

FIRST DISTRICT APPELLATE PROJECT

JURY INSTRUCTIONS
RELATING TO THE LAW OF HOMICIDE

January, 1995

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Updated February 2001

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Updated May 2002

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"But from our appellate perspective, of the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions."

(People v. Thompkins (1987) 195 Cal.App.3d 244, 252.)

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I. INTRODUCTION: SCOPE OF THESE MATERIALS

These materials were originally prepared in connection with the First District Appellate Project's training seminar on the law of homicide, presented January 28, 1995. They have since been updated twice: in 2001 by panel attorney George Schraer, and in 2002 (in connection with the June 2002 Homicide/Sex Offense Seminar) by FDAP staff attorney Renee Torres.

These materials provide an overview of some key points of law concerning instructions in homicide cases.

The materials first present some general principles of black-letter law concerning jury instructions in all cases. This is not intended to be a comprehensive listing, but rather a general framework within which the more specific homicide instruction issues fall. We have presented much of this general material by way of quotes from the cases, in order to give a sense of the courts' rationale and holdings.

The materials then discuss specific issues concerning instructions in homicide cases. It is not possible to present a comprehensive list of instructional issues in homicide cases. However, the materials attempt to set out a number of important areas, particularly involving recent case law .

As noted, these materials were originally compiled in January, 1995, and updated in February 2001 and May 2002. Before

citing any recent Court of Appeal case discussed in the materials, the practitioner should check to make sure the case has not been depublished or review granted.

Finally, please note that the materials are not comprehensive. A number of areas have not been included, or are only included in brief:

- death penalty and special circumstance issues;¹
- the appellate standard of review or standard of prejudice for instructional error;
- aider and abettor liability or other types of vicarious liability;
- conspiracy law as it relates to homicide (conspiracy to commit murder);
- vehicular homicide.

In sum, these materials are intended to provide a framework and starting point for the practitioner dealing with basic homicide instructional issues.

¹ The California Appellate Project (San Francisco) compiles materials on death penalty and special circumstances issues.

II. BLACK-LETTER LAW ON JURY INSTRUCTIONS IN GENERAL

This section is a summary of some of the key points of law concerning jury instructions in general. The listing is not comprehensive, but is presented here to give the general framework which covers the specific homicide instruction cases discussed in the remaining part of these materials.

We have used quotes from the cases here, to give a sense of the scope and rationale of the courts' broad holdings on the general law of jury instructions.

Please remember that these materials do not include a discussion of the appellate standard of review or the standard of prejudice for instructional error; those questions are discussed in separate materials prepared for this training seminar.

The requirement that the judge instruct the jury is set out in Penal Code § 1093, subd. (f):

"The judge may then [after argument of counsel] charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party; and the judge may state the testimony, and he or she may make such comment on the evidence and the testimony and credibility of any witness as in his or her opinion is necessary for the proper determination of the case and he or she may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case. Upon the jury

retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy."

The law concerning jury instructions is generally divided into two major areas: (1) instructions which must be given sua sponte by the court; and (2) instructions which should be given upon request of a party. Case law involving these two areas is presented below. In addition, certain general black-letter principles of law concerning instructions are also summarized.

A. SUA SPONTE INSTRUCTIONS

1. The court must instruct sua sponte on the general principles of law relevant to the case.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.]"
(People v. St. Martin (1970) 1 Cal.3d 524, 531.)

2. Some "general principles" which require sua sponte instructions.

_____ A large number of instructions are required sua

sponte, and a complete listing is beyond the scope of these materials. The following are major areas in which it has been held that instructions must be given sua sponte. _____

(a) Elements of the offense.

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense. [Citation.]"
(People v. Cummings (1993) 4 Cal.4th 1233, 1311.)

The elements of the offense include the necessary intent for the crime:

"As one of the essential elements of robbery is a specific intent to steal [citations], it follows that it was the trial court's duty in the case at bench to so instruct the jury even without a request therefor by defendant. [Citation.]"
(People v. Ford (1964) 60 Cal.2d 772, 793, disapproved on other grounds in People v. Satchell (1971) 6 Cal.3d 28.)

(b) Burden of proof.

"Apparently through inadvertence the trial court failed to include in its charge to the jury any specific instruction that the defendants were presumed to be innocent and that the prosecution had the burden of proving their guilt beyond a reasonable doubt. ... Even though no such instruction is requested, the court must nevertheless instruct sua sponte on those general principles of law which are closely and openly connected with the facts and are necessary for the jury's understanding of the case."
(People v. Vann (1974) 12 Cal.3d 220, 225-226.)

The requirement for instructions on burden of proof includes instructing the jury as to any burdens placed on the defendant to prove defenses:

"The court is required to instruct the jury on both the assignment and the magnitude of burdens of proof. [Citation.]" (People v. Figueroa (1986) 41 Cal.3d 714, 721. Original emphasis.)

(c) Lesser included offenses.

"That obligation [to instruct on general principles of law governing the case] has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citation.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]" (People v. Breverman (1998) 19 Cal.4th 142, 154-155, quoting People v. Sedeno (1974) 10 Cal.3d 703, 715-716.)

"In People v. Flannel (1979) 25 Cal.3d 668, 684-685 fn. 12, the lead opinion disapproved the suggestion that 'jury instructions must be given whenever any evidence is presented, no matter how weak' ... The lead opinion stated that the court need only give the instruction if the accused proffers evidence sufficient to 'deserve consideration by the jury, i.e., "evidence

from which a jury composed of reasonable men could have concluded" that the particular facts underlying the instruction did exist. [Citation.]

This does not require-- or permit-- the trial court to determine the credibility of witnesses. It simply frees the court from any obligation to present theories to the jury which the jury could not reasonably find to exist. ...

Flannel did not directly discuss the standard to be utilized in determining when the court has a duty to instruct sua sponte on necessarily included offenses. However, logic would seem to require that the same standard should generally apply. The trial court is not obligated to instruct sua sponte on necessarily included offenses unless the evidence would justify a conviction of such offenses. [Citation.]"

(People v. Wickersham (1982) 32 Cal.3d 307, 324-325.)

"For purposes of determining whether an instruction on a lesser included offense may or must be given an offense is necessarily included in the charged offense if under the statutory definition of the charged offense it cannot be committed without committing the lesser offense, or if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed. [Citation.]"

(People v. Geiger (1984) 35 Cal.3d 510, 517 fn. 4, overruled on other grounds in People v. Birks (1998) 19 Cal.4th 108.)

"It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.

[Citation.]"
(People v. Dewberry (1959) 51 Cal.2d 548, 555.)

"[A] jury should be restricted only from returning a verdict on, not from considering or deliberating on, a lesser included offense before acquitting of the greater offense. It should otherwise be free to consider charges in any order it feels conducive to fruitful deliberations.
[Citation.]"
(People v. Hernandez (1988) 47 Cal.3d 315, 352.)

(d) Defenses.

"The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses, including self-defense and unconsciousness, and on the relationship of these defenses to the elements of the charged offense. [Par.] ... [T]he duty to give instructions, sua sponte, on particular defenses and their relevance to the charged offense arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."
(People v. Seden (1974) 10 Cal.3d 703, 716, overruled on other grounds in People v. Breverman (1998) 19 Cal.4th 142.)

"If defendant proffers evidence enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded [that the defense existed]' [citation], the court must so instruct. A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the

evidence should prove minimal and insubstantial, however, the court need not instruct on its effect. [Citations.] In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.' [Citation.] We likewise note that 'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citations.]" (People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

(e) Credibility of witnesses.

"We deem it appropriate ... to reaffirm and reinforce the existing instructions as to the credibility of witnesses which must presently be given -- at least in part (see Pen. Code § 1127)-- sua sponte by the trial court in every criminal case. Thus the substance of the instruction set forth as CALJIC No. 2.20 should henceforth always be given, and while those paragraphs thereof inapplicable under the evidence may be omitted, the paragraphs alerting the jury to the bearing on the credibility of a witness of the 'existence or nonexistence of a bias, interest, or other motive' and the attitude of the witness 'toward the action in which he testifies or toward the giving of testimony,' should be given in any case in which the victim of the alleged offense has testified for the prosecution, regardless of whether specific evidence of any motive or disposition to misstate facts on the part of the complaining witness has been adduced by the defendant.

We are also of the opinion that an instruction derived from CALJIC No. 2.22 ["Weighing Conflicting Testimony"] ... should be given henceforth in every criminal case in which no corroborating evidence is required. ... A new instruction ... should be given in every criminal case in which no corroborating evidence is required and should read substantially as follows: 'Testimony which you believe given by one witness is sufficient

for the proof of any fact. However, before finding any fact to be proved solely by the testimony of such a single witness, you should carefully review all of the testimony upon which proof of such fact depends.'" (People v. Rincon-Pineda (1975) 14 Cal.3d 864, 883-885.)

"[I]t is the duty of the trial court in a criminal case to give, on its own motion, instructions on the pertinent principles of law regarding accomplice testimony `... whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice ...' [Citation] [Fn. 3: The appropriate instructions ... are (1) that the testimony of the accomplice witness is to be viewed with distrust [citation], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated]" (People v. Gordon (1973) 10 Cal.3d 460, 466.)

(f) Technical terms and special meanings.

"Such a [sua sponte] duty [to give clarifying or amplifying instructions] arises where the terms have a technical meaning that is peculiar to the law. As Justice Mosk observed in People v. Failla (1966) 64 Cal.2d 560, 565, `The general rule provides that in defining the elements of a crime it is enough for the court to instruct in the language of the statute when the defendant fails to request amplification thereof. [Citations.] But that rule is always subject to the qualification that "An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court."' [Citation.] However, it is well settled that where the terms `have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required.' [Citation.]"

(People v. Howard (1988) 44 Cal.3d 375, 408.)

(g) Unanimity.

"[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, either the prosecution must select the specific act relied on to prove the charge or the jury must be instructed ... that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act."
(People v. Gordon (1985) 165 Cal.App.3d 839, 853. Original emphasis.)

"The second established principle is that a unanimity instruction is not required when the case falls within the continuous course of conduct exception. ... Analogous to the single course of conduct exception is the third established principle, that the failure to give [a unanimity instruction] is harmless when disagreement by the jury is not reasonably probable. ... The fourth principle applicable to the question whether unanimity instructions are required is that the jury is not required to agree on the specific 'theory' of guilt. [Citation.]"
(People v. Melendez (1990) 224 Cal.App.3d 1420, 1428-1432. Criticized on its holding, but not the above general principles, in People v. Davis (1992) 8 Cal.App.4th 28 and People v. Perez (1993) 21 Cal.App.4th 214.)

"As for the necessity of a unanimous jury on specific charges, we acknowledge that the requirement of unanimity in criminal cases is of constitutional origin. (See Cal. Const., art. I, § 16.) The standard unanimity instruction codifies that principle. ... [Par.] In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no

reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim."
(People v. Jones (1990) 51 Cal.3d 294, 321-322.)

B. REQUESTED INSTRUCTIONS

1. A defendant is entitled to requested instructions which direct the jury's attention to principles of law which may engender a reasonable doubt. However, such instructions cannot be argumentative, and must meet the requirements of "pinpoint" instructions.

The concept of requested "pinpoint" instructions is somewhat elusive and difficult to apply in actual specifics. The California Supreme Court originally stated the basic principle clearly in People v. Sears:

"Section 1096a of the Penal Code declares that when the statutory definition of reasonable doubt is given (see Penal Code § 1096), no other instruction need be given defining reasonable doubt. Despite this section, a defendant, upon proper request therefor, has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered. (People v. Granados, 49 Cal.2d 490, 496.) This right is not limited to felony-murder cases, such as Granados ..., where the defendant is demanding an instruction that the underlying felony must be proved beyond a reasonable doubt. A defendant is entitled to an instruction relating particular facts to any legal issue.

[Citations.]"
(People v. Sears (1970) 2 Cal.3d 180, 190.)

Subsequently, the Court used the term "pinpoint" to describe this principle:

"For his part, the defendant is entitled upon request to an instruction relating particular facts to any legal issue.' [Citation.] Such a requested instruction may, in appropriate circumstances, relate the reasonable doubt standard for proof of guilt to particular elements of the crime charged or may 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citations.]"
(People v. Rincon-Pineda (1975) 14 Cal.3d 864, 885.)

However, in actual application the court has been restrictive in permitting such pinpoint instructions. The court has set forth a number of qualifications concerning pinpoint instructions. First, the instruction cannot be simply duplicative of other instructions already given:

"Defendant also notes that instruction No. 4 would tell the jury he need not prove his innocence or another's guilt; but the court stated this rule in CALJIC No. 2.90, which defines the presumption of innocence and the prosecutor's general burden of proof beyond a reasonable doubt. Defendant's special instructions Nos. 1 and 4 are thus repetitious of instructions already given, the trial court correctly refused them on this ground. [Citation.]"
(People v. Wright (1988) 45 Cal.3d 1126, 1134.)

Second, the instruction cannot be argumentative. By

"argumentative," the court has retreated from the original explicit Sears statement that the instruction can refer to "evidence," and has stated that Sears actually meant that the instruction cannot refer to evidence:

"Defendant's second proposed instruction lists certain specific items of evidence introduced at trial, and would advise the jury that it may 'consider' such evidence in determining whether defendant is guilty beyond a reasonable doubt. The court refused to give this instruction because it is argumentative, i.e., it would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact, and therefore properly belongs not in instructions, but in the arguments of counsel to the jury. [Par.] The court ruled correctly. ... 'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citation.]"
(People v. Wright (1988) 45 Cal.3d 1126, 1135.)

The court explained that the key difference is between instructions which relate principles of law, as opposed to instructions which argued specific facts:

"The difference between an instruction that pinpoints the crux of the defense and one that improperly implies certain conclusions from specified evidence is illustrated by People v. Wilson [citation], a case relied on in Sears. The defendant in Wilson, charged with robbery, put on an alibi defense. The court instructed generally that the prosecution must prove every material fact beyond a reasonable doubt, and defined reasonable doubt The defendant specially requested additional instructions that explained the alibi defense, relating it to

the prosecution's burden of proof, and advising the jury that if it believed the defendant was not present when the crime was committed, he should be acquitted. The court refused these instructions. [Par.] ... The Court of Appeal reversed the conviction, distinguishing between instructions merely 'defining' reasonable doubt and those 'covering a defense as shown by the evidence in the case from which reasonable doubt of the guilt of the defendant may be inferred.' [Citation.] The defendant's requested instruction was in the latter category, for it pinpointed the theory of the defense, namely alibi, and charged the jury on how to relate the evidence of that defense to the prosecution's general burden of proving guilt beyond a reasonable doubt. [This instruction was a valid one.]"
(People v. Wright (1988) 45 Cal.3d 1126, 1137-1138.)

Numerous cases have ruled on particular pinpoint instructions, and it is beyond the scope of these materials to enumerate the cases and holdings. However, some brief examples can illustrate the difficulty in applying the law of pinpoint instructions. In People v. Roberts (1992) 2 Cal.4th 271, the trial court rejected a defense pinpoint instruction, concerning the credibility of witnesses, as argumentative. The evidence in the case showed that certain witnesses for the prosecution had received payments and promises. The Supreme Court held:

"Defendant contends the court erred by not modifying CALJIC No. 2.20 (4th ed., 1980 rev.) as he requested. That instruction reminds jurors to consider witnesses' possible bias, interest, or other motive for giving testimony. Defendant would have had the court specify that the jury must also consider the state's specific promises and payments to

certain prosecution witnesses in evaluating credibility.

Defendant's requested instruction would have been too argumentative. `A criminal defendant is entitled, on request, to an instruction "pinpointing" the theory of his defense. [Citations.] As we recently explained, however, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative [citation], and the effect of certain facts on identified theories `is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.' [Citation.]" (People v. Roberts (1992) 2 Cal.4th 271, 313-314.)

Thus, where there is evidence that a witness has received payments or promises, a defense pinpoint instruction on credibility is apparently vulnerable where it adds a term such as "payments to a witness" to the general instruction on credibility of witnesses. However, in People v. Randle (1992) 8 Cal.App.4th 1023, there was evidence that the defendant changed his appearance after arrest to avoid identification. The prosecution requested a pinpoint instruction on consciousness of guilt, which the trial court gave: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by change of appearance, such attempt may be considered by you as a circumstance tending to show consciousness of guilt." (8 Cal.App.4th at 1036 fn. 3.) The court of appeal had no trouble upholding this instruction against the charge that it violated the rules of pinpoint instructions:

"The instruction at issue here does not focus on specific evidence. A contrary

conclusion might have been reached if the trial court had specifically directed the jury's attention to the change of hairstyle or the missing shirt. No such pinpointing was present here. Instead, the trial court only tailored the instruction to the generic type of consciousness of guilt disclosed by the evidence. ... [Par.] Here, the trial court properly drew to the jury's attention that it was appellant's effort to disguise himself that was the applicable form of suppression of evidence. Such guidance is proper." (People v. Randle (1992) 8 Cal.App.4th 1023, 1036-1037.)

The distinction between "payments to witnesses" and "change of appearance" is not readily apparent. In general, the more specifically the instruction focuses on particular evidence, the more vulnerable it would seem to be. However, from the above examples it appears the line between "specific" evidence and "general theory" is a blurred one.

Note that the court in People v. Saille (1991) 54 Cal.3d 1103 reviewed the law concerning pinpoint instructions, and held that an instruction which relates not to a defense to a crime but rather just to negating an element of the crime, must be requested as a pinpoint instruction.²

2. The court must give a proper requested instruction when there is substantial evidence to support the instruction.

² See discussion of Saille in connection with express malice, infra, at p. 41.

