

**FELONY MURDER REVISITED:
NEW OPPORTUNITIES FOR CHALLENGES TO CALIFORNIA'S
NON-STATUTORY SECOND-DEGREE FELONY-MURDER RULE
(& OTHER RECENT FELONY-MURDER DEVELOPMENTS)**

Prepared by
J. Bradley O'Connell
Staff Attorney, First District Appellate Project
jboc@fdap.org
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I. JUSTICES INVITE RE-EXAMINATION OF NON-STATUTORY SECOND-DEGREE FELONY-MURDER DOCTRINE.

In *People v. Robertson* (2004) 34 Cal.4th 156, a divided California Supreme Court held, 4-3, that the *Ireland* “merger” doctrine did not bar submission of grossly negligent discharge of a firearm (Pen. Code § 246.3) as a predicate for second-degree felony-murder. The “merger” holding itself is discussed in greater detail in Part II-C, below. But *Robertson* is more noteworthy for a different reason: **Three members of the Court (Justices Brown, Moreno, and Werdegar) announced their willingness to re-examine the more fundamental question of the legitimacy of California's non-statutory second-degree felony-murder doctrine.**

From the 1960's through the 1980's, a number of California Supreme Court decisions described felony-murder in general and second-degree felony-murder in particular as a “disfavored” doctrine which was to be given the “narrowest possible application.” On at least two occasions, individual justices (Chief Justice Bird, Justice Panelli) went farther and suggested that the Court should abandon the doctrine altogether. The topic had largely been abandoned for the past 15 years until the individual concurring and dissenting opinions in *Robertson* placed it back on the table. This was a surprising development – both because no such issues had been raised in the *Robertson* briefing and because the current critics of the doctrine appear to span the current Court's ideological spectrum.

Justice Brown's dissent in *Robertson* lays out the most extensive critique of second-degree felony-murder. Justice Werdegar wrote a shorter dissent stating her agreement with Justice Brown's position. Justice Kennard, the third *Robertson* dissenter, confined her opinion to the merger issue; since she believed that doctrine required reversal, she took no position on the overall validity of the doctrine. However, Justice Moreno, a member of the *Robertson* majority, wrote a concurring opinion, reviewing the history of the doctrine and questioning its soundness. He indicated his own willingness to consider abandonment of the doctrine, but concurred in the *Robertson* majority's disposition because the issue had not been briefed. Meanwhile, the *Robertson* majority opinion itself said nothing on the subject. Consequently, there appear to be at least three justices willing to re-examine second-degree felony-murder, and possibly a fourth (Justice Kennard).

It is now up to criminal appellate defenders to take up the justices' invitation and to present the Court with the appropriate case(s) to re-examine second-degree felony-murder "from scratch." The author of these materials currently has another felony-murder case pending on review which could be a vehicle for consideration of some of these issues. *People v. Randle*, S117370 (former appellate opn., 109 Cal.App.4th 313). It is not entirely clear which issues the Supreme Court intends to address in *Randle*.¹ But the Supreme Court has granted filing of a supplemental brief relating the broad questions raised in the *Robertson* concurrence and dissents to arguments already pending in *Randle*.

The most broadly-applicable sections of the *Randle* supplemental brief are attached, and the main arguments will only be summarized very briefly here.² The issues require appreciation of the very different bases of the first- and second-degree felony-murder doctrines and the relationship of each doctrine to malice aforethought. In *People v. Dillon* (1984) 34 Cal.3d 441, the Supreme Court rejected a *Sandstrom* argument that the *first-degree* felony-murder theory amounted to an unconstitutional presumption of malice. The Supreme Court concluded that first-degree felony-murder was *statutory*. Section 189 (which enumerates robbery, rape, burglary and other predicate felonies for first-degree felony-murder) establishes a form of first-degree murder *which does not include any element of malice*. Because the Legislature had not made malice an element of that form of murder, there was no unconstitutional presumption of an element of the offense. *But the Supreme Court emphasized that second-degree felony-murder was a judicially created doctrine with no statutory basis.* (*Dillon, supra*, at p. 472 fn. 19.) It has repeated that distinction in other

¹ The *Randle* appellate court upheld the felony-murder instructions (which, like those in *Robertson*, submitted § 246.3 as a predicate offense), but reversed the murder conviction based on the erroneous refusal of instructions on imperfect defense of another. The Attorney General petitioned for review on the imperfect self-defense issue, but the Answer raised the various felony-murder issues (incl. merger, presumption of malice, and due process/retroactivity). Because the Supreme Court granted review without expressly designating issues, both sides' briefs have treated all the issues (both imperfect defense and felony-murder related) as before the Court. (Cal. Rules of Court, rule 29.1(b)(2)(B).)

