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THE LATEST DEVELOPMENTS IN CALIFORNIA HOMICIDE LAW

J. BRADLEY O'CONNELL
Assistant Director
First District Appellate Project
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INTRODUCTION AND SCOPE

These materials address *recent* developments in California homicide law, with particular emphasis on cases decided within the past two years (2015-2016). They are not comprehensive. They do not cover every reported homicide decision, but only noteworthy opinions that appear to have broader implication for homicide appellate practice in the coming years. Although the primary focus is on opinions from 2015-2016, we also *briefly* address some significant opinions from a few years earlier – to provide background for the more recent cases applying those principles. E.g., *Miller v. Alabama* (2012) (limiting juvenile LWOP); and *People v. Chiu* (2014) (curtailing "natural and probable consequences" liability for first-degree murder).[1]

I. DEGREE OF CULPABILITY.

As discussed in previous iterations of these homicide materials, one of the most noteworthy trends in California homicide law over the past 15 years has been *the delinking of the culpability levels of direct perpetrators and aider/abettors*. The Supreme Court has clarified that, under traditional or direct aiding/abetting principles, *an aider's level of guilt depends upon his own level of culpability* and is not necessarily identical to the culpability of the direct perpetrator.

Where multiple participants are involved jointly in commission of a homicide, "'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way.'" *People v. McCoy* (2001) 25 Cal.4th 1111, 1119. Thus, an aider who encourages a homicide may be *more* culpable than the killer (as in the Iago-Othello example discussed in the *McCoy* opinion) or less culpable, depending on the circumstances and the aider's individual intent.[2]

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[1] The author has also prepared several similar sets of homicide materials in previous years, for either FDAP or CACJ seminars. Those materials are available on request, jboc@fdap.org.

[2] *People v. Chiu* (precluding aider/abettor liability for first-degree premeditated murder under the natural and probable consequences doctrine) is another prominent example of this "delinking" trend. See Part II below.

A. "Equally Guilty" Aiding/Abetting Instructions.

Several appellate opinions have found former versions of CALJIC's and CALCRIM's aiding and abetting instructions misleading, due to language describing director perpetrators and aiders as "equally guilty."

- *People v. Nero* (2010) 181 Cal.App.4th 504 (former CALJIC 3.00 failed to inform jurors of possibility that aider may be guilty of lesser offense than direct perpetrator and did not require them to assess aider's distinct mental state).

- Waiver. Compare *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119[3] (any defect in CALCRIM 400 waived by failure to object or to request modification of "equally guilty" language).

- Ineffective assistance. *People v. Loza* (2012) 207 Cal.App.4th 332 (ineffective assistance in failing to request modification of the "equally guilty" language, where the evidence would have supported a finding that the aider acted without premeditation and the jurors' mid-deliberations question indicated confusion on subject).

- **CALCRIM & CALJIC Revisions**. CALCRIM has deleted the "equally guilty" language from its direct aiding/abetting instruction (CALCRIM 400). CALJIC 3.00 still includes "equally guilty" language as a bracketed option, but has also added a bracketed paragraph stating that an aider's guilt may be either greater or less than the perpetrator's, depending on the aider's own mental state.

- **Supreme Court addresses "equally guilty" instructions**. The Supreme Court addressed the "equally guilty" language of the former instructions in a recent capital case, *People v. Johnson* (2016) 62 Cal.4th 600, 638-641.

    - The "equally guilty" language of former CALCRIM 400 was "generally correct" "'in the sense that [both direct perpetrators and aiders] are criminally liable.'" However, "the instruction could be misleading in a case in which the principals might be guilty of different crimes and the jury believes the instruction prevents such a verdict."

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[3] Disapproved on different point, *People v. Banks* (2015) 61 Cal.4th 788.

- The Court found "no reasonable likelihood" that the jurors in *Johnson* "would have understood the 'equally guilty' language ... to allow them to base defendant's liability for first degree murder on the mental state of the actual shooter, rather than on defendant's own mental state," where:
  - "[T]here was no version of the evidence ... suggesting that defendant's mental state was less culpable than that of the actual killer";
  - CALCRIM 401 required the jurors to find that the defendant knowingly and intentionally aided the shooter in committing the killing and thereby "cleared up any ambiguity" in CALCRIM 400; and
  - There was no indication of juror confusion (such as mid-deliberations juror queries).

B. Jury Unanimity on Degree of Murder – Multiple Theories.

- *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1277-1287.
- *People v. Sanchez* (2013) 221 Cal.App.4th 1012.

Ordinarily, there is no requirement that the jurors agree unanimously on the *legal theory* for a murder conviction where the case is tried on multiple theories – e.g., premeditation or felony-murder as alternative theories for first-degree murder. "You do not all need to agree on the same theory." CALCRIM 548.

However, delivery of that portion of CALCRIM 548 may be prejudicially misleading, *where the different theories correspond to different degrees of murder.* Both *Sanchez* and *Johnson* found prejudicial error, where the jury was instructed on both first-degree felony-murder and second-degree malice-murder.

"[B]ecause the prosecutor put forward theories that supported both degrees of murder, an instruction that the jurors did 'not all need to agree on the same theory' ... misled the jury into thinking it need not reach a unanimous conclusion as to the degree of murder...." *Johnson*, 243 Cal.App.4th at 1278 (summarizing *Sanchez*).

- In *Sanchez*, an error in the malice instruction compounded the error, and there were other indicia of juror confusion (a query on the second-degree murder definition). However, the *Johnson* court found a similar error prejudicial even without such additional circumstances. *Johnson* at 1280-1281.

II. NATURAL AND PROBABLE CONSEQUENCES – *CHIU*.

A. Background: *Chiu*'s Repudiation of NPC Liability for First-degree Premeditated Murder.

People v. Chiu (2014) 59 Cal.4th 155.[4]

Under California's natural and probable consequences doctrine (NPC), an aider-abettor is liable not only for the "target offense" he intentionally aids, but also for any greater offense committed by a principal, where the greater offense was foreseeable as a "natural and probable consequence" of the target crime under the circumstances. Prior California cases had upheld aiders' convictions of first-degree murder under the NPC doctrine. However, in *Chiu*, the California Supreme Court squarely repudiated NPC liability for first-degree premeditated murder.

"[T]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first-degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the ... public policy concern of deterrence." *Chiu* at 166.

Under *Chiu*, an aider may be vicariously liable for first-degree premeditated murder only under a "traditional" aiding-abetting theory – that is, where he acted with knowledge of the principal's purpose and the specific intent to encourage or facilitate premeditated murder.

- **Recent cases finding prejudicial *Chiu* error on direct appeal**:
  - *People v. Brown* (2016) 247 Cal.App.4th 211.
  - *People v. Rivera* (2015) 234 Cal.App.4th 1350.

B. *Chiu* Error Harmless Where Verdicts Establish Felony-Murder.

Chiu's limitation on vicarious liability for first-degree murder applies only to *first-degree premeditated murder*. *Chiu* has no application to felony-murder. *Chiu*, 59 Cal.4th at 166.

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[4] *Chiu* is discussed in greater depth in previous sets of homicide materials for CACJ appellate seminars in 2014 and 2015. The more brief summary here is intended only to serve as background for the more recent cases applying *Chiu*.

- *People v. Covarrubias* (2016) 1 Cal.5th 838, 922-923.
  Erroneous delivery of NPC instructions as alternative theory for first-degree murder harmless where burglary and robbery special circumstances established that "the jury relied unanimously on a legally valid and independent theory of first degree felony murder."

C. Retroactivity and Habeas.

- *In re Brigham* (2016) 3 Cal.App.5th 318.
- *In re Johnson* (2016) 246 Cal.App.4th 1396.
- *In re Lopez* (2016) 246 Cal.App.4th 350.

Because *Chiu* represents a change in substantive California homicide law, it is fully retroactive. *Brigham*, *Johnson*, and *Lopez* each granted habeas relief to defendants whose first-degree murder cases convictions had been affirmed prior to *Chiu*.[5]

- *"*The *Chiu* decision sets forth a new rule of substantive law by altering the range of conduct for which a defendant may be tried and convicted of first-degree murder." *Lopez* at 358.

- "Like other cases making similar changes in substantive criminal law [citations], *Chiu* has been held to apply retroactively. [Citing *Lopez* & *Johnson*]." *Brigham* at 327 fn. 4.