"We have previously enunciated the principles governing the duty of a trial court to give requested instructions. In People v. Carmen, supra, 36 Cal.2d 768, 773-774, we noted that 'it is reversible error to refuse a manslaughter instruction in a case where murder is charged, and the evidence would warrant a conviction of manslaughter.' (Italics added.) We found it 'elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever.'" (Original italics.) We went on to warn that '[t]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. [Citations.] That is a question within the exclusive province of the jury.' (Id.) 'As an obvious corollary, where there is "no substantial evidence ...' the court does not err in refusing to give instructions ..." [Citation.]

".... If defendant proffers evidence enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded that [the substance of the instruction is true]' [citation], the court must so instruct. A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect. [Fn. 12: Many cases cite, often without elaboration, language in Carmen, supra, 36 Cal. 2d 768, or in People v. Modesto (1963) 59 Cal.3d 722, 729, to the effect that jury instruction must be given whenever any evidence is presented, no matter how weak. To the extent that a decision of any court interprets these cases to require instructions without evidence substantial enough to merit consideration, it is disapproved.] In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.'

[Citation.] We likewise note that 'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citation.]"
(People v. Flannel (1979) 25 Cal.3d 668, 684-685.)

3. A court has no obligation to amplify or to alter accepted and correct instructions absent a request.

"The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel."
(People v. Wolcott (1983) 34 Cal.3d 92, 108-109.)

"Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]"
(People v. Andrews (1989) 49 Cal.3d 200, 218.)

4. A court must correct defects in proffered instructions when the nature of the defendant's theory of the instruction is made clear.

"Nichols' proposed instruction No. 5 was identical to one of the instructions which was found to be too long and argumentative in Guzman. [Citation] Further, some of the factors highlighted by the instruction have no application to the present case. Although the trial court did not err in refusing to give the instruction as written, it should not have refused to tailor the instruction to the facts of the case."
(People v. Hall (1980) 28 Cal.3d 143, 159, disapproved on other grounds, People v. Valentine (1986) 42 Cal.3d 170.)

"The trial court must correct defects in proffered instructions where the nature of the defendant's theory is made clear to it."

(People v. Brady (1987) 190 Cal.App.3d 124, 136; disapproved on other grounds in People v. Montoya (1994) 7 Cal.4th 1033, 1040.)

"We reject at the threshold the People's argument that defendant's proposed instruction improperly incorporated Dr. Pezdek's opinions and restated them as facts. To the extent that the proposed instruction was argumentative, the trial court should have tailored the instruction to conform to the requirements of Wright, supra, 45 Cal.3d 1126, rather than deny the instruction outright."

(People v. Fudge (1994) 7 Cal.4th 1075, 1110.)

C. MISCELLANEOUS BLACK-LETTER LAW ON JURY INSTRUCTIONS

1. The jury is presumed to follow instructions.

"The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. [Citation.]"

(People v. Mickey (1991) 54 Cal.3d 612, 689, fn. 17.)³

2. Jury instructions must be viewed as a whole.

³ There are, however, exceptions to the rule. The presumption controls "[i]n the absence of evidence to the contrary." (People v. Beach (1983) 147 Cal.App.3d 612, 625.) Also, the presumption does not apply to instructions limiting the use of certain kinds of evidence, such as the out-of-court statement of a nontestifying codefendant that inculpatates the nondeclarant defendant (People v. Fletcher (1996) 13 Cal.4th 451, 461) or inadmissible but inflammatory evidence of uncharged crimes. (People v. Guerrero (1976) 16 Cal.3d 719, 730.)

"It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citation.] '[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.' [Citation.] 'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.' [Citation.]"
(People v. Burgener (1986) 41 Cal.3d 505, 538-539.)

3. Doubts about the sufficiency of evidence to warrant an instruction should be resolved in defendant's favor.

"Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. Such a rule assures compliance with the rules laid down in section 1093 of the Penal Code."
(People v. Wilson (1967) 66 Cal.2d 749, 763.)

4. The court has a duty not to instruct on principles of law which are irrelevant to the case.

"The trial court's duty in a criminal case to instruct on the general principles of law relevant to the issues raised by the evidence [citations] includes a correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues."
(People v. Satchell (1971) 6 Cal.3d 28, 33 fn.10.)

5. The court cannot direct a verdict on any element, regardless of how conclusive the evidence.

"It has long been recognized that a trial judge `may not direct a verdict of guilty no matter how conclusive the evidence.' [Citations.] [Par] The prohibition against directed verdicts `includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.' [Citation.]... `[N]o fact, not even an undisputed fact, may be determined by the judge.' [Citation.]"
(People v. Figueroa (1986) 41 Cal.3d 714, 724.)

In Figueroa the court held that it was therefore error for the court to instruct the jury, in a securities fraud case, that the notes in question were "securities" under the law. However, in a subsequent case, without any discussion of Figueroa or other authority, the court seemed to retreat from this position:

"Defendant contends the court directed a verdict on an element of the burglary with which he was charged. ... [Par.] The court instructed the jury ... `Every person who enters any structure of a type shown by the evidence in this case with the specific intent to steal ... [is guilty of burglary]. In order to prove ... burglary, each of the following elements must be proved: One, that a person entered a structure of the type shown by the evidence,' [Par.] Section 459 provided in pertinent part at the time of the crimes charged that anyone who enters `any house ... or other building ... with intent to commit grand or petit larceny or any felony is guilty of burglary.

The instruction required the jury to find that defendant entered a structure. It also required the jury to find that defendant entered a structure of the type shown by the evidence. The only thing that the instruction did not require of the jury was a finding that the `structure of the type shown by the

evidence' was a building. But only one type of structure was shown by the evidence: the Davieses' house. By definition the house was a building. No rational trier of fact could have found that the structure shown by the evidence ... was not a building. The law does not require the jury to decide the impossible. There was no error."

(People v. DeSantis (1992) 2 Cal.4th 1198, 1224-1225.)

6. The court must reinstruct the jury if it is apparent that the jury is confused on a point of law.

"Just as the law imposes a sua sponte obligation to instruct on certain principles of law in the first place (those rules openly and closely connected with the case) so does it impose on the judge a duty to reinstruct on the point if it becomes apparent to him that the jury may be confused on the law."

(People v. Valenzuela (1977) 76 Cal.App.3d 218, 221.)

"Defendant contends the court's refusal to further explain the instructions violated [Penal Code] section 1138, which provides that when the jury `desire to be informed on any point of law arising in the case, ... the information required must be given' The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation] Indeed, comments diverging from the standard are often risky. [Citation.] ... But a court must do more than figuratively throw up its hands and tell the

jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given."

(People v. Beardslee (1991) 53 Cal.3d 68, 97.)

7. The court has discretion to give instructions at the beginning of the trial, or before or after closing argument.

"[D]efendant complains of the fact that the trial court chose to give the jury its instructions on circumstantial evidence at the beginning rather than the end of the trial; this procedure, however, is within the discretion of the court. (Penal Code § 1093, subd. 6.; Citation.)"

(People v. Webb (1967) 66 Cal.2d 107, 128.)

"Lamb seeks to distinguish a 'charge' from an 'instruction.' ... However, his argument is contrary to authority. [Citations.] 'The "charge" consists of his (the court's) "instructions," and the latter term is more common.'] While it may be general practice for courts to 'charge the jury' or 'instruct the jury' following argument, when to instruct a jury is a matter within the trial court's discretion. [Citations.]"

(People v. Lamb (1988) 206 Cal.App.3d 397, 400.)

8. The court must submit written instructions to the jury upon request of the jury; otherwise the court has discretion whether to submit written instructions.

"In 1986, [Penal Code] section 1093, subdivision (6), was amended to provide for written instruction upon request by the jury. The section continues to provide for an exercise of discretion in the absence of such a request."

(People v. Sheldon (1989) 48 Cal.3d 935, 944
(original emphasis).)

"[P]rior to deliberations the trial court indicated to the jury that it 'preferred' not to give written instructions. Instead, the court asked the jury to listen to the oral instructions and inform the court if it had any questions the court could answer. ...[Par.] In reviewing claims of error of the kind involved here, our main inquiry is whether the court abused its broad discretion in failing to provide written instructions. ...[Par.] The jury took only one day to reach its guilty verdict. No questions were raised regarding any of the instructions, and no request for rereading instructions was made. Thus, the record contains no evidence indicating the jury was confused or misled by the oral instructions given. [Citation.] We conclude the court did not abuse its discretion in failing to provide the jury with written guilt phase instructions."
(People v. Danielson (1992) 3 Cal.4th 691, 710-711.)

9. Invited error.

Even if defense counsel acquiesces in or requests an erroneous instruction, the instruction will nonetheless be held to be error on appeal, unless defense counsel has expressed a deliberate tactical purpose in requesting the instruction.

"In the absence of a clear tactical purpose, the courts and commentators eschew a finding of the 'invited error' that excuses a trial judge from rendering full and correct instructions on material questions of law. Witkin has stated that, when the trial court has the duty to instruct, sua sponte, on the rules of law necessarily involved in a case, erroneous instructions are reviewable 'though invited by the defendant's own neglect or

mistake.' [Citation.] ... `After all, it is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause.' Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find `invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause."
(People v. Graham (1969) 71 Cal.2d 303, 319.)

"The existence of some conceivable tactical purpose will not support a finding that defense counsel `invited' an error in instructions. The record must reflect that counsel had a deliberate tactical purpose."
(People v. Avalos (1984) 37 Cal.3d 216, 229.)

One of the most frequent areas where the courts find a tactical basis for counsel's actions, is where counsel states that the defendant does not want instructions on lesser included offenses. The courts frequently find, from counsel's comments, that a tactical "all or nothing" choice has been made:

"[T]he court asked defense counsel whether defendant had personally requested that no instruction be given on second degree murder. After counsel replied in the affirmative, the court then asked: `So that the defendant's position is that it is either murder in the first degree or not at all? Defense counsel replied: `That's right.' The court then inquired of defendant personally whether it was his decision also. Defendant replied in the affirmative. ...[Par] [W]e believe the foregoing exchange on the record clearly reflects that the failure to instruct

on second degree murder resulted from a deliberate choice by defense counsel as well as defendant personally to utilize an all-or-nothing tactical strategy."
(People v. Bunyard (1988) 45 Cal.3d 1189, 1234-1235.)

No personal statement of the defendant is needed to apply invited error; counsel's statement, if it sets forth a tactical basis, is sufficient:

"[W]e have never required a personal waiver [from defendant] before applying the invited error doctrine."
(People v. Cooper (1991) 53 Cal.3d 771, 827.)

Finally, note that the invited error requirement that the record show a tactical basis only applies to a situation where the court would have had a sua sponte duty to give an instruction. Where an instruction must be given only on request, simple failure to request it or acceding in giving such an instruction constitutes invited error:

"Defendant asserts the record contains no express articulation of his tactical basis for requesting the instruction, and hence the invited error rule does not apply. [Citation.] But as we recently held [citation], that requirement applies only when the court is under a sua sponte duty to instruct in a manner other than it did."
(People v. Gallego (1990) 52 Cal.3d 115, 183.)

10. Both defendant and defense counsel must be present during jury instructions and during other communications between judge and jurors.

"[Ex parte] communications [between

trial judge and jurors] violate a defendant's right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error ... "
(People v. Wright (1990) 52 Cal.3d 367, 403.)

However, the defendant's absence during certain proceedings has been held not to violate the defendant's rights:

"The cases ... uniformly have held that the accused is not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters in which defendant's presence does not bear a `reasonably substantial relation to the fullness of his opportunity to defend against a charge.' [Citations.]"
(People v. Jackson (1980) 28 Cal.3d 264, 309-310.)

Under this rationale, it has been held that the defendant does not have the right to be present during the rereading of testimony to the jury. (People v. Douglas (1990) 50 Cal.3d 468, 517-518.)

III. RECENT AND LEADING CASE LAW ON HOMICIDE INSTRUCTIONS

These materials discuss leading principles and recent case law on some of the major instructional areas involving homicide. There is an enormous body of instructional law concerning homicide, and homicide itself is divided into a number of different offenses, ranging from first degree premeditated murder to vehicular manslaughter. CALJIC contains more than 50 standard instructions concerning homicide (not including numerous other instructions involving special circumstances), as well as a large number of instructions on justification and defenses to homicide charges, and a discussion of every aspect of homicide instructions is beyond the scope of these materials.

The materials concentrate on instructional areas which have been most frequently discussed in recent cases. For additional discussions of issues concerning homicide, some references include: California Jury Instructions, Criminal [CALJIC], (6th Ed., 1996, and January 2001 Pocket Part), particularly §§ 8.00 et. seq.; Witkin & Epstein, California Criminal Law (3d ed. 2000), Vol. 1, Crimes Against the Person §§ 91-245; FORECITE (2d ed., 1994), Vol 2, §§ 8.00 et. seq.

Please remember that these materials do not discuss issues concerning the death penalty or special circumstances. The materials also do not discuss the standard of prejudice on appeal

for instructional error, and do not discuss issues of vicarious liability (such as aiding and abetting). These latter topics are covered elsewhere in the course of FDAP's training seminar on homicide. Additionally, these materials do not cover the area of vehicular homicide.

A. Elements of the Offenses.

1. Homicide, Murder and Manslaughter Generally.

Some brief definitions:

Homicide is the killing of a human being by another human being. (People v. Caetano (1947) 29 Cal.2d 616, 618.) Homicides are divided into justified or excusable homicides (which are not unlawful), and first degree murder, second degree murder, and manslaughter.

A justifiable homicide is one committed in self defense or defense of others, or by a peace officer carrying out lawful duties. (Penal Code §§ 196, 197.) An excusable homicide is one committed by accident where ordinary caution has been used in the course of doing a lawful act, or when committed by accident in the heat of passion from sufficient provocation when no undue advantage is taken or weapon used. (Penal Code § 195.)

Murder is the unlawful killing (i.e., a killing which is not justifiable or excusable) of a human being or fetus with malice, or

in the course of committing certain felonies. (See generally People v. Dillon (1983) 34 Cal.3d 441.) Malice may be express (intent to kill) or implied (intentional act dangerous to life, done with conscious disregard of risk to life).

First degree murder is premeditated murder, or murder committed in the course of the felonies listed in Penal Code §189, or murder committed by certain specified methods (poison, destructive device, lying in wait, torture, drive-by shooting).

Second degree murder is non-premeditated murder or murder committed in the course of felonies not listed in Penal Code §189 but which are inherently dangerous to human life.

Manslaughter is the unlawful killing of a human being without malice. (Penal Code § 192.) It consists of three types:

Voluntary manslaughter, which is an unlawful killing upon a sudden quarrel or heat of passion or where there is an honest but unreasonable belief in self-defense (Pen. Code § 192; People v. Flannel (1979) 25 Cal.3d 668; In re Christian S. (1994) 7 Cal.4th 768);

Involuntary manslaughter, which is an unintentional killing in the commission of certain misdemeanors, in the negligent commission (or commission in an unlawful manner) of lawful acts which might produce death (Pen. Code § 192),⁴ or in the commission of a felony

⁴ As discussed more fully in the section on involuntary manslaughter, infra, to an extent involuntary manslaughter may also possibly be a catch-all category for certain homicides which

that is not inherently dangerous to human life; and

Vehicular manslaughter (Pen. Code § 192).

The subsections immediately below discuss some instructional issues relating generally to all the forms of homicide. Following these, instructional issues are presented concerning the elements of each form of homicide.

(a) Killing of Fetus.

Until very recently, it was held error for the trial court to fail to instruct that the fetus must be viable. (See People v. Davis (1994) 7 Cal.4th 797.) However, in Davis the court held that for homicides commencing after that case "a fetus is defined as 'the unborn offspring in the postembryonic period, after major structures have been outlined.' [Citation.] This period occurs in humans 'seven or eight weeks after fertilization' [citation] and is a determination to be made by the trier of fact." (7 Cal.4th at p. 810.) Thus, it is no longer correct to instruct the jury that the fetus must be viable.

Davis indicated that this new rule would apply at least to first degree felony-murder where the death of the fetus was the result of the defendant's direct assault on the mother. The court stated: "We ... do not discuss the question of premeditated murder (as opposed to felony-murder) of a fetus." (7 Cal.4th at p. 810,

do not fit in the defined categories of murder and manslaughter.

fn. 2.) It is thus not certain how the court would apply the new definition of fetus to premeditated murder, and what kinds of knowledge and intent on the defendant's part concerning the fetus would be required.

(b) Causation.

In the leading case of People v. Roberts (1992) 2 Cal.4th 271, the court gave an extended discussion of proximate cause. The court held: "The criminal law thus is clear that for liability to be found, the cause of the harm not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act." (2 Cal.4th at p.319.) The court thus found error where the trial judge instructed the jury to disregard foreseeability in determining proximate cause. The court held that "A result cannot be the natural and probable cause of an act if the act was unforeseeable." (Id. at pp. 321-322.)

The Roberts court found sufficient proximate cause, even though the victim may have received inadequate medical treatment:

"If a person inflicts a dangerous wound on another, it is ordinarily no defense that inadequate medical treatment contributed to the victim's death. [Citations.] To be sure, when medical treatment is grossly improper, it may discharge liability for homicide if the maltreatment is the sole cause of death and hence an unforeseeable intervening cause."
(2 Cal.4th at p. 312).

