

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

<p><b>PEOPLE OF THE STATE OF CALIFORNIA,</b></p> <p><b>Plaintiff and Respondent,</b></p> <p><b>v.</b></p> <p><b>DARRYL RANDLE,</b></p> <p><b>Defendant and Appellant.</b></p>	<p><b>S117370</b></p> <p><b>Court of Appeal</b> <b>No. A097168</b></p> <p><b>(Alameda County</b> <b>Superior Court</b> <b>No. 137823)</b></p>
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**APPELLANT'S SUPPLEMENTAL BRIEF**  
**ON PEOPLE v. ROBERTSON**

**After Decision by the Court of Appeal**  
**First Appellate District, Division One**  
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DARRYL RANDLE,

Defendant and Appellant.

S117370

Court of Appeal  
No. A097168

(Alameda County  
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**INTRODUCTION**

Darryl Randle submits this supplemental brief to address the many implications which *People v. Robertson* (2004) 34 Cal.4th 156, poses for the issues of this case. *Robertson* held that the *Ireland* merger doctrine (*People v. Ireland* (1969) 70 Cal.2d 522) did not bar submission of negligent firearm discharge (Pen. Code § 246.3)<sup>1</sup> as a predicate for second-degree felony-murder “under the facts of the present case” because “the discharge of the firearm was undertaken with a purpose collateral to the resulting homicide.” (*Robertson, supra*, at 171.)

*Robertson* was a 4-3 decision. Justice Moreno wrote a separate concurring opinion, and Justices Kennard, Brown, and Werdegar each wrote separate dissents. Taken together, the majority opinion and the four separate opinions pose fundamental questions about the case-by-case application of the

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<sup>1</sup> Statutory references are to the Penal Code, unless otherwise indicated.

“merger” doctrine and, most significantly, about the constitutionality and continued legitimacy of that non-statutory second-degree felony-murder doctrine itself.

Those broad issues about the history, doctrinal basis, and future of second-degree felony-murder were not decided in *Robertson* because they were far beyond any issue raised by the parties. As Justice Moreno noted:

The subject of my concurrence, the continued viability of the second degree felony murder rule, was neither briefed nor argued in this court, so I have not reached a firm conclusion on this issue, but I write to express my reservations about the doctrine and intention to examine it closely when the issue is clearly raised and briefed in this court. (*Robertson, supra*, 34 Cal.4th at 177 (Moreno, J. , concur. opn.); see also *id.* at 184 fn. 5 (Kennard, J., dis. opn.) [“the issue was not raised in the parties’ briefs or at oral argument”].)

Unlike *Robertson*, Darryl Randle *has* challenged the second-degree felony-murder instructions on multiple constitutional and policy grounds (in addition to the “merger” bar). Both the majority opinion’s reformulations of the merger standard and indeed of the nature of felony-murder itself and the concurring and dissenting opinions’ critiques of that doctrine bear directly on Randle’s arguments. While the *Robertson* opinions placed these important questions on the table and began a discussion about the viability of this unusual “non-statutory” ground for murder, *Robertson* itself was not a suitable case for resolution of those issues. *Randle* is.<sup>2</sup>

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<sup>2</sup> Randle will address *Robertson*’s implications for his arguments in a somewhat different order than in his original Answer Brief on the Merits (AABM). This brief will begin with the doctrinal questions about the viability of felony-murder posed by the various opinions in *Robertson* and will then proceed to the more case-specific issues of applicability of the revived “collateral purpose” merger standard to this jury trial.

**I. AS SUGGESTED IN THE CONCURRING AND DISSENTING OPINIONS IN *ROBERTSON*, THIS COURT SHOULD REPUDIATE THE SECOND-DEGREE FELONY-MURDER THEORY. THIS NON-STATUTORY THEORY NECESSARILY REPRESENTS EITHER AN UNCONSTITUTIONAL PRESUMPTION OF MALICE AFORETHOUGHT, IN VIOLATION OF *SANDSTROM* AND *YATES*, OR A JUDICIAL ABROGATION OF THE STATUTORY ELEMENT OF MALICE, IN VIOLATION OF PENAL SECTION 6, SEPARATION-OF-POWERS, AND DUE PROCESS.**

**A. The *Robertson* Concurring and Dissenting Opinions' Critiques of the Legitimacy of Second-Degree Felony-Murder.**

The various opinions in *Robertson* – the majority opinion as well as the concurrence and the dissents – have re-opened a discussion which animated many of this Court's opinions on felony-murder from the 1960's through the 1980's. This Court often expressed its reservations about the legitimacy and wisdom of the second-degree felony-murder rule and endeavored to give it “... the narrowest possible application” (*People v. Smith* (1984) 35 Cal.3d 798, 803), lest this “creature of judicial invention” (*People v. Burroughs* (1984) 35 Cal.3d 824, 829 fn. 3) “without any express basis in the Penal Code” (*People v. Dillon* (1983) 34 Cal.3d 441, 472 fn. 19) displace the legislatively-enacted element of malice aforethought. The “merger” doctrine of *People v. Ireland* (1969) 70 Cal.2d 522, 539-540, and its progeny was but one front in this Court's effort to rein in this “disfavored doctrine” (*Smith, supra*, at 803).

