CALIFORNIA HOMICIDE LAW
IN THE NEW MILLENNIUM

Noteworthy homicide opinions of the past decade

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FIRST-DEGREE FELONY-MURDER

• Relationship between homicide and predicate felony – jury question.
  • *People v. Sakarias* (2000) 22 Cal.4th 596. Whether the homicide occurred during the same “continuous transaction” as the murder is a question, for the jury, not the judge, under the Sixth Amendment. (However, trial court’s erroneous removal of that question from jury, in its response to jurors’ query, was harmless, where other verdicts and special circumstance findings established that first-degree murder conviction rested on proper theory.)

• Non-killer liability and “logical nexus” between homicide and predicate felony.
  • *People v. Cavitt* (2004) 33 Cal.4th 187. Felony-murder only requires a “logical nexus” between the predicate felony and the homicide. It is not necessary that the homicide be committed “in furtherance of” the felony.
  • *People v. Dominguez* (2006) 39 Cal.4th 1141. Failure to deliver CALJIC 8.27 (defining felony liability of non-killer participant in felony) was harmless. Under the facts, there was no way that jury could have found defendant was a participant in the rape but that the homicide didn’t occur in course of the rape for felony-murder purposes.

• Lesser included instructions on predicate felony – only if felony separately charged.
•  *People v. Kelly* (2007) 42 Cal.4th 763. A defendant is entitled to instructions on a lesser included offense of a felony-murder predicate felony (e.g., theft as LIO of robbery) *only* if the predicate felony is charged as a separate count in its own right.

**SECOND-DEGREE FELONY-MURDER**

• Constitutionality of doctrine upheld.
  •  *People v. Chun* (2009) 45 Cal.4th 1172. Contrary to numerous prior opinions describing second-degree murder as a non-statutory “judicially created” doctrine, California Supreme Court in *Chun* concluded that there was a statutory basis. 19th century criminal statutes effectively codified common law felony-murder. Commission of an inherently dangerous felony resulting in death is an alternative form of implied malice coming within Pen. Code § 188 (“abandoned and malignant heart”).

• Predicate felony must be inherently dangerous in abstract.
  •  *People v. Howard* (2005) 34 Cal.4th 1129. Vehicular flight from police pursuit with wanton disregard for safety of persons or property (Veh. Code § 2800.2) is not a valid basis for felony-murder. There are ways of committing the predicate traffic violations for a § 2800.2 conviction which are not inherently dangerous in the abstract.

• Evolution of the merger doctrine – *Robertson, Randle* and *Chun*.
  •  *People v. Robertson* (2004) 34 Cal.4th 156. In *Robertson*, the Supreme Court found that negligent discharge of a firearm (Pen. Code § 246.3) could serve as a felony-murder predicate, where the defendant fired with a “collateral purpose” of frightening the victims. In so holding, however, the Court seemingly revived a merger test which it had disapproved in *People v. Hansen* (1994) 9 Cal.4th 300 (the case which had upheld submission of Pen. Code § 246 (firing at inhabited dwelling) as a felony murder predicate)...
  •  *People v. Randle* (2005) 35 Cal.4th 987. However, just months later, in another case involving § 246.3, the Court employed a similar “collateral purpose” analysis but reached the opposite result. Because Randle admittedly fired “at” the victim, he did not have any “collateral purpose”
beyond assault. Accordingly, because the firearm discharge felony was really an assault, it “merged” with the homicide and could not serve as a felony-murder predicate under Ireland.

- People v. Chun (2009) 45 Cal.4th 1172. In Chun, the Court recognized the anomalies and inconsistencies emerging out of its merger cases. The Court overruled both Hansen (re § 246) and Robertson (re § 246.3) and also disapproved the reasoning, but not the result, in Randle. The Court abandoned the “collateral purpose” test because (among other problems) it seemed to require a case-by-case factual determination. Returning to the original reasoning underlying Ireland, the Court concluded that the merger doctrine barred use of felony assault or any other “assaultive” felony, including § 246 or § 246.3.

