HOMICIDE 2018

The Latest Developments in California Homicide Law

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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 to three years (2015-2017). They are not comprehensive. They do not cover every reported homicide decision, but only noteworthy opinions that appear to have broader implication for homicide practice in the coming years. Although the primary focus is on opinions from 2015-2017, 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., *People v. Chiu* (2014) (curtailing "natural and probable consequences" liability for first-degree murder).

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.[1]

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[1] *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[2] (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

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

guilty of different crimes and the jury believes the instruction prevents such a verdict."

- 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.

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.

As with other invalid legal theories, submission of a natural and probable consequence theory as a ground for first-degree murder liability is subject to an especially rigorous form of *Chapman* prejudice review. The "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directed aided and abetted the premeditated murder." *Chiu* at 167.

- **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.
  - *People v. Vega-Robles* (2017) 9 Cal.App.5th 382.

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.

- *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 Martinez* (2017) 3 Cal.5th 1216.

The Supreme Court has confirmed that *Chiu*'s holding barring natural and probable consequences as a basis for first-degree premeditated murder is fully retroactive. "[A] change in the criminal law will be given retroactive effect when a rule is substantive rather than procedural (i.e., it alters the range of conduct or the class of persons that the law punishes, or it modifies the elements of the offense) or when a judicial decision undertakes to vindicate the original meaning of the statute." *Martinez* at 1222. Accordingly, where a case became final on direct review prior to *Chiu*, a claim of instructional error under *Chiu* may be raised in a post-affirmance habeas corpus petition. The petition is not subject to the usual procedural bar on habeas review of a claim previously rejected on appeal.[3]

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[3] Several pre-*Martinez* appellate opinions had similar found *Chiu* claims properly cognizable on post-affirmance habeas petitions. *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.

Although the Attorney General's Office conceded the retroactivity of *Chiu* and the cognizability of the claim on habeas review, it argued that a habeas petitioner must satisfy a more onerous standard of prejudice, rather than the *Chapman* test applicable on direct appeal.[4] The Attorney General suggested that the defendant must show that "there is no material dispute as to the facts" and that the defendant could not validly be convicted under the applicable statute – the equivalent of a showing of legally insufficient evidence. Alternatively, the Attorney General urged the California Supreme Court to adopt the more forgiving *Brecht* harmless error test – "substantial and injurious effect or influence" – applicable on *federal* habeas review of a state conviction.[5]

The Court rejected both of the alternative tests proposed by the Attorney General. "We hold that a habeas corpus petitioner is in the same position as a defendant raising this type of error on direct appeal, and the same rule should apply." *Martinez* at 1225. Consequently, reversal is required unless the reviewing court can determine beyond a reasonable doubt that the jury based its first-degree verdict on a legally valid ground rather than natural and probable consequences theory.

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

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[4] *Chapman v. California* (1967) 386 U.S. 18 (constitutional violation requires reversal unless reviewing court finds error harmless beyond a reasonable doubt).

[5] *Brecht v. Abrahamson* (1993) 507 U.S. 619.

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.

- "'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 had 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),[6] 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*.

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,

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

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?"[7]

III. OTHER AIDING AND ABETTING ISSUES.

A. Insufficient Evidence of Aiding and Abetting.

- *People v. Lara* (2017) 9 Cal.App.5th 296.

In a murder case arising from the shooting of a fellow gang member, the Court of Appeal: (1) reduced one defendant's conviction from first-degree to second-degree murder; and (2) found the evidence insufficient to support the second-degree murder convictions of two co-defendants.

The evidence was insufficient to support Lara's first-degree conviction where it did not establish who shot the victim. Although the evidence did support a finding that Lara aided and abetted in the assault with a firearm, it did not show that Lara aided or encouraged the murder with premeditation and deliberation. However, there was sufficient evidence to hold him culpable of second-degree murder on a natural and probable consequences theory.

"There was even less evidence that" either of the co-defendants shot the victim. Although the co-defendants were present (and later fled from the scene), there was insufficient evidence of their actions to convict them of murder either as direct perpetrators or aider-abettors.