The Supreme Court has granted review in a habeas case raising a *Chiu* claim. *In re Martinez*, review granted, S226596. However, it appears that the issue on review is the *merits* of the *Chiu* claim, especially whether the error was prejudicial,

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[5] At least in the First District, we have had some success (though mixed) in persuading the Court to appoint counsel *nunc pro tunc* on habeas petitions raising *Chiu* claims. In *Brigham* and *Johnson*, appellate counsel filed habeas petitions on behalf of former clients. Although appointment of counsel is not mandatory unless and until an OSC issues, the Court exercised its discretion in each case to appoint counsel nunc pro tunc to cover counsel's preparation of the initial petition. However, in another case, a different division declined to exercise original jurisdiction and required counsel to first file the habeas petition in superior court.

rather than retroactivity or the cognizability of a *Chiu* claim on habeas.[6]

D. Applicability of *Chiu* to Conspiracy to Commit a Different Murder.

In re Brigham (2016) 3 Cal.App.5th 318, 327 (one of the habeas cases noted above) holds that *Chiu*'s proscription on NPC liability for first-degree murder applies *even where "the target offense is itself premeditated murder."*

- The participants planned to murder a specific victim, but were unable to find him. One of the confederates became angry and shot someone else, even though he realized that he was not the intended victim.
- The Attorney General contended that *Chiu* "does not apply where the target crime is premeditated murder." Though the First Dist. recognized its "superficial appeal," the Court's ultimately found that objection "not persuasive."
- In contrast to "transferred intent" (where a defendant mistakenly kills someone else in his attempt to kill the intended victim), the NPC theory in *Brigham* was more attenuated: "Respondent assumes that the mens rea of a person who knowingly acts with the intention of assisting in the premeditated murder of a specific victim necessarily transfers to an intention *in killing a completely unrelated victim the perpetrator independently decides to kill instead*." *Id.* at 328 (emphasis added).
- The perpetrator's "independent, deliberate and premeditated decision to kill a different victim would reflect a personal and subjective state of mind that was *insufficiently connected to petitioner's culpability for aiding and abetting the (intended) murder* of [the original intended victim] to justify holding petitioner liable for [the perpetrator's] premeditated independent act." *Id.* at 329 (emphasis added).

E. Transferred Intent Distinguished.

People v. Vasquez (2016) 246 Cal.App.4th 1019.

In contrast to the unusual scenario in *Brigham* (perpetrator's intentional killing of entirely different victim), *Chiu* does *not* limit liability under the traditional transferred intent doctrine.

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[6] The unpublished appellate opinion states, "The parties do not dispute that *Chiu* is retroactive and applies to this case." *In re Martinez* (2015) 2015 WL 2374750.

- "'Under the classic formulation ... of transferred intent, a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had "'the fatal blow reached the person for whom intended.'" [Citation.] *Vasquez* at 1025.
- An aider's "transferred intent" liability in a mistaken killing of the wrong victim represents an application of "direct" or traditional aiding-abetting principles, rather than natural and probable consequences. "[T]he jury was not instructed on the natural and probable consequences doctrine" but only on "the required findings for directly aiding and abetting the crimes." *Id*. at 1024.
- Transferred intent liability for an aider "does not implicate the concerns expressed in *Chiu*, in which the connection between the defendant's culpability and the perpetrator's premeditative state was too attenuated to impose aider and abettor liability for first degree murder." *Ibid*.

F. Possible Extension to Attempted Murder with Premeditation.

Just two years before *Chiu*, the Supreme Court adopted an expansive interpretation of natural and probable consequences liability in the context of *attempted* murder with premeditation. *People v. Favor* (2012) 54 Cal.4th 868.

- Under Pen. Code § 664(a),[7] a premeditation finding elevates the punishment for attempted murder from a determinate sentence triad (5-7-9) to an indeterminate life term.
- Under *Favor*, an aider may be found guilty of attempted murder with premeditation under the NPC doctrine where the perpetrator acted with premeditation and attempted murder was a foreseeable consequence of the lesser target crime. However, *the foreseeability requirement does not apply to the premeditated character of the attempted murder*.
    - As construed in *Favor*, § 664(a) requires "only that the murder attempted was wilful, deliberate, and premeditated" – i.e., that *the perpetrator* premeditated. Where the jury finds that attempted murder was foreseeable as a natural and probable consequence of the aider's target offense, an aider is subject to a life term under § 664(a). But *no separate jury finding is required on the foreseeability of the premeditated character of the attempted murder*.

[7] Throughout these materials, statutory references are to the Penal Code, unless otherwise indicated.

The Supreme Court has now indicated its willingness to reconsider *Favor* in light of *Chiu*. *People v. Mateo*, review granted, S232674: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Allelyne v. United States* (2013) __ U.S. __ [113 S.Ct. 2151] and *People v. Chiu* (2014) 59 Cal.4th 155?"[8]

III. FELONY-MURDER AND FELONY-MURDER SPECIAL CIRCUMSTANCE.

A. Felony-Murder Special Circumstance.

Background: California's felony-murder special circumstance is tailored to 8th Amendment limits on the death penalty. § 190.2(d) (based on *Tison v. Arizona* (1987) 481 U.S. 137). A participant in robbery who doesn't personally kill or intend to kill is subject to the special circumstance only if:

- He or she was a "major participant" in the felony; and
- Acted with "reckless indifference to human life."

Although these originated as death-eligibility requirements, California has incorporated them into the felony-murder special circumstance. Consequently, there must be sufficient evidence of the defendant's "major participant" role and "reckless indifference" to life, regardless of whether the prosecution is seeking the death penalty or LWOP. However, those findings are necessary only for the special circumstance, *not* for first-degree felony-murder liability.

***Banks* – tightening the "major participant" and "reckless indifference" elements.** *People v. Banks* (2015) 61 Cal.4th 788.

The Supreme Court tightened both these special circumstance elements in the case of a getaway driver, who was waiting blocks away at the time of the killing during a robbery gone awry. The Court found insufficient evidence of either "major

[8] Throughout these materials, statements of the questions presented in review-granted cases are taken either from the Supreme Court's own reformulation of the issues in the review-grant order or from the summary of "Issues Pending Before the California Supreme Court in Criminal Cases," available on the Court's web site.

participant" status or "reckless indifference" and reversed the special circumstance finding and resulting LWOP sentence (though not the underlying first-degree murder conviction).

- The driver was not a "major participant" in the robbery where he was not present, had no immediate role, and did nothing to instigate the shooting.
- To establish "reckless indifference," the defendant must have been subjectively aware that his participation in the robbery carried "a grave risk of death." *Mere knowledge that his confederates were armed is not enough*.
- As the Court emphasized, because it incorporates constitutional limitations on the death penalty (*Tison v. Arizona*, etc.), the special circumstance requires that "the defendant's personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder." *Banks* at 802.

Banks represents a change in California law. The Supreme Court explicitly disapproved prior appellate cases that had found an aider's knowledge that a confederate was armed sufficient to establish reckless indifference. *Banks* at 809 fn. 8, disapproving *People v. Lopez* (2011) 198 Cal.App.4th 1106; and *People v. Hodgson* (2003) 111 Cal.App.4th 566.

Applications of *Banks* on direct appeal.

Several cases have reversed special circumstance findings on direct appeal, based on insufficient evidence of "major participant" status and/or "reckless indifference to life," based on *Banks*'s clarification of those elements.

- *People v. Clark* (2016) 63 Cal.4th 522, 610-623 (insufficient evidence of "reckless indifference").

- *People v. Perez* (2016) 243 Cal.App.4th 863, 882 (insufficient evidence of either "major participant" or "reckless indifference" elements).

- *Contrast*, e.g., *People v. Medina* (2016) 245 Cal.App.4th 778, 791-793 (upholding special circumstance findings: one aider was armed, "willing to employ potentially deadly violence," and "actively involved in every element" of armed robbery, and the other aider "participated fully as armed backup").

- *People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1382-1386 (upholding "major participant" findings for defendants who participated in planning or setting up robbery and who took no steps to aid the injured victim).

Retroactivity and habeas.

Because *Banks* represents a clarification of substantive law, it should be fully retroactive. The Supreme Court has issued at least two OSC's (returnable in lower courts) on habeas petitions raising *Banks* claims, and the First District has also issued at least one such OSC (returnable before itself).

- As of this writing, there appears to be only one unpublished appellate opinion addressing a *Banks* claim on habeas review (following an OSC from the Supreme Court). *In re Joe* (2016) 2016 WL 275593.
  - Joe too was a getaway driver, and "[t]he factual scenario" was "not distinguishable from *Banks* in any meaningful way."
  - The Second Dist. panel agreed that, because *Banks* "clarified the substantive meaning" of the special circumstance, it was fully retroactive.
  - Additionally, because Joe's conduct did not come within the statute (as clarified in *Banks*), the special circumstance punishment was "in excess of jurisdiction," and the claim was not subject to any of the procedural bars asserted by the state.

- Unfortunately, *Joe* is unpublished. The Attorney General's Office is continuing to assert various procedural bars in opposition to habeas review of *Banks* claims.

B. Felony-Murder Theory for First-Degree Murder.

Two reversals for prejudicial *Pulido* error.

Two recent opinions have found prejudicial error where the instructions didn't clarify that a "late joiner" who aids in the robbery only *after* the killing is not liable for felony-murder. *People v. Pulido* (1997) 15 Cal.4th 713.

- *People v. McDonald* (2015) 238 Cal.App.4th 16. Prejudicial combination of delivery of escape rule instruction, CALCRIM 1603 (robbery continues until place of temporary safety), plus omission of "late joiner" paragraph of felony-murder instruction, CALCRIM 540B.

- *People v. Hill* (2015) 236 Cal.App.4th 1100. Failure to deliver "optional" "late joiner" paragraph of CALJIC 8.27.

