DIAL H FOR HOMICIDE:
IL BUONO, IL CATTIVO, IL BRUTTO
(2017 REVISION)

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To whom the following words of Ronald Reagan fully apply:
"Deep down, he's shallow"

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INTRODUCTION

Of all substantive crimes, homicide offenses are the most complex and interesting. Homicide is interesting in part due to our ingrained and long-standing fascination with the subject. Remove homicide and we would lose half of our television programs and movies. Homicide, in the form of fratricide, is the second offense mentioned in the Old Testament (the first, eating forbidden fruit, appears to have no relationship to homicide unless viewed from the perspective of the fruit). (*Genesis* 4:8 (King James Version) ["and it came to pass, when they were in the field, that Cain rose up against Abel his brother, and slew him."].)

Another aspect of our interest in homicide is that it involves conduct that is in a very different realm than the mundane activities of our daily lives – paying bills, stocking shelves, going to football games with fake wedges of cheese on our heads. Also, homicide has an aura of danger and taboo not found in ordinary conduct. Who would want to watch a television series entitled *Auto Theft She Wrote*, or play the game *Clue* if the crime was forgery. Colonel Mustard, in the library, with a magic marker. And wouldn't *Girls Gone Wild* be more fascinating if it was *Girls Gone Homicidally Wild*? Who wouldn't want to be killed by a drunk exhibitionist who performs demeaning acts for a string of worthless beads? Laissez les bons temps rouler.

The complexity of homicide is due in part to the fact that there are so many variations of the offense. There is first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter, vehicular manslaughter with gross negligence, vehicular manslaughter with gross negligence while intoxicated, vehicular manslaughter with ordinary negligence, excusable homicide, and justifiable homicide. There are also numerous theories of the many variations of homicide. There is first degree premeditated murder; first degree felony murder; first degree murder by means of a destructive device (or explosive, weapon of mass destruction, or ammunition designed primarily to penetrate metal or armor); first degree murder by poison, lying in wait or torture; first degree murder by means of discharging a firearm from a motor vehicle; second degree murder with express malice but without premeditation or deliberation; second degree murder with implied malice; second degree felony murder; voluntary manslaughter based on heat of passion; voluntary manslaughter based on imperfect self-defense; voluntary manslaughter based on imperfect defense of others; involuntary manslaughter based on the commission of a lawful act in an unlawful manner; involuntary manslaughter based on the commission of an unlawful act not amounting to a felony; involuntary manslaughter based on the commission of a felony not inherently dangerous to human life.

You get the picture. Whenever you have lots of stuff, you will have lots to say about it. In fact, you will have to say a lot of stuff about it if you wish to differentiate between the different stuff you have. But you not only have to say a lot, you have to try to describe meaningful analytic distinctions between the piles of stuff you have. You don't want those piles to run together like wet watercolors on paper. You want adjacent patches of yellow and blue, of red and blue, not amorphous blobs of green and purple. You want clear boundaries that can be easily explained and understood. You don't want the cops coming upon a scene, or the prosecutor trying the case, saying "we either have a first degree murder with premeditation or a vehicular manslaughter with gross negligence – I can't be sure which."

All homicides share a common feature – a death. So we cannot use this to draw distinctions. The primary distinction relates to the state of mind of the person who caused

the victim to shuffle off this mortal coil, to join the choir indivisible, to push up daisies, to kick the bucket, to pass on and to rest in peace. These distinctions are important because in the setting of homicide, the blameworthiness or culpability of the perpetrator is key. We treat a person who causes a death by accident or recklessness as being less blameworthy than someone who intentionally takes a life. And we try to punish more severely those who are more blameworthy. (*Edmund v. Florida* (1982) 458 U.S. 782, 800 ["American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical to the degree of his criminal culpability...." Citation, internal quotation marks and brackets omitted].) And over the course of centuries, the law of homicide has tried to come up with ways of creating distinctions between the many forms of homicide with an eye toward making the punishment fit the crime.

The area of homicide is vast, and no one can even begin to explain it in a satisfactory way in an hour's lecture or in a short outline such as this one. The lecture and the outline are hors d'oeuvres. Although they cannot do justice to the entire range of cuisine, they try to capture and present some flavorful tidbits. To paraphrase the Bard, what foods these morsels be. Sit back, relax, chew thoroughly, savor, floss and enjoy.

I. General Overview

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 murder and manslaughter (which are).

Generally speaking, 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.) Generally speaking, 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 Penal Code §§ 187, 189.) Malice may be express (intent to kill) or implied (intentional commission of an 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 (e.g., 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 or the need to defend another (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 or infractions, in the negligent commission (or commission in an unlawful manner) of lawful acts which might produce death (Pen. Code §192), or in the commission of a felony that is not inherently dangerous to human life; and

Vehicular manslaughter (Pen. Code § 192).

