

## SAMPLE SUBSTANTIVE *HOWARD* ARGUMENT

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**Note to Attorneys:** This sample substantive argument is intended for insertion in a motion to recall the remittitur or a habeas petition seeking to re-open an appeal or otherwise raise a *Howard* claim in a case which has already become final. (See the accompanying sample motion to recall the remittitur, posted on ADI's & FDAP's web sites.) As drafted, this argument presumes that an earlier section of the motion or petition has already summarized the holding of *People v. Howard* (2005) 34 Cal.4th 1129, and has also explained why this clarification of substantive homicide law is fully retroactive and cognizable either via recalling the remittitur or through a habeas petition. (See *People v. Mutch* (1971) 4 Cal.3d 389, and other authorities discussed in the sample motion.) If this argument is being used in a "stand-alone" brief (e.g., a supplemental brief following the reinstatement of the appeal), counsel will need to include an introductory section covering those subjects (which can be adapted from the sample motion).

The purpose of this substantive argument is: (1) to address federal due process implications of a post-affirmance decision which reveals that appellant's conduct does not meet the elements of murder (*Fiore v. White, infra*); and (2) to explain the appropriate prejudice framework where the case went to the jury on both a legally invalid theory (Veh. Code § 2800.2 as felony-murder predicate) and on an alternative legally permissible theory (e.g., implied malice).

### **BECAUSE *HOWARD* ESTABLISHES THAT THE FELONY-MURDER THEORY WAS UNAUTHORIZED, DUE PROCESS PRINCIPLES REQUIRE REVERSAL OF APPELLANT'S MURDER CONVICTION.**

#### **A. A Conviction on an Unauthorized Legal Theory Violates Due Process.**

As discussed in the preceding section, appellant was tried on a felony-murder theory. The court instructed on Vehicle Code section 2800.2 (reckless evasion of a pursuing officer) as a predicate felony for second-degree felony-murder. Although this Court upheld those instructions and affirmed appellant's conviction on direct appeal, the Supreme Court's new decision in *Howard* establishes that this felony-murder theory was unauthorized under California law. Section 2800.2 does not represent an "inherently dangerous felony" in the "abstract" because there are ways of violating the statute which do not endanger human life.

Because the offense is not “inherently dangerous,” it cannot lawfully serve as a felony-murder predicate. (*People v. Howard* (2005) 34 Cal.4th 1129, 1136-1139.)

In view of *Howard*, the submission of the section 2800.2 felony-murder theory was plainly erroneous under California law. Just as clearly, those instructions also represented federal constitutional error. Submission of an unauthorized felony-murder theory violates due process principles by allowing a conviction on a legally non-existent theory (*Suniga v. Bunnell* (9<sup>th</sup> Cir. 1993) 998 F.2d 664, 669) and deprives a defendant of his Sixth Amendment right to jury determination of malice aforethought. (See generally, *Mullaney v. Wilbur* (1975) 421 U.S. 684; *United States v. Gaudin* (1995) 515 U.S. 506 [right to jury determination of every element]; see, e.g., *People v. Jones* (2000) 82 Cal.App.4th 663, 670; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 980; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1238; *People v. Baker* (1999) 74 Cal.App.4th 243, 253 [each finding federal constitutional error in submission of invalid felony-murder predicate offenses].)

Most significantly for present purposes, a conviction on an unauthorized ground violates due process, **even when the decision recognizing the illegality of the theory is not issued until after the defendant’s conviction has become “final.”** (*Fiore v. White* (2001) 531 U.S. 225.) Much as in this case, the Pennsylvania appellate court had approved the theory on which Fiore was tried and had affirmed his conviction, and the Pennsylvania Supreme Court had denied review. But three years later, in a different case, the Pennsylvania Supreme Court disapproved that theory and held that similar conduct (deviating from the terms of a hazardous waste permit) did not come within the conviction statute (operating without a permit). In response to a later certification request from the U.S. Supreme Court, the Pennsylvania Supreme Court explained that its intervening decision was not intended as a *change* in the scope of the law, but as a *clarification* of the correct interpretation of the scope of the statute. Because the intervening state decision revealed that (contrary to the earlier affirmance by the state reviewing court) Fiore’s conduct did not satisfy the elements of the statute “as properly interpreted,” “Fiore’s conviction and continued incarceration on

this charge violate[d] due process.” (*Fiore, supra*, at p. 228.)