- **Historical note.** Messrs. McDonald and Hill fared better than Michael Pulido. In its 1997 opinion, California Supreme Court found the former CALJIC instructions misleading, but dismissed the defect as harmless. The error was ultimately found harmless on federal habeas review as well, after divided decisions by the U.S. Supreme Court and the Ninth Circuit. *Hedgpeth v. Pulido* (2008) 555 U.S. 57 (6-3 opinion remanding for reconsideration of prejudice); *Pulido v. Chrones* (9th Cir. 2010) 629 F.3d 1007 (2-1 opinion finding harmless error).

C. Possible Vagueness Challenge to Second-Degree Felony-Murder.

***Johnson* – invalidation of "residual clause" of federal ACCA.**
Johnson v. United States (2015) 135 S.Ct. 2551.

The Supreme Court found the "residual clause" of the Armed Career Criminal Act unconstitutionally vague. A defendant with a prior conviction for a "violent felony" is subject to enhanced punishment for possession of a firearm. The "residual clause" defines "violent felony" as one that "involves conduct that *presents a serious risk of potential physical injury to another*."

In its prior ACCA opinions, the Supreme Court had tried to apply the "violent felony" definition by evaluating the statute for the prior offense in the abstract, rather than on the facts of the prior case. But, in *Johnson*, the Court abandoned that effort as futile and found the definition hopelessly vague: "[T]he indeterminancy of the wide-ranging inquiry [into the prior statute] ... both denies fair notice to defendants and invites arbitrary enforcement by judges." "Two features of the residual clause conspire to make it unconstitutionally vague," *Johnson*, 135 S.Ct at 2557:

- "[G]rave uncertainty about how to estimate the risk posed by a crime." The attempt to evaluate a prior conviction statute in the "abstract" resulted in an inquiry into "a judicially imagined 'ordinary case' of a crime, not ... real world facts or statutory elements." *Johnson* at 2557.

- "[U]ncertainty how much risk it takes for a crime to qualify." The Court emphasized the hazards of assessing the risk level of "a judicially-imagined abstraction." *Johnson* at 2558.

Possible vulnerability of second-degree felony-murder.

Some commentators have argued that California's second-degree felony-murder rule suffers from the same vagueness in its definition of a qualifying predicate felony as the ACCA residual clause struck down in *Johnson v. United States*.

The California rule "imputes malice" to a homicide committed during a "felony inherently dangerous to human life." The test is whether the felony "'by its very nature ... cannot be committed without creating a substantial risk that someone will be killed....'" *People v. Howard* (2005) 34 Cal.4th 1129, 1135. As with the test formerly employed under the ACCA residual clause, California's "inherently dangerous" felony standard "looks to the elements of the felony *in the abstract*, 'not the "particular" facts of the case,'...." *Ibid.* (emphasis in original).

Arguably, the "inherently dangerous to human life" concept poses the same notice and vagueness problems as the "serious risk of potential physical injury" definition struck down in *Johnson*. There are similar problems of measurement of the risk level of a statutory offense. And, as with the ACCA definition, "inherently dangerous" is measured "in the abstract" on hypothetical facts, not the actual facts of the offense.

A recent law review article makes the case that "from the standpoint of vagueness, the two provisions are materially indistinguishable." Lee, *Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness* (2015) 43 Hastings Const. L.Q. 1. That article should provide a good starting point for anyone considering an appellate or habeas challenge to the second-degree felony murder rule.[9]

Cautionary notes.

There are, however, several reasons for caution on the *Johnson* argument.

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[9] Interestingly, the California Supreme Court has already taken note of Prof. Lee's article on *Johnson*'s implications. It cited the *Lee* article, as well as *Johnson* itself, in a notice requesting an informal response to a pro. per. habeas petition. *In re White*, S233265 (docket entry, May 11, 2016). The Court has not yet acted on that petition.

- **Distinctions.**

    - Unlike the ACCA residual clause, "inherently dangerous felony" is not a statutory definition, but a judicially-developed test for assessment of a predicate felony. However, it may present the same problem of inadequate notice to the public of which offenses qualify.
    - Although both standards look to a statutory offense in the "abstract" rather than to the particular facts of the defendant's crime, the analyses differ. The California test does not imagine a hypothetical "ordinary" example of the offense. Instead, it looks to whether the *least adjudicated elements* of the felony necessarily present the requisite "substantial risk that someone will be killed."

- **Notice provided by case law.**

    - A *Johnson* challenge to a second-degree felony-murder conviction would be strongest as to a predicate felony *that had never been the subject of a previous published opinion declaring it "inherently dangerous*."
    - But the argument would be weaker where a prior published opinion, already on the books at the time of the defendant's crime, established that a particular statutory offense came within the second-degree felony-murder rule (e.g., methamphetamine manufacture). In that case, the prior opinion on the offense's status as a predicate felony might provide the necessary notice, even if the nebulous "inherently dangerous" test was otherwise not sufficiently clear to impart that notice.

- **Limited scope of second-degree felony-murder.** Finally, relatively few convictions may be vulnerable to *Johnson* challenges for the simple reason that there currently are few convictions under the second-degree felony-murder rule.
    - First, most homicides involve some kind of assault. But, as amplified in *People v. Chun* (2009) 45 Cal.4th 1172, the merger doctrine takes all "assaultive" offenses off the table as possible predicates for second-degree felony-murder (such as assault with a deadly weapon, firing at an occupied dwelling, etc.).
    - Second, as illustrated in cases like *People v. Howard* (2004) (2005) 34 Cal.4th 1129, relatively few non-assaultive felonies qualify as inherently dangerous to life under a "least adjudicated elements" analysis. Even some offenses that commonly may pose a danger to

life do not qualify as felony-murder predicates, because there are some ways of violating those statutes that do not pose that level of risk. E.g., *Howard* at 1137-1139 (vehicular flight with "willful or wanton disregard for the safety of persons or property" (Veh. Code § 2800.2) can be committed in ways not inherently dangerous to life).

- As a consequence of these two limitations, in the past several years, we have been seeing few murder cases involving second-degree felony-murder theories.

IV. MENTAL IMPAIRMENT DEFENSES.

A. Background

California's "diminished actuality" statutes allow the trier of fact to consider a defendant's mental disorder in assessing whether he or she actually harbored a specific intent or other mental state element. But the statutes prohibit an expert from *explicitly* addressing whether a defendant had the "capacity" to form a certain mental state or from stating an opinion on the ultimate question whether he actually had that intent at the time of the offense. §§ 28, 29.

For diminished actuality as a basis for *involuntary manslaughter*, see Part VII-B.

B. Erroneous Limitation of Psychological Testimony.

In *People v. Herrera* (2016) 247 Cal.App.4th 467, the trial court allowed a psychologist to testify that the defendant suffered from PTSD and to describe the condition and its symptoms. But it sustained objections to questions whether he was suffering from a "peritraumatic dissociative state" or was "psychiatrically impaired" *on the date of the homicide.*

- That limitation of the expert's testimony was prejudicial error. The queries directed to the defendant's mental impairment and symptoms on the date of the offense did not violate the diminished actuality statutes, because the expert was not being asked to address the ultimate questions of whether he premeditated or acted in imperfect self-defense. Moreover, "the prosecutor took full advantage" of the erroneous limitation of the expert testimony during closing argument.
- See also *People v. Cortes* (2011) 192 Cal.App.4th 873 (similar prejudicial error in limiting psychiatric testimony).

C. Selective or Misleading Instructions.

Prejudicial limitation of mental disorder instruction.
People v. Townsel (2016) 63 Cal.4th 25, 57-65.

CALCRIM 3428 and its precursor CALJIC 3.32 provide that the jurors may consider mental disorder evidence in determining the specific intent elements of the charges. As delivered in the *Townsel* trial, CALJIC 3.32 referred only to the murder charges, but didn't mention the other charges with specific intent elements – a witness-killing special circumstance and a witness dissuasion count.

- **Cognizability.** Ordinarily, a trial court does not have a sua sponte duty to deliver a "pinpoint" instruction relating mental illness or intoxication to mental state elements. The Supreme Court, nonetheless, found the instruction's omission of the witness-related charges reviewable under the principle that "once a trial court undertakes to instruct on a legal point, it must do so correctly."
- **Prejudice.** Even though jury had apparently rejected a mental impairment defense to premeditation, the defective instruction's limitation to the murder count was prejudicial under *Chapman* as to the witness-related charges. "We cannot say that the evidence of intellectual disability that the jury evidently did not view as sufficient to cast doubt on the prosecution's evidence of premeditation and deliberation could not have raised a reasonable doubt whether, in killing [the victim], defendant acted for the purpose of preventing her testimony in a criminal proceeding."

Misleading combination of form instructions.
People v. McGehee (2016) 246 Cal.App.4th 1190.

CALCRIM 362 authorized consideration of any "false or misleading statement" as proof of "consciousness of guilt, while CALCRIM 3428 limited consideration of mental disorder to whether the defendant possessed mental state for murder. The combination of the two pattern instructions was misleading, because CALCRIM 3428 appeared to prohibit consideration of the mental impairment evidence in assessing whether the defendant's post-offense statements were knowingly false.