B. Mere Presence Instruction.

- *People v. Petite* (2017) 16 Cal.App.5th 23, 58-61.

Attempted murder, assault, and other convictions in gang-related case

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[7] 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.

reversed as to one defendant due to failure to instruct on the "mere presence" rule. Although "the prosecution presented no specific evidence of individual acts, words or conduct by [Petite] that would make him liable," the Court agreed there was sufficient evidence to support the inference that Petite was summoned to participate in the assault and aided and abetted it.

Although the convictions withstood the sufficiency-of-evidence challenge, the Court recognized that the "overall evidence of Petite's active participation in the assault was not overwhelming" and was susceptible to a converse finding. "The record holds sufficient evidence from which a jury could infer that he was merely present. Accordingly, ... the trial court had a sua sponte duty to instruct the jury on mere presence, e.g., with the pertinent bracketed paragraph of CALCRIM No. 401." That paragraph states that mere presence at the scene and failure to prevent the crime "does not, by itself, make him or her an aider and abettor." Because the evidence of Petite's role was "not strong," the omission of that instruction was prejudicial under either the sttae *Watson* or the federal *Chapman* standard.

IV. FELONY-MURDER AND FELONY-MURDER SPECIAL CIRCUMSTANCE.

A. Felony-Murder Special Circumstance – "Major Participant" and "Reckless Indifference to Life."

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.

1. *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 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), review granted on different issue, S234377.[8]

- *In re Loza* (2017) 10 Cal. App. 5th 38 (sufficient evidence for both "major participant" and "reckless indifference" findings where defendant helped plan robbery, provided shooter with the gun, and watched without intervening while killer counted down before shooting victims).

Retroactivity and habeas.

- *In re Miller* (2017) 14 Cal.App.5th 960, 977-980.

Because *Banks* represents a clarification of substantive law, it is fully retroactive. "*Banks* and *Clark* did not create new law; they simply stated what [§ 190.2(d)] has always meant." *Miller* at 979. Where the facts are legally insufficient to satisfy the "reckless indifference" and "major participant" prerequisites, as clarified in *Bank*, a special circumstance finding and sentence of death or LWOP is unauthorized. Consequently, a challenge under *Banks* is cognizable in a post-affirmance habeas corpus petition and is not procedurally barred by the usual rule precluding

[8] The Supreme Court granted review in *Gonzalez* on whether the felony-murder special circumstance finding rendered harmless the failure to instruct on murder with malice, and lesser offenses and defenses to malice murder.

habeas review of claims previously rejected on appeal.

2. Distinction from Implied Malice "Conscious Disregard."

- *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285: Despite some superficial similarity, the "reckless indifference to life" necessary for the felony-murder special circumstance is *not* equivalent to the "conscious disregard for life" threshold for the implied malice basis for second-degree murder. "Consistent with the principle that only the most culpable may be subjected to the death penalty [citing *Banks*], the 'reckless indifference to life' necessary for death penalty [or LWOP] eligibility *requires subjective awareness of a higher degree of risk* than the 'conscious disregard for human life' required for conviction of second degree murder based on implied malice." (Emphasis added.)

3. Rejection of Vagueness Challenge.

- *People v. Price* (2017) 8 Cal.App.5th 409.

The terms "reckless indifference to life" and "major participant" do not render the felony-murder special circumstance unconstitutionally vague. The Court of Appeal also found no sua sponte duty for instructions elaborating on the meaning of those terms. In view of the Supreme Court's prior holding in *People v. Estrada* (1995) 11 Cal.4th 568, "there is no constitutional requirement of a more explicit or detailed instruction on the meaning of the special circumstance elements." *Price* at 451.

However, as noted in the *Price* opinion, CALCRIM has recently added bracketed paragraphs to the special circumstance instruction (CALCRIM 703) listing several factors, drawn from *People v. Banks*, that jurors "may consider" in determining whether a defendant was a "major participant." These include the defendant's "role in planning the criminal enterprise," providing "lethal weapons," and the role of the defendant's own "actions or inactions" in contributing to the death. Although the *Price* court found that such an elaboration was not required sua sponte, "this should not discourage trial courts from amplifying the statutory language, if requested; .... trial court should consider whether *Banks* factors need be given." *Price* at 451 (summarizing Bench Note to CALCRIM 703).