II. A Few Preliminary Concepts

A. Fetal Attraction

Before 1970, the killing of a fetus was not murder because section 187 defined murder as involving the killing of a human being and the Supreme Court considered a fetus not to be a human being. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 623.) Following *Keeler*, the Legislature amended section 187 to provide that murder is the unlawful killing of either a human being or a fetus. (Stats. 1970, ch. 1311, §1, p. 2440.) Penal Code §187, subdivision (a) defines murder as the "unlawful killing of a human being or fetus, with malice aforethought." Penal Code §192, defines manslaughter as the "unlawful killing of a human

being without malice." Manslaughter is a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 989.) This has been the law for more than 160 years. (*People v. Gilmore* (1854) 4 Cal. 376, 380.) But because manslaughter does not apply to a fetus, a defendant who is charged with the murder of a fetus cannot be convicted of manslaughter as a lesser included offense. (*People v. Apodaca* (1978) 76 Cal.App.3d 479, 490-492.) A fetus does not need to be viable for the defendant to be convicted of murder. Instead, "a fetus is defined as the unborn offspring in the postembryonic period, after major structures have been outlined." (*People v. Davis* (1994) 7 Cal.4th 797, 810.) This occurs in humans seven or eight weeks after fertilization. (*Ibid*.) In *Davis*, the Supreme Court did not reach the issue of premeditated murder (as opposed to felony murder) of a fetus, or the issue of whether felony murder applies when the death of the fetus is caused by some agency other than the defendant's direct assault on the mother. (*Id*. at p. 810, fn. 2.) To be convicted of second degree murder of a fetus based on implied malice, the defendant need not know that the victim is pregnant. (*People v. Taylor* (2004) 32 Cal.4th 863, 868.)

B. Causation

Axiomatically, the defendant must cause the death of the victim in order to be convicted of unlawful homicide. To paraphrase Robert Blake, who himself was accused of homicide, you don't do the time unless you did the crime. *People v. Roberts* (1992) 2 Cal.4th 271, contains 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." (*Id*. at p. 319.) The court thus found error where the trial judge instructed the jury to disregard foreseeability in determining proximate cause, stating: "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 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 forseeably 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.

(*Id*. p. 321.)

The 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 court made clear that at least for the vast majority of cases, proximate cause means a result that is direct, natural and probable.

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. 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. ... 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.

(*People v. Armitage* (1987) 194 Cal.App.3d 405, 420-421, citations and internal quotation marks omitted.) "One commentary has described the rationale for finding the acts of a second party to be a remote, independent intervening (and superseding) cause in these terms: 'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.' (Hart & Honore, *Causation in the Law* (2d ed. 1985) p. 326, fn. omitted.)" (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.) In *Cervantes*, the defendant, a member of a street gang, perpetrated a nonfatal shooting that precipitated a revenge killing by members of an opposing street gang. The Supreme Court held that the defendant did not proximately cause the death. (*Id*. at p. 862.) The murder was directed at a victim not involved in the original altercation and there was no proximate cause between that murder and the defendant's original conduct. (*Id*. at p. 874.)

Suppose the defendant shoots the victim in a manner that will lead to a painful and inevitable death, and the victim decides to hasten the death by slitting his throat. The defendant would be responsible for the homicide because even though the victim's act is the cause of death, it was natural and understandable and therefore not an independent intervening cause of death. (*People v. Lewis* (1899) 124 Cal. 551, 555.) But if the defendant inflicts a wound that is painful but not dangerous to life, and the victim knows it is not mortal

and yet takes his life to escape the pain, the defendant is not guilty of homicide. (*Id*. at p. 556.) Although the wound induced the suicide, it did not cause the suicide. (*Ibid*.) Death would not have inevitably followed the act and instead occurred though the independent intervening cause of the victim's own will to die. (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 869.)

In addition, "there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*People v. Sanchez* (2001) 26 Cal.4th 834, 846.) For example, if two people incite and encourage each other to drive at a reckless speed, and one of them causes death, the other also is guilty of homicide because the acts of both were proximate causes of the death. (*Ibid*.) Also, A is guilty of murder if he engages B in a gun battle during which B fatally shoots a bystander with a stray bullet. (*Id*. at pp. 839, 845, 848-849.)

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.) However, 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).

C. Jury Unanimity

Numerous cases hold that a unanimity instruction is not required concerning different theories of a degree 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.)

As the court noted in *Beardslee*, where "the defendant committed multiple independent acts, any of which could have lead to [the death]," a unanimity instruction would be required. (*Id*. at p. 93.) However, the acts would need to be independent, as they were in *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." (*Beardslee* at p. 93.) The court also noted: "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*Id*. at p. 92.)[1]

The United States Supreme Court, in the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 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." (*Id*. at p. 630.) 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. 632.) 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

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[1]The *Beardslee* court did not specifically approve *Dellinger*, it just distinguished it. (See also *People v.* Grimes (2016) 1 Cal.5th 698, 728, which assumes that *Dellinger* was correctly decided but finds it to be distinguishable because there was no dispute as to the acts which caused the victim's death.) *Dellinger* was criticized in *People v. Davis* (1992) 8 Cal.App.4th 28 and *People v. Sutherland* (1993) 17 Cal.App.4th 602, 609-611.