Similarly, the Roberts court found that where the defendant

stabbed another inmate, and the inmate then grabbed a knife and, in an unconscious reaction, stabbed a third party, there was sufficient proximate cause:

"Shots that cause a driver to accelerate impulsively and run over a nearby pedestrian suffice to confer liability [citation]; but if the driver, still upset, had proceeded for several miles before killing a pedestrian, at some point the required causal nexus would have become too attenuated for the initial bad actor to be liable even for manslaughter, much less for first degree murder.

[W]e conclude that [in defendant's case] the evidence sufficed to permit the jury to conclude that [the ultimate victim's] death was the natural and probable consequence of defendant's act. This is so because [the ultimate victim] was in the area in which harm could foreseeably occur as a result of a prison stabbing. ... The jury was entitled to find that the distance [the initial victim] pursued [his attackers] was not so great as to break the chain of causation."
(2 Cal.4th at p. 321.)

The Roberts court did note that "principles of proximate cause may sometimes assign homicide liability when, foreseeable or not, the consequences of a dangerous act directed at a second person cause an impulsive reaction that so naturally leads to a third person's death that the evil actor is deemed worthy of punishment."
(2 Cal.4th at p. 317.) However, the court's opinion on this point seems unclear, since the court went on to state that a cause must be "not so remote as to fail to constitute the natural and probable consequence of the defendant's act," (Id. at p. 319), and that "a

result cannot be the natural and probable cause of an act if the act was unforeseeable." (Id. at pp. 321-322.) In any event, the Roberts court made clear that at least for the vast majority of cases, proximate cause means a result that is direct, natural and probable.

Following Roberts, CALJIC revised its instruction on proximate cause (CALJIC 3.40; see also CALJIC 8.55 which requires for homicides an unlawful act causing death, and instructs the judge to give CALJIC 3.40). The revised instruction now states: "A cause ... is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the [result of the crime] and without which the [result of the crime] would not occur."

This revised instruction was upheld in People v. Temple (1993) 19 Cal.App.4th 1750.

The Temple court also held that there was no error in the trial court's rejection of requested defense instructions amplifying CALJIC 3.40 by stating that "A proximate cause is a cause which could reasonably have been foreseen," and that "An unforeseen ... intervening cause which produces a result which could not have been foreseen is not a proximate cause." (19 Cal.App.4th at p. 1756 n.9.) The Temple court gave no reasons why these instructions were properly rejected, but the court noted that the word 'foreseeable' is not itself part of definition of

proximate cause.

Courts have held that causation is broken when the act of the victim, or some other act, amounts to a "superseding cause:"

"It has long been the rule in criminal prosecutions that the contributory negligence of the victim is not a defense. [Citations.] In order to exonerate a defendant the victim's conduct must not only be a cause of his injury, it must be a superseding cause. `A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability.' [Citation.] ... Thus, it is only an unforeseeable intervening cause, an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause. ... `When defendant's conduct causes panic an act done under the influence of panic or extreme fear will not negative causal connection unless the reaction is wholly abnormal.' [Citation.]"

(People v. Armitage (1987) 194 Cal.App.3d 405, 420-421.)

In People v. Morse (1992) 2 Cal.App.4th 620, 638, the court held that "evidence the victim intentionally caused his own death constitutes a causation defense" (Original emphasis.)⁵

More recently, in the companion cases of People v. Cervantes

⁵ Note, however, that actively and intentionally assisting a person to commit suicide by participating in the suicide itself is murder. (People v. Cleaves (1991) 229 Cal.App.3d 367.) Cleaves also notes that merely furnishing the means of suicide is not murder, but is a violation of Penal Code § 401 (assisting suicide).

(2001) 26 Cal.4th 860 and People v. Sanchez (2001) 26 Cal.4th 834, the California Supreme Court has taken on the formidable task of clarifying concepts of concurrent and superceding causation in the context of gang-related shootings. In People v. Cervantes, supra, defendant, a gang member, shot a member of another gang who tried to defuse an argument at a party. Defendant fled. A short time later, in retaliation, members of that other gang shot and killed a member of defendant's gang, and defendant was convicted of that murder. The actual shooters did not witness defendant's act, and defendant was not present at the scene when the victim was killed. Defendant was tried and convicted of second degree murder on a "provocative act implied malice murder" theory. The Supreme Court reversed Cervantes' conviction, holding there was insufficient evidence that his "provocative act" - shooting a rival gang member at the party - was a proximate cause of the victim's death. "[T]he critical fact that distinguishes this case from other provocative act murder cases 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. . . . To the contrary, the acts of the actual murderers here were themselves criminal, felonious, and perpetrated with malice aforethought. The fatal shots were fired, not at the defendant or an accomplice, but instead at a third party . . . who was not a party to the initial provocative act. It can further be said that

the murderers of Cabrera "intend[ed] to exploit the situation created by [defendant], but [were] not acting in concert with him," a circumstance that is "normally held to relieve the first actor [defendant] of criminal responsibility." (Hart & Honoré, *Causation in the Law*, *supra*, at p. 326, fn. omitted.) In short, nobody forced the [rival gang's] murderous response in this case, if indeed it was a direct response to defendant's act of shooting The willful and malicious murder of [the victim] at the hands of others was an independent intervening act on which defendant's liability for the murder could not be based." (26 Cal.4th at pp. 872-874)

In Sanchez, supra, by contrast, defendant and co-defendant were rival gang members who engaged in an exchange of gunfire on a public street during a drive-by shooting. Defendant shot at codefendant from a car. A single bullet killed a neighbor who happened to be working on his car nearby. The evidence did not establish whose bullet killed the neighbor. Both defendants were convicted of first degree murder. The court of appeal reversed, concluding that the jury must have been convicted defendant of first degree murder on an unsupportable provocative act implied malice murder theory elevated to first degree by operation of the felony murder rule. The Supreme Court reversed the court of appeal, holding that both defendants' shots at each other were substantial concurrent and proximate causes of the innocent bystander's death. Sanchez' first degree murder was sustainable

either on a premeditation theory or by operation of the felony murder rule (intentional discharge of a firearm from a motor vehicle with the specific intent to inflict death), coupled with transferred intent (i.e., the intent to kill codefendant transferred to the innocent bystander.) Justices Kennard and Werdegar agreed with the result but preferred to explain the result in terms of a causal chain of events that proximately caused the victim's death, rather than as a concurrence of causes, and contrasted the Sanchez facts with those in Cervantez, which established a supervening cause that cut off proximate causation. Justice Werdegar thinks the provocative act theory explains both Sanchez and Cervantes, but fails to explain how that implied malice murder theory gets the defendant to first degree murder, which requires express malice.

(c) Aiding and Abetting.

Drive-by shootings have also prompted the California Supreme Court to reexamine principles of aiding and abetting as they arise in homicide and attempted homicide cases. In People v. McCoy (2001) 25 Cal.4th 1111, the Court clarified some of the confusion about the nature and extent of the aider and abettor's liability for the intended, and charged, acts of the direct perpetrator that was engendered by its discussions, in People v. Prettyman (1996) 14 Cal.4th 1114 and People v. Croy (1985) 41 Cal.4th 248, of the aider and abettor's liability for the

unintended crimes that are the natural and probable consequences of the direct perpetrator's acts. In *McCoy*, *supra*, both defendants fired guns from a car, but only the first defendant fired the fatal shots. The first defendant claimed self-defense, and the court of appeal reversed his conviction for instructional error. It reversed *McCoy*'s conviction as well, on the theory that as an aider and abettor he could not be found guilty of a crime greater than the actual perpetrator. The California Supreme Court disagreed, holding that an aider and abettor's liability is based on the actions of the direct perpetrator as well as his own, but he is liable for his own mens rea, not the other person's. (25 Cal.4th at p. 1118.) Thus, "assume someone, let us call him Iago, falsely tells another person, whom we will call Othello, that Othello's wife, Desdemona, was having an affair, hoping that Othello would kill her in a fit of jealousy. Othello does so without Iago's further involvement. In that case, depending on the exact circumstances of the killing, Othello might be guilty of manslaughter, rather than murder, on a heat of passion theory. Othello's guilt of manslaughter, however, should not limit Iago's guilt if his own culpability were greater. Iago should be liable for his own acts as well Othello's, which he induced and encouraged. But Iago's criminal liability, as Othello's, would be based on his own personal mens rea. If, as our hypothetical suggests, Iago acted with malice, he would be guilty of murder even

if Othello, who did the actual killing, was not." (25 Cal.4th at pp. 1121-1122.) Presumably, this means the aider and abettor's liability can be less than, as well as greater than, the direct perpetrator's. The court made clear that "only an aider and abettor's guilt of the intended crime is relevant here. Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequences doctrine." (25 Cal.4th at p. 1117)

Further explication of aiding and abetting is in the works. On March 28, 2001, the Court granted review in People v. Lee, S094597, formerly at 85 Cal.app.4th 706, mod 86, on the question whether, in order to be convicted of an attempt to commit willful, deliberate and premeditated murder under Penal Code section 664, subdivision (a), an aider and abettor personally must have acted with premeditation and deliberation, and if so, what standard of prejudicial error applies to a failure to so instruct the jury.

(d) Jury Unanimity.

It has repeatedly been held that a unanimity instruction is not required concerning different theories of murder: "[I]n a prosecution for first degree murder it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by the statute."

(People v. Milan (1973) 9 Cal.3d 185, 195.)

This holding has been applied in situations where the jury is deciding whether the murder was premeditated or committed in the course of a felony, and where the jury is deciding whether the defendant was the actual perpetrator or an aider and abettor:

"A jury may convict a defendant of first degree murder, however, without making a unanimous choice of one or more of several theories proposed by the prosecution, e.g., that the murder was deliberate and premeditated or that it was committed in the course of a felony. ...[It has also been held that] a conviction of second degree murder did not require unanimous agreement by the jurors on whether the accused was the actual perpetrator or was an aider and abettor."
(People v. Beardslee (1991) 53 Cal.3d 68, 92.)

The court in Beardslee did note that where "the defendant committed multiple independent acts, any of which could have lead to [the death]," a unanimity instruction would be required. (53 Cal.3d at p. 93.) However, the acts would need to be independent: "[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case." [Citation.]" (Ibid.) The Beardslee court distinguished a case such as People v. Dellinger (1984) 163 Cal.App.3d 284, "where a first degree murder conviction was reversed on the ground that the trial court should have instructed the jury on its own motion that a conviction required their unanimous agreement on whether the defendant killed the two-year-

old victim by giving her cocaine or killed her by inflicting a fatal blow to her head." (Ibid.) The Beardslee court noted that "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (Id. at p. 92.)⁶

The United States Supreme Court, in the plurality opinion in Schad v. Arizona (1991) 501 U.S. 624, 111 S.Ct. 2491, held that it was permissible not to require unanimity in deciding that "petitioner murdered either with premeditation or in the course of committing a robbery." (111 S.Ct. at p. 2496.) The Schad plurality did indicate: "That is not to say, however, that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." (Id. at p. 2497.) The limits are inherent in the requirement that "a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to different guesses about its meaning" (Ibid.)

The Schad plurality, however, declined to set forth a specific test for determining when such limits have been reached: "It is, as we have said, impossible to lay down any single analytical model

⁶ The Beardslee court did not specifically approve Dellinger, it just distinguished it. Dellinger has been criticized in People v. Davis (1992) 8 Cal.App.4th 28 and People v. Sutherland (1993) 17 Cal.App.4th 602, 609-611.

for determining when two means are so disparate as to exemplify two inherently separate offenses." (Id. at p. 2503.) The plurality analyzed the specific situation in Schad, holding that premeditated murder and felony-murder can reasonably be viewed as involving equivalent moral culpability, and therefore it was permissible to unite those two means of murder into a single crime. Justice Scalia concurred with the plurality, by looking to historical practice and concluding that "it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is `due.'" (Id. at p. 2507.)

Finally, note that in the very recent case of People v. Santamaria (1994) 8 Cal.4th 903, the court held that the lack of a unanimity requirement for the jury as a whole, concerning theories of murder, also applies to each juror: "Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (8 Cal.4th at p. 919.)

(e) Invited Error.

As noted in the discussion of general jury

instruction principles, supra at page 25, the traditional doctrine of invited error requires an express tactical statement by defense counsel. However, recently the courts possibly have relaxed that requirement, by examining a record that is not entirely explicit and inferring a tactical basis for counsel's actions. This was recently summed up regarding homicide cases in People v. De Leon (1992) 10 Cal.App.4th 815, 823-824:

"The test for instructional 'invited error,' as stated by People v. Graham (1969) 71 Cal.2d 303, 318 requires that 'defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of an instruction.' Recent California Supreme Court cases have eased the 'expressly' requirement and have found 'invited error' where tactical objection was inferable from the record. (People v. Duncan (1991) 53 Cal.3d 955, 969-970 [All-or-nothing tactical strategy]; People v. Cooper (1991) 53 Cal.3d 771, 827 [All-or-nothing tactical strategy]; People v. Whitt (1990) 51 Cal.3d 620, 641 ['Death row' redemption strategy].)"

However, the courts have also found no invited error where no tactical basis could be found for counsel's actions. (People v. Beardslee (1991) 53 Cal.3d 68; People v. De Leon, supra.) Nonetheless, it would be a significant change in the doctrine if the courts avoid the "express" tactical basis requirement altogether, and find invited error where the court itself can imagine some tactical reason why counsel might have acted in the way he or she did.

2. First Degree Murder.

The elements of first degree premeditated murder are generally: (1) Unlawful killing of a human being or a fetus; (2) with malice; (3) with premeditation and deliberation.

In addition, murder (i.e., an unlawful killing with malice) perpetrated by certain specified means is statutorily defined as first degree murder: (1) destructive device or explosive device; (2) poison; (3) lying in wait; (4) torture; (5) drive-by shooting; (6) murder during certain felonies.

(a) Premeditated Murder.

(1) Express Malice.

Malice is an element of first degree premeditated murder and second degree murder (People v. Dillon (1983) 34 Cal.3d 441, 475), and thus the jury must be instructed on malice. Malice is divided into two kinds: express malice and implied malice.

Express malice means an intention to kill. The leading case of People v. Saille (1991) 54 Cal.3d 1103, 1113-1114 explained:

"[Penal Code] Section 188, as amended [in 1981], now provides: `... [Malice] is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. ... When it is shown that the killing resulted from the intentional doing of an act with express ... malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.'

[Par.] ... This [latter] sentence

clearly provides that once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish malice aforethought. ... After this amendment of section 188, express malice and an intent unlawfully to kill are one and the same."

(Italics deleted.)

The Saille court pointed out that the Legislature left unchanged the definition of voluntary manslaughter in Penal Code § 192, meaning that even where there is an unlawful intent to kill, malice can be negated:

"[T]he Legislature left unchanged the definition of voluntary manslaughter in section 192. ... Section 192 defines voluntary manslaughter as the 'unlawful killing of a human being without malice ... [Par.] ... upon a sudden quarrel or heat of passion.' Thus, pursuant to the language of section 188, when an intentional killing is shown, malice aforethought is established. Section 192, however, negates malice when the intentional killing results from a sudden quarrel or heat of passion induced by adequate provocation."
(54 Cal.3d at p. 1114.)

The court in Saille also pointed out that the definition of express malice in Penal Code § 188, a "deliberate intention" to kill, does not mean that the word "deliberate" adds any further requirement to an intention to kill:

"One might argue that the word 'deliberate' has a significance in the distinction between murder and manslaughter. That argument would be mistaken. As noted in In re Thomas C. (1986) 183 Cal.App.3d 786, 796-797: 'In People v. Valentine (1946) 28 Cal.2d 121 our Supreme Court pointed out that it was "incorrect [to differentiate] manslaughter from murder on the basis of

deliberate intent. ... Deliberate intent ... is not an essential element of murder, as such. It is an essential element of one class only of first degree murder and is not at all an element of second degree murder." [Citations.] Indeed, the standard CALJIC instruction (No. 8.11 (1983 rev.) has been held to be a correct definition of express malice aforethought, despite the fact that it does not use the word 'deliberate' as used in Penal Code section 188, but merely states that '[m]alice is express when there is manifested an intention unlawfully to kill a human being.' (CALJIC 8.11.) In short, 'deliberate intention,' as stated in Penal Code section 188, merely distinguishes 'express' from 'implied' malice, whereas premeditation and deliberation is one class of first degree murder.' [Citation.]" (54 Cal.3d at pp. 1114-1115.)

In sum, express malice is defined an intention unlawfully to kill. "'The adverb "unlawfully" in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law.' [Citation.]" (People v. Saille, supra, at p. 1115.)

The Saille court held that even under this narrowed definition of express malice: "A defendant ... is still free to show that because of his mental illness or voluntary intoxication, he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought)." (54 Cal.3d at pp. 1116-1117.) However, the Saille court held that there is no sua sponte duty on the part of the trial judge to instruct the jury on the relationship of voluntary intoxication or mental illness to malice; such instructions must be requested by the defendant, and must meet the

requirements of pinpoint instructions.

CALJIC adopted a new instruction, No. 4.21.1 in response to Saille, instructing a jury on voluntary intoxication as it relates to specific intent. In People v. Aguirre (1995) 31 Cal.App.4th 391 the court held that CALJIC No. 4.21.1 correctly stated the applicable law, was not confusing to a jury, and did not create an impermissible burden-shifting presumption relieving the prosecution of proving specific intent or requiring the defendant to prove intoxication.