With the noteworthy exception of *People v. Hansen* (1994) 9 Cal.4th 300, the Court had little occasion to grapple with second-degree felony-murder over the past decade. But the thoughtful opinions in *Robertson* have raised fundamental questions about the legitimacy of the doctrine. Justice Brown, in particular, has reviewed the many shifts in the Court's formulations of the

standards governing the doctrine, as well as the anomalies the rule continues to produce in subjecting less culpable conduct, which is merely negligent, to greater criminal liability than wilful assaults. (*Robertson, supra*, 34 Cal.4th at 186-192 (Brown, J., dis. opn.)). Justices Brown and Werdegar both urged this Court to abandon the doctrine out of respect for the constitutional prerogative of the *Legislature* to establish the elements of crimes. (*Id.* at 189-192 (Brown, J., dis. opn.); *id.* at 185-187 (Werdegar, J., dis. opn.)) Justice Moreno expressed similar concerns about “the continued viability of the second degree felony murder rule” and (while cautioning that he has “not reached a firm conclusion”) declared his “intention to examine it closely when the issue is clearly raised and briefed in this Court.” (*Id.* at 177 (Moreno, J., concur. opn.)).<sup>3</sup> Finally, Justice Kennard took note of her colleagues’ calls “to reconsider the validity” of the doctrine, but “express[ed] no view on this issue” in view of her “conclusion that [Robertson’s] conviction should be reversed in any event and because the issue was not raised in the parties’ briefs.” (*Id.* at 184 fn. 5 (Kennard, J., dis. opn.)).

Randle’s arguments provide this Court with the opportunity to address these broader concerns about the legitimacy of this doctrine – most notably, he has argued that the felony-murder theory operates as an unconstitutional presumption of malice (AABM Part IV) and that any conception of the

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<sup>3</sup> Justices Brown, Moreno, and Werdegar echoed many of the concerns which other justices of this Court had raised in the past. As Justice Panelli wrote in 1989, “we have traveled very close to the edge of our role as judges and have come perilously close to becoming legislators.” (*People v. Patterson* (1989) 49 Cal.3d 615, 641 (Panelli, J., concur. & dis. opn.)). Similarly, Chief Justice Bird undertook an extensive historical survey of the felony-murder concept and declared, “The time has come for this court to discard the artificial and court-created offense of second degree felony murder.” (*Burroughs, supra*, 35 Cal.3d at 836 (Bird, C.J., concur. opn.)).

doctrine as eliminating malice would offend separation-of-powers principles, as codified in section 6 (see AABM 57-58 & fns. 34, 35). Like the concerns raised by Justices Brown, Werdegar and Moreno, Randle’s arguments flow from the non-statutory character of second-degree felony-murder. Under contemporary constitutional principles, it is impossible to reconcile the continued use of an uncodified doctrine to “eliminate[] the need for proof of malice” (*Robertson, supra*, 34 Cal.4th at 165) with the Legislature’s statutes establishing malice aforethought as an element of all forms of murder (§§ 187, 188) except *first-degree* felony-murder (§ 189; *People v. Dillon, supra*, 34 Cal.3d at 471-475).

**B. *Robertson* Represents an Apparent Shift in this Court’s Conception of Second-Degree Felony-Murder from the Historic Model of “Imputing,” “Positing,” or “Presuming” the Element of Malice (as Reiterated in *Hansen*) to One of Eliminating that Statutory Element.**

As this Court has done in the past, the *Robertson* majority opinion acknowledges that, unlike section 189’s codification of first-degree felony-murder, there is no statutory basis for second-degree felony-murder: It “is a common law doctrine.” (*Robertson, supra*, 34 Cal.4th at 166.) But that characterization begs the question of how exactly the rule operates. In particular, what is the relationship of this judicially created doctrine to the statutory element of malice aforethought, which section 187(a) defines as an essential requirement for murder? (See also § 188, defining malice.)

There are two possible models for conceiving the relationship between felony-murder and malice. The first model acknowledges that malice is an element of all forms of second-degree murder (§ 187), and views felony-murder as a device for “positing” or “imputing” malice and excusing the necessity for presentation of evidence of that mental state. Because no statute

has eliminated malice as an element or otherwise codified an offense of second-degree felony-murder and this Court has no authority to delete a statutory element of a crime (§ 6), Randle has contended that the judicially created second-degree rule represents an unconstitutional presumption of that element, under *Yates v. Evatt* (1991) 500 U.S. 391, and *Sandstrom v. Montana* (1979) 442 U.S. 510. (AABM 53-59)