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 for determining when two means are so disparate as to exemplify two inherently separate offenses." (*Id*. at p. 643.) 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. 651.)

In *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." (*Id*. at p. 919.)

Although the courts do not require unanimity for various theories of the same offense, such as first degree murder, when the court instructs the jury on first degree murder on one theory, and second degree murder on another theory, the jury cannot convict unless they unanimously agree. This is because the jury must unanimously agree on the nature of the offense, such as whether the crime is first degree murder or second degree murder. (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1278; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024-1026.)

III. First Degree Murder

"[M]urder [is] the most evil of crimes." (*People v. Littrel* (1986) 185 Cal.App.3d 699,

702.) "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (Penal Code §187.) A murder ends with the death of the victim, not when the fatal blow is struck. (*People v. Celis* (2006) 141 Cal.App.4th 466, 471-472.) A defendant who murders only one person cannot be convicted of three counts of murder. (*People v. Coyle* (2009) 178 Cal.App.4th 209, 217.)

Penal Code §189 describes the various forms of first degree murder, stating, in relevant part:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

The most common forms of murder that we see on appeal are (1) deliberate and premeditated murder and (2) felony murder. Although section 187 says murder requires malice, as we shall see, felony murder does not.

A. Premeditated Murder

1. Express Malice

As noted above, murder is the unlawful killing of a fetus or a human being with malice aforethought. Penal Code §188 describes two kinds of malice, stating, in relevant part, "malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Although section 189, when defining first degree premeditated murder, does not say

that a conviction cannot be based on implied malice, case law indicates that express malice is the only kind of malice upon which this theory can be based. (*People v. Knapp* (1886) 71 Cal. 1, 6; *People v. Cox* (1888) 76 Cal. 281, 285-286; *People v. Holt* (1944) 25 Cal.2d 59, 91; *In re Sergio R.* (1991) 228 Cal.App.3d 588, 595 ["Murder of the first degree necessitates a finding of express malice on the part of the perpetrator."].) Express malice is simply an intent to kill. Or, as the Supreme Court has put it, the mental state of intent to kill is "coincident with express malice." (*People v. Guerra* (1985) 40 Cal.3d 377, 386.) "Intent to unlawfully kill and express malice are, in essence, one and the same." (*People v. Smith*, (2005) 37 Cal.4th 733, 739, internal quotation marks and citation omitted.)[2] Express malice does not require that the defendant act in wanton disregard for human life or from antisocial motivation. (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1267.)

Although section 188 says that, for express malice, there must be a "deliberate" intention to take away life, the Supreme Court, in *People v. Saille* (1991) 54 Cal.3d 1103, held that the word "deliberate" does not add any further requirement to the intent to kill, quoting, as follows, from a Court of Appeal case:

> "From the time it was enacted in 1872, section 188 has stated that malice is express 'when there is manifested a deliberate

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[2]Citing two cases, *Smith* also says that express malice requires a showing that the assailant either desires the result of death or knows to a substantial certainty that the result will occur. (*Id*. at p. 739.) The first cited case so stating is *People v. Velasquez* (1980) 26 Cal.3d 425, 434.) *Velasquez* gets this from a case defining the term "intentionally caused death" found in a section of the Probate Code. The Supreme Court did not explain why it thought the Probate Code was relevant when interpreting a clear term in the Penal Code. Like Omar Khayyam, it just wrote these words and moved on. ("The Moving Finger writes; and, having writ,/ Moves on: nor all thy Piety nor Wit/ Shall lure it back to cancel half a Line,/ Nor all thy Tears wash out a Word of it." *The Rubáiyát of Omar Khayyam*. Edward Fitzgerald's translation.)

Fortunately, the exegesis in *Velasquez* is rarely mentioned; unfortunately, it has never been disapproved and in fact has been cited with approval. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 211.) Penal Code §188 tells us that express malice is the deliberate intention to kill. It does not say that express malice includes knowledge to a substantial certainty that death will occur. The two formulations are different. One depends on the intent of the defendant, the other on his knowledge but not necessarily his intent.

> intention unlawfully' 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.]"

(*Id*. at pp. 1114-1115.) The Court went on to note: "The adjective 'deliberate' in section 188 consequently implies an intentional act and is essentially redundant to the language defining express malice. (*Id*. at p. 1115.)

In addition, the word "unlawfully" in section 188's definition of express malice has no real meaning. "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." (*Saille* at p. 1115.)

In other words, two of the words in section 188's definition of express malice have no meaning. Courts should give significance, if possible, to every word of an act, and a construction that renders a word surplusage should be avoided. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799.) Except here. Maybe it's because the Court was not giving no meaning to a word, but rather was giving no meaning to two words, and rendering both surplusage – think big, elide big. Not bad for a statutory clause that contained only 12 operative words ("deliberate intention unlawfully to take away the life of a fellow creature").

And what is a fellow creature? Would a pet qualify if we viewed it as human because of its human-like qualities of loyalty and good dental hygiene? Also, this leads to an idea for a game show in which contestants guess which words in a statute the courts have decided have no meaning. Most boring game show ever.