² In addition to the attached portions, the *Randle* supplemental brief also includes two additional *Robertson*-related arguments: (1) that, because *Robertson*'s reformulation of the "merger" test depends upon the specific facts of the case, Sixth Amendment principles (*Apprendi*, etc.) require jury determination and instructions on whether the felony had the requisite "collateral purpose"; and (2) that *Robertson*'s revision of the merger test represents an unforeseeable judicial enlargement of criminal liability and cannot be applied retroactively to a pre-*Robertson* homicide. Those two arguments are not included in these materials because they are more dependent upon the specific predicate felony at issue (§ 246.3) and the factual circumstances and instructions of the *Randle* case. However, the complete *Randle* brief is available from the author upon request (jbo@fdap.org).

cases; even the *Robertson* majority opinion refers to second-degree felony-murder as a “common law” rather than a statutory doctrine.

The *Dillon* opinion begged a question which has gone unanswered for the intervening 20 years. If second-degree felony-murder is not statutory, what is the relationship between that theory and malice aforethought, which sections 187 and 188 make an element of every murder (except first-degree felony murder, per § 189)? And does this distinction between the first- and second-degree felony-murder theories necessarily mean that the latter, non-statutory doctrine *is* vulnerable to a *Sandstrom*/presumption challenge, even though the former is not? As reflected in the attached *Randle* supplemental brief, these questions suggest an “either/or” framework for challenging the entire second-degree felony-murder doctrine:

--The “either” argument (*Sandstrom* presumption). Since there is no statute comparable to § 189, malice must still be an element of second-degree felony-murder. Consequently, as suggested by the language of most of the Supreme Court’s prior opinions, the second-degree felony-murder theory must “posit” or “impute” this necessary element from the commission of an inherently dangerous felony. But, if those characterizations are accurate, then the theory operates as an unconstitutional presumption of malice, contrary to *Sandstrom v. Montana* and its progeny. (*Randle* Supp. Br. Part I-B & -C)

--The “or” argument (separation of powers). In *Randle* and other cases, the Attorney General has opposed the *Sandstrom* argument on the ground that, like first-degree felony-murder, second-degree felony-murder is an offense which requires no element of malice aforethought. If that is so, then the entire doctrine is unconstitutional on a different ground – as a violation of separation of powers (Cal. Const. art. III, § 3; Pen. Code § 6). Judicial invention of a rule which *eliminates a statutorily-prescribed element* of an offense (the malice element of murder) is tantamount to judicial recognition of a common law or non-statutory offense. That is the very kind of judicial usurpation of the Legislature’s role which section 6 prohibits. (Separation-of-powers principles also figured heavily in Justice Brown’s *Robertson* dissent and, to a lesser degree, in Justice Moreno’s concurrence.) (*Randle* Supp. Br. Part I-D)

--Legislative intent & other policy arguments. Many of the critiques of second-degree felony-murder in the separate *Robertson* terms were framed more in policy than in constitutional terms. The justices suggested that the rule undermined legislative intent – without explicitly casting it as a constitutional separation-of-powers violation. Additionally, throughout the dissents and the concurrence, the justices suggested that the doctrine does not fill any true need, since in most cases in will be easy enough to prove malice without reliance on felony-murder. But it creates anomalies by treating negligent conduct more severely than intentional

assaults and by eliminating the malice inquiry in the cases in which it would be most important. For example as Justice Brown remarked, “It takes no genius to discern that a rule that relieves the People of the need to prove malice *because* the defendant asserts he did not harbor any is problematic.” (*Robertson, supra*, 34 Cal.4th at pp. 189-190 (Brown, J., dis. opn.), emphasis in original.) Consequently, in addition to the “either/or” pair of constitutional challenges (presumption or separation of powers), briefs should also invite the Court to abandon or curtail the doctrine on policy grounds. Because it is a doctrine of the Court’s own creation, the Court itself has the power to repudiate or modify it. Ideally, these legislative intent and policy arguments should be tailored to the specific predicate felony at issue or to other aspects of the instructions. For example, the attached *Randle* brief argues that extension of felony-murder to section 246.3 subverts legislative intent because that development was unforeseeable in light of the case law on the books at the time of the Legislature’s enactment of that felony in 1988. (*Randle* Supp. Br. Part II-A)