The alternative model, urged by respondent, conceives of felony-murder as *eliminating the element* of malice aforethought. Of course, that *is* how first-degree felony-murder operates. In enacting section 189, which enumerates specific predicate felonies, the Legislature established a form of first-degree murder which does not include any element of malice. (*Dillon, supra*, 34 Cal.3d at 472-476.) Notwithstanding *Dillon's* emphatic limitation of its reasoning to the first-degree rule codified in section 189 (*id.* at 472 fn. 19), respondent has insisted, “the second degree felony-murder rule operates like its first-degree counterpart to *eliminate the element* of malice for murders which occur during the commission of inherently dangerous felonies.” (Ct Appeal RB 36, emphasis added)

At least until *Robertson*, this Court's explanations of the doctrine consistently matched the former of these models – i.e, positing or imputation of malice, not elimination of malice as a required element. (See Part I-C, *infra.*) As the most recent case on the books at the time of this homicide, *People v. Hansen, supra*, 9 Cal.4th 300, is especially significant. As discussed in previous briefing, *Hansen's* explanation of second-degree felony-murder leaves no doubt that the element of malice remains integral to that doctrine: Malice remains a “requisite,” and the rule serves an evidentiary function by “imputing” or “posit[ing] the existence of that crucial mental state,” thereby excusing the need for presentation of further evidence. (*Hansen, supra*, at

308; see AABM 58 for complete quotation.)

The *Robertson* majority opinion appears to endorse a very different concept of the doctrine. Almost as an aside, *Robertson* goes further than any previous opinion and portrays the rule as abrogating, rather than imputing, the element of malice. “Because malice has been eliminated as an element, circumstances that may serve to reduce the crime from murder to manslaughter, such as provocation or imperfect self-defense, are not relevant in the case of a felony murder. [Citations.]” (*Robertson, supra*, 34 Cal.3d at 165.)<sup>4</sup> Since the precise status of malice in the second-degree felony-murder equation was not at issue in *Robertson*,<sup>5</sup> it is not clear whether the majority actually intended (without the benefit of briefing) to alter California’s longstanding formulation of the rule or whether it employed the “eliminated as an element” phrase simply as a shorthand for the more cumbersome traditional definition of “positing” or “imputing” malice. Because cases are not authority on issues not squarely presented, this passing statement should not be regarded as the final word on whether malice remains an element.

Randle contends that *Hansen*’s explanation of second-degree felony-

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<sup>4</sup> None of the cited cases described *second-degree* felony murder as abolishing malice *as an element*. *People v. Balderas* (1985) 41 Cal.3d 144, 197 (which *Robertson* quotes), and *People v. Seaton* (2001) 26 Cal.4th 598, 665, concerned first-degree felony-murder as defined in section 189. The other cited cases either indicated that the rule imputed or “posited” the element of malice (*Ireland, supra*, 70 Cal.2d at 538), failed to explain exactly how it operated (e.g., *People v. Ford* (1964) 60 Cal.2d 772, 795), or did not discuss felony-murder at all (*In re Christian S.* (1994) 9 Cal.4th 768, 773 fn. 1).

<sup>5</sup> The briefing in *Robertson* focused solely on the *Ireland* merger question and did not address whether the second-degree felony-murder doctrine operated as a presumption of the element of malice. (See Appellant’s Answer Brief in *People v. Robertson*, S118034, pp. 10-23.)

murder as a way of “positing” or “imputing” malice is more faithful to the Court’s historic understanding of the concept than the suggestion in *Robertson* that the rule eliminates malice as an element. More importantly, however, **under either model of second-degree felony-murder, the doctrine is unconstitutional, though for different reasons.** The former model (imputing malice) represents an unconstitutional presumption diluting the prosecution’s burden of proof (Part I-C, *infra*), while the latter concept (elimination of a statutory element) poses a judicial usurpation of the Legislature’s exclusive authority to establish the elements of crimes (Part I-D).

**C. If Second-Degree Felony-Murder “Posits” or Imputes” the “Requisite” Element of Malice, as Indicated In *Hansen* and Previous Decisions, It Violates Due Process by Presuming the Mens Rea Element from the Predicate Fact of Unlawful Weapon Use, in Violation of *Sandstrom* and *Yates*.**

From this Court’s earliest cases following the enactment of the Penal Code of 1872, through pre-*Sandstrom* opinions of the 1970’s, the Court repeatedly described the felony-murder doctrine as a mechanism for “imputing,” “superadding” (*People v. Olsen* (1889) 80 Cal. 122, 126-127), “inferring” (*People v. Brown* (1958) 49 Cal.2d 577, 591 fn. 3), “ascribing” (*People v. Washington* (1965) 62 Cal.2d 777, 780; *People v. Antick* (1975) 15 Cal.3d 79, 87), or “presuming” (*People v. Nichols* (1970) 3 Cal.3d 150, 164; *People v. Satchell* (1971) 6 Cal.3d 28, 34 fn. 1) the malice aforethought necessary for a murder conviction.<sup>6</sup>

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<sup>6</sup> E.g.: “In such homicides the law superadds the intent to kill to the original felonious intent, and estops the criminal from denying the further intent thus imputed.” (*Olsen, supra*, 80 Cal. at 127.) “[T]he malice necessary for murder is itself presumed in felony murder from the intent to commit the felony....” (*Nichols, supra*, 3 Cal.3d at 164, emphasis added; accord *Satchell, supra*, 6 Cal.3d at 34 fn. 1.)