Finally, concerning malice, there is a doctrine, known as "transferred intent," in which the defendant's malice towards his or her intended victim is imputed towards an accidental victim: "[U]nder the common law doctrine of transferred intent, if A shoots at B with malice aforethought but instead kills C, who is standing nearby, A is deemed liable for murder notwithstanding lack of intent to kill C." (People v. Roberts (1992) 2 Cal.4th 271, 317.) A also can be convicted for the attempted murder of B and the murder of C. (People v. Scott (1996) 14 Cal.4th 544.)

However, in People v. Czahara (1988) 203 Cal.App.3d 1468, 1471, the court held that "[A] jury should not be instructed on transferred intent to kill when a defendant is charged with multiple attempted murders arising from a single act." The court discussed at length the history of the transferred intent rule, and concluded that:

"Where an act intended to kill one person injures another but, for whatever reason, does not constitute an attempt on the intended victim's life, an instruction on transferred intent may be proper. But where a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another."
(203 Cal.App.3d at p. 1475.)

In People v. Hayden (1994) 22 Cal.App.4th 48, 56-57 the court noted that the Czahara case and some others involved the situation where there is more than one victim:

"These cases involve two murders or attempted murders, including both an 'intended' victim (in the true sense-- i.e., the defendant knew who the victim was and intended to kill him or her) and an unintended victim. Because the fiction of 'transferred' intent to kill is not necessary to hold the defendant liable for the actual murder of the intended victim, some cases have held that it is inapplicable when both the intended victim and an unintended victim are killed."

The doctrine of transferred intent can be somewhat confusing, especially in the context of multiple killings.⁷ CALJIC, in its use note to CALJIC No. 8.65 (on transferred intent), cites People v. Birreuta (1984) 162 Cal.App.3d 454, and states that the instruction should not be given in the situation of multiple

⁷ The doctrine is also confusing in non-homicide contexts. There is a split of authority on the question whether the doctrine of transferred intent applies to charges of assault and/or assault with a deadly weapon. (Compare People v. Lee (1994) 28 Cal.App.4th 1724 [doctrine does not apply to assault since assault is a general intent crime], with People v. Cotton (1980) 113 Cal.App.3d 294 and People v. Williams (1980) 102 Cal.App.3d 1018 [doctrine applies, with certain limitations].)

killings where an intended victim is killed: "This instruction should not be given in a case where the evidence establishes that defendant intended to kill A, actually killed A as intended, but accidentally also killed B. Defendant has a right to have jury instructed that the killing of B is only second degree murder or manslaughter. The doctrine of transferred intent does not apply because public policy is satisfied when defendant is convicted of first degree murder for killing A."

Note that current case law holds the doctrine of transferred intent does not apply to attempted murder. (People v. Calderon (1991) 232 Cal.App.3d 930.) However, the California Supreme Court will be revisiting that question soon. In People v. Bland, S097340 (unpublished CA opinion), argued April 3, 2002, the question presented is whether the transferred intent doctrine permits conviction for the attempted premeditated murder of an unintended victim when the intended victim was killed.

Transferred intent also figures in People v. Lee, S094597 (formerly at 85 Cal.App.4th 706, mod.86, review granted 3/28/01). In an unpublished portion of Lee, the court of appeal held there was substantial evidence to support a transferred intent instruction on the weak theory that the defendants had unintentionally killed two children who were innocent bystanders, as opposed to intentionally killing everyone outside an apartment building targeted because of its association with a rival gang.

When review was granted, however, the issues were limited to those pertaining to aider and abettor liability for attempted first degree murder.

(2) Implied Malice.

See discussion of implied malice in connection with second degree murder, infra at page 80.

(3) Presumption of Malice.

There is a somewhat confusing provision of law concerning malice, stated in Penal Code § 189.5 [formerly Penal Code § 1105]:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

This provision has been held to mean: "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; ..." (People v. Craig (1957) 49 Cal.2d 313, 319.)

This concept of a "presumption" of malice has caused considerable confusion. However, a long line of cases has held clearly that all this section means is that some circumstances of the killing itself may be enough to permit a jury to infer malice. There is no requirement that the defendant bear any burden of proof on lack of malice; however, where circumstances are sufficient to

show malice, then the defendant may bear a burden of producing evidence to raise a reasonable doubt about malice:

"Properly interpreted, section [189.5] merely reflects the commonsense observation that the circumstances of a killing may and often do suggest an inference of malice. Under such circumstances, a prima facie case of murder is established and the burden of producing evidence negating malice falls to the defendant who is, needless to say, in the best position to produce such evidence. Where either the prosecution evidence or evidence presented by the defendant is sufficient to raise a reasonable doubt as to whether the killing was malicious, the prosecution bears the burden of persuading the jury as to the defendant's mental state. Where such evidence is non-existent, however, the prosecution's burden has already been met."

(People v. Hyde (1985) 166 Cal.App.3d 463, 475.)

This limitation on § 189.5 has long been the rule. The California Supreme Court, in a line of cases stemming from People v. Cornett (1948) 33 Cal.2d 33, 42, held that:

"This section does not set forth a rule relating to the burden of proof, but merely declares a rule of procedure that imposes on the defendant only a duty of going forward with the evidence of mitigating circumstances. ... [T]he defendant is not required to prove mitigating circumstances by a preponderance of the evidence, but need only introduce evidence of such circumstances to raise a reasonable doubt of his guilt."

Of critical importance in terms of jury instructions, the cases are clear that it is error for the court to instruct the jury at all in terms of Penal Code § 189.5. The best summary and discussion of the history of this case law is found in People v.

Kelley (1980) 113 Cal.App.3d 1005, 1011-1012:

"`Cloaked in whatever verbalisms, section [189.5] should be excluded from jury instructions. Beyond the apparent fact that it generates more difficulty than value, it is none of the jury's affair and plays no legitimate role in their deliberations. By the time the court instructs the jury, section [189.5] has fulfilled its role in the trial. Having disappeared from the scene, it plays no part in the jury deliberations.' [Citation.]"

Kelley noted that CALJIC has deleted a jury instruction based on Penal Code § 189.5, because the CALJIC commentators explained "the concept underlying Penal Code section [189.5] is not pertinent to the jury's deliberations. [Citation.]" (113 Cal.App.3d at p. 1012.) The Kelley court also noted that the United States Supreme Court, in Mullaney v. Wilbur (1975) 421 U.S. 684, 704, struck down as a violation of due process a Maine statute similar to § 189.5, which had been interpreted to shift the burden of proof to the defendant: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."

In sum, Penal Code § 189.5 is essentially unnecessary. The Supreme Court has noted:

"As defendant suggests, the prosecution must prove every element of a charged offense beyond a reasonable doubt. The accused has no burden of proof or persuasion, even as to his defenses. [Citations.] However, once the prosecution has submitted proof that permits a finding beyond a reasonable doubt on every

element of a charge, the accused may obviously be obliged to respond with evidence that 'raises' or permits a reasonable doubt that he is guilty as charged. (See § 189.5. [Citations.]")
(People v. Gonzalez (1990) 51 Cal.3d 1179, 1214-1215, original emphasis.)

Thus, § 189.5 is basically a rule of sufficiency of evidence that permits a case to be tried as murder, and to go to the jury as murder, where the prosecution has shown an unlawful killing and nothing further is shown to indicate any evidence of mitigation or justification; the jury may infer malice from the circumstances of the killing. However, the jury should not be instructed concerning § 189.5, and should not be instructed that the killing raises a presumption of malice, or that the defendant bears any burden of proof to negate malice.

(4) Premeditation and Deliberation.

There has been little controversy about the basic definitions of "premeditation" and "deliberation." CALJIC 8.20's definition of premeditation was upheld in People v. Goldbach (1972) 27 Cal.App.3d 563, 569 holding that premeditation was correctly defined as simply meaning "considered beforehand."

Similarly, Goldbach upheld CALJIC 8.20's definition of deliberate as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (27 Cal.App.3d at p. 569.)

More recently, the Supreme Court in People v. Daniels (1991)

52 Cal.3d 815, 870 held that "the standard jury instruction (CALJIC No. 8.20) given to define premeditation and deliberation is sufficient."

Two issues concerning premeditation and deliberation have arisen in the past few years. First, defendants argued that it was error for a trial court to refuse a proposed defense instruction on premeditation and deliberation based on the criteria set forth in People v. Anderson (1968) 70 Cal.2d 15, 26-27. In Anderson the Supreme Court set forth three criteria by which an appellate court reviewed the sufficiency of the evidence of premeditation and deliberation: (1) planning activity; (2) motive; and (3) nature of the killing. However, such an instruction was held to be properly refused:

"[T]he Anderson analysis [citation] is intended as a framework to aid in appellate review when a defendant claims that a finding of premeditation and deliberation is not supported by substantial evidence. It was not intended to form the basis for a jury instruction; to the contrary [citation], the standard jury instruction (CALJIC No. 8.20) given to define premeditation and deliberation is sufficient."

(People v. Daniels (1991) 52 Cal.3d 815, 869-870.)

In People v. Cordero (1989) 216 Cal.App.3d 275, the court dealt with another aspect of the definition of premeditation and deliberation. The standard CALJIC 8.20 further defines those terms: "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the

reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill." This phrase is considered to be part of the definition of "deliberation," and in Cordero the jury asked for clarification of the term 'consequences.' The jury wanted to know: "[W]hat exactly does consequences mean? I.e., consequences of the act relating to victim, resulting in death, or consequences relating to defendant personally (i.e., he would face punishment by law if he killed victim." (216 Cal.App.3d at p. 280.) The defense then requested that the court give clarifying instructions, but the trial court refused to give any clarifying instruction. The court of appeal held that this refusal was reversible error.

Regarding the definition of "consequences," the Cordero court held:

"[T]he 'consequences' to be considered for the element of deliberation in murder may include those that affect the perpetrator. A first degree murder conviction is proper although the defendant weighed and considered the consequences only to himself or herself. For example, a felon in a stolen car who kills a police officer during a routine traffic stop does so to avoid apprehension. [Citations.] Conversely, convictions have been upheld where the defendant gave no thought to personal consequences. [Citations.]

In most instances, however, the 'consequences' considered cannot be categorized so easily. Homicides occur in diverse factual settings and the thought processes invoked by assailants are varied; in many instances an assailant will contemplate consequences to both the victim and to his or

her own future. In other cases, the deliberation will simply involve consequences to a third party or even an idea or strongly held principle (e.g., politically or religiously motivated assassinations).

[Par.]

The slayer need not have in mind all or any particular type of consequences; he or she may reflect on several consequences, but it is not a requirement that there be reflection about more than one consequence. A finding of deliberation may be based on any one consequence."

(216 Cal.App.3d at pp. 280-281. Original emphasis.)

There is currently some dispute concerning whether a trial court must give a sua sponte instruction, where evidence warrants it, on the issue of provocation as relating to premeditation; i.e., an instruction that provocation may negate premeditation and thus reduce an offense to second degree murder. (See CALJIC 8.73.)⁸

A series of Supreme Court cases state, at least in dicta, that such an instruction must be given sua sponte. Thus, in the recent case of People v. Johnson (1993) 6 Cal.4th 1, 42-43, the court stated:

"As defendant observes, a sua sponte instruction on provocation and second degree murder must be given 'where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately' to carry it out. (People v. Wickersham (1982) 32 Cal.3d 307, 329.) Wickersham noted that 'the fact that heated words were exchanged or a physical struggle took place between the victim and the

⁸ Provocation may also reduce a killing to manslaughter. See discussion of voluntary manslaughter, infra.

accused before the fatality may be sufficient to raise a reasonable doubt' as to premeditation. (Ibid.)"

The Johnson court held that no such instruction was needed in Johnson, because the evidence was insufficient to justify instructions on the subject. The defendant had put on a defense of alibi, and no other evidence showed provocation by the victim.

However, two recent Court of Appeal opinions have held that there is no sua sponte duty to give such an instruction, and it only needs to be given on request. (People v. Middleton (1997) 52 Cal.App.4th 19; People v. Lee (1994) 28 Cal.App.4th 1724.)

In both cases the court, in a extended discussions, held that the statements of the Supreme Court in Johnson were just dicta, and that, under the Supreme Court's analysis in People v. Saille (1991) 54 Cal.3d 1103, an instruction on provocation is just an instruction which negates an element of an offense, and is not an instruction on a defense. Accordingly, such an instruction only needs to be given on request.

_____Nevertheless, there is an open issue whether the trial court is required sua sponte to instruct the jury on provocation where evidence supports such an instruction.

(b) Murder by Specified Means.

A basic point in connection with murder by specified means is that merely committing a homicide by the specified means does not elevate the killing to first degree

murder. The killing must first be a murder, i.e., an unlawful killing with express or implied malice; only if that is the case, does the use of the specified means elevate the killing to first degree.

Thus, for example, Penal Code § 189 defines murder in the first degree as including murder "by means of a destructive device or explosive." In People v. Morse (1992) 2 Cal.App.4th 620, the court held that the trial court erred when it instructed the jury that if it found that the defendant committed second-degree felony-murder, based on the felony of possessing a destructive device, the murder was then automatically elevated to first degree murder because of the use of the destructive device. The Morse court explained that first the jury must find that the killing was in fact murder, i.e., that it was done with malice:

"This statute [Pen. Code § 189] creates three categories of first degree murder: (1) willful, deliberate, and premeditated murder; (2) first degree felony-murder (a killing `committed in the perpetration of [specified felonies]'); and (3) murder perpetrated by a specified means such as `a destructive device.'

Unlike the second category (first degree felony-murder) which requires neither malice aforethought nor deliberation or premeditation, the third category (murder by a specified means) requires not just a killing but a murder. `It must be emphasized, however, that a killing by one of the means enumerated in the statute is not murder of the first degree unless it is first established that it is murder. If the killing was not murder, it cannot be first degree murder. ...'

(People v. Mattison (1971) 4 Cal.3d 177, 182, original italics.)

The effect of the trial court's instructions was a rewriting of section 189. Instead of "All murder which is perpetrated by means of a destructive device" the section became "All homicide which is perpetrated by means of a destructive device." Put another way, the trial court's instructions added a felony to the first degree felony-murder rule: possession of a destructive device.

Although the reckless possession of a bomb (§ 12303.2) may become second degree murder [i.e., by the doctrine of second degree felony-murder], it does not, thereby, automatically become first degree murder. People v. Mattison, addressing a comparable provision of section 189, stated: "To go further, however and hold that ... the use of poison is enough not only to supply the implied malice of murder but to make that murder of the first degree would make the use of poison serve double duty and result in criminal liability out of all proportion to the 'turpitude of the offender.' [Citation.] It would extend the felony-murder doctrine 'beyond any rational function that it is designed to serve.' [Citation.]" (2 Cal.App.4th at pp. 654-655. Original emphasis.)

(1) Destructive Device.⁹

See discussion of murder by specified means in immediately preceding subsection.

⁹ This discussion concerns first degree murder committed by the means of a destructive device, as defined in Penal Code § 189. The discussion does not involve the special circumstance of killing by means of a destructive device, as defined in Penal Code § 190.2(a)(6). Requirements for special circumstances are not always identical to the requirements for first degree murder.

(2) Lying in Wait.¹⁰

The Supreme Court has consistently upheld the standard CALJIC instruction on lying in wait (CALJIC 8.25), which defines lying in wait as "waiting and watching for an opportune time to act, together with a concealment by ambush or other secret design to take the other person by surprise, even though the victim is aware of the murderer's presence. The lying in wait need not continue for any period of time provided its duration is such to show a state of mind equivalent to premeditation or deliberation." The instruction also states that the murder must be "immediately preceded" by the lying in wait.

This instruction was upheld in People v. Ceja (1993) 4 Cal.4th 1134, 1139:

"[D]efendant argues that this instruction misstates or omits three elements of lying in wait: '[1] a "substantial period of lying in wait"; [2] that the attack proceed from a position of advantage; and [3] that the attack follow immediately after the watchful waiting.' Although the instruction does not verbatim track our language in [a prior case], we have repeatedly upheld the instruction, and continue to do so. [Citations.] ... The instruction contains the substance of all the legal requirements."

There is no requirement that the assailant intend to kill; an

¹⁰ This discussion concerns first degree murder committed by the means of lying in wait, as defined in Penal Code § 189. The discussion does not involve the special circumstance of killing while lying in wait, as defined in Penal Code § 190.2(a)(15). Requirements for special circumstances are not always identical to the requirements for first degree murder.

intent to inflict injury likely to cause death is sufficient: "The trial court correctly instructed that murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death." (People v. Webster (1991) 54 Cal.3d 411, 448.)

The court in Webster further held that "The lying-in-wait instructions also expressed the correct temporal relationship between concealment and attack. For purposes of first degree murder, CALJIC No. 8.25 ... states that the killing must be 'immediately preceded' by the period of lying in wait." (54 Cal.3d at p. 449.) Thus:

"The precise period of time is also not critical. As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise."

(People v. Ceja, supra, 4 Cal.4th at p. 1145.)¹¹

The courts have also consistently held that there does not

¹¹ A series of cases concerning the special circumstance of lying in wait have noted that "If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (Domino v. Superior Court (1982) 129 Cal.App.3d 1000, 1011; People v. Superior Court (Sims) (1986) 185 Cal.App.3d 471, 474.) However, these cases turn on the different wording of the special circumstance statute, and it is not certain what types of break in the chain of lying in wait would constitute a defense to first degree murder by lying in wait. As noted in text, the courts have upheld CALJIC 8.25's statement that the murder must be "immediately preceded" by the lying in wait.

have to be an actual concealment of the assailant, just a concealment of his or her purpose:

"The concealment required for lying in wait `is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations.]"
(People v. Webster, supra, at p. 448.)