- "If ... defendant's mental illness or impairment prevented him from knowing those statements were false, the statements would not have been probative of his consciousness of guilt. The jury should have been allowed to consider the evidence of defendant's mental illness or impairment for purposes of assessing consciousness of guilt." *Id.* at 1205.

- "[T]he trial court should have modified CALCRIM No. 3428 to allow the jury to consider evidence of defendant's mental impairment in determining whether the false statements he made ... following the murder ... were knowingly false, and therefore evidenced his consciousness of guilt." *Id.* at 1204 (emphasis added).
- But Third Dist. found no due process violation and declared the error harmless under *Watson*.

Lack of reference to imperfect self-defense.
People v. Ocegueda (2016) 247 Cal.App.4th 1393.

In delivering CALCRIM 3428, trial court limited consideration of mental disabilities to "intent to kill" and "premeditation and deliberation." That limitation was erroneous because *the mental disability evidence was also material to imperfect self-defense*. The instructions "did not allow the jury to consider whether [defendant's] perceptual or sensory processing disabilities made it more likely that self-defense would appear to be necessary to him." *Id*. at 1408-1409.

- **Cognizability**. As in *Townsel*, the defect was cognizable despite the lack of an objection. "Once the court gave such an instruction, it had a duty to do so correctly." *Id.* at 1407. Because CALCRIM 3428 was defective in the form delivered, the issue was reviewable under § 1259 as affecting the defendant's "substantial rights."
- **Harmless error.** The Sixth Dist. found the error harmless under *Watson*. The application of the *Watson* standard is somewhat puzzling, because the Supreme Court applied *Chapman* to the erroneous limitation of CALCRIM 3428 to particular charges in *Townsel*, 63 Cal.4th at 64.
- The Supreme Court's denial of review in *Ocegueada* (on Sept. 21, 2016) is also somewhat puzzling. Just 3 weeks later (Oct. 12), it granted review in *People v. Soto*, which presents an analogous instructional issue concerning consideration of *intoxication* on imperfect self-defense, as discussed below.

D. Intoxication and Imperfect Self-Defense.

People v. Soto (2016) 248 Cal.App.4th 884; **review granted, S236164.**

In delivering CACLRIM 625, the trial court limited consideration of voluntary intoxication to the questions of specific intent to kill, premeditation, and unconsciousness. The instruction's restriction of that evidence to those discrete

issues improperly "preclud[ed] the jury from considering voluntary intoxication with respect to imperfect self-defense." *Id*. at 900.

- **Harmless error.** The Sixth Dist held that an erroneous limitation of consideration of intoxication represented only state law error, not a due process violation. It proceeded to find the error harmless under *Watson*.
- **Supreme Court review.** Both sides petitioned for review. The Supreme Court granted review as to both "(1) whether the trial court erred in instructing the jury ..., and (2) if so, whether the error was prejudicial."

E. Imperfect Self-Defense and Delusions.

Imperfect self-defense can't be based entirely on "delusion."
People v. Elmore (2014) 59 Cal.4th 121.

- There is no right to instructions on imperfect self-defense where the defendant's mistaken belief is based entirely on his "delusional mental state." Imperfect self-defense is a "form of mistake of fact [and] has no application when the defendant's actions are entirely delusional." *Id*. at 136-137.
- Imperfect self-defense requires some misperception or misjudgment of the "actual circumstances," rather than "threats that exist only in the defendant's mind." *Id*. at 137.
- *Elmore*'s limitation applies only where the mistaken belief is based *entirely* on delusions. "Our holding does not prevent the defense from presenting evidence of mental disease, defect, or disorder to support a claim of unreasonable self-defense based on a mistake of fact." *Id*. at 147.
- "A claim of unreasonable self-defense based solely on delusion is quintessentially a claim of insanity." *Id*. at 140. It should be adjudicated through an NGI plea and a separate sanity phase, rather than at the guilt phase.

F. NGI and Delusional Self-Defense.

Erroneous assessment of NGI defense under reasonable self-defense standard.
People v. Leeds (2015) 240 Cal.App.4th 822.

"Leeds shot and killed his father and three other men whom he believed were conspiring to kill him." Leeds, "a diagnosed paranoid schizophrenic," "claimed

that due to the hallucinations and delusions caused by his mental illness he was legally insane ... because he believed it was necessary to defend himself by killing the 'conspirators' before they killed him." *Id.* at 824.

- The trial court erroneously instructed that, for purposes of Leed's NGI defense, "to claim self-defense, Leeds's beliefs also had to be reasonable." *Id.* at 825.
- "A person suffering from a delusion that causes him to fear that another is attempting to take his life is legally insane *if the facts perceived as a product of his delusion would legally justify his acting in self-defense.*" *Id.* at 829 (emphasis added).
- "The unqualified emphasis on reasonableness in the context of an insanity defense allowed the jury to conclude that Leeds's beliefs, based on his hallucinations and delusions, were objectively unreasonable and did not allow him to assert he was acting in self-defense." *Id.* at 832.
- Instead, "the jury should have been instructed ... [that] Leeds was legally insane if, because of a mental disease or defect ..., he actually believed that he was in imminent danger of being killed or suffering great bodily injury and that the immediate use of deadly force was necessary to defend against the danger."
- The instructional error was prejudicial, under both *Chapman* and *Watson*, as to the killing of Leeds's father, "because there was evidence that Leeds believed he shot him in response to an imminent lethal threat," requiring reversal of the sanity verdict on that murder count. However, it was harmless as to the other three murder counts, "because there was no evidence that he perceived he was in imminent danger" from those victims. *Id.* at 833.

G. NGI – Sufficiency of Evidence and Instructions.

People v. McCarrick (2016) 6 Cal.App.5th 227 (pet. review filed, S239355).

- **Guilt phase.** McCarrick was convicted of first-degree murder in killing her 3-year-old twins. The defense theory was that she did not premeditate due to her delusional beliefs. CALCRIM 627 apprised the jurors that they could consider a defendant's "hallucinations" in assessing premeditation and defined that term as "a perception that is not based on objective reality." The majority held that the trial court had no sua sponte duty to modify the

instruction to refer to "delusions." On the merits, the majority found "no reasonable possibility that the jury interpreted the instruction to preclude it from considering defendant's delusions."

- Justice Streeter dissented: CALCRIM 6.27 "short-circuited McCarrick's guilt phase" defense because her delusions did not come with the "everyday understanding" or dictionary definitions of "hallucinations."

- **NGI.** The court unanimously upheld the sanity verdict against a sufficiency challenge. Although three experts concluded McCarrick was insane, the jurors were not bound by their "speculation" on her mental state at the moment of the crime. Additionally, "[a] defendant may not be found insane solely on the basis of addiction to, or abuse of intoxicating substances. (§ 29.8)" "Even in the face of unanimous expert opinion, the jury could rationally reject those opinions and find that defendant's long-term and recent drug usage ... caused any psychotic symptoms she was experiencing at the time of the killing and that defendant had not met her burden to show she was legally insane."

V. OTHER SELF-DEFENSE AND IMPERFECT SELF-DEFENSE ISSUES.

A. Expert Testimony on Homelessness and Heightened Sensitivity to Threats of Violence.

Reversal of murder conviction for exclusion of expert testimony *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732 (pet. review filed, S238767).

Sotelo-Urena fatally stabbed another homeless man who aggressively confronted him in an encampment in back of a public library. The trial court barred the defense from calling a retired superior court judge who had conducted research on threats and violence experienced by the homeless. The "expert [was] prepared to testify that as a result of this higher rate of victimization, *homeless individuals experience a heightened sensitivity to perceived threats of violence*." *Id*. at 736 (emphasis added).

- The proffered expert testimony was material to both reasonable and imperfect self-defense on several points, including the "defendant's actual belief in the need to defend himself," the reasonableness of that belief, and the defendant's credibility.
- "[T]he jury was entitled to evaluate defendant's belief *from his*

perspective." *Id*. at 745 (emphasis in original). Homelessness is comparable to other circumstances, such as intimate partner battering (formerly called "battered women's syndrome"), where expert testimony will assist a factfinder in assessing a defendant's actual subjective perceptions and in "weighing the reasonableness of defendant's belief in imminent harm." *Id.* at 751.

- The exclusion of the expert testimony was prejudicial under *Watson*. "Such testimony would have bolstered the credibility of defendant's statements .. . that he actually perceived an imminent threat..." It would also have provided a "valuable contextual background" for the jurors to evaluate the witnesses' accounts of the confrontation. *Id*. at 756-757.

B. Presumption on Use of Force Defending Residence from Intruder.

Under § 198.5, a person who uses deadly force "within his or her residence" against a person who forcibly enters the residence "shall be presumed to have held a reasonable fear of imminent peril" to self or to another member of the household.

People v. Grays (2016) 246 Cal.App.4th 679, addressed the meaning of "residence" for purposes of the § 198.5 presumption of the reasonableness of a resident's use of force.

- Grays testified that the decedent had kicked open the door of the public housing apartment he shared with his girlfriend. He fired because he believed the intruder was going to harm the girlfriend. The trial court refused to instruct on the § 198.5 presumption "on the ground that [the unit] was not appellant's 'residence' because he was not legally subletting the unit." *Id.* at 685.