Randle recognizes that, in *Dillon*, this Court found that similar recitals “that malice is ‘presumed’ (or a cognate phrase)” did not accurately describe the *first-degree* felony-murder rule. (*Dillon, supra*, 34 Cal.3d at 473 & fn. 20.) But the lynchpin of *Dillon* was the Court’s holding that first-degree felony-murder was statutory (§ 189), while the second-degree version was not. Section 189 established a form of first-degree murder, which does not include any element of malice aforethought. As it was, *Dillon* acknowledged that its statutory construction of the legislative intent underlying section 189 was a tenuous and debatable one. (*Id.* at 472.) The Court admonished that its reasoning would *not* carry over to second-degree felony-murder: “Although the misdemeanor-manslaughter rule is plainly a creature of statute (Pen. Code, § 192, par. 2), we reach the same conclusion as to the first degree felony-murder rule only by piling inference on inference; and the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code [citation].” (*Id.* at 472 fn. 19.)<sup>7</sup>

Section 187 requires malice as an element of murder. The recognition that, “like all murder (except *first degree* felony murder [citation]), [second-degree murder] does require ‘malice aforethought’ [citations]”<sup>8</sup> underlies the Court’s holdings that malice is a “requisite” or “crucial mental state” for a

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<sup>7</sup> While the original Act of 1850 included a statute codifying a broad felony-murder rule (§ 25 of that Act), applicable to all felonies, that provision “was *not* reenacted” in 1872 when the Legislature adopted the Penal Code “and hence ‘ceased to be the law.’ [Citation.]” (*Dillon, supra*, at 467, emphasis in original.) The only felony-murder provision enacted in the 1872 Code was section 189’s establishment of first-degree felony-murder for certain specifically enumerated predicate felonies, and that narrowly-tailored first-degree provision remains California’s only *statutory* felony-murder rule.

<sup>8</sup> 1 Witkin & Epstein, Cal. Criminal Law (3<sup>rd</sup> ed. 2000), Crimes Against the Person § 163, p. 777, emphasis added.

murder conviction, even under the second-degree felony-murder rule. (*Hansen, supra*, 9 Cal.4th at 308.)

Because malice remains an *element* of second-degree murder, it follows that the felony-murder doctrine operates exactly as described in *Hansen* and previous cases – it “posits,” “imputes,” or “presumes” this necessary mental state. Thus, the presumptive “posit”/ “impute” language of the Court’s opinions *does* define how the non-statutory second-degree felony murder rule works, even though that is not a correct description of the distinct statutory offense of first-degree felony-murder (*Dillon, supra*, 34 Cal.3d at 473). Because there has been no statutory elimination of malice, the second-degree doctrine necessarily operates as an evidentiary device, it *presumes* the malice necessary for murder from the intent to commit an inherently dangerous felony. (See *Nichols, supra*, 3 Cal.3d at 164; *Olsen, supra*, 80 Cal. at 126-127.)

There are compelling historical reasons for taking those previous statements at their word. In view of the legal landscape as it appeared in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, it is more reasonable to believe that the Court was simply fashioning a presumption or comparable evidentiary device, rather than eliminating the malice as an element. This Court would never have arrogated to itself the power to write an element out of a statute. Any such use of a “common law” doctrine to remove the statutory malice element of murder would have been recognized as a patent invasion of the Legislature’s exclusive constitutional prerogative to establish and define the elements of crimes. (Cal. Const., art. III, § 3; Pen. Code § 6; see Part I-D, *infra*.)

This Court’s historic respect for separation of powers would have deterred it from creating, by judicial fiat, a form of second-degree murder with no malice element. However, the same cannot be said for judicial

development of a presumption or imputation of malice from commission of a felony. *At the time the Court fashioned the second-degree felony-murder rule, there was no recognized constitutional or statutory bar to judicial development of such an evidentiary presumption or inference.*

Until *Sandstrom v. Montana* (1979) 442 U.S. 510, and other opinions of the 1970's,<sup>9</sup> presumptions or inferences which affected the burden of proof were a common feature of criminal cases.<sup>10</sup> Indeed, several longstanding California presumptions were later found to violate *Sandstrom* principles.<sup>11</sup> But those developments occurred long after this Court's opinions establishing the second-degree felony-murder rule and describing it as form of presumption or imputation.