The same principle entitles appellant to reversal of this murder conviction. Throughout the *Howard* opinion, the California Supreme Court made clear that it was not announcing a new rule of law but was applying long-established felony-murder principles to the proper construction of section 2800.2. At least since the time of its last amendment in 1998, section 2800.2 has never qualified as an inherently dangerous felony. (*Howard, supra*, 34 Cal.4th at pp. 1137-1139.) Consequently, it did not represent an authorized basis for felony-murder liability at the time of this incident in \_\_\_ or at the time of appellant’s trial and direct appeal. As in *Fiore*, appellant stands convicted of murder on the basis of conduct (the reckless evasion violation) which we now know does not come within California’s felony-murder doctrine. Because that theory of conviction did not satisfy the elements of murder under California law “as properly interpreted,” appellant’s “conviction and continued incarceration on that charge violate due process.” (*Fiore, supra*, 531 U.S. at p. 228.)

**B. The Submission of the Unauthorized Felony-Murder Theory Requires Reversal Because There is No Indication that the Murder Conviction Rests on a Valid Ground.**

The court instructed appellant’s jury both on the invalid felony murder theory (predicated on Veh. Code § 2800.2) and on implied malice {add any other theory submitted, e.g., express malice, a different felony-murder predicate, etc.}. The submission of the latter, legally permissible theory does not in any way salvage this conviction. As both the U.S. and the California Supreme Courts have repeatedly held, submission of a legally unauthorized theory requires reversal where it is impossible to determine whether the jurors relied upon that invalid theory or on an alternative legally permissible ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69; *Yates v. United States* (1957) 354 U.S. 298, 312; *People v. Swain* (1996) 12 Cal.4th 593, 607; *Stromberg v. California* (1931) 283 U.S. 359, 369-370; *Zant v. Stephens* (1983) 462 U.S. 862, 880-882; *Mills v. Maryland* (1988) 488 U.S. 367; *Stirone v. United States* (1960) 361 U.S. 212.)

Indeed, as the Ninth Circuit recently emphasized, the necessity for this rigorous form of review is so firmly established that any application of a more lenient harmless error analysis (such as affirming on the basis of the strength of the evidence supporting an alternative theory) would contravene “clearly established federal law” and entitle a defendant to federal habeas corpus relief. (*Martinez v. Garcia* (9<sup>th</sup> Cir. 2004) 379 F.3d 1034, 1037-1041.)

More specifically, the California courts have employed this analysis (sometimes called the “*Guiton-Green* rule”) whenever a murder charge went to the jury on both an invalid felony-murder theory and a permissible malice theory. As one court explained in addressing an invalid felony-murder predicate very similar to this one (Vehicle Code section 2800.3):

The trial court's misinstructions on the elements of second degree felony murder require reversal of defendant's murder conviction unless it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict. [Citations] "*Such a reasonable doubt arises where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid ground.* [Citations.]" (*People v. Sanchez, supra*, 86 Cal.App.4th at p. 980, emphasis added; see also e.g., *People v. Smith, supra*, 62 Cal.App.4th at p. 1238; *People v. Jones, supra*, 82 Cal.App.4th at pp. 670-671; *People v. Baker, supra*, 74 Cal.App.4th at p. 253.)

As that excerpt reflects, where the record does not affirmatively establish whether the conviction rests on a valid or an invalid ground, there is necessarily a reasonable doubt that the error contributed to the verdict within the meaning of *Chapman v. California* (1967) 386 U.S. 18, and its progeny.

In this case too, the jury rendered a general verdict of murder and did not return any other verdicts or findings which would permit this Court to ascertain whether the conviction rested on the invalid felony-murder theory or the permissible malice theory. Consequently, both California’s “*Guiton-Green* rule” and federal constitutional principles mandate reversal of appellant’s murder conviction.

{Also add any circumstances which buttress prejudice argument, e.g., prosecutorial emphasis on the theory during closing arguments, jury questions, lengthy deliberations, etc.}