SECOND-DEGREE MURDER – IMPLIED MALICE.

- Implied malice standard.
  - People v. Knoller (2007) 41 Cal.4th 139 (a.k.a., “the dog case”). Implied malice requires conscious disregard of danger to human life. Awareness of risk of great bodily injury is not sufficient. However, it’s not necessary to find awareness of a “high probability” conduct will cause death.

- Failure to act insufficient basis for implied malice.
  - People v. Whisenhunt (2006) 44 Cal.4th 174. A “failure to act” (e.g., a failure to obtain medical assistance for an injured victim) does not “on its own, constitute an ‘intentional act’” for implied malice murder.

- Death of fetus.
  - People v. Taylor (2004) 32 Cal.4th 863. Defendant shot and killed his ex-girlfriend, apparently unaware that she was 11-13 weeks pregnant. In addition to his first-degree murder conviction for death of the mother, defendant could be liable for second-degree murder of the fetus, on an implied malice theory, despite his lack of knowledge of the pregnancy. “In battering and shooting [his ex-girlfriend], defendant acted with knowledge of the danger to and conscious disregard for life in general. That is all that is required for implied malice murder. He did not need to be specifically aware how many potential victims his conscious
ATTENUATED THEORIES OF MURDER LIABILITY – AIDING/ABETTING, NATURAL AND PROBABLE CONSEQUENCES, ETC.

- Traditional aiding/abetting (not involving natural and probable consequences doctrine). Director perpetrator and aider’s different levels of culpability.
  - Aider/abettor may be guilty of greater degree of offense than direct perpetrator.
    - *People v. McCoy* (2001) 25 Cal.4th 1111. Aider’s level of guilt depends upon own level of culpability. Where multiple participants are involved jointly in committing or causing a killing “‘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.’” (Quoting Dressler treatise.) Consequently, an aider/abettor can be guilty of greater degree of offense than actual perpetrator. E.g., Aider may be guilty of murder though actual perpetrator’s offense is lesser due to heat-of-passion or imperfect self-defense (as in *McCoy* opinion’s Othello example).
  - Conversely, aider/abettor may be guilty of lesser degree of offense than direct perpetrator.
    - *People v. Nero* (2010) 181 Cal.App.4th 504. CALCRIM and CALJIC aiding/abetting instructions stating that all principals are equally guilty are misleading. They fail to require jurors to assess aider’s distinct mental state and fail to inform them of possibility that aider may be guilty of greater or lesser offense than direct perpetrator. Error prejudicial, where jurors could have found that aider/abettor acted under provocation and heat-of-passion.

- Natural and probable consequences.
  - Under totality of evidence, first-degree murder and attempted murder were natural and probable consequences of aiding-abetting simple assault (fistfight) on member of another gang, even though aiders weren’t aware their companion was armed.
  - Scenario began with “verbal challenge” by members of...
defendants’ group – “Where are you from?,” which, per testimony, meant “What gang are you from?”

- Dispositive question is “not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable.”
- “Given the gang-related purpose of the initial assault ..., the jury could reasonably have found that a person in defendants’ position (i.e., a gang member) would have or should have known that retaliation was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable...”
- Aider may be guilty of lesser crime than actual perpetrator, depending on level of crime reasonably foreseeable.
- *People v. Hart* (2009) 176 Cal.App.4th 662. Aider’s level of culpability depends upon the “natural and probable consequences” of the target crime which the defendant intended to aid. E.g., though perpetrator ultimately committed attempted premeditated murder, jury might found that only attempted murder, without premeditation, was a “natural and probable consequence” of the contemplated target crime. The standard instructions were defective under circumstances because they did not require jurors to assess whether attempted *premeditated* murder, as opposed to simple attempted murder, was natural and probable consequence of the target crime which Hart aided.