Nor would there have been any apparent state law impediment to judicial development of a non-statutory presumption or inference of malice. In contrast to specification of the elements of crimes – which was and is committed solely to the Legislature (§ 6) – the courts have long had the authority to fashion common law evidentiary rules, including presumptions. Prior to the adoption of the Evidence Code in 1965, much of California

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<sup>9</sup> E.g., *Ulster County Court v. Allen* (1979) 442 U.S. 140.

<sup>10</sup> Pre-*Sandstrom* case law took the position that such presumptions were constitutionally permissible, so long as there was “sufficient rational connection in experience between the preliminary fact proved and the ultimate fact presumed.” (E.g., *People v. Lachman* (1972) 23 Cal.App.3d 1094, 1098.)

<sup>11</sup> E.g., *People v. Roder* (1983) 33 Cal.3d 491 [presumption of second-hand dealer's knowledge of stolen character of goods, where circumstances should have prompted him to make reasonable inquiry]; *Carella v. California* (1989) 491 U.S. 263 [presumption of intent to steal or to defraud where defendant fails to return rented car within prescribed period]; *People v. Milham* (1984) 159 Cal.App.3d 487, 502-505 [presumption of intoxication from blood alcohol content of 0.10%].

evidence law was uncodified and developed through judicial opinions. (1 Witkin, Cal. Evidence (4<sup>th</sup> ed. 2000), Introduction §§ 11-14, pp. 18-24.) Both before and after the adoption of that Code, California courts have had the authority to “create nonstatutory presumptions” and inferences (*id.*, Introduction § 14, p. 24; *id.*, Burden of Proof & Presumptions, §§ 103, 111-113, pp. 235, 246-249), and this Court did so in criminal as well as civil contexts, often looking to common law.<sup>12</sup>

It is more reasonable to view this Court’s second-degree felony-murder cases as applications of an evidentiary presumption or inference of malice, rooted in common law principles, rather than as exercises in judicial legislation of the elements of crimes. Surely, that interpretation finds greater support in the opinions themselves. Unfortunately, as with many other presumptions which had become embedded in California law, this device cannot survive scrutiny under contemporary (i.e., post-*Sandstrom*) due process principles. Since the felony-murder theory here allowed the jurors to convict Randle of murder based solely upon his unlawful use of a deadly weapon (§ 246.3), without any further inquiry into his subjective mental state, those instructions represented an unlawful presumption of malice from weapon use in violation of *Yates v. Evatt* (1991) 500 U.S. 391. (See AABM 53-59)

**D. Alternatively, If the Second-Degree Felony-Murder Theory Does Eliminate Malice as an Element (As Suggested in *Robertson*), Then It Violates Separation of Powers, Due Process, and Penal Code Section 6, as a Judicial Creation of a Non-Statutory Crime.**

Contrary to the imputation or presumption language of previous cases,

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<sup>12</sup> E.g., *People v. Agnew* (1940) 16 Cal.2d 655, 663 [adopting “common law presumption of unlawfulness in unlawful imprisonment cases,” though “not specifically enumerated” by statute].

the *Robertson* majority opinion appears to take the doctrine in a different direction by passingly describing it as eliminating the *element* of malice. (*Robertson, supra*, 34 Cal.4th at 165.) If (contrary to Part I-C) the Court were to reconceive or reposition second-degree felony-murder as a distinct form of murder with no malice element, it might well sidestep the *Sandstrom-Yates* presumption problems posed by the “posit” or “impute” model. **But that conception of the doctrine would simply trade one constitutional infirmity for another, for it would violate separation of powers principles, as well as section 6.** As Randle has consistently argued (AABM 57-59 & fns. 34, 35), the judiciary cannot employ a non-statutory “common law” doctrine of its own creation to delete or supplant a statutory element of an offense.

Under the California Constitution,<sup>13</sup> “... the power to define crimes and fix penalties is vested exclusively in the legislative branch.’ [Citations.]” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552; accord *People v. Mikhail* (1993) 13 Cal.App.4th 846, 854.) Penal Code section 6 reinforces that constitutional command, providing that “[n]o act or omission ... is criminal or punishable, except as authorized by this Code.”

Far from confer legitimacy, the *Robertson* majority’s description of the non-statutory second-degree felony-murder rule as “a common law doctrine” (*Robertson, supra*, 34 Cal.4th at 166), places it in direct violation of these constitutional and statutory strictures. “[T]here are no common law crimes in California. [Citations.] ‘In this state the common law is of no effect so far as

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<sup>13</sup> “The powers of the state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” (Cal. Const., art. III, § 3.)

the specification of what acts or conduct shall constitute a crime is concerned ...' [Citation.]" (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631-632.)<sup>14</sup> Judicial elimination of a statutorily-prescribed element is tantamount to judicial recognition of a common law offense or judicial prescription of punishment greater than authorized by the Legislature. (*In re Brown* (1973) 9 Cal.3d 612, 624; *People v. Tufunga* (1999) 21 Cal.4th 935, 939.)