B. Bungling the Special Circumstance Instructions – Conjunctive vs. Disjunctive.

Several cases have involved an elementary error in the delivery of instructions on the felony-murder circumstance. In delivering CALJIC 8.81.7, some trial courts have inadvertently substituted "or" for "and" in describing the core requirements of the special circumstance:

> "1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery *or*
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery."

- *People v. Harris* (2008) 43 Cal.4th 1269, 1299-1300.
- *People v. Stanley* (2006) 39 Cal.4th 913, 956-958.
- See also *Pulido v. Chrones* (9th Cir. 2010) 629 F.3d 1007 (on remand following *Hedgpeth v. Pulido* (2008) 555 U.S. 57).

By framing the requirements in the disjunctive ("or") rather than the conjunctive ("and"), the instructions in those cases suggested that the jurors need only make one of the two findings, rather than both. "[T]his permitted the jury to find the special circumstance true based only on a finding that the murder occurred while he as engaged in the commission of a robbery, without making the further finding that the murder was committed to carry out or advance the robbery." *Harris* at 1299.

While the Supreme Court recognized the instructional error, it proceeded to find it harmless in each case, based on the jury's other findings and the state of the evidence. E.g., *Harris* at 1300: "The defect ... clearly did not affect the verdict. .... The evidence simply did not support the notion that the robbery was somehow incidental to the murder."

C. Felony-Murder Special Circumstance – Independent Felonious Purpose.

A prior version of the felony murder special circumstance statute had been construed as applying only where the defendant "had an independent purpose for commission of the predicate felony." That is, the special circumstance did not apply where the felony was "merely incidental to an

intended murder," such as where the defendant kidnapped the victim in order to facilitate the murder. E.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 182. However, an initiative amendment, adopted in 2000, explicitly abrogated that "independent felonious purpose" requirement as to the kidnapping and arson special circumstances. If "specific intent to kill" is established, "those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purposes of facilitating the murder." Current § 190.2(a)(17)(M). However, issues under the former "independent felonious purpose" rule have continued to arise in capital cases involving offenses prior to that amendment.

- *People v. Brooks* (2017) 3 Cal.5th 1.

  In *Brooks*, the defendant initially challenged the kidnapping special circumstance finding only on sufficiency of evidence grounds. He argued that, in rejecting his heat-of-passion defense, the jury must necessarily have found that he placed the unconscious victim in the car and drove off with the intention of killing her. In its initial *Brooks* opinion, the majority upheld the special circumstance against the sufficiency challenge. The majority found that the evidence supported a "reasonable inference that defendant was conflicted, confused and possibly in a state of panic after rendering [the victim] unconscious, and that he decided her fate only after having placed her [in] ... her car and driven off." *Brooks* at 64. Justice Liu dissented, urging that there was insufficient evidence of any purpose independent from the murder, even under the deferential sufficiency standard of review. In the course of his dissent, Justice Liu noted that there was no reason to believe that the jurors had actually found any such independent purpose, because the jurors had never been instructed on that distinct requirement for the special circumstance.

  Brooks petitioned for rehearing and, for the first time, raised the instructional omission as a distinct claim. Despite its very late presentation, the Supreme Court considered the instructional argument and ultimately reversed the special circumstance on that ground. The trial court was required to instruct sua sponte on the independent felonious purpose rule because the evidence supported an inference "that defendant placed [the victim] in the back of her car and drove off for the sole purpose of killing her." *Brooks* at 118.

Brooks is a dramatic illustration of the difference between the appellate standards governing sufficiency and instructional claims. "Although there was substantial evidence from which a jury could reasonablly infer to the contrary, that defendant did *not* kidnap [the victim] for the sole purpose of killing her, the evidence did not establish that inference 'so overwhelmingly" that it can be said that the jurors "'could not have had a reasonable doubt on the matter."'" *Brooks* at 119-120 (emphasis in original).