- "[S]ubleasing was technically not allowed" at the housing project "but in fact was not uncommon." *Id.* at 685. The First Dist. panel found that the status of the unit as Grays's 'residence" was not necessarily contingent on full compliance with the project's tenancy rules.
- Because the object of the § 198.5 presumption is protection of the security of individuals against intruders in their homes, "the statute's purpose ... would be frustrated if we relied on the nuanced, and sometimes arcane, laws of trespass or landlord-tenant to define the scope of residence in section 198.5." *Id.* at 688.
- The jury "could reasonably have found [Grays] had a reasonable 198.expectation of protection against unwanted intruders...," where he had

"been in the unit for four or five months, paid rent, and had a key to the unit." Although the Housing Authority had notified Grays that he and his girlfriend must leave, "it had not immediately ejected him, giving him some days or weeks to move." *Id.* at 687.

- The First Dist. found the instructional error harmless. However, it did not publish that portion of the opinion.

VI. VOLUNTARY MANSLAUGHTER – HEAT-OF-PASSION PROVOCATION.

***Beltran* recap: provocation standard *not* whether reasonable person would kill.** *People v. Beltran* (2013) 56 Cal.4th 934.

- In *Beltran*, the Supreme Court repudiated the common prosecutorial assertion that provocation will support a reduction to manslaughter only if it would cause "an ordinary person of average disposition" to *kill*.
- The Court affirmed the longstanding California formulation requiring only that the provocation would cause an ordinary person to react "rashly" and without "judgment" or "reflection."
- Although the prosecutor's argument "muddied the waters" by appearing to equate the standard with whether a reasonable person would kill, the Court found the error harmless. By reinstructing with CALCRIM 570 in response to the jury's questions, the trial court cured any "potential ambiguity" and "properly refocused the jury on the relevant mental state." *Id.* at 954-956.

Pinpoint instructions on the *Beltran* principle.
People v. Trinh (2014) 59 Cal.4th 216, 231-233.

- A defendant is entitled, on request, to a pinpoint instruction clarifying "that the jury need not find a provocation sufficient to rouse a reasonable person to kill, but only a provocation sufficient to trigger actions out of passion rather than judgment."

VII. INVOLUNTARY MANSLAUGHTER.

A. Homicide During Inherently Dangerous Assaultive Felony.

Background – the path from *Garcia* to *Brothers*

Under the "merger" doctrine, the second-degree felony murder rule does not apply to a homicide committed during an inherently dangerous "assaultive" felony.

People v. Chun (2009) 45 Cal.4th 1172. Of course, if the defendant acts with express or implied malice during a felony assault, the crime is murder. But courts have struggled with the question of the proper classification of a homicide resulting from an assaultive felony where the defendant did *not* act with malice – that is, without either specific intent to kill or conscious disregard of the high probability of death or great bodily injury.

- **The short-lived "*Garcia* theory" of voluntary manslaughter**. *People v. Garcia* (2008) 162 Cal.App.4th 18, held that the resulting homicide must be *voluntary* manslaughter, because the circumstances did not seem to fit the statutory definition of involuntary manslaughter.

- **Demise of *Garcia*.** In *People v. Bryant* (2013) 56 Cal.4th 959, the Supreme Court overruled *Garcia*. Although provocation or imperfect self-defense will negate malice aforethought, voluntary manslaughter still requires the mental state that would otherwise constitute malice – intent to kill or conscious disregard for life.

The "*Brothers* theory" of involuntary manslaughter.

The same appellate court that had decided *Garcia* (2nd Dist. Div. 7) revisited the question in *People v. Brothers* (2015) 236 Cal.App.4th 24:

- A killing during an assaultive felony without intent to kill or conscious disregard for life can't be murder, because there's no malice (and the merger doctrine bars felony-murder liability).
- It can't be voluntary manslaughter under the Supreme Court's holding in *Bryant*.

- The unlawful killing must be some kind of homicide offense, so the "necessary implication" is "the offense is involuntary manslaughter."
- Consequently, where the evidence poses a "material issue ... whether a killing was committed without malice," *the trial court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense*.
    - But there was no such duty in *Brothers* itself, since, under the facts, no juror could have doubted that the defendant acted with conscious disregard for life.

B. Diminished Actuality as Basis for Involuntary Manslaughter.

People v. Nelson (2016) 1 Cal.5th 513, 555-556.

In a recent capital opinion, the Supreme Court has passingly confirmed that diminished actuality may provide a basis for instructions on involuntary manslaughter (but not voluntary manslaughter) as a lesser included offense. The Court described former CALJIC 3.32 as a "full and correct statement of that doctrine": Where a defendant "did not actually have the mental state of malice and did not intend to kill," due to a mental illness or impairment, "then the defendant is not guilty of murder but is guilty of involuntary manslaughter."

The Court reiterated, however, that diminished actuality is not a distinct basis for *voluntary* manslaughter. "'[T]he elimination of the diminished capacity defense effectively eliminated the middle option of voluntary manslaughter in a diminished actuality case.' [Citation.]" *Nelson* at 556.

VIII. MURDER AND VEHICULAR MANSLAUGHTER .

Informing jury of manslaughter conviction on retrial of murder charge.

Erroneous refusal of defense request.
People v. Batchelor (2014) 229 Cal.App.4th 1102.

In first trial, the jury convicted Batchelor of gross vehicular manslaughter but deadlocked on second-degree murder. On retrial of the murder charge, the trial court refused the defense request to inform the jurors that the defendant had already been convicted of vehicular manslaughter in the incident.

The denial of that request "gave the jury the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder." *Batchelor* at 1117. The prosecutor compounded the prejudice by arguing "now is the time ... to hold this person accountable."

Inadequate instruction. *People v. Johnson* (2016) 6 Cal.App.5th 505.

As in *Batchelor*, in his first trial, Johnson was convicted of gross vehicular manslaughter, but the jury deadlocked on second-degree murder. On retrial, the court informed the jury "that in a previous trial defendant had been convicted of 'two of the three charges...,' and that the jury's task would be to 'address the one count that was left unresolved in the first trial.'"

- That vague description was not adequate to cure the problem addressed in *Batchelor*. It still did not inform the jury that Johnson had been convicted of manslaughter (as opposed to "relatively minor offenses, not related to the death of the victim").
- "[T]he trial court's instruction ... left open the distinct possibility that he would, absent a conviction for murder, avoid any conviction holding him directly accountable for the death of the victim. This is only a slight variant of the evil that our holding in *Batchelor* was intended to address."
    - Because the Supreme Court has granted review on similar issues in *People v. Hicks* (described below), it is likely to "grant and hold" *Johnson.*

Supreme Court review.

The Supreme Court has granted review in a case where the appellate court disagreed with *Batchelor* and found no entitlement to an instruction informing the jurors of the manslaughter conviction.

- *People v. Hicks* (2015) 243 Cal.App.4th 343, review granted, S232218: "Did the trial court err when it refused to inform the jury at the retrial of a murder charge that the defendant had been convicted of gross vehicular manslaughter in the first trial? [Citing *Batchelor*.]" (Review-grant order stating issue.)

IX. ATTEMPTED MURDER.

A. "Kill Zone" Theory.

- **Recap**. Under some circumstances, a defendant who fires into a crowd may be convicted of multiple counts of attempted murder, under the "kill zone" theory of *People v. Bland* (2002) 28 Cal.4th 313, even if he was only primarily targeting one person. See also *People v. Stone* (2009) 46 Cal.4th 131.

- **Split of authority and review-grant on necessity of specific intent toward everyone in zone**.

    - *People v. McCloud* (2012) 211 Cal.App.4th 788 Error to instruct on "kill zone" theory where there was no "primary target."
        - "The theory applies only if the defendant chooses, as a means of killing the primary target, to kill everyone in the area in which the primary target is located; with no primary target,

there can be no area in which the primary target is located and hence no kill zone. [Fn.]" *Id.* at 801-802.

- *People v. Canizales* (2014) 229 Cal.App.4th 820, **review granted, S221958**.
  - The appellate court in *Canizales* disagreed – "*McCloud* goes too far." *Canizales* found sufficient support for a "kill zone" instruction, where 5 shots were fired at the intended target and the evidence allowed the jury to determine whether there was a "kill zone," its scope, and whether the attempted murder victim was in that zone.
  - The Supreme Court's summary describes the issue on review in *Canizales* simply as: "Was the jury properly instructed on the 'kill zone' theory of attempted murder?"

- **Count-by-count assessment.**

People v. Falaniko (2016) 1 Cal.App.5th 1234, reflects the necessity of count-by-count assessment of the propriety of "kill zone" instructions.

- Falaniko was convicted of 7 counts of attempted murder based on 3 separate shooting incidents. The appellate court affirmed 3 of the attempted murder convictions, but reversed the other 4 attempted murders, based on factual distinctions among the incidents and the respective victims' positions.
- The Supreme Court evidently did not view the "kill zone" issues of *Falaniko* as sufficiently similar to those of *Canizales* to warrant a grant-and-hold. Although the Court has granted-and-held at least two other attempted murder cases, pending the disposition in *Canizales*,[10] it denied review in *Falaniko*.