- Proximate cause and provocative act doctrine.
- *People v. Sanchez* (2001) 26 Cal.4th 834. Sanchez and a member of a rival gang member exchanged gun fire. A stray bullet struck and killed an innocent bystander. Both Sanchez and his rival (who was tried as a co-defendant) were convicted of first-degree murder, though it was impossible to determine which of them had fired the fatal shot. The Supreme Court affirmed. Regardless of whose bullet struck the bystander, Sanchez’s life-threatening conduct was a “substantial concurrent, and hence proximate, cause” of the bystander’s death. Because the evidence supported a finding that Sanchez acted with a premeditated intent to kill the rival gang-member and that he intentionally fired from a vehicle, he was liable for first-degree murder for the bystander’s death. (Although the case had been briefed
principally under the “provocative act” doctrine, the Supreme Court instead analyzed it as a proximate cause question.)

• But compare People v. Cervantes (2001) 26 Cal.4th 860 (decided same day as Sanchez). Cervantes, a gang member, “perpetrated a nonfatal shooting that quickly precipitated a revenge killing by members of an opposing street gang.” In contrast to Sanchez, the Supreme Court found that Cervantes was not liable for murder under proximate cause and provocative act principles. There was no evidence that the actual perpetrators of the later murder were even present at the earlier incident in which Cervantes shot a rival gang member, and Cervantes himself was not present at the scene when the perpetrators shot the victim in revenge. “[T]he critical fact that distinguishes this case from other provocative act murder cases [fn.] is that here the actual murderers were not responding to defendant’s provocative act by shooting back at him or an accomplice, in the course of which someone was killed.” “The fatal shots were fired ... instead at a third party who was not a party to the initial provocative act. .... The wilful and malicious murder ... at the hands of others was an independent intervening act,” such that the evidence was insufficient, as a matter of law, to establish proximate cause to hold Cervantes liable for that murder.

• People v. Concha (2009) 47 Cal.4th 653. “Provocative act murder is not an independent crime with a fixed level of liability,” but is simply a “shorthand” for a type of causation scenario. As in McCoy (the 2001 case as disparate levels of culpability for perpetrator and aider/abettor), the Court emphasizes that, in joint causation scenarios, the respective actors’ levels of guilt “are permitted to float free” depending upon each individual’s mens rea. The Supreme Court agrees that, depending on facts, a provocative act murder may support first-degree murder liability, depending on the individual defendant’s mens rea: “The jury must find that the individual defendant personally acted wilfully, and with deliberation and premeditation” in the criminal act which provoked the fatal shooting. The instructions in Concha were defective in failing to communicate that requirement of premeditation on the part of the individual defendant.
VOLUNTARY MANSLAUGHTER

• Elements
  • Intent to kill not an element.
  • Contrary to earlier opinions describing specific intent to kill as an element of voluntary manslaughter, Lasko and Blakely hold that heat-of-passion or imperfect self-defense will also negate implied malice (conscious disregard for human life) and reduce an unintentional killing to voluntary manslaughter.

• Heat-of-passion and/or imperfect self-defense not elements of offense of voluntary manslaughter.
  • People v. Rios (2000) 23 Cal.4th 450. Imperfect self-defense and/or heat-of-passion negate malice and reduce an offense which would otherwise be murder to voluntary manslaughter. However, these malice-negating grounds are not elements of offense of voluntary manslaughter, and prosecution is not required to prove either circumstance in a trial (or retrial) for voluntary manslaughter.

• Imperfect self-defense
  • Imperfect defense of another.
    • People v. Randle (2005) 35 Cal.4th 987. The Flannel/Christian S. imperfect self-defense doctrine applies equally to actual but unreasonable belief in need to use deadly force in defense of someone else. Refusal of imperfect defense instructions prejudicial, where evidence could have supported finding that Randle fired in unreasonable belief in necessity to protect his younger cousin, who was being beaten after being caught trying to burglarize a car.