Unfortunately, however, the Supreme Court held that the reversal of the kidnapping special circumstance did *not* require reversal of the death penalty. In view of the "valid torture-murder special circumstance" finding, the Court opined that the kidnapping special circumstance was "superfluous" to death-eligibility and "did not alter the universe of facts and circumstances" the jury could consider in aggravation. *Brooks* at 120.

D. 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.[9]

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[9] **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

E. 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.

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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)

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*. See Lee, *Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness* (2015) 43 Hastings Const. L.Q. 1.

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.

Supreme Court OSC on *Johnson* challenge.

- *In re White*, S233265 (OSC issued July 27, 2017, returnable in 4th Dist.).

The California Supreme Court has issued an order to show cause on an inmate's pro. per. habeas corpus petition raising a *Johnson* vagueness challenge. The OSC frames the issue as whether the "reasoning set forth in *Johnson v. United States* [citation] renders the California second-degree [felony] murder rule unconstitutionally vague." The issuance of the OSC represents the Supreme Court's implicit preliminary determination that the *Johnson* challenge presents a prima facie case for habeas relief. The Supreme Court made the OSC returnable before the Fourth District, Div. Two. Briefing has not yet been completed in the Fourth District.

Cautionary notes.

Although the Supreme Court's OSC in *White* is a favorable development, there are some reasons for caution on the *Johnson* argument.

- **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.

V. LYING IN WAIT SPECIAL CIRCUMSTANCE.

A. Sufficiency of Evidence Under Former Law.

Several recent capital opinions have reversed lying-in-wait special circumstances for insufficient evidence that the killing occurred during a substantial period of concealment and "watchful waiting."

For example, in *People v. Becerrada* (2017) 2 Cal.5th 1009, 1028-1029, the prosecution theory was that the defendant lured the victim to his home and killed her upon finding out that she had not dropped rape charges against him, as he had expected. However, the special circumstance failed because there was no evidence "that defendant learned *before* her fatal trip to his home that [the victim] had not dropped the charges." "The evidence strongly supports a jury finding that defendant killed [the victim] premeditatedly when he learned that she had not dropped the charges, but it does not support a finding that he had lured her to his home intending to kill her." *Becerrada* at 1029.

Other recent cases have also turned on the absence of evidence of a

temporal nexus between the concealment or waiting period and the actual killing.

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- E.g., *People v. Nelson* (2016) 1 Cal.5th 513, 549-552 ("no evidence ... that Nelson arrived before the victims or waited in ambush for their arrival").
- *People v. Hajek* (2014) 58 Cal.4th 1144, 1183-1185 (insufficient evidence "that defendants' concealment was contemporaneous with a substantial period of watching and waiting for an opportune time to act, or that their concealment allowed them to launch a surprise attack on an unsuspecting victim from a position of advantage").

Although *Becerrada, Nelson* and *Hajek* were recent opinions, they arose from decades-old homicides and were governed by a former version of the special circumstance statute, which required that the "defendant intentionally killed the victim *while* lying in wait." Consequently, under the law governing those cases, the statute required "that the killing take place *during the period of concealment and watchful waiting*." *Hajek* at 1184 (emphasis in original). As discussed below, subsequent statutory amendments have substantially loosened that temporal requirement.

B. Effect of Statutory Amendment.

- *People v. Johnson* (2016) 62 Cal.4th 600, 629-637.

As explained in *Johnson*, a voter initiative adopted in 2000 "changed the [statutory] definition of the lying-in-wait special circumstance from a killing *while* lying in wait to a killing *by means of* lying in wait, mirroring the language of the first degree murder statute." *Johnson* at 634; see current § 190.2(a)(15).

Like prior versions of the statute, the amended special circumstance "requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) ... a surprise attack on an unsuspecting victim from a position of advantage....'" *Johnson* at 629.

However, as construed by the Supreme Court, the amendment's substitution of "by means of " for "while" has effectively abrogated the former requirement that the killing be contemporaneous with the period

of "watchful waiting." "[T]he voters' purpose ... was to eliminate the temporal distinction between the special circumstance and lying-in-wait first-degree murder, and thereby expand the class of cases in which the special circumstance could be found true." *Johnson* at 636.