B. Natural and Probable Consequences Issue on Review.

As summarized above in Part II-F, the Supreme Court has granted review to consider the possible extension of the rationale of *People v. Chiu* to attempted murder with premeditation. *People v. Mateo,* review granted, S232674. See Part II-F for Supreme Court's formulation of question on review.

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[10] *People v. Cardona* (2016) 246 Cal.App.4th 608, grant-and-hold, S234660; *People v. Sek* (2015) 235 Cal.App.4th 1388, grant-and-hold, S226721.

X. JUVENILE LWOP.

A. *Miller/Gutierrez* Recap.[11]

Bar on mandatory LWOP. *Miller v. Alabama* (2012) 132 S.Ct. 2455.

- Eighth Amendment bars *mandatory* LWOP for a juvenile convicted of murder.
- Sentencing court must be able to choose between LWOP and a sentence allowing for parole eligibility.
- Court must take into account "the mitigating qualities of youth" and its "hallmark features," including "immaturity, impetuosity, and failure to appreciate risks and consequences." Sentencing court must also weigh the minor's "family and home environment ... from which he cannot usually extricate himself, no matter how brutal or dysfunctional." These have come to be known as the "*Miller* factors."

Presumptive LWOP also contrary to *Miller*.
People v. Gutierrez (2014) 58 Cal.4th 1354.

- Unlike the statutes at issue in *Miller*, California law does not mandate LWOP for juveniles convicted of special circumstances murder. § 190.5 provides a sentencing court with discretion to choose between LWOP and 25-to-life.
- However, prior case law had construed § 190.5 as establishing a *presumption* in favor of LWOP and allowing only "circumscribed" discretion to choose the lesser punishment of 25-to-life.
- In *Gutierrez*, the California Supreme Court repudiated the presumptive-LWOP construction of § 190.5(b). Treatment of LWOP as the presumptive sentence choice would "raise[] serious constitutional concerns," in view of *Miller*'s holding that this extreme punishment must be "rare" and "uncommon" for juveniles convicted of murder. In the two cases before it, the Supreme Court remanded for the sentencing courts to reconsider the choice between LWOP and 25-to-life, without any reliance on the former presumption.

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[11] *Miller v. Alabama* and its immediate California progeny, such as *People v. Gutierrez*, have been discussed in depth in prior materials. We are providing only brief descriptions of those earlier holdings here, simply as background for the discussion of the most recent authorities.

- See Part X-E, *post*, for summary of *Gutierrez*'s analysis of the new remedial statute, § 1170(d)(2).

B. De Facto LWOP.

The California Supreme Court has agreed that the limitations on juvenile LWOP sentences also apply to a sentence which – though not literally barring parole consideration – is so lengthy that it represents the functional equivalent of LWOP. *People v. Caballero* (2012) 55 Cal.4th 262 (110 years to life).

In *People v. Contreras*, review granted, S224564, the Court has ordered briefing on where to draw that line: "Is a total sentence of 50 years to life or 58 years to life the functional equivalent of life without the possibility of parole for juvenile offenders?" (Order of Aug. 17, 2016.)[12]

C. Limitation of Constitutional Holdings to Juveniles.

Several appellate opinions have construed *Miller v. Alabama*, *People v. Gutierrez*, and similar cases restricting juvenile LWOP as applying only to defendants who were literally juveniles – i.e., below the age of 18 – on the date of the offense. Those cases have refused to extend the *Miller* rationale to defendants who were slightly older.

- As stated in the most recent case (involving a 20 year-old), the U.S. and California Supreme Court "have concluded *18 years of age is the bright line rule*." *People v. Perez* (2016) 3 Cal.App.5th 612, 617 (emphasis added).
- See also *People v. Argeta* (2012) 210 Cal.App.4th 1478 (although defendant's offense occurred 5 months past his 18th birthday, "a line must be drawn at some point"); accord *People v. Abundio* (2013) 221 Cal.App.4th 211.

Although those constitutional holdings do not apply to young adult offenders, many inmates whose offenses occurred before the age of 23 will, nonetheless, be entitled to "youth offender parole hearings" under § 3051 (as amended in 2015), as discussed in Part X-E-2, *post*.

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[12] Many de facto LWOP challenges have involved 50-to-life terms. It is the *mandatory* term for a first-degree murder, in which the defendant personally used a firearm causing death. §§ 190(a) (1st degree murder), 12022.53(d) (mandatory firearm use enhancement).

D. *Montgomery* – Retroactivity and Clarification of *Miller*.

Retroactivity: *Montgomery v. Louisiana* (2016) 136 S.Ct. 718.

Miller v. Alabama's bar on mandatory LWOP is *fully retroactive*. Inmates whose LWOP sentences became final on direct review prior to *Miller* may petition for post-conviction relief to seek resentencing. (6-3 majority opinion by Justice Kennedy, with Justices Scalia, Thomas, and Alito dissenting.)

Miller represents a new *substantive* rule of constitutional law, rather than merely a procedural holding. Consequently, it's retroactive under *Teague v. Lane*.

In characterizing *Miller* as substantive, the Court emphasized its statements that LWOP for juveniles must be rare:

- "*Miller* determined that sentencing a child to life without parole is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption"'...." *Montgomery* at 734.
- "*Miller* did bar life without parole ... for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Ibid.*
- "*Miller*'s substantive holding [is] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.* at 735.

- **Invitation to systemic remedies.**

In holding *Miller* fully retroactive to all juveniles under LWOP sentences, the Court added that states could avoid the necessity for case-by-case resentencing hearings by fashioning other remedies to allow parole consideration for such inmates.

- "A State may remedy a *Miller* violation *by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them*. [Citing Wyoming statute making "juvenile homicide offenders eligible for parole after 25 years".] Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment. " *Montgomery* at 736 (emphasis added).
- In one of his last dissenting opinions before his death, Justice Scalia took particular umbrage at what he termed "a not-so-subtle invitation." "This whole exercise, this whole distortion of *Miller*, is just a devious way of

eliminating [LWOP] for juveniles." Justice Scalia described the suggestion that states could avoid individual resentencings by simply authorizing parole consideration for juvenile offenders as a "Godfather fashion ... offer [the states] can't refuse." *Id*. at 744 (Scalia, J., dis. opn.).

- For California's systemic remedies in this area (which were enacted after *Miller* but prior to *Montgomery*), see discussion of §§ 1170(d)(2) and 3051 in Part X-E, *post*.

- ***Montgomery*'s implications for sentencing decisions – split of authority**.

There is an apparent split of authority on the extent to which *Montgomery*'s explanation of *Miller*'s "substantive holding" clarifies or alters our understanding of the criteria that must govern the sentencing choice between LWOP and a parole-eligible sentence for a juvenile. Both the cases below, *Blackwell* and *Padilla*, were appeals from resentencing hearings under *Miller* (but prior to *Montgomery*). In both cases, the sentencing courts again imposed LWOP.

- *People v. Blackwell* (2016) 3 Cal.App.5th 166.

  Blackwell held that there is no Sixth Amendment/*Apprendi* right to a *jury finding* of the juvenile's "irreparable corruption" before a court may impose LWOP.
  - "'[I]rreparable corruption' is not a factual finding, but merely 'encapsulates the [absence] of youth-based mitigation.'" *Blackwell* at 192.
  - "*Miller* does not require 'irreparable corruption' to be proved to a jury beyond a reasonable doubt in order to 'aggravate' or 'enhance' the sentence for [a] juvenile offender convicted of homicide."
  - *Blackwell* also upheld the sentencing court's reimposition of LWOP as within its discretion and rejected a claim that it was disproportionate to the offender's individual culpability.

- *People v. Padilla* (2016) 4 Cal.App.5th 656.

  The *Padilla* court found the *Blackwell* opinion not "persuasive" on the importance of an "irreparable corruption" finding. *Id.* at 673 fn. 7.

  - "In view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an express determination whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption." *Padilla* at 673.

- The *Padilla* court considered *Montgomery* a sufficiently significant clarification of the substantive demands of *Miller* that it required a remand for another resentencing hearing.
    - Because "the trial court resentenced appellant without the benefit of *Montgomery*, it did not examine the *Miller* factors in that manner." *Ibid.*

E. Remedial Statutes – §§ 1170(d)(2) & 3051.

In the past four years, the California Legislature has enacted two separate statutes intended to provide many juvenile offenders under LWOP or de facto LWOP sentences with an opportunity for reconsideration of the duration of their imprisonment – the § 1170(d)(2) "recall" procedure and § 3051's establishment of "youth offender parole hearings." Despite their similar objects, the statutes apply to different categories of offenders and sentences and employ very different mechanisms.

1. § 1170(d)(2) Petition to "Recall" Sentence.

§ 1170(d)(2) (enacted in 2012) establishes a procedure for an inmate to petition the sentencing court to "recall" and reconsider a sentence after he or she has served 15 years of an LWOP sentence for a crime committed as a juvenile.

- § 1170(d)(2) excludes some categories of offenses, such as those in which the defendant tortured the victim or killed a law enforcement officer.
- The statute enumerates criteria for the sentencing court to consider in exercising discretion whether to resentence the inmate. The statutory list partially overlaps but is not identical to the "*Miller* factors."