As mentioned above, it is not clear whether the Supreme Court will actually reach these issues in *Randle*. In the meantime, since the *Robertson* opinions put the future of second-degree felony-murder “in play,” **appellate counsel should challenge the legitimacy of this doctrine in every second-degree murder case in which felony-murder instructions were given**, regardless of the specific predicate felony involved. While *Robertson* and *Randle* have both involved section 246.3, the broader doctrinal critiques discussed here are not limited to that offense or to others involving possible “merger” arguments. They arise from the simple fact that California’s *statutes* require malice as an element of second-degree murder, while this “creature of judicial invention” does not. Additionally, given the stated willingness of Justices Brown, Werdegar, and Moreno to re-examine second-degree felony-murder (as well as the hope that Justice Kennard may be persuadable as well), counsel should be creative in fashioning additional challenges to the doctrine and its application to specific felonies, in addition to the arguments sketched here.

II. OTHER RECENT NOTEWORTHY FELONY-MURDER DEVELOPMENTS.

In addition to the intriguing possibilities raised by the *Robertson* opinions, there have been a number of other significant rulings over the past year or so on various aspects of felony-murder (both first- and second-degree).

A. Scope of First-Degree Felony-Murder

“Drive-by” murder distinct from felony-murder. *People v. Chavez* (2004) 118 Cal.App.4th 379. Immediately after its enumeration of the predicate felonies for first-degree murder, Pen. Code § 189(a) continues: “or any murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first-degree.” But, per the *Chavez* court, “drive-by shooting is not part of that list” of felony-murder predicates and is not within the first-degree

felony-murder rule. “The drive-by shooting clause requires ‘an intent to inflict death’ which is never an element of felony murder.” Consequently, it was error to deliver felony-murder instructions indicating that it was irrelevant whether the drive-by killing was “intentional, unintentional or accidental.” Those instructions were inconsistent with the correct instructions requiring intent to inflict death. (But error found harmless under *Chapman*.)

B. Scope of Second-Degree Felony Murder

Veh. Code § 2800.2? *People v. Howard*, S108353 (argued in Supreme Court, Nov. 4, 2004). The Supreme Court is currently considering whether evading an officer with “wilful or wanton disregard for the safety of persons or property” (§ 2800.2) is an “inherently dangerous felony” subject to second-degree felony murder rule.

Compare: Veh. Code § 2800.3 not within felony-murder. *People v. Jones* (2000) 82 Cal.App.4th 663. Evading an officer resulting in death or serious bodily injury (§ 2800.3) cannot support felony-murder liability because the only mental state required is the intent to evade, and the conduct would be a misdemeanor (§ 2800.1) if there had been no injury or death. Unlike 2800.2 (currently under review in *Howard*), 2800.2 does not require “wilful or wanton disregard” for safety.

C. Merger Doctrine

Grossly negligent discharge of firearm (Pen. Code § 246.3) not barred by “merger” doctrine. *People v. Robertson* (2004) 34 Cal.4th 156. As noted earlier, the majority opinion in *Robertson* held that the *Ireland* “merger” doctrine did not preclude use of grossly negligent discharge of a firearm (§ 246.3) as a predicate for second-degree felony-murder (at least under the specific circumstances of that case). But the Court reiterated that the merger rule would continue to bar submission of assault with a deadly weapon as a basis for felony-murder liability. As argued in the various dissents (and passingly acknowledged in the majority opinion), this means that a less culpable defendant who kills negligently may be held strictly liable for felony-murder, without the necessity for proof of malice. But a more culpable defendant who intentionally fires at the victim can still require the prosecution to prove malice and can still take advantage of malice-negating grounds for manslaughter (heat of passion & imperfect self-defense).

Additional arguments arising from *Robertson*’s rewriting of “merger” test. In rejecting the merger challenge to submission of § 246.3 in *Robertson*, the majority substantially altered the standards governing the merger doctrine. Those changes should give rise to at least two further arguments. Both the due process/retroactivity and *Apprendi* arguments sketched below have been raised in the briefing in *People v. Randle*, S117370 (although those portions