Saille is not all bad, however. The court held that even under its 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)." (*Saille* at pp. 1116-1117.) The court held, however, 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. (*Id*. at pp. 1117-1120.)

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 defendant also can be convicted for the attempted murder of B and the murder of C. (*People v. Scott* (1996) 14 Cal.4th 544.) Transferred intent, however, does not apply to inchoate crimes like attempted murder; instead, the defendant must intend to kill the victim of the attempted murder or, if, he has not selected a specific victim, he must intend to kill everyone within a kill zone, a concept which will be discussed in detail in the section below on attempted murder. (See generally *People v. Bland* (2002) 28 Cal.4th 313, 326-331; *People v. Stone* (2009) 46 Cal.4th 131, 140-141.)

2. Premeditation and Deliberation

The term "deliberate intention" used in Penal Code §188's definition of express malice is not the same as "deliberation," which is an element of first degree murder. (*In re Thomas C.* (1986) 183 Cal.App.3d 786, 796.) "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance.

The process of premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. …" (*People v. Booker* 51 Cal.4th 141, 172, citation and internal quotation marks omitted.)

Premeditation and deliberation are not to be confused with a deliberate intent to kill – they require substantially more reflection, i.e., more understanding and comprehension of the character of the act than the mere amount of thought necessary to form an intent to kill. (*People v. Stress* (1988) 205 Cal.App.3d 1259, 1269.) "Consequently, an intentional killing is not first degree murder unless the intent to kill was formed upon a preexisting reflection and was the subject of actual deliberation and forethought." (*Ibid*.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the Supreme Court listed three criteria for appellate courts to use when reviewing the sufficiency of the evidence of premeditation and deliberation: (1) planning activity; (2) motive; and (3) nature of the killing. The trial court, however, is not required to instruct on these criteria because the *Anderson* analysis "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." (*People v. Daniels* (1991) 52 Cal.3d 815, 869-870.)

Although it is permissible to convict a person of first degree premeditated murder when that person directly aids and abets in such a murder, the Supreme Court has held that a defendant cannot be convicted of this offense on the theory of natural and probable consequence aiding and abetting. (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159.) The latter theory applies when the defendant aids and abets a less serious target offense such as assault or disturbing the peace, and a coparticipant in this less serious offense commits a premeditated murder. (*Id*. at p. 158.) *Chiu* applies to cases that were final when the Supreme Court decided *Chiu*, and a defendant can raise the issue in habeas corpus. (*In re Lopez* (2016) 246 Cal.App.4th 350, 354, 356-361.)

B. First Degree Murder by Various Means[3]

Merely committing a *homicide* by the means specified in Penal Code §189 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 murder.

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:

> [Penal 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

[3]Murder by various means can constitute not just a theory of first degree murder, but also a special circumstance under Penal Code §190.2 that increases the punishment from 25 years to life to death or life without possibility of parole. Usually there is one or more distinction between the requirements of the theory of first degree murder and the corresponding special circumstance. This outline deals only with the theories of first degree murder and does not discuss the corresponding special circumstances.

> *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.]

(*Id*. at pp. 654-655. Original emphasis.)

1. Destructive Device or Explosive

See discussion of murder by specified means in immediately preceding subsection. Gasoline is not an explosive. (*People v. Clark* (1990) 50 Cal.3d 583, 603-605.)

2. Lying in Wait

Our first image about murder by lying in wait is the classic ambush from Westerns. The defendant lies in the chaparral with a rifle, waits for the victim, and shoots the victim in the back as he rides by. Quaint, but not even close to true. Ordinarily, lying in wait applies to any murder other than those in which the defendant makes his purpose clear in advance of the act. If I come up to the victim intending to kill him, chat him up awhile, and then pull out old Betsy and blow him away, this can be first degree murder by lying in wait. The focus is not on what the shooter is doing, but on the fact the victim is unaware of the shooter's purpose. (But see the *Nelson* case, below.) To avoid being found guilty of first degree murder based on lying in wait, the defendant should communicate with the victim by phone, e-mail or an engraved announcement telling the victim what he is up to. "I request the honor of your presence at your murder. Please try not to be late, as I have several other calls of a similar nature to make that day." On the downside, this prior announcement makes the

defendant guilty of first degree murder based on premeditation. Such are the thorny dilemmas facing those who murder, and why it is always best to consult with counsel before embarking on any enterprise that might have adverse legal consequences. The correct advice, by the way, is for the lawyer to say "don't do it," rather than to say "let me check out Schraer's outline on homicide and get back to you about the most advantageous way of offing this fool."