***Gutierrez* – § 1170(d)(2) not adequate substitute for remand**.

People v. Gutierrez (2014) 58 Cal.4th 1354 (discussed in Part X-A above) also addressed the efficacy of § 1170(d)(2) to satisfy *Miller*. The Supreme Court held that the opportunity to petition the sentencing court to "recall" its sentence years in the future did *not* provide an adequate remedy for the failure to consider the *Miller* factors at the time of sentencing – at least where the defendant's case was still pending on direct appeal.

- The Attorney General argued that, even if the original sentencing hearing did not satisfy *Miller*, the new § 1170(d)(2) "recall" procedure represented the only mechanism to seek reconsideration of that LWOP sentence.
- The Supreme Court held that the future opportunity to seek a discretionary reconsideration of the sentence was not an adequate

remedy for the sentencing court's failure to give full consideration to the mitigating features of youth "*at the outset*" and "*before* imposing a particular penalty." *Gutierrez* at 1386-1387 (emphasis in *Gutierrez*).

- The availability of a procedure to petition for a "recall" of an LWOP sentence "15 or 24 years into the future" does not "somehow make more reliable or justifiable the imposition of that sentence ... 'at the outset.'" *Id*. at 1386.

Pending review of adequacy of § 1170(d)(2) as substitute for habeas review.

Gutierrez concerned cases still pending *on direct review*. The Supreme Court has recently granted review to determine whether § 1170(d)(2), rather than habeas corpus, represents the only mechanism for seeking *Miller* reconsideration of a sentence that has already become final.

- *In re Kirchner* (2016) 244 Cal.App.4th 1398, **review granted**, S233508 (argued Feb. 7, 2017). In *Kirchner*, the appellate court took the position that habeas corpus was not a proper vehicle to seek reconsideration of an LWOP sentence under *Miller*, because the new statutory procedure, § 1170(d)(2), provides "an adequate remedy at law."

    - In the appellate court's view, "the statute meets the requirements of *Miller* and *Montgomery* and is therefore an adequate remedy which Kirchner must pursue before resorting to habeas relief."
    - The Supreme Court's pending issues summary states the question in *Kirchner* as: "When a juvenile offender seeks release from [an LWOP] sentence that has become final, does [§ 1170(d)(2)], which permits most juvenile offenders to petition for recall of [an LWOP] sentence ..., provide an adequate remedy under *Miller v. Alabama* [citation], as recently construed in *Montgomery v. Louisiana* [citation]?"

§ 1170(d)(2) appeals.

Some defendants under LWOP terms have sought reconsideration under the § 1170(d)(2) "recall" procedure. There have been a handful of appeals from denials of § 1170(d)(2) petitions. The appellate courts have shown considerable deference

to the sentencing courts' discretion in weighing the various factors listed in the statute. Those initial opinions suggest that a denial of resentencing under § 1170(d)(2) may survive appellate review as long as at least some of the statutory criteria weigh against reduction of the sentence.

- *People v. Willover* (2016) 248 Cal.App.4th 302 (no abuse of discretion where "only four of the eight factors listed in [§ 1170(d)(2)(F)] applied favorably to defendant").

- *People v. Gibson* (2016) 2 Cal.App.5th 315 (evidence of lack of rehabilitation and remorse was sufficient to support denial of resentencing; "[t]he finding of one proper factor is sufficient to justify the court's decision").

2. § 3051 – Parole Consideration for Youthful Offenders.

While § 1170(d)(2) established a *judicial* procedure to seek sentencing reconsideration years in the future, § 3051 (enacted in 2014 & revised in 2015) employs a different model. It is an *administrative* procedure in which youthful offenders under lengthy sentences will be entitled to *parole suitability hearings* ("youth offender parole hearings") earlier than provided in their stated sentences. The hearing will occur after the inmate has served 15, 20, or 25 years depending on the nature of the sentence: after 15 years on a determinate sentence, 20 years on an indeterminate sentence of less than 25-to-life, or 25 years on an indeterminate term of 25-to-life or longer.

- In contrast to the judicial recall procedure of § 1170(d)(2), the youthful offender parole suitability procedures of § 3051 do not apply to LWOP sentences. § 3051 also exclude sentences under two of the regimens accounting for many of the most lengthy non-homicide sentences – "three strikes" (§ 1170.12) and "one strike" life terms for certain aggravated sex offenses (§ 667.61).
- As originally enacted in 2014, the § 3051 procedures applied only to juveniles –i.e., inmates sentenced for offenses committed before the age of 18.
- As revised in 2015 (eff. Jan. 1, 2016), the statute now makes early parole suitability hearings available for substantial numbers of *young adult offenders* – "any prisoner who was *under 23 years of age* at the time of his or her controlling offense." § 3051(a)(1) (emphasis added).
- Through a revision of a related parole consideration statute, the legislation

directs the Board of Parole Hearings to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner." § 4801(c).

Adequacy of § 3051 as remedy for de facto LWOP.

People v. Franklin (2016) 63 Cal.4th 261.

Franklin (who was 16 at the time of the offense) challenged his 50-to-life term for first degree murder as a mandatory de facto LWOP. The Supreme Court held that § 3051 (enacted during the pendency of the appeal) cured any potential constitutional defect in the original sentence and mooted Franklin's de facto LWOP challenge.

- By making Franklin and similar offenders eligible for parole consideration afer serving 25 years, the new regimen effectively "superseded Franklin's sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole hearing' during the 25th year of his sentence." *Franklin* at 277.
- The statutory regimen's explicit directions to give "great weight"to the *Miller* factors, such as the "diminished culpability of juveniles" and the "hallmark features of youth," "are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." *Ibid.*

- Although the Court had held in *Gutierrez* that the § 1170(d)(2) recall petition was *not* an adequate remedy for reconsideration of an LWOP sentence, *Franklin* stated that the two statutes were not analogous. Under § 1170(d)(2), a sentencing court retains discretion to deny resentencing, so an inmate will not necessarily receive a parole-eligible sentence. "Section 3051, by contrast, effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." *Franklin* at 281.

***Franklin* and *Perez* remands for record development for future § 3051 parole hearings.**

- ***Franklin* – record-development remands for juveniles.** A significant defense critique of the efficacy of the § 3051 remedy has been that a parole hearing 15 or 25 years after the original sentencing will not provide an adequate opportunity for reconstruction and consideration of the facts relevant to the youth-related *Miller* factors. Although the Supreme Court held that the prospect of early parole consideration under § 3051 mooted the necessity for a true resentencing hearing, it devised a more limited judicial remedy – **a remand to the sentencing court to develop a record for consideration at future parole hearings**.

  - §§ 3051 and 4801(c) "contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. . . . Assembling such statements 'about the individual before the crime' is typically *a task more easily done at or near the time of the juvenile's offense rather than decades later* when memories may have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." *Franklin*, 63 Cal.4th at 283-284 (emphasis added).
  - The Supreme Court remanded the case to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing."
  - If the trial court determines that there was not an adequate opportunity at the original sentencing hearing, "Franklin may place on the record any documents, evaluations, or testimony ... that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." *Franklin* at 284.

- ***Perez* – record development remands for young adult offenders.** *People v. Perez* (2016) 3 Cal.App.5th 612, extends the rationale of *Franklin* to other youthful offenders who will be entitled to early parole hearings under § 3051, *even ones who were 18 or older at the time of the offense*.

- As noted earlier, under the 2015 amendment of § 3051, an inmate whose "controlling offense" occurred before the age of **23** will also be entitled to a "youth offender parole hearing."
- Perez, who was 20 at the time of his offenses, was sentenced to 86 years to life for multiple attempted murders.
- The sentencing occurred prior to the extension of § 3051 to young adult offenders and to the Supreme Court's opinion in *Franklin*. The appellate court found that the *Franklin* rationale applied equally to a young adult offender who would be entitled to a "youth offender parole hearing" under the expansion of § 3051.
    - "Perez did not have a sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." *Perez* at 619.
    - As in *Franklin*, the *Perez* court remanded to the sentencing court to allow both parties to develop a record on the defendant's "characteristics and circumstances at the time of the offense" to enable the Board of Parole Hearings to give due consideration to the "youth-related factors" at his future parole hearings. *Ibid*.

- **Time of sentencing hearing – opportunity for record development**.

  In both *Franklin* and *Perez*, the original sentencing hearings occurred prior to the § 3051 legislation (or its extension to young adult offenders). However, it was not until the *Franklin* and *Perez* opinions that the bench and bar had notice that the *sentencing hearing* (rather than the eventual parole hearing) was the appropriate forum for development of a record on youth-related factors.
  - There should be solid grounds to seek a record development hearing for:
    - Any juvenile whose original hearing occurred before the *Franklin* opinion (May 26, 2016); and
    - Any adult under the age of 23 at the time of the offense whose sentencing hearing occurred before publication of the *Perez* opinion (Sept. 22, 2016).
    - Arguably, that rationale could also apply where the sentencing occurred before the relevant opinion (*Franklin* or *Perez*) became "final."