• CALCRIM instructional defects.
  • People v. Her (2009) 181 Cal.App.4th 349, identifies a defect in the imperfect self-defense instructions for reducing attempted murder to attempted voluntary manslaughter. The imperfect self-defense instruction for an actual killing (CALCRIM 571) correctly requires either an unreasonable belief in imminent
danger of death or great bodily injury or an unreasonable belief that immediate use of deadly force was necessary. (“At least one of those beliefs was unreasonable.”) But the counterpart instruction for an attempted killing, CALCRIM 604, erroneously indicates that “imperfect self-defense exists only if both of the defendant’s beliefs were unreasonable.”

• Heat-of-passion.
  • Sufficiency of provocation.
    • People v. Moya (2009) 47 Cal.4th 537. Neither a fight the previous evening nor the victim’s act of kicking the defendant’s car the following morning constituted sufficient provocation to warrant heat-of-passion instructions.
  • Provocation standard – ordinary person would act rashly, etc., not that ordinary person would kill.
• People v. Naajera (2006) 138 Cal.App.4th 212. Contrary to common prosecutorial argument, heat-of-passion manslaughter does not require finding that the provocation would cause an ordinary person to kill – but only that it would cause an ordinary person to act rashly and without judgment. “The focus is on the provocation – the surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.”

IN Voluntary MansLAUGHTER

• Misdemeanor manslaughter.
• People v. Cox (2000) 23 Cal.4th 665. Under the “misdemeanor manslaughter” rule (homicide resulting from unlawful act not amounting to felony, Pen. Code § 192(b)), the test is not whether the predicate misdemeanor is inherently dangerous in the abstract, but whether it was dangerous under the circumstances. Trial court erred in instructing that misdemeanor battery was inherently dangerous as a matter of law.
ATTEMPTED MURDER

- Transferred intent, concurrent intent and the “kill zone” theory.
  - *People v. Bland* (2002) 28 Cal.4th 313. *Bland* addressed the possible attempted murder liability of a defendant who intends to kill a particular person, but also endangers others, such as where a defendant fires at a group of people, intending to kill a specific victim.
  - Transferred intent inapplicable to attempted murder. In contrast to murder itself, the concept of “transferred intent” does *not* apply to the inchoate crime of attempted murder. However, “the person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory.”
  - The “kill zone” theory. Even when a defendant “primarily” intends to kill a specific person, he may also have a “concurrent intent” to kill others in the “zone of harm” created by his attack. “[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [an out-of-state court] termed the “‘kill zone.’” “Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.”
  - The Supreme Court revisited the “kill zone” theory in *People v. Stone* (2009) 46 Cal.4th 131:
    - The “kill zone” theory “addresses ... whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted persons.” But that theory “simply does not fit” a scenario where the defendant is not targeting a specific victim, but fires at a group of people with the more generic intent of killing “someone.”
    - But the defendant may still be convicted of attempted murder, based on a generalized intent to kill, such as where a terrorist places a bomb on a plane.” “An indiscriminate would-be killer is just as culpable as one who targets a specific person.” “The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being.”
• Stone also identified two defects in CALCRIM’s original “kill zone” pattern instruction, CALCRIM 600. Rather than refer to “an intent to kill ‘anyone,’” the instruction should require an intent to kill “everyone in the kill zone.” Second, in its original form, one sentence of CALCRIM 600 referred to “an intent to harm everyone in the kill zone, rather than to kill everyone in the zone.” (CALCRIM has subsequently revised No. 600 on both points (substituting “everyone” for “anyone” and “kill” for “harm”).)

• Number of attempted murder convictions.
  • People v. Perez (2010) 50 Cal.4th 222. Although a generic intent to kill someone will suffice for attempted murder liability, the firing of a single shot with that intent will support only one such conviction. “[W]here the shooter indiscriminately fires a single shot at a group of persons with specific intent to kill someone, but without targeting any particular individual or individuals, he is guilty of a single count of attempted murder.” (Perez had been convicted of eight counts of attempted murder for firing a single shot at a group of police officers; the Supreme Court let one count stand and reversed the others.)