Lying in wait is the functional equivalent of proof of premeditation, deliberation and intent to kill. (*People v. Stanley* (1995) 10 Cal.4th 764, 794-795.) However, its factual matrix is distinct from ordinary premeditated murder. (*Id*. at p. 796.) Premeditated means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Lying in wait is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or other secret design to take the victim by surprise, even though the victim is aware of the murderer's presence. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) The concealment need not be physical. It suffices if the defendant's purpose and intent are concealed by his conduct or actions and the concealment of purpose puts the defendant in a position of advantage, from which the fact finder may infer that lying in wait was part of the defendant's plan to take the victim by surprise. (*Id*. at p. 1140.) There is thus no requirement that the defendant literally be concealed from view before he attacks the victim. (*People v. Webster* (1991) 54 Cal.3d 411, 448.) There is no requirement that the assailant intend to kill; a wanton and reckless intent to inflict injury likely to cause death is sufficient. (*Ibid*.)

There is a temporal requirement. The killing must be immediately preceded by the period of lying in wait. (*Webster*, *supra*, at p. 449.) However: "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.)[4] The defendant does not lie in wait if he comes up behind his victims and simply

[4]A series of cases concerning the *special circumstance* of lying in wait have noted that "[i]f a cognizable interruption separates the period of lying in wait from the period during

shoots them. This is because the defendant did not wait in ambush for the victims until they were vulnerable for a surprise attack. (*People v. Nelson* (2016) 1 Cal.5th 513, 551.)

The Supreme Court, in *People v. Edwards* (1991) 54 Cal.3d 787, 824, 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 constitute 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. This is because the holding is based on the principle that there is no need to agree on the theory of guilt and because the requirement of unanimity typically applies to acts that could have been charged as separate offenses.

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.[5] 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 commit assault, the *Ireland* doctrine did not apply and there was an "adequate basis for criminal responsibility for first degree murder." (*Id*. at p. 1049.)

3. Torture

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

> Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and

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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.

[5] *Ireland* is discussed in more detail in the section on second degree felony-murder, below.

> 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.) Further: "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*, 52 Cal.3d at p. 1242.) The defendant does not need to intend to kill the victim – it is enough that the acts causing death involve a high degree of probability of the victim's death. (*People v. Cook* (2006) 39 Cal.4th 566, 602.) The term "sadistic purpose" is a term in common usage and there is no need to instruct on the meaning of the term even if the jury asks for clarification of what the term means. (*People v. Raley* (1992) 2 Cal.4th 870, 901.)[6]

C. First Degree Felony Murder[7]

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

People v. Berryman (1993) 6 Cal.4th 1048, 1085 describes as follows the requirements for first degree felony murder:

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[6]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.

[7]The discussion in this section does not include issues directly relating to aider/abettor liability. A treatment of vicarious/derivative liability is beyond the scope of this handout and beyond the mental capacity of the author of this handout to comprehend.

> The mental state required is simply the 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.].

Even though felony murder does not require malice, a defendant who is charged with murder with malice may be convicted of felony murder. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1097.) The information does not need to charge the felony that is the predicate for the felony-murder theory. (*People v. Silva* (2001) 25 Cal.4th 345, 371.)

Ordinarily, even if the prosecutor is proceedings solely on a theory of felony murder, the accusatory pleading will phrase the charge as murder with malice. When this occurs, the defendant is entitled to instructions on the lesser included offenses of murder with malice (such as second degree murder, voluntary manslaughter and involuntary manslaughter) even if these crimes are not lesser included offenses of felony murder and even if the only instruction on first degree murder the jury hears is based on first degree felony murder. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159-1161; *People v. Campbell* (2015) 233 Cal.App.4th 148, 157-165.)

Under the language of Penal Code §189, the murder must be committed in the perpetration of or attempt to perpetrate the felony. Felony murder applies even if the felony itself is not occurring or has been abandoned when the homicide takes place, so long as the homicide is related to the felony and resulted as a natural and probable consequence of the felony. (*People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025.) "In order for the killing to be part of the felony's 'perpetration' there must be both a causal and temporal relationship between the two." (*People v. Russell* (2010) 187 Cal.App.4th 981, 988.) "The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony.... The temporal relationship is

established by proof the felony and the homicidal act were part of one continuous transaction." (*People v. Cavitt* (2004) 33 Cal.4th 187, 193.) There are two rules related to this. The escape rule defines the duration of the underlying felony by deeming it to continue until the felon has reached a place of temporary safety. The continuous-transaction doctrine, however, defines the duration of felony-murder liability, which may extend beyond the termination of the felony itself, provided that the felony and the act resulting in death constitute one transaction. (*Id*. at p. 208.) A robber who has kidnapped the victim cannot reach a place of temporary safety because at any unguarded moment the victim might escape or signal for help. (*In re Malone* (1996) 12 Cal.4th 935, 967.)

"Whether a defendant has reached a place of temporary safety is a question of fact for the jury." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 559.) The issue does not turn on the defendant's state of mind, but rather on objective factors. The question is whether the defendant actually reached a place of temporary safety, rather than whether he believes he did. (*Id*. at p. 559-560.) The sojourn in the place of temporary safety need not be long. It is sufficient if the defendant was "momentarily" in the place of temporary safety. (*People v. Salas* (1972) 7 Cal.3d 812, 822; *People v. Boss* (1930) 210 Cal. 245, 250.) Thus not only need the safety provided by the location be temporary, the amount of time spent there need only be momentary.