are not included in the attached excerpts).³

Due process/retroactivity. The *Robertson* majority opinion revived a “collateral and independent purpose” test which the Supreme Court had disapproved just 9 years earlier in the Court most recent merger case, *People v. Hansen* (1995) 9 Cal.4th 300 (also a 4-3 opinion). For the reasons discussed in the superseded appellate opinion in *Robertson* (formerly 109 Cal.App.4th 1740), proper application of the *Hansen* analysis would bar any use of 246.3 as a felony-murder predicate because that offense necessarily includes assaultive as well as merely negligent shootings. Because *Robertson* alters the merger standard in a way that allows felony-murder liability for an offense which would have been barred under the prior case law (*Hansen*), it represents an unforeseeable judicial enlargement of criminal liability. Consequently, due process principles (*Bouie v. City of Columbia* (1964) 378 U.S. 347; etc.) should bar retroactive application of *Robertson*’s revised merger test to any homicide committed prior to the finality of the Supreme Court’s *Robertson* opinion (Sept. 18, 2004).

Apprendi/right to jury trial on “collateral purpose.” As with the question of whether an offense is “inherently dangerous,” in its prior merger opinions, the California Supreme Court had ruled categorically on whether a particular statutory offense was subject to the merger doctrine. But, as applied in *Robertson*, the “collateral purpose” standard appears to depend upon the specific facts of the case. The majority held that *Robertson*’s purpose in firing to *frighten* the victims was an independent purpose which distinguished the negligent shooting there from the kind of traditional assault subject to the merger doctrine. Throughout the opinion, the majority grounded its disposition on “the facts of the present case.” The fact-specific character of *Robertson*’s merger test should implicate the Sixth Amendment right to jury trial (under *Apprendi*, *Blakely*, and other authorities): Because a section 246.3 offense may be the basis of felony-murder liability only if the defendant had some “independent or collateral purpose,” depending on the facts of the case, the Sixth Amendment should require submission of the “collateral purpose” requirement to the jury.

D. Other *Apprendi* Issues

No jury trial right on “inherently dangerous” character of felony, where established by prior case law. *People v. Schaefer* (2004) 118 Cal.App.4th 893. Instructions that methamphetamine manufacture is an inherently dangerous felony for second-degree felony-murder purposes did not violate *Apprendi*. Prior case law has established methamphetamine manufacture’s status as “inherently dangerous” as a matter of law. Because this was a settled

³ As noted earlier (fn. 2), the complete *Randle* supplemental brief is available on request (contact jboc@fdap.org).

question of law rather than a “contested issue of fact,” *Apprendi* did not require jury determination of whether methamphetamine manufacture was inherently dangerous in the abstract. (Note, however, that this rationale should not apply to a putative predicate felony which had *not* already been classified as inherently dangerous in published case law prior to trial.)

E. Relation of Killing to Felony – “Complicity” Standard

Adoption of “logical nexus” standard of “complicity.” *People v. Cavitt* (2004) 33 Cal.4th 187. *Cavitt* clarified the “complicity aspect” of first-degree felony-murder – the test for determining “a nonkiller’s liability for the felony-murder committed by another.” (*Id.* at p. 196, emphasis in original.) The Supreme Court addressed the tension between different formulations of the rule appearing in prior cases. Contrary to oft-repeated language in *People v. Vasquez* (1875) 49 Cal. 560, *Cavitt* holds that felony-murder liability for a nonkiller does *not* require that the co-felon committed the homicide “in furtherance of their common purpose to rob.” But the Court also rejected the Attorney General’s much looser formulation which “would require only a temporal connection between the homicide and the underlying felony” but would not otherwise require any “logical connection” between the two. (*Cavitt, supra*, at pp. 200-201.)

We hold instead that the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, *there must be a logical nexus--i.e., more than mere coincidence of time and place--between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller.* Evidence that the killing facilitated or aided the underlying felony is relevant but is not essential. [¶] We also hold that the requisite temporal relationship between the felony and the homicidal act exists even if the nonkiller is not physically present at the time of the homicide, as long as the felony that the nonkiller committed or attempted to commit and the homicidal act are part of *one continuous transaction.* (*Cavitt, supra*, at p. 187, emphasis added.)

