

Workers' Compensation & SSDI > Benefit Determinations > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

Business & Corporate Compliance > ... > Disability & Unemployment Insurance > Unemployment Compensation > Scope & Definitions

Workers' Compensation & SSDI > General Overview

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Enforcement

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview

Workers' Compensation & SSDI > ... > Course of Employment > Activities Related to Employment > Emergencies

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 > Interpretation

HN6 **Legislation, Interpretation**

In the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

Governments > Legislation > Effect & Operation > General Overview

Workers' Compensation & SSDI > Coverage > General Overview

HN7 **Legislation, Effect & Operation**

Cal. Const. art. XIV, § 4 gives the legislature plenary power, unlimited by any provision of the California Constitution, over workers' compensation.

Governments > Legislation > Effect & Operation > General Overview

Workers' Compensation & SSDI > Coverage > General Overview

HN8 **Legislation, Effect & Operation**

See *Cal. Const. art. XIV, § 4*.

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

mandated by the state for workers' compensation benefits. The trial court found that Cal. Cosnt., 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

Classified to California Digest of Official Reports, 3d Series

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)**

Constituional 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 entitles 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

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[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 XIIIB 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).

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[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.

[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.

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 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]

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[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.

[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 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

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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. Flournoy (1974) 42 Cal. App. 3d 908, 913 [117 Cal. Rptr. 224]*.)

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 Pamp., 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]*; *Big 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

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[9] Whether 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]*.)

[10] The 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]** Legislature "plenary power, unlimited by any provision of **[*59]** this Constitution" over workers' compensation.

[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 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.)

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]** ***HN9***[⬆] 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*

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)** 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.

End of Document

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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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