The primary purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly liable for the killings they commit when they commit a felony. (*People v. Billa* (2003) 31 Cal.4th 1064, 1069.) What about felons who kill intentionally or with implied malice? They do not fall within the primary purpose of the rule. And they are subject to prosecution for murder based on malice. Still, the courts apply the felony-murder rule to them. After all, the felony-murder rule means the prosecution does not have to prove malice. And if this applies to negligent and accidental homicides, why not apply it to homicides with malice since the defendants who act in this manner have a more culpable state of mind than those who kill negligently or accidentally.

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.) Moreover, " first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*Id*. at p. 477.) In one of the more interesting cases, the Court of Appeal upheld a first degree robbery-felony murder conviction based on the fact that the victim, who had a history of heart disease and advanced atherosclerosis and who did not take good care of his heart and was under a great deal of pressure due to the intensely competitive nature of his business, died of a heart attack about 15 or 20 minutes after the robbery occurred due to fright stemming from the robbery. (*People v. Stamp* (1969) 2 Cal.App.3d 203, 208-211.) The Court of Appeal stated that the death does not need to be foreseeable so long as the homicide is a direct cause of the felony, and that as long as the felony shortens the victim's life it does not matter that the victim might have died soon anyway. (*Id*. at pp. 210-211.) "In this respect, the robber takes his victim as he finds him." (*Id*. at p. 211; accord *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287-288 [victim, who suffered from atherosclerosis, suffered psychological stress during a robbery that triggered arrhythmia which caused heart dysfunction and death].)

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 a crime such as rape." (*People v. Hernandez* (1988) 47 Cal.3d 315, 346.) Although rape is a general intent crime, the defendant must specifically intend to commit this crime to be guilty of rape felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1256; *People v. Osband* (1996) 13 Cal.4th 622, 685-686.) If the underlying felony is a specific intent crime, this is the only specific intent that the prosecution must prove – it is not necessary to prove the specific intent to commit each element of the felony. (*People v.*

Pollock (2004) 32 Cal.4th 1153, 1175.)

The intent to commit the predicate felony must exist at the time of the killing. If the defendant forms the intent to commit the felony after the killing occurs, the offense is not felony murder. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 446.)

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.) There is no requirement that death be a natural and probable consequence of the felony. (*People v. Hernandez* (1985) 169 Cal.App.3d 282, 287.)

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 737, overruled on an unrelated point in *People v. Cahill* (1993) 5 Cal.4th 478.).

Where the defendant is charged with the underlying felony as well as with felony-murder, the court must instruct *sua sponte* on lesser included offenses of the underlying felony if there is substantial evidence to find such a lesser included offense. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 348, 351; *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 several cases courts have held that the requirement of instructing on lessers to the underlying felony (e.g., theft being a lesser included offense of robbery) did not apply where the defendant was not actually charged with the underlying felony because the duty does not apply to uncharged offenses relevant only as a predicate offense under the felony-murder doctrine. (*People v. Kelly* (2007) 42 Cal.4th 763, 792; *People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Silva* (2001) 25 Cal.4th 345, 371; *People v. Miller* (1994) 28 Cal.App.4th 522, 526-527.) But involuntary manslaughter is a

lesser included offense of murder. And as we will see later, a homicide during the commission of a felony that is not inherently dangerous to life is involuntary manslaughter. Therefore, if the underlying felony is theft rather than robbery, or false imprisonment rather than kidnapping, then the homicide is not first degree felony murder but felony involuntary manslaughter. The court would have to instruct on this.

Also, a court must instruct on all *theories* of a lesser included offense which find substantial support in the record. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The theory can be characterized as involuntary manslaughter based on a death during a noninherently dangerous felony. But this does not give the jury enough information without telling them the nature of that felony and how it differs from the felony upon which the prosecution is relying.

People v. Blair (2005) 36 Cal.4th 686 supports the contention that the court has a duty to instruct sua sponte to describe the underlying felony supporting a involuntary manslaughter theory based on a death during a noninherently dangerous felony, although it provides this support only by analogy. There, the defendant was charged with first degree murder by administering poison. The Supreme Court concluded that the court should have instructed the jury sua sponte on second degree felony murder based on a death occurring during the inherently dangerous felony of violating Penal Code §347 – administering a poison by a person who knows or should know a person would take the poison to his injury. The intent for the felony is to injure or intoxicate the victim. (*Id*. at p. 745-746.) Under *Blair*, it is not enough to say that second degree murder is the lesser included offense of murder by poison. Instead, the trial court must identify the lesser included offense as felony murder and must also instruct sua sponte on the felony. Mutatis mutandis, this means that in a felony-murder case, the court must instruct on involuntary manslaughter based on a noninherently dangerous felony and must also instruct on the relevant felony.

In short, 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 felony 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.)