Adequacy of instructions. *People v. Dominguez* (2004) 124 Cal.App.4th 1270 {modified, Jan. 12, 2005 (H022727)}. *Cavitt* held that the standard instruction on aider/abettor liability for felony-murder, CALJIC 8.27, “adequately apprised the jury of the need for a logical nexus between the felonies and the homicide” (though it didn’t use that term) and “the trial court had no sua sponte duty to clarify the logical-nexus requirement.” (*Cavitt, supra*, 33 Cal.4th at p. 203.) But just a few months later in *Dominguez*, the appellate court reversed a murder conviction where: (1) the jurors received almost no instructions on the necessary relationship, except that “the killing occurred during the commission” of the felony (rape); (2) the trial court inexplicably failed to give CALJIC 8.27, despite a defense request; and,

most importantly, (3) *the jurors expressed confusion on the subject, but the court failed to provide any clarification.* The jurors specifically asked, “*Did Dominguez only need to be present at the time of [the victim’s] death, or did he need to kill her himself. We are clear [sic] about the rape element of the crime.*” (Emphasis added.) “Even if the defense had not requested an instruction, a duty to instruct arose when the jury itself sought guidance.” (Citing Pen. Code § 1138) The error was prejudicial because the unanswered “question establishes directly and without need of inference that the jurors were seriously considering the possibility that defendant's involvement in the killing did not go beyond mere presence at the scene,” contrary to the *Cavitt* requirement of a logical nexus.

F. Accidental Death of Accomplice

First-degree felony-murder (arson). *People v. Billa* (2003) 31 Cal.4th 1064. “While committing the arson, one of the conspirators caught fire and burned to death.” Supreme Court upholds felony-murder liability for the other co-conspirators on the scene. “The felony-murder rule applies to death of cohort as much as to the death of an innocent person.” Although the doctrine doesn’t apply when the *victim* of the predicate felony kills one of the confederates, a confederate’s accidental death during the felony does come within the rule – at least, when the other participants are at the scene at the time. Supreme Court distinguishes the contrary result in *People v. Ferlin* (1928) 203 Cal.3d 587, because in *Ferlin* the defendant (though a conspirator in the arson) wasn’t present at the scene. (Court “leave[s] for another day whether *Ferlin* was correctly decided on its facts.”)

Second-degree felony-murder (methamphetamine manufacture). *People v. Schaefer* (2004) 118 Cal.App.4th 893. *Billa* rationale is equally applicable to accidental death of a confederate during an “inherently dangerous” felony subject to second-degree felony-murder rule (flash fire during operation of a methamphetamine lab).

F. Escape Rule

Sex offenses. *People v. Portillo* (2003) 107 Cal.App.4th 834. Under the “escape rule,” the predicate felony continues for purposes of felony-murder liability until the perpetrator has reached a place of temporary safety. While the escape rule has most commonly been applied to homicides occurring during flight from a robbery or burglary, *Portillo* confirms that it applies equally to flight following rape or one of the other sexual offenses enumerated in Pen. Code § 189.

G. Defenses to Predicate Felony

Duress. *People v. Callahan* (2004) 124 Cal.App.4th 198. Although duress is not a defense to the offense of murder (*People v. Anderson* (2002) 28 Cal.4th 767), duress can provide a defense to a felony murder theory by negating the predicate felony (as recognized in *Anderson*). *Callahan* upheld a trial court’s order granting a new trial on ineffective

assistance grounds, based on trial counsel's failure to offer expert testimony supporting duress as to the predicate felonies of robbery and kidnapping.

H. Lesser Included Offenses

No instructions on lesser included offense of predicate felony where felony not separately charged: *People v. Combs* (Dec. 16, 2004) __ Cal.4th __, 22 Cal.Rptr.3d 61, 89 [& prior cases cited there]. Even where prosecution proceeds on robbery felony-murder theory, there's no right to instructions on theft as lesser included of robbery (e.g., per "after-formed intent" rule), *unless the robbery is charged as a separate count*.

- Note, however, that, under numerous earlier Supreme Court rulings, defense is still entitled *upon request* to "pin-point" instructions on the "after-formed intent" rule. See, e.g., *People v. Webster* (1991) 54 Cal.3d 411, 443; *People v. Turner* (1990) 50 Cal.3d 668, 690-691.

Conspiracy to commit robbery as lesser of felony-murder under circumstances?: *People v. Nguyen* (2003) 4 Cal.Rptr.3d 211, *depublished* {formerly 111 Cal.App.4th 184}. This unusual case involving a homicide during a botched robbery plot presented an issue of whether some of the defendants had withdrawn from the robbery conspiracy prior to the homicide. The case was tried solely on a felony-murder theory, predicated on the robbery conspiracy. Under those circumstances, First Dist. Div. 3 held that the defendants were entitled to requested instructions on conspiracy-to-commit-robbery as a lesser included of the charged felony-murder. (Of course, the *Nguyen* opinion is uncitable. Though the issues aren't identical, it's hard to reconcile *Nguyen* with some of the Supreme Court's holdings defining the test for necessarily included offenses.)