Second-degree felony-murder is a "constructive crime" which embodies all the evils condemned in *Keeler* and other cases.<sup>15</sup> Even first-degree felony-murder rests on "inference, implication, and strained interpretation" (cf. *Keeler, supra*, at 632), but at least it has a statutory basis. (*Dillon, supra*, 34 Cal.3d at 472 fn. 19.) Second-degree felony-murder is an even more precarious pile of inferences and rests on nothing but common law; it is not tethered to any statute. If the doctrine is understood as eliminating (rather than just imputing) the element of malice, it directly contravenes section 187. These are the same objections raised by Justice Brown:

There should not be any nonstatutory crimes in California. (Pen. Code § 6.) Certainly there should be none that thwart specific legislative authorizations. It is not enough to congratulate ourselves that the Legislature has allowed us to do so with impunity. It would be remarkable if the Legislature understood the implications of a doctrine we ourselves cannot satisfactorily explain. (*Robertson, supra*, 34 Cal.4th at 191 (Brown, J., dis. opn.); see also *id.* at 185-186 (Werdegar, J., dis. opn.); *id.* at 175-176 (Moreno, J., concur. opn.) [calling the doctrine "deeply

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<sup>14</sup> Accord *Ex parte Harder* (1935) 9 Cal.App.2d 153, 155 ["[w]e cannot have recourse to the common law to determine prohibited acts"].)

<sup>15</sup> "Constructive crimes--crimes built up by courts with the aid of inference, implication, and strained interpretation--are repugnant to the spirit and letter of English and American criminal law.' [Citation.]" (*Keeler supra*, 2 Cal.3d at 632.)

flawed”].)

Not only is second-degree felony-murder a judicial invention, it is an ever-changing one. “It requires the court to determine both how the predicate felony is to be defined and what threshold of dangerousness is sufficient.” (*Robertson, supra*, at 186 (Brown, J., dis. opn.)) Unlike the statutory first-degree felony-murder rule, which enumerates a discrete list of predicate felonies (§ 189), the scope of the second-degree doctrine is fraught with uncertainty “because reasonable judges can disagree about the legitimacy of contracting or expanding the statutory definition of a felony in order to conclude that a particular violation should be deemed inherently dangerous. [Citation.]” (*Ibid.*) The Court’s attempts to rein in the rule via the merger doctrine have introduced an additional layer of uncertainty because almost every successive opinion has modified the governing test. The Court adopted an “independent felonious intent” test in *People v. Mattison* (1971) 4 Cal.3d 177, 185, repudiated it in *Hansen, supra*, 9 Cal.4th at 315, and has now resurrected it in *Robertson*. (*Robertson, supra*, 34 Cal.4th at 171 (maj. opn.)) “[W]e are changing the rules yet again.” (*Id.* at 186 (Brown, J., dis. opn.); accord *id.* at 180 (Kennard, J., dis. opn.); *id.* at 185 (Werdegar, dis. opn.))

As discussed in Part IV, *infra*, the successive judicial alterations of the scope of second-degree felony-murder (such as *Robertson*’s revival of the “independent felonious purpose” test) pose due process retroactivity problems, as well. Because it does not rest on any statutory text and the judicially declared standards, such as they are, are so amorphous and subject to change (see *Robertson, supra*, at 186-188 (Brown, J., dis. opn.)), the doctrine does not impart the requisite certainty as to which specific felonies may later be declared sufficiently dangerous to trigger the rule (or which ones may be

declared exempt from the merger prohibition).

This Court should not be in the business of defining crimes or non-statutory theories of criminal liability. And the very exercise of attempting to define the scope of second-degree felony-murder has required the Court to revisit the subject again and again over the decades in what is essentially a legislative task of adopting and then revising the substantive definition of an offense. Assuming that second-degree felony-murder is a form of murder requiring no element of malice (as respondent has contended), then it is a lawless one, for it was promulgated by the wrong branch of government.

**E. Conclusion.**

This Court has not been afraid to re-examine the validity of its own longstanding assumptions about important tenets of homicide law. It did so four years in *People v. Lasko* (2000) 23 Cal.4th 101, 110, when it held (contrary to numerous prior opinions) that intent to kill is not an element of voluntary manslaughter. “[T]he foundations of and need .... for a nonstatutory second degree felony-murder rule” are “ripe” for a similar “reexamination.” (*Robertson, supra*, 34 Cal.4th at 185 (Werdegar, J., dis. opn.).

Regardless of how the doctrine is conceived, it is constitutionally infirm. If it “posits” or “imputes” the element of malice, it is an unconstitutional presumption. If it eliminates malice as an element, it is a judicially created common law crime, contrary to the separation of powers doctrine. If California is to have an offense of second-degree felony-murder, it is up to the Legislature, not this Court, to establish and define that offense.