If the prosecution's theory of guilt is that the defendant aided and abetted in a felony murder, the defendant must aid and abet in the felony before or at the time of the act causing death, and the trial court must instruct on this sua sponte. It is not enough that the defendant aids by engaging in an act that occurs after the victim's death. (*People v. McDonald* (2015) 238 Cal.App.4th 16, 20-21, 24-26; *People v. Hill* (2015) 236 Cal.App.4th 1100, 1115-1121.)

IV. Second Degree Murder

Second degree murder comes within the same definition in Penal Code §187 as first degree murder. That is, second degree murder "is the unlawful killing of a human being, or a fetus, with malice aforethought." More specifically, second degree murder is murder of any variety other than the types of first degree murder listed in Penal Code §189. It comes in several cerebrally-challenging yummy flavors.

A. Second Degree Murder With Express Malice But Without Premeditation or Deliberation

As explained above, one form of first degree murder is murder with express malice (intent to kill), premeditation and deliberation. If express malice remains and either premeditation or deliberation is not present, the homicide is second degree murder. (*People v. Long* (1870) 39 Cal. 694, 696.) "Murder that is committed with malice but is not premeditated is of the second degree." (*People v. Ramirez* (2006) 39 Cal.4th 398, 464.) "Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

B. Second Degree Murder with Implied Malice

Unlike first degree murder, second degree murder can be based on implied malice.

(*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.) Penal Code §188 describes implied malice as existing "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." It has taken dozens of cases for the Supreme Court to figure out what the four simple words "abandoned and malignant heart" means. Thank God they have not been asked to give meaning to "I love you" or "jump the shark," which have only three words, not four.

Early instructions on implied malice defined the term using the statutory language of abandoned and malignant heart. (*People v. Sedeno* (1974) 10 Cal.3d 703, 722; CALJIC 301 (1st ed. 1946).) The meaning of the words abandoned and malignant heart, however, is clearly far from clear. (*People v. Knoller*, *supra*, 41 Cal.4th at p. 151.) The Supreme Court has called the phrase abandoned and malignant heart an "obscure metaphor" that "invites confusion and unguided speculation." (*People v. Phillips* (1966) 64 Cal.2d 574, 587.) Although you can lose your heart in San Francisco (hearts are slippery, and you must contend with the fog), how do you abandon your heart. Is it like abandoning a ship? Do you jump overboard and leave it behind? And in what ways is a heart malignant? Is it like a malignant tumor that must be excised or reduced through radiation treatment or chemotherapy?[8] Giving a jury an instruction containing the language about a malignant heart could lead the jury to equate the malignant heart with an evil disposition or despicable character and to convict in a close case because it believes the defendant is a bad person. (*Ibid*.)

To replace the statutory definition of implied malice, the Supreme Court approved two alternative and different definitions.

One definition came from a 1953 concurring opinion by Justice Traynor that was approved in a case decided a dozen years later. It described implied malice as existing where

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[8]These observations are not as weird or cavalier as they might seem. As the Supreme Court put it: "Hardness of the arteries is an ascertainable concept – but not of the heart; malignant cancer is similarly ascertainable, but not malignant hearts; also abandoned children but not abandoned hearts. As sophisticated as human knowledge has become regarding anatomy of the body, the anatomy of the crime concept – and especially of malice – has remained as mysterious for many courts as it was for cavemen. Why not stop abusing the poor heart?" (*Id*. at p. 587, fn. 11, citation and internal quotation marks omitted.)

the defendant, for a base, antisocial motive and with a wanton disregard for human life, does an act that involves a high probability that it will result in death. (*People v. Washington* (1965) 62 Cal.2d 777, 782; *People v. Thomas* (1953) 41 Cal.2d 470, 480 [concurring opn, of Traynor, J.].) A year later in *People v. Phillips*, *supra*, 64 Cal.2d 574, the court approved a second definition. Under it, implied malice is present when a killing proximately results from 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. (*Id*. at p. 587.)

Both of these formulations of implied malice were in use, and the Supreme Court relied on both, when it decided the seminal case holding that a vehicular homicide can result in a conviction for second degree murder based on implied malice. (*People v. Watson* (1981) 30 Cal.3d 290, 300.) The Supreme Court there indicated that the two formulations were different ways of phrasing the circumstances under which implied malice exists. (*Ibid*.) The relevant part of *Watson*, with quotation marks, citations and an ellipsis omitted, states:

> We have said that second degree murder based on implied malice has been committed 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.

(*Ibid*.)

When the Supreme Court decided *Watson*, the CALJIC instructions defining implied malice and second degree murder with implied malice were phrased using both the *Washington* and *Phillips* formulations of implied malice. (CALJIC 8.11 (1979 Revision); CALJIC 8.31 (1974 Revision.) In 1989, the Supreme Court stated that the *Washington* formulation, although legally correct, was superfluous and the better practice was to use the *Phillips* formulation. (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215.)

In *Dellinger*, the jury was instructed using the 1983 revisions of CALJIC 8.11 and

CALJIC 8.31. The 1983 revision of CALJIC 8.11 used both the *Washington* and *Phillips* formulations of implied malice. It stated, in relevant part: "Malice is implied when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life *or* when the killing results from an intentional 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." (Italics in original.) (*People v. Dellinger*, *supra*, 49 Cal.3d at p. 1217.) Second degree murder was defined using almost identical language. (*Ibid*.)