In People v. Edwards (1991) 54 Cal.3d 787, 824, the court rejected an argument, in connection with special circumstance of lying in wait, that the jury needs to be instructed that they must unanimously agree which acts constituted the lying in wait. The court held that it is sufficient if each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by the statute. Presumably, the same would be true for first degree murder by lying in wait.

In People v. Ireland (1969) 70 Cal.2d 522, the court held that there cannot be instructions for felony-murder based on a felony, such as assault with a deadly weapon, which is an integral part of the homicide.¹² A similar argument was raised in connection with lying in wait, in People v. Maciel (1987) 199 Cal.App.3d 1042. However, the court held that where a defendant was lying in wait to

¹² Ireland is discussed in more detail in the section on second degree felony-murder, *infra*.

commit assault, the Ireland doctrine did not apply and there was an "adequate basis for criminal responsibility for first degree murder." (199 Cal.App.3d at p. 1049.)

(3) Torture.¹³

In People v. Pensinger (1991) 52 Cal.3d 1210, 1239, the court reviewed the definition of torture murder as defined by Penal Code § 189:

"Torture murder is `murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain.' [Citation.] There is no requirement that the victim be aware of the pain; what is considered culpable enough to punish the crime as a first degree murder is the calculated intent to cause pain for `the purpose of revenge, extortion, persuasion or for any other sadistic purpose.'" [Citations.] However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder `by means of' torture."

Thus, "intent to torture ... must be present in order to sustain a conviction of first degree murder on a theory of torture murder." (People v. Proctor (1992) 4 Cal.4th 499, 531.)¹⁴ Further,

¹³ This discussion concerns first degree murder committed by the means of torture, as defined in Penal Code § 189. The discussion does not involve the special circumstance of killing by means of torture, as defined in Penal Code § 190.2(a)(18). Requirements for special circumstances are not always identical to the requirements for first degree murder.

¹⁴ Cert. granted on an unrelated issue, judgment affirmed, 114 S.Ct. 2630.

"A court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the requisite specific intent to inflict cruel suffering." (People v. Pensinger, supra, at p. 1242.)

In People v. Mills (1991) 1 Cal.App.4th 898, 918, the court stated that "a causal relationship between the torturous acts and the murder has never been held to be an explicit element of torture murder by our Supreme Court." As noted above, in People v. Pensinger, supra, the Supreme Court held that "there must be a causal relationship between the torturous act and death." (52 Cal.3d at p. 1239.) The court in People v. Proctor, supra, reiterated that there must be a "causal relationship" between the torture and death, and explained that "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. [Citation.]" (4 Cal.4th at pp. 530-531.)

There has been some debate among the cases whether this requirement of a causal connection between the torture and death is actually an element of the offense, and thus whether there is a sua sponte duty on the part of the trial court to include in the instructions on torture murder such a causal element. In People v. St. Joseph (1990) 226 Cal.App.3d 289, the court held that there did not have to be such an explicit instruction; the court held that

since the instruction did state that the torture had to be on a living person, the jury could not have found that the wounds were inflicted after death, and that it was clear that the totality of the wounds did cause death so if there was any error it was not prejudicial. In People v. Mills, supra, the court held that even though there was no such explicit instruction in connection with torture murder, the trial judge gave the general proximate cause instruction and that was sufficient.

In response to this discussion, CALJIC revised the torture murder instruction (CALJIC 8.24) to include a specific instruction that "The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were [a] [the] cause of the victim's death." It appears from Pensinger and the other cases noted above, that some form of an instruction on causation is required since a causal relation to death is an essential aspect of torture murder; however, where there is no factual issue concerning causation, presumably the elimination of such an instruction would be found harmless, at least where, as in St. Joseph and Mills, some other instruction can be said to have at least partially covered the point.

The court in People v. Raley (1992) 2 Cal.4th 870, 901 noted that the cases have uniformly upheld the phrase "sadistic purpose" in the definition of torture murder, and held that even where the jury asked for clarification of the term there was no error in

refusing to give such clarification:

"[T]here is no legal definition of the term. The jurors' common understanding of the term was all that was required. `There is no need to instruct a jury on the meaning of terms in common usage, which are presumed to be within the understanding of persons of ordinary intelligence.' [Citation.]" (Original emphasis.)¹⁵

3. First Degree Felony-murder.¹⁶

Penal Code § 189 defines first degree felony-murder as murder committed "in the perpetration of, or attempt to perpetrate" certain specified felonies: arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or offenses under Penal Code §§ 206, 286, 288, 288a, or 289.

The basic requirements for first degree felony-murder were summarized in People v. Berryman (1993) 6 Cal.4th 1048, 1085:

"The mental state required is simply the

¹⁵ The court's discussion of this issue in Raley was in the context of the special circumstance of torture murder, but the discussion refers to the cases dealing with first degree torture murder and would seem to be applicable to the first degree context.

¹⁶ This discussion concerns first degree felony murder as defined in Penal Code § 189. The discussion does not involve the special circumstance of killing by means of felony murder, as defined in Penal Code § 190.2(a)(17). Requirements for special circumstances are not always identical to the requirements for first degree murder.

Please note that the discussion in this section does not include all issues directly relating to aider/abettor liability. A treatment of vicarious liability is beyond the scope of these materials; vicarious liability will be discussed in the panel discussion at FDAP's seminar.

specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. [Citations.] There is no requirement of a strict `causal' [citation] or `temporal' [citation] relationship between the `felony' and the `murder.' All that is demanded is that the two `are parts of one continuous transaction.' [Citation.] There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony. [Citation]."

Thus, malice is not an element of felony-murder, and thus no instruction should be given on it. (People v. Dillon (1983) 34 Cal.3d 441, 475.)

Note that the requirement of specific intent to commit the felony applies even where the felony itself is a general intent crime: "We have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is crime such as rape." (People v. Hernandez (1988) 47 Cal.3d 315, 346.)

Regarding the "causal" connection, although as noted above there does not have to be a strict causal connection, there is a requirement of some connection: "It also is established that the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing." (People v. Proctor (1992) 4 Cal.4th

499, 532.¹⁷) Furthermore, “[a]n unlawful killing is deemed to occur during the commission or attempted commission of an enumerated felony so long as the fatal blow is struck in its course, even if death does not then result.” (People v. Alvarez (1996) 14 Cal.4th 155, 222; see also fn. 28)

Since burglary is one of the enumerated felonies, note that under the Ireland doctrine¹⁸, a burglary undertaken with the intent to commit an assault or to commit murder cannot form the basis for first degree felony-murder, and it is error to instruct the jury on felony-murder based on such burglaries. (People v. Wilson (1969) 1 Cal.3d 431; People v. Garrison (1989) 47 Cal.3d 746.)

A court must instruct sua sponte that the underlying felony (or attempt) must be proved beyond a reasonable doubt (People v. Whitehorn (1963) 60 Cal.2d 256), and that the specific intent to commit the felony must be proved beyond a reasonable doubt (People v. Sears (1965) 62 Cal.2d 737¹⁹). CALJIC No. 8.21 contains an instruction to this effect.

Where the defendant is charged with the underlying felony as well as with felony-murder, the court must instruct sua sponte on

¹⁷ Cert. granted on an unrelated issue, judgment affirmed, 114 S.Ct. 2630.

¹⁸ See discussion of the Ireland doctrine in connection with second degree felony-murder, infra.

¹⁹ Overruled on an unrelated point in People v. Cahill (1993) 5 Cal.4th 478.

lesser included offenses of the underlying felony if there is substantial evidence to find such a lesser. (People v. Ramkeesoon (1985) 39 Cal.3d 346; People v. Kelly (1992) 1 Cal.4th 495, 529-530.)

Note that there is no requirement that the defendant actually be charged with the underlying felony, only that the underlying felony must be proved. (See, e.g., People v. Whitehorn (1963) 60 Cal.2d 256.) In People v. Miller (1994) 28 Cal.App.4th 522, the court held that the requirement of instructing on lessers to the underlying felony did not apply where the defendant was not actually charged with the underlying felony.

The holding in Miller seems inconsistent with the general discussion in Ramkeesoon, which noted that the jury should be able to consider the full range of possible culpability shown by the evidence. If the defendant committed a lesser included offense of the underlying felony that is the basis for the felony-murder theory, the trial court should instruct on theories of homicide premised on the commission of such a felony. These would include second degree felony murder if the lesser included felony was inherently dangerous to human life (see People v. Hansen (1994) 9 Cal.4th 300, 308-309) and involuntary manslaughter if the lesser included offense is not inherently dangerous to human life. (People v. Burroughs (1984) 35 Cal.3d 824, 833-836; People v. Morales (1975) 49 Cal.App.3d 134, 144-145.) Notwithstanding the

analysis outlined above, the California Supreme court has recently reiterated in People v. Silva (2001) 25 Cal.4th 345, 371 that "[a]lthough a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to uncharged offenses relevant only as predicate offenses under the felony-murder doctrine. (People v. Miller (1994) 28 Cal.App.4th 522, 526-527 [33 Cal.Rptr.2d 663]; see People v. Memro, supra, 11 Cal.4th 786, 888-890 (conc. & dis. opn. of Kennard, J.)).) Because defendant was not charged with robbery, the trial court did not have to instruct the jury on theft as a lesser included offense of robbery."

On May 15, 2002, the California Supreme Court granted review in People v. Cavitt, S105058, (unpublished) to consider the "question left open in People v. Pulido (1997) 15 Cal.4th 713: "Does first degree felony murder liability attach to the nonkiller accomplice only when the killing is committed 'in the furtherance of the common design' of the felony, or instead, when the accomplice is 'jointly engaged' in the felony?" Two additional questions are also to be reviewed: "Whether the enumerated felony continues as to every accomplice when some, but not all, reach a place of temporary safety; and "Whether the trial court prejudicially erred in precluding defendants from presenting evidence establishing a cohort harbored independent animus for purposes of first degree felony murder." (02 C.D.O.S.4240) In

Pulido, supra, the Court held that an aider and abettor of a robbery, who joined that criminal enterprise only after the original robber, acting alone, killed a person in the perpetration of the robbery, was not criminally liable for murder under the felony murder rule. (15 Cal.4th at p. 716) The questions left open by Pulido include whether a robber is guilty of felony murder if his confederate kills someone after the robber has reached a place of temporary safety.

4. Second Degree Murder

The elements of second degree murder are generally: (1) unlawful killing of a human being or fetus (a killing is unlawful if it is not justifiable or excusable); (2) with malice.

In addition, the unlawful act of the defendant must be the proximate cause of the death.

(a) Presumption of Malice.

See discussion of presumption of malice, supra, at page 52.

(b) Express Malice.

See discussion of express malice, supra, at page 46.

(c) Implied Malice.

There has been a great deal of case law concerning jury instructions defining implied malice.

Penal Code § 188 defines implied malice as "when the circumstances attending the killing show an abandoned and malignant heart." The court in People v. Watson (1981) 30 Cal.3d 290, 300,

finding that this somewhat ancient formulation did not provide clarity for the modern juror, defined implied malice as "when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. ... Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life. [Citation.]" In 1984 the Legislature embraced this definition when it amended Penal Code § 192 (concerning gross negligence for vehicular manslaughter), stating that "gross negligence" does not prohibit a charge of murder "upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in *People v. Watson* 30 Cal.3d 290."

CALJIC 8.11 (defining malice) was then formulated to include the Watson definition.²⁰ However, there was initially litigation challenging CALJIC 8.11 because it stated the Watson definition using alternative language (intentional act involving a high degree of probability that it will result in death, done with wanton disregard for life; or an intentional act, the natural consequences

²⁰ CALJIC 8.31 also states the same definition of malice in instructing the jury on the definition of second degree murder.

of which are dangerous to life, done with conscious disregard for life). The argument was that the "or" in the instruction implied that the two phrases were not equivalent, and thus the jury might decide that the "dangerous to life" part of the instruction meant something less than "high probability of death"; also, that "wanton disregard" might mean something other than "conscious disregard." In People v. Dellinger (1989) 49 Cal.3d 1212, the court held that this instruction did correctly define implied malice (and that "wanton" disregard for life did convey "conscious" disregard).

However, the Dellinger court stated that the instruction's formulation was confusing and potentially misleading. It noted that CALJIC 8.11 had just been revised again, and it approved the latest version. That version eliminates the alternative formulation, and simply states: "Malice is implied when [Par.] 1. The killing resulted from an intentional act, [Par.] 2. The natural consequences of the act are dangerous to human life, and [Par.] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."

Subsequently, defendants have tried to challenge this new version by pointing out that it omitted the formulation in Watson that the act have a "high probability of death." It was argued that the "high probability" formulation was a more correct formulation of the degree of dangerousness needed. However, this contention was rejected by the court in People v. Nieto-Benitez

(1992) 4 Cal.4th 91, 111. The court stated specifically that there was no error in the current formulation of CALJIC 8.11, and "[we] decline amicus curiae's invitation to recommend modification of the instruction." (4 Cal.4th at p. 111.).

Thus, the current case law now seems somewhat settled in terms of the definition of implied malice. It has been suggested that defense counsel continue to press for the "high probability of death" definition, and Justices Mosk and Kennard wrote a concurrence in Nieto-Benitez stating that the CALJIC instruction was adequate but that it would be clearer for the jury to be instructed in terms of the "high probability of death" language. However, it appears that this is now basically a trial issue; it would be good for trial counsel to press the trial court to give the "high probability of death" language, and it clearly would be acceptable for a trial court to define implied malice that way; but if the trial court declines to do so and sticks with the standard CALJIC definition there does not appear to be an appellate argument since Dellinger and Nieto-Benitez have specifically approved the standard definition against such a challenge.

Another possible argument has been suggested by the editors of Forecite, concerning the elimination of the phrase "base, antisocial motive" from the definition of implied malice. The argument is that the case which originally eliminated this phrase, People v. Washington (1965) 62 Cal.2d 777, 780, did so through

erroneous interpretations of prior cases on which it relied. However, trying to add "base, antisocial motive" to CALJIC 8.11 now is probably an uphill task, since the Supreme Court has twice specifically approved the current CALJIC 8.11 instruction (Dellinger and Nieto-Benitez) as adequately defining implied malice.

A series of such arguments was made and rejected in People v. Curtis (1994) 30 Cal.App.4th 1337. There, the defense made two challenges to the standard implied malice instruction (CALJIC 8.11): (1) that the instruction was invalid since it did not include the language "base, antisocial motive;" and (2) that the instruction was invalid because it did not include the term "high probability" of death. The court held that:

"We believe, however, that 'base antisocial motive' in this context merely means that the defendant killed without any legally recognized justification or excuse (such as self defense). Hence, it is more like the absence of an affirmative defense than a true element of the crime. ...[Pars.]

'Base, antisocial motive' therefore is an allusive and elliptical term of art for an 'element' of the crime which is not an element at all unless the defendant places it in issue. The 'conscious disregard' definition [i.e., CALJIC 8.11] properly omits this confusing term. It leaves the topic of justification and excuse to be covered by other instructions, which may be given as needed in a particular case. This is just one more way in which, as the Supreme Court has held, the 'conscious disregard' definition is preferable to the 'wanton disregard' definition."

(30 Cal.App.4th at pp. 1352-1353.)

The court in Curtis also held that there was no error in failing to include the term "high probability of death" in the instruction: "The `conscious disregard' definition requires that the `natural consequences' of the defendant's act be `dangerous to life.' This is equivalent to the requirement of the `wanton disregard' definition that the act involve a `high probability' of death. [Citations.]" (30 Cal.App.4th at pp. 1353-1354.)

An additional area of litigation involves the relationship of voluntary intoxication to implied malice. In People v. Whitfield (1994) 7 Cal.4th 437, 441, the court held that "evidence of voluntary intoxication is admissible under [Penal Code] section 22 with regard to the question whether the defendant harbored malice aforethought, whether such malice is express or implied." Specifically, "The sole disputed issue was whether defendant knew that his conduct endangered the life of another and acted with conscious disregard for human life. ... The most important factor bearing upon defendant's awareness of the dangerousness of his conduct and conscious disregard of that danger was his degree of intoxication when he undertook his dangerous course of conduct." (7 Cal.4th at p. 452.)

At the time Whitfield was decided, Penal Code §22, subdivision (b), provided that evidence of voluntary intoxication was admissible in a murder case on whether the defendant harbored malice aforethought. The year after Whitfield, the Legislature

narrowed subdivision (b) so that intoxication would be admissible to negate express malice. The effect of this amendment was to supersede the holding in Whitfield. (People v. Martin (2000) 78 Cal.App.4th 1107, 1114-1115; People v. Reyes (1997) 52 Cal.App.4th 975, 984, fn. 6.) Accordingly, voluntary intoxication no longer can negate implied malice.

However, mental disease, disorder or defect still can negate implied malice, and this should apply to cases in which use of drugs results in a mental disorder such as cocaine-induced psychosis. Mental disease, disorder and defect is not based on section 22, but rather on section 28, subdivision (a). This subdivision contains language identical to the pre-1995 version of section 22 that the Supreme Court construed in Whitfield and states that the evidence is admissible on the issue whether the defendant harbored malice aforethought. A defendant would be entitled to an instruction informing the jury that mental disease, defect or disorder can negate both express and implied malice. (See CALJIC 3.32.) However, like an instruction on intoxication, an instruction on mental disease, defect or disorder is a pinpoint instruction. Accordingly, the trial court has no duty to give the instruction sua sponte, and is required to give it only on the defendant's request. (People v. Ervin (2000) 22 Cal.4th 48, 89-91.)