The Supreme Court also rejected the claim that this expansion of the scope of the special circumstance offended the Eighth Amendment by insufficiently narrowing the class of murder offenses subject to the death penalty. "Like the murderer who poisons his victim, the murderer who kills by lying in wait acts surreptitiously, concealing himself or his purpose and making a surprise attack on his victim from a position of advantage, thereby depriving the victim of any chance of escape, aid, or self-defense. It is no surprise that a murder committed by lying in wait has historically been viewed as 'a particularly heinous and repugnant crime.'" *Johnson* at 636-637.

C. Transferred Intent.

- *People v. Robbins* (Jan. 19, 2018; E066284) __ Cal.App.5th __, 2018 Cal. App.LEXIS 39 (slip opn., pp. 10-12).

"Can transferred intent apply if the [special circumstance] statute requires intent to kill the victim?" A just-issued Fourth District opinion holds that the transferred intent doctrine does apply to the lying-in-wait special circumstance. Under prior cases, lying in wait is considered "'the functional equivalent of proof of premeditation, deliberation, and intent to kill.'" *Robbins*, slip opn. at p. 11 (quoting *People v. Sandoval* (2016) 62 Cal.4th 394, 415-416). "Because lying in wait provides proof of the same type of deliberate intent associated with premeditation and deliberation, the intent associated with lying in wait transfers in the same manner as the intent associated with premeditation and deliberation." *Robbins* at p. 12.

VI. 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 VIII-B, *post*.

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.

D. Intoxication and Imperfect Self-Defense.

People v. Soto (2016) 248 Cal.App.4th 884; **review granted, S236164, set for argument, Feb. 7, 2018.**

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.

- **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."

VII. 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.

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.

VIII. 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.

The disappointing application of *Beltran*.

The *Beltran* opinion was an important vindication of the longstanding defense position that a heat-of-passion manslaughter verdict does *not* require the jurors to find that an ordinary person would have killed under similar circumstances, but only that he would have reacted rashly and without judgment. But unfortunately *Beltran* appears to have made much less difference in practice than hoped. Prosecutors continue to make arguments similar to the one condemned in *Beltran*. Compounding the problem, though appellate courts have often found such arguments improper, they have proven extremely reluctant to reverse for this form of prosecutorial misconduct.

- E.g., *People v. Forrest* (2017) 7 Cal.App.5th 1074 (prosecutorial misconduct found harmless). (There have been numerous similar unpublished appellate opinions.)

Nonetheless, defense counsel should continue to object, under *Beltran*, to any line of prosecutorial argument that frames the inquiry in terms of whether an ordinary person would have reacted in the same way. In addition to objecting, counsel should also be sure to *request an admonition* explicitly apprising the jurors on the correct standard, as clarified in *Beltran*.

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." Especially in light of the pervasiveness of prosecutorial misstatements of the heat-of-passion standard, **counsel should preemptively request a pinpoint instruction on this principle in *every* case presenting a heat of passion defense** and should specifically cite the *Trinh* opinion in support of the request.

IX. 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.

X. MURDER AND VEHICULAR MANSLAUGHTER.

No duty to inform jury of manslaughter conviction on retrial of murder charge.

- *People v. Hicks* (Dec. 28, 2017; S232218) __ Cal.5th __, 2017 Cal. LEXIS 9840.

Several recent opinions have arisen out of retrials of murder charges, where the first jury convicted the defendant of gross vehicular manslaughter but deadlocked on a second-degree murder count. In two opinions, the Fourth District held that, during the retrial, the defendant was entitled to have the jury informed of the manslaughter conviction. The purpose of that advisement was to ensure that the jurors did not proceed under "the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder." *People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1117; accord *People v. Johnson* (2016) 6 Cal.App.5th 505.

In *Hicks*, however, the Supreme Court has repudiated the remedy adopted in *Batchelor* and *Johnson* and has approved a much more limited advisement. A trial court must *not* inform the retrial jury of the defendant's vehicular manslaughter conviction in the incident. Instead, the Supreme Court formulated a more limited instruction which does not refer to "specific convictions":

> "Sometimes cases are tried in segments. The only question in this segment of the proceedings is whether the prosecution has proved the charge of murder. In deciding this question, you must not let the question of punishment enter your deliberations. Nor are you to speculate about whether the defendant may have been, or may be, held criminally responsible for his conduct in some other

segment of the proceedings." *Hicks*, slip opn., p. 1.