## II. THE SECOND-DEGREE FELONY-MURDER THEORY CONTRAVENES LEGISLATIVE INTENT.

Even if this Court does not believe that separation-of-powers or due process principles compel its repudiation, the Court should still abandon the second-degree felony-murder rule in light of the policy and jurisprudential considerations discussed in the concurring and dissenting opinions in *Robertson*. Because “[s]econd degree felony murder does not have the same statutory basis” as first-degree felony-murder, it “may be abrogated by this court [citations],” even without a finding that it is unconstitutional. (*Robertson, supra*, 34 Cal.4th at 175 (Moreno, J., concur. opn.)) Those concerns have particular application to two specific legislative intent challenges Randle has raised to extension of the felony-murder doctrine to section 246.3: contravention of the Legislature’s expectations at the time of its enactment of section 246.3 in 1988 (AABM Part II-F), and the impropriety of use of a non-statutory judicially-created theory to supplant the Legislature’s statutory rule (§ 192(a)) that a homicide “upon a sudden quarrel or heat of passion” is voluntary manslaughter (AABM Part V).<sup>16</sup>

### A. The Legislature Had No Expectation or Intent to Authorize a New Basis for Felony-Murder Liability When It Enacted Section 246.3.

As this Court has said in numerous contexts, its paramount duty is to ascertain and give effect to the intent of the Legislature.<sup>17</sup> The question then

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<sup>16</sup> Here too, because Quincy Robertson did not raise either of these legislative intent arguments, this Court had no occasion to address them. But because Darryl Randle has squarely raised these issues, this Court cannot avoid deciding them in this case.

<sup>17</sup> E.g., *People v. Mendoza* (2000) 23 Cal.4th 897, 905; *People v. Ledesma* (1997) 16 Cal.4th 90, 95 (& cases cited there).

is – or should be – whether the Legislature intended to radically alter homicide law when it enacted this new felony in 1988. It cannot seriously be argued that the Legislature gave any thought to the possibility of its use as a felony-murder predicate when it established this new wobbler. Instead, the case for inclusion of section 246.3 within second-degree felony-murder ultimately comes down to a theory of “legislation by accident” – that is, that Legislature should have anticipated that the new offense would be swept up within this doctrine. Yet, there are two patent problems with that line of reasoning.

First, although this surely has never been the Court’s intention, the second-degree felony-murder doctrine has created a “gotcha” trap for the Legislature. Even where the Legislature never made any affirmative conscious decision to extend felony-murder liability to a particular offense (as with § 246.3), the courts may do so anyway on the theory that it follows inexorably from the creation of any offense which is later deemed to be inherently dangerous. Not only does this view attach unintended consequences to legislative enactments and undermine comity between the Legislature and the judiciary, it hamstring the Legislature’s ability to craft new offenses. When the Legislature perceives that certain conduct poses sufficient risks to the public to warrant criminal penalties (in this case, either a county jail term or a prison sentence of up to three years), it should be able to enact such penalties without fear that the courts will subsequently up the ante and transform the offense into a new form of murder, exempt from the statutorily-prescribed requirement of malice.

Second, any suggestion that the Legislature implicitly authorized felony-murder for section 246.3 collapses altogether in view of the ever-changing character of this Court’s felony-murder standards, as recounted in the *Robertson* dissents. *It is unfair for this Court to extend second-degree*

*felony-murder to an offense on the basis of standards other than those extant at the time of the Legislature’s enactment of that felony.* Section 246.3 was enacted during a period which, in retrospect, appears to have been the high-water mark of this Court’s view of the merger doctrine. The most recent opinion then on the books was *People v. Smith* (1984) 35 Cal.3d 798, which applied the merger prohibition, outside its original context of felony assaults (§ 245), to bar felony-murder liability for child abuse (§ 273a). As noted earlier (AABM 45), *Smith* also approved an appellate opinion which had applied the merger bar to discharging a firearm at an inhabited building (§ 246). (*Id.* at 805, citing *People v. Wesley* (1970) 10 Cal.App.3d 902, 907.)<sup>18</sup>

The extant case law did not give the Legislature fair notice that a firearm discharge offense such as new section 246.3 would be subject to the “disfavored” felony-murder doctrine. It is unreasonable to employ the substantially revised standards of 2004, to say that the Legislature implicitly authorized felony-murder liability when it enacted section 246.3 in 1988.

**B. Application of the Judicially Created Second-Degree Felony-Murder Rule to Section 246.3 Contravenes the Legislature’s Specification, in Section 192, That Homicides in the Heat of Passion, Including Shooting Deaths, Are Voluntary Manslaughter.**

Though Robertson did not raise the issue and the majority did not discuss it, Justices Kennard, Brown, and Werdegar criticized the use of a non-statutory doctrine to override the Legislature’s *statutory* command fixing killings in the heat of passion as voluntary manslaughter (§ 192(a)). The

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<sup>18</sup> The *Smith* opinion also contained some of the Court’s strongest admonitions that second-degree felony-murder was a “highly artificial,” “disfavored,” “anachronistic[],” and even “barbaric” concept,” which should “be given the narrowest possible application.” (*Smith, supra*, at 803.)