5. Second Degree Felony-murder.

Where a killing occurs in the course of a felony which is not one of the enumerated felonies in Penal Code § 189 (first degree felony-murder), but which is a felony inherently dangerous to life, the case law has established that such a killing is second degree murder:

"The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life. ...`The felony-murder doctrine, whose ostensible purpose is to deter those engaged in felonies from killing negligently or accidentally, operates to posit the existence of that crucial mental state-- and thereby to render irrelevant evidence of actual malice or the lack thereof-- when the killer is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it. [Citations.]

The felony-murder rule applies to both first and second degree murder. ... In People v. Ford (1964) 60 Cal.2d 772, 795, the court restricted the felonies that could support a conviction of second degree murder, based upon a felony-murder theory, to those felonies that are `inherently dangerous to human life.' ...

In determining whether a felony is inherently dangerous, the court looks to the elements of the felony in the abstract, `not the "particular " facts of the case,' i.e., not to the defendant's specific conduct. [Citation.]

Past decisions of this court have explained further the concept of an inherently dangerous felony.... [A]n inherently dangerous felony is one which `by its very nature, ... cannot be committed without creating a substantial risk that someone will be killed....' [Citation.] ...[W]e specified that `for purposes of the second degree

felony-murder doctrine, an "inherently dangerous felony" is an offense carrying "a high probability" that death will result.' [Citation.]"
(People v. Hansen (1994) 9 Cal.4th 300, 308-309. Original emphasis.)

Among the felonies which have been found to be inherently dangerous to human life are discharging a firearm at an inhabited dwelling (People v. Hansen (1994) 9 Cal.4th 300, 309-311); furnishing a poisonous substance (People v. Mattison (1971) 4 Cal.3d 177, 184-186); burning a motor vehicle, in view of the danger of explosion of gasoline (People v. Nichols (1970) 3 Cal.3d 150, 162-163); manufacturing methamphetamine, in view of the danger of explosion of volatile chemicals used in the manufacturing process (People v. James (1998) 62 Cal.App.4th 244, 257-271); simple kidnapping (People v. Greenberger (1997) 58 Cal.App.4th 298, 377; People v. Pearch (1991) 229 Cal.App.3d 1282, 1296-1299);²¹ kidnapping for robbery (People v. Coleman (1992) 5 Cal.App.4th 646, 649-651); kidnapping for ransom, extortion or reward (People v. Ordonez (1991) 226 Cal.App.3d 1207, 1224-1229); evading an officer in violation of Vehicle Code §2800.2 (People v. Sewell (2000) 80 Cal.App.4th 690, 693-697; People v. Johnson (1993) 15 Cal.App.4th 169, 173-174); reckless and malicious possession of a destructive device or explosive (People v. Morse (1992) 2 Cal.App.4th 620, 644-

²¹Kidnapping now is listed in Penal Code §189 among the felonies upon which a conviction for first degree murder can be based. Aggravated kidnappings, such as kidnappings for robbery, ransom, extortion or reward also may qualify.

646); felony child abuse by malnutrition and dehydration (People v. Shockley (1978) 79 Cal.App.3d 669, 674-677); and driving under the influence of a narcotic drug. (People v. Calzada (1970) 13 Cal.App.3d 603, 605-606.)

Felonies which have been found not to be inherently dangerous to human life include practicing medicine without a license (People v. Burroughs (1984) 35 Cal.3d 824, 828-833); false imprisonment (People v. Henderson (1977) 19 Cal.3d 86, 93-96); escape (People v. Lopez (1971) 6 Cal.3d 45, 51-52); possession of a firearm by a felon (People v. Satchell (1971) 6 Cal.3d 28, 35-41); possession of a sawed-off shotgun (id. at pp. 41-43); grand theft (People v. Phillips (1966) 64 Cal.2d 574, 580-583); conspiracy to possess methedrine (People v. Williams (1965) 63 Cal.2d 452, 458); evasion of an officer in violation of Vehicle Code §2800.3 (People v. Sanchez (2001) 86 Cal.App.4th 970;); extortion (People v. Smith (1998) 62 Cal.App.4th 1233, 1236-1238); furnishing PCP (People v. Taylor (1992) 6 Cal.App.4th 1084, 1095-1101); and child endangerment or abuse (People v. Lee (1991) 234 Cal.App.3d 1214, 1222-1229; People v. Caffero (1989) 207 Cal.App.3d 678, 682-684).

As with first degree felony murder, second degree felony murder requires proof of the specific intent to commit the underlying felony (see CALJIC 8.32), even if the underlying felony is a general intent crime. (People v. Jones (2000) 82 Cal.App.4th 663, 667-668.) This rule sometimes works to the advantage of the

defendant on appeal. As noted in the previous paragraph, a violation of Vehicle Code §2800.3 (felony evasion of an officer proximately causing death or serious bodily injury) cannot be a basis for second degree felony murder because the felony is not inherently dangerous to human life. In addition, section 2800.3 cannot be a basis for second degree felony murder because the specific intent to commit that offense would be the specific intent to kill or to cause serious bodily injury -- which are identical to express and implied malice -- and the felony-murder rule does not apply where proof of malice is required. (People v. Jones (2000) 82 Cal.App.4th 663, 669.)

A major consideration concerning second degree felony-murder is the Ireland merger doctrine. In People v. Ireland (1969) 70 Cal.2d 522 the court held that where the felony was assault with a deadly weapon, it was improper to base a conviction on felony-murder since that would "bootstrap" any killing committed with a deadly weapon into murder, without the jury making an independent determination concerning actual malice. Subsequent to Ireland a number of other types of felonies were found to be merged into the killing itself, and thus not subject to the felony-murder doctrine. (E.g., People v. Smith (1984) 35 Cal.3d 798 [felony child abuse/assault]; People v. Wilson (1969) 1 Cal.3d 431 [burglary with intent to commit assault].)

In People v. Hansen, supra, the court undertook a major

examination of the Ireland doctrine. The Hansen court rejected language in Ireland which had indicated that any offense which is "an integral part of" the homicide and "included in fact within" the homicide was subject to the merger doctrine. Instead, Hansen held that "with respect to certain inherently dangerous felonies, their use as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent." (9 Cal.4th at p. 315.) Thus, Hansen held that Penal Code § 246, (shooting a firearm at an inhabited dwelling) can be a predicate for felony-murder:

"In the present case, ... application of the second degree felony-murder rule would not result in the subversion of legislative intent. Most homicides do not result from violations of section 246, and thus, unlike the situation in Ireland, supra, 70 Cal.2d 522, application of the felony-murder doctrine in the present context will not have the effect of `preclud[ing] the jury from considering the issue of malice aforethought ... [in] the great majority of all homicides. (Id. at p. 539.) Similarly, application of the felony-murder doctrine in the case before us would not frustrate the Legislature's deliberate calibration of punishment for assaultive conduct resulting in death, based upon the presence or absence of malice aforethought. ...[T]his is not a situation in which the Legislature has demanded a showing of actual malice ... in order to support a second degree murder conviction. Indeed, ... application of the felony-murder rule, when a violation of section 246 results in the death of a person, clearly is consistent with the traditionally recognized purpose of the second degree felony-murder doctrine-- namely the

deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies."
(9 Cal.4th at p. 315.)²²

Nevertheless, after Hansen, the merger doctrine of Ireland has been applied to two additional assault-related felonies. One is conspiracy to commit an assault with a deadly weapon. (People v. Baker (1999) 74 Cal.App.4th 243, 248-251.) The other is evasion of an officer proximately causing death or serious bodily injury, in violation of Vehicle Code §2800.3, since "[a] person driving with the specific intent to violate section 2800.3 is using the vehicle to commit an assault with a deadly weapon, an offense that precludes application of the felony-murder doctrine." (People v. Jones (2000) 82 Cal.App.4th 663, 669.)

6. Attempted Homicide.

Penal Code § 664 states that an attempted offense is punishable for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. For crimes such as second degree murder and other offenses carrying a life term, the punishment is imprisonment for a term of five, seven or nine years. However, "if the crime attempted is willful, deliberate and premeditated murder, as defined in Section 189, the person guilty

²² Note that in Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664, 667, the court found that the Ireland doctrine, while a state rule and not a constitutional one, "is based upon considerations of policy and justice."

of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole."

In 1994 the Legislature added a subdivision to Penal Code § 664 providing that attempted murder on a peace officer is punishable by life with the possibility of parole. The subdivision also stated that it applies "if it is proved that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being." The Legislature declared that "this paragraph is declaratory of existing law." (Penal Code §664, subd. (e).)

The recent case law concerning attempted murder has focused on two general issues. First, the question was raised whether attempted murder requires express malice. People v. Guerra (1985) 40 Cal.3d 377, 386, held that attempted murder "requires a specific intent to kill, a mental state coincident with express malice but not necessarily with implied malice or felony-murder." It therefore is not permissible to instruct the jury on implied malice where the offense is attempted murder.

Subsequently, in People v. Lee (1987) 43 Cal.3d 666, 670, the court dealt with the issue again, specifically holding that giving an instruction on implied malice is error:

"It is now well established that a specific intent to kill is a requisite element

of attempted murder, and that mere implied malice is an insufficient basis on which to sustain such a charge. Accordingly, implied malice instructions should never be given in relation to an attempted murder charge. [Citations.]"

As noted, Guerra also held that a felony-murder theory would also be inconsistent with the requirement of express malice, and thus, as Lee indicated, giving such an instruction would be error.

The second major issue that has been litigated recently is the question of whether attempted murder is divided into degrees. In that regard, the cases have consistently held that the offense is not divided into degrees. (People v. Bright (1996) 12 Cal.4th 652, 665-669; People v. Douglas (1990) 220 Cal.App.3d 544, 548-550; People v. Jones (1991) 234 Cal.App.3d 1303, 1310-1313.) Thus, where the defendant is charged with attempted premeditated murder, there is no entitlement to an instruction on a "lesser" offense of simple attempted murder. (People v. Douglas, supra, 220 Cal.App.3d at pp. 549-550; People v. Jones, supra, 234 Cal.App.3d at p. 1311.)

CALJIC's standard instructions (CALJIC Nos. 8.66 and 8.67) instruct the jury on the requirements of specific intent to kill for attempted murder, and on the further requirement that the jury must then determine whether the attempted murder was premeditated. These instructions were upheld in People v. Douglas, supra:

"The trial court instructed the jury with a slightly modified form of CALJIC No. 8.66, the general attempted murder instruction. It requires a specific intent to kill (malice) and a direct act towards that end; it does not

include the elements of premeditation or deliberation which would justify imposition of the greater penalty under section 664. The court then gave CALJIC No. 8.67, which instructed the jury that if they determined that Douglas had committed attempted murder, they then must make a specific finding on whether the offense was willful, deliberate and premeditated. CALJIC No. 8.67 sufficiently distinguishes the different elements necessary for imposition of either of the punishments under section 664, subdivision 1, regardless of whether those punishments establish different degrees of attempted murder."

(220 Cal.App.3d at p. 550.)

Note that there is such an offense as attempted voluntary manslaughter, based on heat of passion and/or imperfect self-defense:

"An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. [Citation.] Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense. If the law acts out of forbearance for the weakness of human nature and mitigates an intentional killing where mitigating circumstances appear, then we can discern no plausible reason why the law should not also mitigate an intentional attempt to kill under similar circumstances."

(People v. Van Ronk (1985) 171 Cal.App.3d 818, 824.)

However, it is unclear after People v. Saille (1991) 54 Cal.3d 1103²³, whether there can be attempted voluntary manslaughter based on voluntary intoxication or other mental state (other than heat of passion or imperfect self-defense). It does not appear that such an offense is possible. Voluntary intoxication would be relevant to show that there was in fact no intent to kill formed. (People v. Walker (1993) 14 Cal.App.4th 1615.) However, if no intent to kill was present, it would seem that the crime could no longer be an attempted homicide, since an attempted homicide would seem to require an intent to kill. (See People v. Van Ronk, supra.) If there were no intent to kill, the offense would appear to be some form of attempted battery and/or assault.²⁴ The Von Ronk court, however, was not entirely clear on this point. In both Walker and People v. Morales (1992) 5 Cal.App.4th 917, the courts held that there was no sua sponte obligation on the part of the judge to instruct on a lesser offense of attempted voluntary manslaughter based on voluntary intoxication negating malice. Neither opinion discussed the more fundamental question of whether such an offense actually exists.

Note that since involuntary manslaughter is an unintentional

²³ See discussion of People v. Saille in connection with express malice, supra, at page 41.

²⁴ The question of the intent needed for assault is beyond the scope of these materials. It has been the subject of recent case law. (See People v. Colantuono (1994) 7 Cal.4th 206; People v. Lee (1994) 28 Cal.App.4th 1724.)

killing, it has been held that there is no such crime as attempted involuntary manslaughter. "An `attempt' to commit involuntary manslaughter would require that the defendant intend to perpetrate an unintentional killing-- a logical impossibility." (People v. Broussard (1977) 76 Cal.App.3d 193, 197. See also, People v. Brito (1991) 232 Cal.App.3d 316.)

7. Voluntary Manslaughter.

Manslaughter is the unlawful killing of a human being, but without malice. (Pen. Code § 192.) Voluntary manslaughter used to be described as an intentional unlawful killing without malice. (People v. Coad (1986) 181 Cal.App.3d 1094, 1106; People v. Wickersham (1982) 32 Cal.3d 307, 325.) However, the California Supreme Court recently held that intent to kill is not required and that voluntary manslaughter includes both intentional and unintentional killings. (People v. Blakeley (2000) 23 Cal.4th 82, 87-91; People v. Lasko (2000) 23 Cal.4th 101, 107-111.)

Three circumstances serve to reduce an intentional killing to voluntary manslaughter:

(1) Killing upon a "sudden quarrel." (Pen. Code § 192(a).)

(2) Killing upon "heat of passion." (Pen. Code § 192(a).)

(3) Killing upon an honest but unreasonable belief in the need to defend against imminent peril of life or great bodily injury. (People v. Flannel (1979) 25 Cal.3d 668, 680-683.)

There used to be a fourth type of voluntary manslaughter--

where the defendant's diminished capacity negated malice. (People v. Castillo (1969) 70 Cal.2d 264.) However, the addition of Penal Code §§ 28 and 29 and the redefinition of Penal Code § 188 in 1981 eliminated this type of non-statutory voluntary manslaughter. (People v. Saille (1991) 54 Cal.3d 1103.) Saille held that "pursuant to the language of section 188, when an intentional killing is shown, malice aforethought is established. Section 192, however, negates malice when the intentional killing results from a sudden quarrel or heat of passion induced by adequate provocation." (54 Cal.3d at p. 1114.) There is no other negation of malice based on the defendant's mental state (other than unreasonable self-defense). Thus, although a defendant can introduce evidence of intoxication or mental disease or defect to show that he or she did not in fact form an intent to kill, once an intent to kill is found the crime is murder unless it meets the specific statutory reduction to manslaughter based on quarrel or heat of passion.

In a recent case, the Court of Appeal held that imperfect duress is not a basis for voluntary manslaughter. (People v. Son (2000) 79 Cal.App.4th 224, 231-240.)²⁵

²⁵ Two recent cases on the scope of the duress defense in homicide cases which cited Son are presently pending in the California Supreme Court: People v. Anderson, S094710, argued May 7, 2002 (formerly at 85 Cal.App.3d 565) and People v. Chavez, S098775 (formerly at 89 Cal.App.4th 806) Two additional cases raising duress defense issues in homicide cases are also pending. (People v. Mounsaveng, S096988 (formerly at 87

Although unreasonable self-defense and sudden quarrel/heat of passion are shorthand descriptions of voluntary manslaughter, they are viewed as mitigating circumstances that reduce an unlawful killing from murder to manslaughter by negating the element of malice aforethought that otherwise inheres in an unlawful homicide. (People v. Rios (2000) 23 Cal.4th 450, 461.) They are not, however, elements of voluntary manslaughter either where murder and manslaughter are under joint consideration or where voluntary manslaughter alone is charged. Accordingly, in such situations, in order to have the jury find the defendant guilty of voluntary manslaughter, the People are not required to prove that malice is absent by proving that the defendant was provoked or unreasonably sought to defend himself. (Id. at pp. 462-463.)

The interplay of Lasko, Blakeley, and Rios has led to much confusion and some odd revisions of CALJIC instructions. For example, because Lasko is not considered a break with the then-existing law but merely a correction of it, its holding, that intent to kill is not an element of voluntary manslaughter, can be constitutionally applied to all defendants, whether their crimes occurred before or after Lasko was decided. However, Blakeley's holding, that implied malice murder, like express malice murder,

Cal.App.4th 1253) and People v. Reay, S093980 (unpublished.) Anderson appears to be the lead case, although Reay, involving duress in the Battered Woman Syndrome context, is also fully briefed.

can only be reduced to voluntary manslaughter by imperfect self defense (or heat of passion) did change the law, to the detriment of defendants who relied on cases saying that imperfect self defense reduced unintentional killings (i.e., implied malice murders) to involuntary manslaughter. Thus, as Blakeley itself recognized, its holding could not constitutionally be applied to defendants who committed their crimes before Blakeley was decided. This leads to the confusing situations where the trial court must instruct the jury in the same case in of terms of Lasko (no intent to kill) for the some purposes but in terms of pre-Blakeley law for others. See, for example, People v. Johnson (5/16/2002) ___ Cal.App.4th ___; B152162 (CA 2, Div. 7) And query whether the 2001 Revision of CALJIC 8.40 correctly states the law as explicated by Lasko and Rios. For an excellent analysis of the changes in homicide law wrought by Lasko, Blakely, and Rios see the article by Madeline McDowell in conjunction with the Central California Appellate Program, reprinted by permission with these materials.