The Supreme Court held that this instruction, "which need only be given upon request, would prevent the jury from wrongly assuming that an acquittal on the murder charge would result in the defendant escaping criminal liability altogether, and it would do so without introducing matters that are extraneous to the retrial." *Hicks*, slip opn., pp. 1-2.

XI. 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 several other attempted murder cases, pending the disposition in *Canizales*, it denied review in *Falaniko*.

B. Pleading and Notice of Premeditation Allegation.

- *People v. Perez* (2017) 18 Cal.App.5th 598, 614-618.

Attempted murder is not divided into degrees. Instead, under § 664(a), premeditation and deliberation represents a separate enhancing allegation which, if found true, elevates the sentence to an indeterminate life term. In *Perez*, the prosecution did not specifically plead premeditation and deliberation in the information, as required by the statute. However, the court instructed the jury on premeditation, the jury returned premeditation findings, and the court imposed life terms on the attempted murder counts.

The Court of Appeal found that the life terms were unauthorized due to the "flagrant deficiency in the accusatory pleading in violation of section 664." The Court found that a passing reference to "the possibility of an enhanced sentence for premeditated attempted murder" during the colloquy on "unrelated jury instructions" was insufficient to "impart[] the

notice required by due process," where it was not even clear from the record that the defendant was personally present during that instructional colloquy.

C. 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.

XII. FIREARM ENHANCEMENTS – NEW DISCRETION TO STRIKE.

Formerly, a sentencing court had no discretion to strike a firearm enhancement under §§ 12022.5 or 12022.53. Effective Jan. 1, 2018, the Legislature has explicitly restored § 1385 discretion to strike firearm enhancements in the interests of justice. §§ 12022.5(c), 12022.53(h), as amended by Stats. 2017 ch. 682 (SB 620).

Application to all cases not yet final on appeal.

- *People v. Robbins* (Jan. 19, 2018; E066284) __ Cal.App.5th __, 2018 Cal.App.LEXIS 39.

Under the *Estrada* rule, as legislation reducing punishment (by conferring discretion to strike formerly mandatory enhancements), the SB 620 amendments apply retroactively to all cases not yet final on direct appeal. The *Robbins* court remanded for resentencing to give the sentencing court the opportunity to exercise its discretion.

Implications for sentencing hearings.

Formerly, a sentencing court had no statutory discretion in imposing sentence on a non-special circumstance murder with a firearm – at least as to the murder count itself. The sentence for murder was fixed (25 to life for first-degree, 15-to-life for second), and the court had no discretion as to imposition of any firearm enhancement (e.g., a 25-to-life enhancement for personal firearm use resulting in death, § 12022.53(d)). Consequently, there was often no occasion to put on a mitigating case at sentencing, because there was no decision point for the court to exercise discretion.

Now, however, there is every reason for the defense to develop mitigating evidence and to argue for the court to exercise its discretion to strike firearm enhancements. The exercise of such discretion could make the difference whether the sentence is a de facto LWOP (e.g., 50 to life) or one that provides a realistic opportunity for parole consideration within the inmate's lifetime.

In cases with § 12022.53 findings, counsel should also consider offering the sentencing court a range of sentencing options. The sentencing decision does not necessarily have to be a binary choice between imposition of a 25-to-life enhancement under § 12022.53(d) or no firearm enhancement at all. Juries frequently are asked to return findings under multiple subdivisions of § 12022.53 – personal firearm use (subd. (b)), personal discharge of firearm (subd. (c)), personal discharge resulting in death or GBI (subd. (d)). If the court is unwilling to strike the firearm enhancements altogether, counsel should consider suggesting an intermediate alternative. In lieu of imposing a 25-to-life enhancement, the court could strike the § 12022.53(d) enhancement (as well as the subd. (c) personal discharge enhancement) and instead impose a 10-year personal use enhancement under § 12022.53(b).