- ***Franklin* and *Perez* – retroactivity and habeas.**

  In re Cook (Jan. 10, 2017) __ Cal.App.5th __, 2017 WL 83811: An inmate whose case has already become final may seek a *Franklin* record-development hearing through a habeas corpus petition.

  - *Franklin* "in effect expanded the defendant's rights" by recognizing a right at the time of sentencing to develop a record of "information that may be relevant at his or her eventual youth offender parole hearing."
  - "Changes in case law customarily are fully retroactive."
  - "[T]he deprivation of the rights granted by *Franklin* is cognizable on habeas corpus."
  - Ideally development of a record on the youth-factors should occur "as near in time as possible to ... the original sentencing." Although 9 years had passed since the original sentencing, a remand was still better than waiting until the "15th, 20th, or 25th year of incarceration" to attempt to develop those facts.

  Because Cook had been 17 at the time of the offenses, he was entitled to a record development remand under *Franklin*. However, the *Cook* opinion's retroactivity analysis and its recognition of a habeas remedy should apply equally to a young adult offender (under age 23) entitled to a record development opportunity under *Perez*. (Both *Perez* and *Carter* were decided by 4th Dist. Div. 3.)

- **Lessons of *Franklin* and *Perez* for appellate practitioners.**
  Anyone with a client, juvenile or adult, who will eventually be entitled to a "youth offender parole hearing" under § 3051 should strongly consider seeking a *Franklin* or *Perez* remand for development of an adequate record on the youth-related factors which the revised statutes require the Board to accord "great weight." (If the appeal has already been briefed, counsel should consider filing a supplemental brief.)

  - **Not limited to juveniles.** As reflected in *Perez*, any defendant under a lengthy sentence whose offense occurred before the age of 23 may be entitled to a remand on the ground he did not have a sufficient opportunity for development of a record on those factors at the time of the original sentencing.

- **Sentence does not necessarily need to constitute de facto LWOP**. As noted earlier, section 3051 does not apply to literal LWOP sentences, nor to "third strike" or "one strike" (aggravated sex offense) terms. But, subject to those exceptions, the statute requires a youth offender parole hearing for anyone under *either a determinate or indeterminate sentence of 15 years or greater*. § 3051(b).
  - The considerations noted in *Franklin* – the great difficulty of reconstructing an adequate record on an inmate's characteristics as a youth over a decade after his offense – will apply to the Board's consideration of those circumstances at *any* youth offender parole hearing, because that hearing will necessarily occur *at least 15 years* into the sentence (and, in many cases, 20 or 25 years).
  - That means that counsel should seek a *Franklin-Perez* remand hearing for anyone coming within § 3051, *even if his sentence would likely not be considered the functional equivalent of life without parole.*
- **Passing the baton on a remand.** Where the appellate court does order a record-development remand, appellate counsel should follow-up to ensure that counsel is appointed for those proceedings. Appellate counsel should discuss with trial counsel the types of inquiries necessary to ensure development of a record adequate to facilitate review of the youth-related factors at the inmate's later parole hearings – e.g., social history investigation, expert assessments, etc.
  - One final vital tip for remand counsel: After the remand proceedings, **counsel must ensure that the superior court actually sends *all* the records generated (both transcripts and written reports, etc.) to CDCR** for inclusion in the inmate's file.

XI. CLOSING THOUGHTS – COMMON ISSUE-SPOTTING AND ARGUMENTATION LESSONS FROM RECENT HOMICIDE CASES.

The subject of these materials has been recent developments in substantive law. However, many of the cases discussed here, especially the defense victories, also attest to the value of several of the practice- pointers commonly discussed in other seminar materials, presentations, and practice guides.

Consider *how* the court delivers or fills in form instructions. Many of our instructional arguments concern whether a particular instruction should have been given at all under the facts of the case (e.g., a felony-murder theory, a lesser included offense, etc.) or whether a CALCRIM or CALJIC instruction is substantively correct. But **many of the recent cases have addressed situations in which otherwise-correct form instructions were misleading or incomplete, *as delivered*, or when considered together with other (also otherwise-correct) form instructions**.

- For example, form instructions correctly directing jurors to consider mental disorder evidence in evaluating specific intent or other mental states were erroneous, as delivered, because they appeared to preclude the jurors from considering the mental impairment evidence for other legitimate purposes, such as other charges with specific intent elements not named in the instruction (*People v. Townsel*) or other purposes dependent on the defendant's state of mind, such as whether his prior statements were knowingly false (*People v. McGehee*).
- In CALJIC and, to an even greater degree, CALCRIM, there are frequently many "decision points" *within* a form instruction – that is, "optional" or "alternative" paragraphs to be included or omitted depending on the circumstances. (For example, both of the cases involving prejudicial "*Pulido* error" involved omission of the "late joiner" paragraphs of form felony-murder instructions. (*People v. McDonald*; *People v. Hill*.))
    - Further complicating matters, both prosecutors and defense attorneys frequently submit their instruction requests through check-lists, indicating only CALCRIM or CALJIC numbers but not identifying which paragraphs to include.
    - Consequently, in reviewing instructions, it's frequently essential to have the latest CALCRIM or CALJIC volume on hand to identify all those internal decision points, including which available paragraphs were omitted.

It's better to frame the issue as error in the instructions delivered, rather than omission of some other instruction. Forfeiture and waiver remain common obstacles to review of most categories of appellate claims. But several of the recent cases, including the Supreme Court's opinion in *People v. Townsel*, have emphasized that an objection or request is not necessary to preserve appellate review of an error in the instructions*, as delivered*. Even where a topic is considered a "pinpoint instruction" (e.g., consideration of mental illness or intoxication), *if a trial court chooses to instruct on a subject, it must do so correctly and completely.*

The prosecutor's arguments are crucial to every issue. Other than jury instructions, there is no more crucial part of the record than the prosecutor's arguments, regardless of the nature of the appellate issue – instructional error, admission or exclusion of evidence, etc. A substantial portion of the reversals take note of some way in which the prosecutor's jury arguments exacerbated some other kind of error. In some instances, of course, a prosecutor will openly capitalize on some previous ruling – such as by noting the absence of a type of evidence the prosecutor had successfully blocked the defense from presenting. But even where the prosecutor's exploitation of an error is less blatant, there are often more subtle ways in which the prosecutor's argument may contribute to a misleading impression created by some different instructional or evidentiary error.

Frustration of presentation of the defense seems to fare better on appeal than prosecutorial overreach. This last lesson from recent homicide cases is less clear-cut. But, in general, the appellate courts appear to have been more receptive to claims that adverse rulings prevented or crippled presentation of the defense than arguments that the prosecution overstepped in presenting its case.

- To note one obvious example of the latter, the *Beltran* opinion was a welcome repudiation of the common, but erroneous, prosecutorial refrain that heat-of-passion manslaughter requires a provocation that would induce an ordinary reasonable person to *kill*. But, it has been disappointing that the courts have only rarely recognized that recurring practice as prejudicial, even where jurors asked questions on that very subject, as in *Beltran* itself.
- In contrast, *the courts have shown greater sensitivity to rulings that effectively block or significantly impair presentation of the defense case* – such as the complete exclusion of expert testimony on chronic homeless and heightened sensitivity to violence (*People v. Sotelo-Urena*) or the limitation on psychiatric testimony on the defendant's mental condition on the date of the offense (*People v. Herrera*).
- Those victories are especially noteworthy in light of the common perception that the courts disfavor mental state defenses.

Watching for helpful opinions – *Pyrrhic* victories in capital cases. When the California Supreme Court decides a capital case, it's tempting to look only at whether it affirmed or reversed the murder conviction or the death penalty. But many capital opinions contain holdings that may be helpful in other cases – such as reversals of some counts (but not the murder or the death penalty) or various error findings (then deemed harmless). While they may represent Pyrrhic victories for

the capital inmate, those holdings can proved valuable to other appellants. Several of the favorable holdings mentioned in these materials were in capital affirmances – e.g., *People v. Townsel* (misleading scope of mental impairment instruction), *People v. Trinh* (right to pinpoint instruction on *Beltran* principle).

Consider potential application of new favorable substantive holdings to closed cases. Where a new opinion clarifies substantive law by foreclosing a previously-available theory of liability (e.g., *People v. Chiu*) or tightening the elements necessary to sustain a charge (e.g., *People v. Banks*), it generally will be fully retroactive. That is, it will apply not only to cases still pending on appeal but also to inmates whose cases have already become final. The same is true of a new "substantive" or "categorical" ruling that precludes criminal liability or a particular punishment for a certain class of conduct or offenders (e.g., *Miller v. Alabama*). Consequently, when a new favorable "substantive" case comes down, appellate counsel should consider whether it may present a potential opportunity for habeas relief for any former clients.[13]

[13] As noted earlier, in the First District, we have often, but not always, been successful in persuading the Court to grant appointment of counsel nunc pro tunc in situations where former appellate counsel files a habeas petition based on a significant intervening decision. The Court has ordered such nunc pro tunc appointments on petitions raising claims under *Miller v. Alabama*, *People v. Chiu*, and *People v. Banks*.