(a) Sudden Quarrel/Heat of Passion.

Where the evidence raises a question concerning the issue of sudden quarrel or heat of passion, the burden is on the prosecution to prove the absence of such:

"The prosecution must `prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.' (Mullaney v. Wilbur (1975) 421 U.S. 684, 704." (People v. Bloyd (1987) 43 Cal.3d 333, 349.)

However, such proof may "be inferred from the circumstances of the homicide." (Ibid.)

Since the burden is on the prosecution, the defendant need only show some credible evidence raising a reasonable doubt about quarrel/passion in order to be entitled to instructions on manslaughter; i.e., evidence "from which reasonable persons could have concluded there was sufficient provocation to reduce murder to manslaughter." (People v. Wharton (1991) 53 Cal.3d 522, 571; People v. Brooks (1986) 185 Cal.App.3d 687.)

The cases have enumerated some key points concerning sudden quarrel and heat of passion:

-- The standard for judging quarrel/heat of passion is not solely the subjective belief of the defendant, but rather whether the defendant's actions comported with those of an ordinarily reasonable person faced with the same situation:

"[T]he fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion-- not necessarily fear and never, of course, the passion for revenge-- to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (People v. Logan (1917) 175 Cal. 45, 49.)

It should be noted that recently the court has stated that "determination of the sufficiency of provocation is made by an objective standard; defendant's subjective response is immaterial." (People v. Rich (1988) 45 Cal.3d 1036, 1112. Original emphasis.)

However, note that although this is true in terms of the sufficiency of the provocation, there is still a subjective element-- the defendant must, in fact, have been acting under heat of passion. Thus, as discussed below, if the evidence shows that despite adequate provocation the defendant's passions have in fact cooled and he did not act under such passion, the killing is murder. (People v. Golsh (1923) 63 Cal.App. 609.) Thus, "The subjective element requires that the actor be under the actual influence of a strong passion at the time of the homicide." (People v. Wickersham (1982) 32 Cal.3d 307, 327.)

-- The key "triggering" event for quarrel/passion is that there must be some provocation which would excite such passion in a reasonable person. Further, it is generally held that the provocation must come from the victim. (See People v. Spurlin (1984) 156 Cal.App.3d 119.)

-- The adequacy of the provocation is a question for the jury (unless no reasonable juror could so find). The cases hold that "there is no specific type of provocation required by section 192 and that verbal provocation may be sufficient." (People v. Berry (1976) 18 Cal.3d 509, 515.) However, the cases are clear that a victim's resistance to a defendant's criminal act cannot be sufficient provocation to reduce murder to manslaughter. (People v. Rich, supra.)

-- The passion "need not mean `rage' or `anger' but may

be any `violent, intense, high-wrought or enthusiastic emotion.'" (People v. Berry, supra, at p. 515.) However, revenge cannot be a valid "passion." (People v. Logan, supra, at p. 49.)

-- Since Penal Code § 192 defines voluntary manslaughter as "upon" a sudden quarrel or heat of passion, the cases have held that if, despite adequate provocation, a sufficient time period has elapsed for a reasonable person to cool off, malice has not been negated and the killing is murder. (See People v. Golsh (1923) 63 Cal.App. 609.)

Numerous cases discuss whether certain types of provocation and/or passion were sufficient for voluntary manslaughter, and a canvassing of such cases is beyond the scope of these materials. Regarding instructions in general, the standard CALJIC instructions on voluntary manslaughter (CALJIC Nos. 8.40 - 8.44) embody the general principles noted above. These instructions were upheld in People v. Rupe (1988) 206 Cal.App.3d 1537. However, in People v. Wharton (1991) 53 Cal.3d 522, 571 the court held that "the court erred in refusing to instruct the jury, at defendant's request, that legally adequate provocation could occur over a considerable period of time." As a result, CALJIC revised its instruction No. 8.42 (defining sudden quarrel and heat of passion) to add that adequate provocation may occur "in a short, or over a considerable, period of time." Note that this latter phrase is bracketed in CALJIC No. 8.42, and the Wharton case described this as a

"pinpoint" instruction which must be requested. Thus, if a court omits this phrase sua sponte, there may be no error unless the defendant actively requested it. The discussion in Wharton would apply to such situations as a battered woman's defense.

Cases have found a minor error, in connection with the giving of CALJIC No. 8.50. CALJIC No. 8.50 discusses the difference between murder and manslaughter, noting that killings done in the heat of passion or in an honest but unreasonable belief in self-defense are manslaughter. Cases have found error where the judge fails to use the word "or" between the phrases concerning heat of passion and unreasonable self-defense. (People v. Bloyd (1987) 43 Cal.3d 333, 355.)

In People v. Thompkins (1987) 195 Cal.App.3d 244, the jury told the judge that it was confused about the relationship of premeditation and heat of passion. The court of appeal found error in the judge's instruction that there was no relationship between the two:

"The two concepts are related in that they are mutually exclusive. As the Supreme Court explained in People v. Sanchez (1864) 24 Cal. 17, 30 'The intent to kill ... must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.' This discussion continues to form the basis for the standard CALJIC instruction on [premeditation]. In response to the jury's inquiry, the judge should have addressed himself to this relationship, explaining why the two concepts cannot coexist concurrently"

(195 Cal.App.3d at p. 251; footnote omitted.)

Note that the court, in People v. Wickersham, supra, held that "a trial court should not instruct on heat-of-passion voluntary manslaughter where the same facts would give rise to a finding of reasonable self-defense. [Citations; footnote omitted.]" (32 Cal.3d at pp. 327-328.) However, because heat of passion and unreasonable self-defense are short-hand descriptions of voluntary manslaughter, they are lesser included offenses of murder. (People v. Barton (1995) 12 Cal.4th 186, 200-201.) Accordingly, where there is substantial evidence supporting both, the court must instruct on both sua sponte. (People v. Breverman (1998) 19 Cal.4th 142, 153-164.)

(b) Unreasonable Self-Defense.

In People v. Flannel (1979) 25 Cal.3d 668, 674, the court held that "An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter. [Emphasis omitted.]" This is a non-statutory basis for voluntary manslaughter. The court further held that "We disagree that the doctrine of unreasonable belief is necessarily bound up with or limited by the concepts of either heat of passion or diminished capacity." (Id., at p. 677.) For cases after Flannel, the court held that a sua sponte instruction on unreasonable self-defense

must be given where the evidence warrants it.

Recently the court revisited the doctrine, to determine whether it survived Proposition 8 and Legislative amendments to Penal Code § 188 (defining malice) as construed in People v. Saille (1991) 54 Cal.3d 1103. In In re Christian S. (1994) 7 Cal.4th 768, the court held that the doctrine survived. It called the doctrine "imperfect self-defense" and held:

"We caution, however, that the doctrine is narrow. It requires without exception that the defendant must have had an actual belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm-- no matter how great the fear and no matter how great the likelihood of the harm-- will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury. `... An imminent peril is one that, from appearances, must be instantly dealt with. ' [Citation.] Put simply, the trier of fact must find an actual fear of an imminent harm. Without this finding, imperfect self-defense is no defense." (7 Cal.4th at p. 783. Original emphasis.)²⁶

In People v. Wickersham (1982) 32 Cal.3d 307 the court held that manslaughter based on imperfect self-defense is classed as a "defense" for purposes of sua sponte instruction, and not as a "lesser offense." Thus, "the trial court need only instruct on a particular defense `if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of

²⁶ The court noted that the former term "honest" belief may be confusing, implying that the belief must be objectively reasonable; instead, the court substituted the term "actual" belief.

such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (32 Cal.3d at p. 329.) The Supreme Court, however, has disapproved of this portion of Wickersham, holding that unreasonable self-defense is not a defense, but rather is a shorthand description of one form of voluntary manslaughter and therefore is a lesser included offense of murder. (People v. Barton (1995) 12 Cal.4th 186, 200-201.)

The court in Christian S., supra, stated "we reiterate that, just as with perfect self-defense or any defense, '[a] trial court need give a requested instruction concerning a defense only if there is substantial evidence to support the defense.' [Citation. Italics added.]" (7 Cal.4th at p. 783.)

CALJIC No. 5.17 incorporates the Flannel definition of imperfect self-defense.

In People v. Uriarte (1990) 223 Cal.App.3d 192, the court, in an opinion that is not entirely clear, appears to hold: that CALJIC No. 5.17 applies to an honest but unreasonable belief in the necessity to defend others; that the instruction should be given even where the belief is based on delusional thinking (i.e., where the defendant actually believes, through delusional thinking, that there is a need to defend against a threat to life or great bodily injury); and that the instruction would also where the belief is based on drugs. However, the discussion is to an extent dicta, since the court held that the evidence failed to show that

defendant actually had such a belief. Nevertheless, the dicta appear to be persuasive. A belief can be unreasonable because it is based on a delusion caused by a mental disorder or intoxication.

In People v. Aris (1989) 215 Cal.App.3d 1178, the court applied the doctrine of imperfect self-defense to a situation involving a battered wife, noting that the prior actions of the battering husband are relevant to the defendant's perceptions of a current threat. However, the court emphasized that there still must be an actual belief in an imminent threat:

"We distill from these cases the rule that a defendant should not be excused from guilt of murder when he or she kills the one who threatened death or serious bodily injury unless the defendant at last actually, if not reasonably, perceives in the victim's behavior at the moment of the killing an indication that the victim is about to attempt, or is attempting, to fulfill the threat. In making that evaluation, the defendant is entitled to consider prior threats, assaults, and other circumstances relevant to interpreting the attacker's behavior."

(215 Cal.App.3d at p. 1189.)

Unreasonable self-defense does not apply to felony murder since felony murder does not have the element of malice that can be negated by unreasonable self-defense. (People v. Lostaunau (1986) 181 Cal.App.3d 163, 170.) Nor is unreasonable self-defense available to a defendant who, through his own wrongful conduct (such as initiation of a physical assault or the commission of a felony) has created circumstances under which his adversary's attack or pursuit is legally justified. (In re Christian S. (1994)

7 Cal.4th 768, 773, fn. 1.) Although simple trespass is not an assault or a felony, under a recent case, in which a petition for review currently is pending, unreasonable self-defense is not available to a trespasser unless the trespasser first attempts to retreat or is met with an assault so sudden and perilous that he cannot retreat. (People v. Hardin (2000) 85 Cal.App.4th 625, 628-634.)

8. Involuntary Manslaughter.

Involuntary manslaughter is an unintentional killing committed without malice. (People v. Broussard (1977) 76 Cal.App.3d 193.) Penal Code § 192(b) defines two classes of involuntary manslaughter:

(1) a killing "in the commission of an unlawful act, not amounting to a felony;" or

(2) a killing "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The first category is sometimes referred to as misdemeanor-manslaughter; the second is sometimes referred to as manslaughter due to criminal (or gross) negligence.

Penal Code § 192(b) states that "This subdivision shall not apply to acts committed in the driving of a vehicle."

Penal Code § 192(c) is a separate subdivision for vehicular manslaughter.

In addition to the two kinds of involuntary manslaughter noted above, some cases have indicated that involuntary manslaughter may be a catch-all for certain unlawful killings which do not fit within the other defined categories of homicide.

The following sections briefly note some of the salient aspects of instructional law concerning involuntary manslaughter.

(a) Misdemeanor-manslaughter.

Penal Code § 192(b) provides that a killing "in the commission of an unlawful act, not amounting to a felony," is involuntary manslaughter. The misdemeanor-manslaughter rule is subject to certain qualifications. The leading case of People v. Stuart (1956) 47 Cal.2d 167, 173 set forth two qualifications:

"[T]he [unlawful] act in question must be committed with criminal intent or criminal negligence to be an unlawful act within the meaning of section 192. ... To be an unlawful act within the meaning of section 192, ... the act in question must be dangerous to human life or safety"

This latter "dangerous" requirement is analyzed not by viewing the elements of the misdemeanor in the abstract, but rather by analyzing the circumstances of its commission in the pending case. (People v. Cox (2000) 23 Cal.4th 665, 670-676.) This is the opposite of the analysis employed in the context of second degree felony murder to determine if the underlying felony is inherently dangerous to human life. (People v. Hansen (1994) 9 Cal.4th 300, 309 ["In determining whether a felony is inherently dangerous, the

court looks to the elements of the felony in the abstract, not to the particular facts of the case, i.e., not to the defendant's specific conduct." Italics, citation and internal quotation marks omitted].)

In addition to the qualifications set out in Stuart, supra, there must also be some causation:

"We cannot ignore the element of causation in the unlawful act necessary to connect it with the offense. In our ordinary phraseology we refer to the result of this element by saying it must be the probable consequence naturally flowing from the commission of the unlawful act."
(People v. Kerrick (1927) 86 Cal.App. 544, 548.)

CALJIC No. 8.45 defines involuntary manslaughter as including a killing "During the commission of a misdemeanor which is inherently dangerous to human life."

(b) Gross Negligence.

Penal Code § 192(b) provides that involuntary manslaughter is a killing "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The cases have held that "without due caution and circumspection" requires a showing of gross (criminal) negligence. Involuntary manslaughter based on criminal negligence must involve an act which "a man of ordinary prudence would foresee ... would cause a high degree of risk of death or great bodily harm. The risk of death or great bodily harm must be great." (People v.

Rodriguez (1960) 186 Cal.App.2d 433, 440.)

The level of gross negligence is in between ordinary negligence and implied malice. The leading case of People v. Penny (1955) 44 Cal.2d 861, 879 stated the difference between ordinary negligence and the level of negligence required for involuntary manslaughter:

"The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences."

The distinction between gross (criminal) negligence and implied malice was described in People v. Brito (1991) 232 Cal.App.3d 316, 321 n.4:

"Second degree murder based on implied malice is committed when the defendant does not intend to kill, but engages in conduct which endangers the life of another, and acts deliberately with conscious disregard for life. [Citation.] An essential distinction between second degree murder based on implied malice and involuntary manslaughter based on criminal negligence, is that in the former the defendant subjectively realized the risk to human life created by his conduct, whereas in the latter the defendant's conduct objectively endangered life, but he did not subjectively realize the risk."

This formulation was followed in People v. Klvana (1992) 11 Cal.App.4th 1679, 1704.

The standard CALJIC instruction (No. 8.46) defines criminal

negligence for involuntary manslaughter along the lines noted by the cases above, and we are not aware of any recent cases raising challenges to this definition.

However, note that in People v. Bennett (1991) 54 Cal.3d 1032, 1036, the court defined gross negligence in the context of vehicular manslaughter:

"Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] `The state of mind of a person who acts with conscious indifference to the consequences is simply, "I don't care what happens."' [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]"

Using the phrase "conscious indifference" could be confusing, since that is very similar to the "conscious disregard" phrase involved in implied malice; as the cases above note, the distinction in criminal negligence is that although a reasonable person would have been conscious of the risk, the defendant was not in fact conscious of it. CALJIC No. 8.46 does not use the "conscious indifference" language, and instead makes clear that the test is the objective one, whether the negligence is "such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to proper regard for human life or to constitute indifference to the consequences of such acts."

In the leading case of People v. Burroughs (1984) 35 Cal.3d

824, the court dealt with the question whether an unintended killing in the course of a nondangerous-to-life felony can be involuntary manslaughter. The court held that involuntary manslaughter is somewhat of a catch-all: "[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (35 Cal.3d at p. 835.)²⁷

Note, however, that CALJIC 8.45, which defines involuntary manslaughter, does not include the definition found in Burroughs, although the comment to CALJIC 8.45 states that under the specific facts of Burroughs, which involved a homicide that occurred during the practice of medicine without a license, "the defendant might be convicted on involuntary manslaughter and the jury should be so instructed." CALJIC 8.45 is incomplete, and its comment about Burroughs is too narrow. Under Burroughs, a homicide during any felony that is not inherently dangerous to human life when viewed in the abstract is an appropriate basis for involuntary manslaughter. One example would be a homicide during grand theft. (People v. Morales (1975) 49 Cal.App.3d 134, 143-145.) But there are many others. (See the discussion of second degree felony

²⁷ Burroughs was clarified on a different issue (test for determining whether a felony is inherently dangerous) in People v. Patterson (1989) 49 Cal.3d 615.

murder, above, particularly pages 74-75.)

An additional point in connection with involuntary manslaughter based on criminal negligence is the situation of a defendant who becomes intoxicated to the point where he or she lacks an intent to kill and lacks the conscious appreciation of risk of life which defines implied malice. In People v. Ray (1975) 14 Cal.3d 20, the court held that a trial court has an obligation to instruct sua sponte on involuntary manslaughter in such a situation:

"The weight of the evidence of defendant's intoxication was sufficient for a jury to have believed that although he was conscious he lacked both malice and an intent to kill. [Citation.] The court was required, accordingly, to have instructed that if, because of a diminished capacity due to defendant's voluntary intoxication, he had harbored neither malice nor an intent to kill the offense could be no greater than involuntary manslaughter."
(14 Cal.3d at p. 31.)