inclusion of section 246.3 brings the non-statutory felony-murder doctrine into conflict with section 192(a) in a way which none of this Court's prior cases did, because offenses previously declared felony-murder predicates (e.g. manufacturing methamphetamine, kidnaping) do not present issues of heat of passion (or its counterpart, imperfect self-defense). But history shows that heat-of-passion homicides *commonly* involve shootings which would come within section 246.3. (See AABM 62) "By holding that the second degree felony-murder rule applies to violations of section 246.3, the majority undermines the Legislature's determination that homicides committed in the heat of passion or in unreasonable self-defense are not murder but voluntary manslaughter." (*Robertson, supra*, 34 Cal.4th at 182 fn. 4 (Kennard, J., dis. opn.), emphasis added.)

The putative distinction between assault with a firearm (which, under the majority opinion, is still subject to the *Ireland* merger prohibition) and reckless firing only accentuates the problem by turning the culpability calculus on its head. "[I]t simply cannot be the law that a defendant who shot the victim with the intent to kill or injure, but can show he or she acted in unreasonable self-defense, may be convicted only of voluntary manslaughter, whereas a defendant who shot only to scare the victim is precluded from raising that defense and is strictly liable as a murderer." (*Robertson, supra*, 34 Cal.4th at 185 (Werdegar, J., dis. opn.); accord *id.* at 181 (Kennard, J., dis. opn.); *id.* at 176 (Moreno, J., concur. opn.)) As Justice Brown notes, this approach subverts the entire legislative distinction between murder and voluntary manslaughter by foreclosing any inquiry into malice and the circumstances which would negate it *in the very situations in which those factors are most crucial to assessment of the defendant's true culpability*: "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.” (*Id.* at 189-190 (Brown, J. , dis. opn.).)

The Court cannot permit this collision between a judicially created doctrine without statutory basis and the explicit legislative intent embodied in section 192(a). Regardless of whether this Court takes this occasion to discard the second-degree felony-murder doctrine altogether or simply draws the line at its use to supplant section 192(a) in shooting homicides, the Court should repudiate these jury instructions’ foreclosure of consideration of the statutory manslaughter ground of heat of passion.

**C. Because Second-Degree Felony-Murder is a Judicially Created Doctrine, This Court Should Abandon or Substantially Curtail It to Avoid Subversion of Legislative Intent.**

The *Robertson* majority opinion passingly notes the “anomaly” presented by the extension of felony-murder to section 246.3 (the more punitive treatment of defendants who kill negligently rather than intentionally): “The asserted anomaly identified by the Court of Appeal [the superseded appellate opinion in *Robertson*] is characteristic of the second degree felony-murder rule in general and is inherent in the doctrine’s premise that it is reasonable to impute malice--or, more precisely, to eliminate consideration of the presence or absence of actual malice--because of the defendant’s commission of an underlying felony that is inherently and foreseeably dangerous.” (*Robertson, supra*, 34 Cal.4th at 173.)

That passage implies that there is nothing the Court can do about this inversion of the traditional gradations of culpability. Where a statute produces such a distortion that may be true, but not when it is a result of a doctrine of the Court’s own making. This “creature of judicial invention” (*People v. Burroughs, supra*, 35 Cal.3d at 829 fn. 3) should not be permitted to take on

a life of its own, beyond the Court’s control. This Court has the power and the responsibility to examine whether the doctrine is subverting the Legislature’s calibration of homicide offenses or is failing to serve its asserted policy objectives. (See *Robertson, supra*, at 176-177 (Moreno, J., concur. opn.).)

If the “anomaly” presented by the doctrine’s application to cases like *Robertson* and *Randle* “is characteristic of the second degree felony-murder rule in general” (*Robertson, supra*, at 173), as the majority opinion states, then the Court should abandon it altogether for the reasons suggested by Justices Brown and Moreno.<sup>19</sup> Alternatively, if it is the doctrine’s application to section 246.3 which poses a more acute problem than its use for other dangerous felonies (as suggested by Justices Kennard and Werdegar), the Court can rule more narrowly and simply prohibit felony-murder liability for that offense. (*Id.* at 182-183 (Kennard, J., dis. opn.); *id.* at 185-186 (Werdegar, J., dis. opn.).) Either way, it is within the province of this Court to redress the injustice presented by the doctrine’s application in a case like this, and Randle respectfully urges the Court to do so.

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<sup>19</sup> As those justices note, in the majority of homicides involving reckless, highly dangerous conduct, prosecutors will have little difficulty obtaining a murder conviction by proving malice aforethought. Those cases which present more difficult questions, such as merely negligent conduct or circumstances of provocation or imperfect self-defense, are precisely the ones in which the prosecution *should* be required to sustain its burden of proving malice and the jurors should be permitted to consider grounds for manslaughter. (*Id.* at 176-177 (Moreno, J., concur. opn.); *id.* at 191-192 (Brown, J., dis. opn.).)

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