XIII. JUVENILE LWOP.

A. *Miller-Gutierrez-Montgomery* Recap.

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" (the "*Miller* factors").

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

- 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(b) 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.

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

Montgomery v. Louisiana (2016) 136 S.Ct. 718.

Miller v. Alabama's bar on mandatory LWOP represents a new *substantive* rule of constitutional law and consequently is *fully retroactive*. Inmates whose LWOP sentences became final on direct review prior to *Miller* may petition for post-conviction relief to seek resentencing.

In *Montgomery,* the Court also doubled down on *Miller*'s 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.

***Montgomery*'s implications for sentencing hearings.**

The California Supreme Court has granted review in two cases to address the implications of *Montgomery* for a sentencing court's choice between LWOP and a parole-eligible term for a juvenile offender. The Court's review orders in the two cases have framed the issues in slightly different

terms.

- *People v. Mendoza*, S238032: "Did *Montgomery v. Louisiana* ... clarify that *Miller v. Alabama* ... created a presumption against a sentence of life imprisonment without possibility of parole for juvenile offenders and requires trial courts to determine that a juvenile offender is one of "those rare children whose crimes reflect irreparable corruption" [citation] before imposing such a sentence? Or is it sufficient, for purposes of compliance with *Montgomery and Miller*, that a trial court take into consideration the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)?"

- *People v. Padilla*, S239454: The order in *Padilla* framed the first part of question somewhat differently: "Did *Montgomery v. Louisiana* ... clarify that *Miller v. Alabama* ... bans a sentence of life without the possibility of parole on a specific class of juvenile offenders whose crimes reflect the transient immaturity of youth, thereby requiring that trial courts determine that the crime reflects 'irreparable corruption resulting in permanent incorrigibility' before imposing life without parole..., or does a trial court comply with the constitutional mandates of *Miller* by giving due consideration to the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)?"

The Supreme Court has subsequently directed the parties in *Mendoza* and *Padilla* to address the effect of SB 394, the recent legislation extending youth offender parole hearings to juveniles sentenced to LWOP. See Part XIII-D, *post*.

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).

- *People v. Contreras*, review granted, S224564.

In *Contreras,* the Court 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?"

Contreras was argued October 2, 2017. However, much as in *Mendoza* and *Padilla*, the Court subsequently ordered briefing on the import of the 2017 legislation extending the availability of youth offender parole hearings under § 3051. See Part XIII-D, *post*.

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.

- *People v. Perez* (2016) 3 Cal.App.5th 612, 617 ("18 years of age is the bright line rule").
- See also *People v. Argeta* (2012) 210 Cal.App.4th 1478; *People v. Abundio* (2013) 221 Cal.App.4th 211.

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

In the past five 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 on appeal**.

- *People v. Gutierrez* (2014) 58 Cal.4th 1354:

> The opportunity to petition the sentencing court to "recall" its sentence years in the future does *not* provide an adequate remedy for the failure to consider the *Miller* factors at the time of sentencing. 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." 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.

***Kirchner* – § 1170(d)(2) not adequate substitute for habeas review.**

- *In re Kirchner* (2017) 2 Cal.5th 1040 244 Cal.App.4th 1398.

Gutierrez arose on direct appeal. In *Kirchner*, the Supreme Court extended *Gutierrez*'s reasoning from appeals to habeas corpus relief. § 1170(d)(2) does not provide an adequate remedy at law for *Miller* error. Accordingly, a inmate seeking review of his sentence is *not* required to pursue the § 1170(d)(2) recall procedure and may instead seek resentencing through a petition for writ of habeas corpus.

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 and revised in 2015 & 2017) 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.

- As originally enacted in 2014, § 3051 applied only to lengthy determinate or indeterminate sentences but *not* to LWOP's.
- § 3051 excludes 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.
- Two rounds of revisions of the statute have extended early parole suitability hearings to *young adult offenders*. A 2015 amendment extended the hearings to "any prisoner who was *under 23 years of age* at the time of his or her controlling offense." § 3051(a)(1) (emphasis added). In 2017, the Legislature further extended such hearings to any inmate "who was *25 years of age or younger* at the time of his or her controlling offense." § 3051(a)(1) (emphasis added), as amended by A.B. 1308. That legislation became effective January 1, 2018.