In People v. Saille (1991) 54 Cal.3d 1103, the court held that Legislative amendments eliminating the defense of diminished capacity and redefining malice meant that if an intent to kill is shown, malice has been shown and there is no longer a lesser offense of voluntary manslaughter in such a situation based on intoxication or other mental state. (There can still be voluntary manslaughter if based on heat of passion, or imperfect self defense.) However, the Saille court did not appear to disapprove of People v. Ray, supra, concerning involuntary manslaughter. If

intoxication eliminates both intent to kill and conscious disregard for life, then no malice has been shown and a killing would be involuntary manslaughter. However, Saille did disapprove of Ray's holding that such an instruction concerning intoxication must be given sua sponte. The court held that where instructions on a lesser offense of involuntary manslaughter were given, it was up to the defendant to request further "pinpoint" instructions on the relationship of intoxication to involuntary manslaughter.

Finally, the cases have held that in a non-vehicle situation, a person who becomes intoxicated to the point of unconsciousness and kills while unconscious does not harbor malice or an intent to kill, and thus the killing is involuntary manslaughter. Under this situation the law implies criminal negligence on the part of a person who voluntarily becomes intoxicated to the point of unconsciousness. However, since there is no malice, the killing is only involuntary manslaughter. (People v. Graham (1969) 71 Cal.2d 303.) CALJIC adopted a standard instruction on this point (CALJIC No. 8.47), using language from the Graham opinion. However, note that People v. Whitfield (1994) 7 Cal.4th 437 held that voluntary intoxication could be used to prove implied malice (at least in a vehicle situation); thus, it may be uncertain after Whitfield whether a (non-vehicle) killing while unconscious due to voluntary intoxication must be involuntary manslaughter, or whether it could, under some circumstances, be murder (i.e., drinking to

unconsciousness before performing some dangerous task other than driving.)

(c) Catch-all Involuntary Manslaughter.

In the previous subsection it was noted that in People v. Burroughs (1984) 35 Cal.3d 824, the court held that an unintentional negligent killing in the course of a non-inherently dangerous felony was involuntary manslaughter, even though the statutory definition of involuntary manslaughter might not necessarily encompass such an offense. In People v. Cameron (1994) 30 Cal.App.4th 591, the court extended this reasoning in a more general fashion. In Cameron the victim entered the residence of a friend of defendant's (defendant was present) and a quarrel ensued. The victim, a much larger person than the defendant, struggled with defendant, and in the course of the struggle the victim was stabbed by defendant. Defendant's testimony was that she was intoxicated, and that she did not intend to stab the victim. The court in Cameron stated that in a previous (unpublished) case the court had formerly believed that if a jury in such a situation did not find that the defendant acted in reasonable self-defense (and therefore the killing was not justified), nonetheless "if the jury found there was an absence of malice and an absence of an intent to kill it would have had to acquit the defendant, even though she committed an unlawful killing of a human being." (30 Cal.App.4th at p. 603.) However, the Cameron court reversed itself, finding

that such a result would be absurd. It held:

"[I]f a killing is unlawful it must constitute either a murder or manslaughter, the defining boundary being malice; if the homicide is unlawful and malice is lacking the offense is manslaughter. If the offense cannot be voluntary manslaughter, because the case law holds that voluntary manslaughter requires an intent to kill, it is manslaughter nonetheless and, a fortiori, must be involuntary manslaughter."
(30 Cal.App.4th at p. 604. Footnotes omitted.)

Cameron raises intricate questions concerning homicide, and its scope is uncertain in light of recent California Supreme Court case law holding that intent to kill is not a required element of voluntary manslaughter. (People v. Blakeley (2000) 23 Cal.4th 82, 87-91; People v. Lasko (2000) 23 Cal.4th 101, 107-111.) On one hand, it can be argued that Cameron no longer is good law insofar as it gives rise to a new theory of involuntary manslaughter. On the other hand, it can be argued that Cameron (1) still is good law because involuntary manslaughter still is an unlawful killed committed without malice and without an intent to kill or (2) gives rise to a verdict of voluntary manslaughter under Blakeley and Lasko since voluntary manslaughter includes unintentional homicides in which malice is absent.

Inexplicably, the 2001 revision of CALJIC 8.45 contains bracketed portions which state that unlawful killings "[without malice aforethought,] [and] [without an intent to kill, and without conscious disregard for human life,] is . . . involuntary

manslaughter. . .” and further, “[t]here is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].” The Comment explains that the revision is based upon People v. Blakeley, supra, 23 Cal.4th 82 which, according to the CALJIC Committee “held it was error to fail to instruct that an unintentional killing in unreasonable self defense was involuntary manslaughter” As noted earlier, while the court so held with respect to Blakeley himself and others whose cases predated the Blakeley opinion, the main thrust of the Blakeley, and Lasko, is that an unlawful killing without either express malice (i.e., intent to kill) or implied malice (i.e., conscious disregard for life) is *voluntary*, not involuntary manslaughter, as noted above. Neither the Use Note nor the Comment make it clear that the 2001 revision applies only to that extremely limited class of defendants whose crimes occurred before June 2, 2000 but whose trials occur after that date. It remains to be seen what the 2002 Revision will bring.

Federal law offers another potential theory for involuntary manslaughter. “A defendant who intends to use nondeadly force to protect himself, but who uses that force in a criminally negligent way resulting in death, could be found guilty of involuntary manslaughter.” (United States v. Anderson (9th Cir. 2000) 201 F.3d 1145, 1151.)

(d) Attempted Involuntary Manslaughter.

Since involuntary manslaughter is an unintentional killing, there is no such crime as attempted involuntary manslaughter. "An `attempt' to commit involuntary manslaughter would require that the defendant intend to perpetrate an unintentional killing-- a logical impossibility." (People v. Broussard (1977) 76 Cal.App.3d 193, 197. See also, People v. Brito (1991) 232 Cal.App.3d 316.)

B. Lesser Included Offenses.

1. Lesser Included Offenses.

"An indictment or information charging murder . . . also charges all lesser offenses necessarily included in murder, including voluntary and involuntary manslaughter." (In re McCartney (1966) 64 Cal.2d 830, 831.)

Thus, second degree murder is a lesser included offense of first degree murder. (People v. Cooper (1991) 53 Cal.3d 771, 827.) Similarly, manslaughter is a lesser offense of murder. (People v. Berryman (1993) 6 Cal.4th 1048, 1080.)

It has been held that while both involuntary and voluntary manslaughter are lessers of murder, involuntary manslaughter is not a lesser included offense of voluntary manslaughter since the latter can be committed without committing involuntary manslaughter. (People v. Orr (1994) 22 Cal.App.4th 780, 784-785.)

"Generally, involuntary manslaughter is a lesser offense within the crime of murder." (People v. Prettyman (1996) 14 Cal.4th 248, 274.) However, "it could be argued that based on a misdemeanor-manslaughter theory [involuntary manslaughter] is not a lesser included offense of second degree murder where ... the underlying misdemeanor is not a lesser included offense of the charged felony." (People v. Edwards (1985) 39 Cal.3d 107, 116, fn. 10.)

Note that since malice is not an element of felony-murder, there is no lesser offense of heat-of-passion manslaughter to felony-murder since heat of passion reduces malice. (People v. Balderas (1985) 41 Cal.3d 144, 196-197.) The same is true for unreasonable self-defense manslaughter. (People v. Lostaunau (1986) 181 Cal.App.3d 163, 170.)

Two recent cases holding that certain offenses are not lesser included offenses are: child endangerment is not a lesser of torture murder because the victims of torture murder can be adults (People v. Mincey (1992) 2 Cal.4th 408, 452); assault with a deadly weapon is not a lesser of attempted murder (People v. Gragg (1989) 216 Cal.App.3d 32, 41). See 1 Witkin & Epstein, California Criminal Law (3d ed. 2000), Defenses, § 173 for a partial listing of offenses which have been held not to be included offenses of murder.

A number of recent cases have considered whether there was

sufficient evidence to warrant the giving of instructions on a lesser offense. A brief listing of some of these cases includes:

Cases finding that instructions should have been given:

People v. Edwards (1985) 39 Cal.3d 107, 113-114. (Error in refusing to instruct on lesser of involuntary manslaughter where defendant gave heroin to the deceased.)

People v. Brooks (1986) 185 Cal.App.3d 687, 693-694. (Error in failing to instruct on lesser of voluntary manslaughter where evidence showed that defendant shot a man whom he thought stabbed his brother two hours earlier.)

People v. McCowan (1986) 182 Cal.App.3d 1, 15-16. (Error to fail to instruct on heat of passion voluntary manslaughter where there was evidence that defendant became enraged when one victim gestured obscenely at him, even though defendant was not relying on that lesser.)

People v. Thompkins (1987) 195 Cal.App.3d 244, 256. (Court had sua sponte duty to instruct on lesser of attempted voluntary manslaughter in attempted murder case, even over defense objection, where the evidence showed possible heat of passion defense because defendant discovered his wife in bed with another man.)

People v. Daya (1994) 29 Cal.App.4th 697, 712-719. (Proper for court to instruct on lesser of second degree murder, even over defense objection, where wanton nature of the crimes could have shown lack of premeditation and deliberation.)

Cases finding no duty to instruct on lesser:

People v. Brito (1991) 232 Cal.App.3d 316, 320-325. (No duty to instruct on attempted involuntary manslaughter since such offense is logical impossibility.)

People v. Hendricks (1988) 44 Cal.3d 635, 643. (No error in refusing to instruct on involuntary manslaughter where evidence showed that defendant shot victim five times at point blank range. Defendant's taped statement denying intent to kill was not substantial evidence under the circumstances.)

People v. Bunyard (1988) 45 Cal.3d 1189, 1233-1234. (No duty to instruct on second degree murder based on implied malice regarding death of fetus, where defendant shot nine-months-pregnant victim in head at close range.)

People v. Wilson (1992) 3 Cal.4th 926, 940-941. (No error in failing to instruct on lesser of second degree murder where evidence showed that victim's wallet was taken and he was shot twice in the head.)

2. Kurtzman Requirement-- Order of Verdict and Deliberations.

In the mid-1980's there was considerable litigation over the standard CALJIC instructions concerning the jury's deliberation about, and return of verdicts on, lesser offenses. Finally, in People v. Kurtzman (1988) 46 Cal.3d 322, the court held that it is correct to instruct the jury that it cannot return a verdict on a lesser offense unless it agreed unanimously that the defendant was

not guilty of the greater, but that it is incorrect to instruct the jury that it cannot deliberate on the lesser before it returns a verdict on the greater.

Accordingly, CALJIC revised its standard instructions to incorporate the Kurtzman holding. In the homicide context, CALJIC 8.75 was revised to accommodate Kurtzman. CALJIC 8.75 was held to be valid in People v. Nicolaus (1991) 54 Cal.3d 551, 580:

"In People v. Kurtzman [citation] we construed our [prior holdings] `to authorize an instruction that the jury may not return a verdict on the lesser offense unless it has agreed . . . that defendant is not guilty of the greater crime charged, but it should not be interpreted to prohibit a jury from considering or discussing the lesser offenses before returning a verdict on the greater offense.' (46 Cal.3d at p. 329, original italics.) This is precisely what CALJIC 8.75 does. As in People v. Hunter (1989) 49 Cal.3d 957, at page 976, `we find nothing in the pertinent language of the instruction as given here or in the record of the jury's deliberations as a whole, to suggest that the jury believed it must return a verdict on the greater offense before it could consider or discuss the lesser included offenses. [Citation.] Accordingly, we find no error in the court's instructing in the language of CALJIC No. 8.75.'" (Original emphasis.)

CALJIC 8.75, as revised, seems to make clear to the jury that it can consider the offenses in any order. It states, in part: "[Y]ou are to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining

to it. You may find it to be productive to consider and reach tentative conclusions on all charged and lesser crimes before reaching any final verdict[s]." The instruction then goes on to specify that in returning verdicts, the jury must first unanimously reach agreement on the greater offense before returning a verdict on the lesser offense.

In connection with greater/lesser issues, note that the court in People v. Avalos (1984) 37 Cal.3d 216 held that the jury should be instructed that before they could return a verdict regarding any degree of homicide, first or second, they must be unanimous in agreement as to that degree. This holding was based in part on Penal Code § 1157:

"The Attorney General's argument that ... trial courts [have] the option of applying section 1157 when a jury is unable to reach a verdict on degree flies in the face of ... the mandatory language of section 1157: `...the jury ... must find the degree of the crime. ... Upon the failure of the jury ... to so determine, the degree of the crime ... shall be deemed to be of the lesser degree.' (Italics added.) The statutory language leaves no room for the discretion respondent wishes to vest in the trial court." (37 Cal.3d at p. 226.)

Thus, the court found error:

"In defendant's case the jury was deadlocked as to defendant's guilt of both first and second degree murder. They returned a verdict of murder only after the court erroneously instructed that they could by that method avoid the necessity for reaching unanimity on the question of degree." (37 Cal.3d at p. 227.)

3. Dewberry Requirement-- Reasonable Doubt as to Degree and as to Greater/Lesser.

In People v. Dewberry (1959) 51 Cal.2d 548, 555, the court held: "It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense."

CALJIC has two standard instructions (Nos. 8.71 and 8.72) which clearly follow Dewberry, with regard to doubt between first and second degree murder, and doubt between murder and manslaughter. The instructions have been approved as consistent with Dewberry. (People v. Morse (1964) 60 Cal.2d 631, 656-657.) Where the instructions are given, there would be no Dewberry issue. It has been held that the instruction must be given sua sponte. (People v. Aikin (1971) 19 Cal.App.3d 685, disapproved on other grounds in People v. Lines (1975) 13 Cal.3d 500.)

However, if the specific Dewberry instruction is erroneously omitted, there is a question whether the error is obviated by the giving of the standard instruction informing the jury that if the jury is not unanimously satisfied beyond a reasonable doubt that the defendant is guilty of the greater offense, it may convict the defendant of the lesser offense if it is satisfied beyond a reasonable doubt that the defendant is guilty of the lesser.

(CALJIC 8.75 states this principle for homicides; CALJIC 17.10 states the same principle for other offenses.)

There are some cases which have dealt with the issue in the non-homicide context. In People v. Gonzalez (1983) 141 Cal.App.3d 789 and People v. St. Germain (1982) 138 Cal.App.3d 507, the courts found that giving the general CALJIC 17.10 was sufficient.²⁸

One case has found error in merely giving the general greater/lesser instruction, and not the specific Dewberry instruction as well. In People v. Reeves (1981) 123 Cal.App.3d 65, 70,²⁹ the court simply noted, without much discussion:

"The jury should, [defendant] contends, have been instructed to consider the charged offense and any lesser offense together, and, if a reasonable doubt arose as to which offense was committed, should have convicted the defendant of the lesser offense only. [Par.] The form of the instruction proposed by appellant appears to be correct, and the instructions as given constitute error. (People v. Aikin (1971) 19 Cal.App.3d 685, 703-704.)"

The Reeves court, however, found the error harmless.

Thus, in a homicide case if the court omits the specific Dewberry instructions (CALJIC 8.71 and 8.72), but gives the general greater/lesser instruction (CALJIC 8.75) there would still seem to be an arguable issue whether CALJIC 8.75 eliminated any Dewberry

²⁸ Gonzalez was disapproved on a different point in People v. Kurtzman (1988) 46 Cal.3d 322.

²⁹ Disapproved on another ground in People v. Sumstine (1984) 36 Cal.3d 909.

error.³⁰

In connection with Dewberry issues, note the discussion of People v. Avalos (1984) 37 Cal.3d 216, in the preceding subsection, regarding the requirement that the jury must be unanimous as to degree before it can return a verdict as to any degree._____

C. Justification and Excuse

A detailed discussion of justifiable and excusable homicide is beyond the scope of these materials.

In brief, Penal Code §§ 196-199 set forth the definitions of justifiable homicide and declare that justifiable homicides are not criminal.

Penal Code § 196 states that homicides committed by public officers are justifiable when the killing is necessary in the course carrying out a legal duty or arresting a felon who is fleeing or resisting arrest.

Penal Code § 197 states that homicides are justifiable: (1) when committed by a person in defense against death, or a felony, or great bodily injury; (2) when committed in defense of habitation against one who manifestly intends by violence or surprise to commit a felony or to violently enter the habitation for the purpose of committing violence against someone inside; (3) when committed in defense of a spouse, parent, child or servant against

³⁰ There would, of course, also be a question whether, if Dewberry error were found to exist in such a situation, the error was prejudicial.

a felony or great bodily injury; and (4) when necessarily committed in attempting by lawful means to apprehend a person for a felony committed. Penal Code § 198 provides that for a homicide to be justifiable in defense of habitation or in defense of others, a "bare fear" is not sufficient and the circumstances must be such that a reasonable person would have had such fears, and that the killer must have acted out of such fear alone.

Penal Code § 198.5, a statute enacted in 1984, provides that where a person uses deadly force inside his or her residence against someone who has forcibly and unlawfully entered the residence, that person is "presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household"

Penal Code § 199 declares that justifiable and excusable homicides are not punishable.

The statutory basis for excusable homicide is set forth in Penal Code § 195. Excusable homicides are those: (1) committed by accident, or in doing a lawful act by lawful means and lawful intent, with ordinary caution; and (2) committed by accident in the heat of passion upon sufficient provocation, or upon sudden combat, where no weapon is used and no undue advantage is taken. As noted, Penal Code § 199 declares that excusable homicides are not punishable.