3. Extension of Parole Eligibility to Juvenile LWOP Sentences.

A separate piece of legislation, also enacted in 2017 and effective January 1, 2018, *has provided parole eligiblity for inmates under LWOP sentences for offenses committed as juveniles.* "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of

parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing..." § 3051(b)(4), as amended by S.B. 394.

Consequently, it now appears that a nominal LWOP sentence for an offense committed by someone under the age of 18 is no longer a true "without possibility of parole" term.

Note, however, that § 3051 still does not apply to "third strike" and "one strike" sentences.

4. Adequacy of § 3051 As Remedy for LWOP and De Facto LWOP.

- *People v. Franklin* (2016) 63 Cal.4th 261. In *Franklin*, the Supreme Court held that the availability of a youth offender parole hearing under § 3051 mooted a challenge to a 50-to-life term imposed for an offense at the age of 16.

- 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.*

- *People v. Mendoza*, S238032.
- *People v. Padilla*, S239454.
- *People v. Contreras*, S224564.

As summarized earlier, in *Mendoza* and *Padilla*, the Supreme Court has been considering the implications of *Montgomery v. Louisiana* on juvenile LWOP sentencing and resentencing hearings. (Part XIII-A.) And, in *Contreras*, the Court is considering at what point a very lengthy sentence (such as 50 or 58 years to life) becomes the functional equivalent of LWOP.

(Part XIII-B.) However, in all three cases, the Supreme Court has recently solicited supplemental briefing on the import of S.B. 394, the new legislation extending § 3051 youth offender parole hearings to inmates under LWOP terms for offenses committed as juveniles.

In view of *Franklin*, the Supreme Court is evidently considering whether, by providing for parole hearings after 25 years, this new legislation provides an adequate remedy to satisfy *Miller* and *Montgomery*.

5. *Franklin* and *Perez* Remands for Record Development for Future Parole Hearings.

- *People v. Franklin* (2016) 63 Cal.4th 261.
  As noted above, *Franklin* held that the enactment of § 3051 effectively resolved a constitutional challenge to a juvenile's 50-to-life sentence. However, the Supreme Court recognized that a parole hearing 25 years later may not not provide an adequate opportunity for reconstruction and consideration of the facts relevant to the youth-related *Miller* factors. Although the availability of early parole consideration under § 3051 mooted the necessity for a true resentencing hearing, the Supreme Court devised a more limited judicial remedy – **a remand to the sentencing court to develop a record for consideration at future parole hearings**.

  - 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*.

- *Perez* concerned the effect of the 2015 amendment, which extended youth offender parole hearings to inmates whose offense occurred before the age of 23.
- Perez had been sentenced to 86 years to life for multiple attempted murders. Because his sentencing hearing had occurred before the 2015 amendment, he had not had "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 development of 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*.
- Now that the Legislature has further extended youth offender parole hearings to inmates who were "25 years of age or younger," newly eligible inmates who were sentenced prior to the latest amendment should similarly be entitled to seek *Franklin-Perez* remands for record development hearings.

- **Habeas as vehicle to seek *Franklin-Perez* record development hearing.**

  - *In re Cook* (2017) 7 Cal.App.5th 393, review granted (S240153). *Franklin* and *Perez* each were direct appeals. In *Cook*, the Supreme Court is considering whether a defendant whose sentence is already final on appeal may seek a *Franklin*-type record development hearing through a petition for writ of habeas corpus.

XIV. CLOSING THOUGHTS – 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 checklists, indicating only CALCRIM or CALJIC numbers but not identifying which paragraphs to include.
    - In many cases, that checklist approach will likely not be sufficient to ensure that the court delivers an omnibus CALCRIM in the correct form for that specific case. In light of the many bracketed paragraphs within a CALCRIM instruction, it frequently will be necessary to designate which specific paragraphs are being requested, as well as which

portions should *not* be delivered.

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 defendants. 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); *People v. Brooks* (reversing kidnapping special circumstance).

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, counsel should consider whether it may present a potential opportunity for habeas relief for any former clients.