The defendant objected to the first definition in the instruction, arguing it allowed the jury to find implied malice without determining that he subjectively appreciated the life-threatening risk of his conduct. (*Ibid*.) The Court of Appeal agreed, finding that the phrase "wanton disregard for human life" was confusing because "wanton" was not defined in the instruction and does not convey a knowing or conscious appreciation of the risk to human life. (*Ibid*.) The Supreme Court disagreed, concluding that the "wanton disregard for human life" definition of implied malice adequately conveys that the defendant must be shown to have subjectively appreciated the life-threatening risk created by his conduct. (*Ibid*.)

The Supreme Court went on to explain the origins and nature of the two formulations of implied malice. (*Id*. at pp. 1218-1219.) The court noted that *Watson* "made it abundantly clear that the two definitions of implied malice which evolved in the aforementioned cases articulated one and the same standard." (*Id*. at p. 1219.) The court acknowledged that some Court of Appeal cases stated that the wanton disregard for life formulation does not convey the requirement of subjective awareness of the risk. (*Ibid*.) The Supreme Court disagreed and found that a reasonable juror would understand that the wanton disregard formulation required a finding of the defendant's subjective awareness of the life-threatening risk. (*Id*. at pp. 1219-1221.)

The Supreme Court concluded, however, that the wanton disregard for life formulation had become superfluous. (*Id*. at p. 1221.) The court explained that this is

because the word "wanton" is not in common use in contemporary daily speech and there is a possibility that many laypersons will be unfamiliar with its meaning. (*Ibid*.) The court stated that the better practice would be to instruct juries using solely the straightforward language in the conscious disregard formulation of implied malice which was employed in the versions of CALJIC 8.11 and 8.31 found in the 1988 fifth edition of CALJIC. (*Id*. at pp. 1221-1222.)

A few years after *Dellinger*, the Supreme Court returned to the issue. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91.) There, the Supreme Court once again recounted the history of the two formulations of implied malice. (*Id*. at pp. 103-104.) It explained that in *Dellinger* it had confirmed that both formulations articulated the same standard, but that the "conscious disregard" formulation was preferable for use in instructions because its phraseology was more straightforward. (*Id*. at p. 104.)

The defendant in *Nieto Benitez* argued that the version of CALJIC 8.31 which the trial court gave misstated the law because it omitted the requirement that a defendant commit the act with a high probability that death will result. (*Id*. at p. 111.) He contended that this requirement articulates an elevated standard above the one incorporated in the version of CALJIC 8.31 which requires an act whose natural consequences are dangerous to life. (*Ibid*.) The defendant did not, however, object to the use of CALJIC 8.31. Nor did he request an instruction explaining that an act is one whose consequences are dangerous to life only when there is a high probability that the act will result in death. (*Id*. at pp. 110-111.) The Supreme Court rejected the defendant's contention based on its view, expressed earlier in both *Watson* and *Dellinger*, that the two formulations of implied malice articulate one and the same standard. (*Id*. at p. 111.)

More recent Supreme Court cases continue to emphasize that implied malice requires that the defendant know his conduct endangers the life of another person and act with a conscious disregard for life. (E.g., *People v. Robertson* (2004) 34 Cal.4th 156, 164; *People v. Taylor* (2004) 32 Cal.4th 863, 868; *People v. Martinez* (2003) 31 Cal.4th 673, 684; *People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Hansen* (1994) 9 Cal.4th 300, 308.)

Implied malice is not an objective standard, but rather a subjective one – whether the defendant acted with a conscious disregard for life. (*People v. Phillips*, *supra*, 64 Cal.2d at p. 588.) The defendant must also know that his conduct endangers the life of another and must act deliberately with a conscious disregard for life. (*People v. Watson*, *supra*, 30 Cal.3d at p. 296.) The defendant must actually appreciate the risk involved – the standard is not whether a reasonable person in the defendant's position would have appreciated the risk. (*Id*. at p. 296-297.) Implied malice requires proof that the defendant acted with a conscious disregard of the danger to human life. A conscious disregard of the risk of serious bodily injury does not suffice. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) For implied malice: "Knowledge of the risk of serious bodily injury is not enough; knowledge of a high probability of death is too much." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1203.)

With respect to the act that results in death, although Penal Code §192, subdivision (b), stated that involuntary manslaughter can consist of an unlawful killing in the commission of an unlawful act not amounting to a felony, if the death results from the commission of a misdemeanor it is second degree murder if implied malice is shown. (*People v. Nieto Benitez*, *supra*, 4 Cal.4th at pp. 108-110.) Even if the death is accidental, the circumstances surrounding the act can support a finding of implied malice. (*Id*. at p. 110.) Second degree murder based on implied malice requires the performance of an act, the natural consequences of which are dangerous to life. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) An assault with a fist may qualify, depending on the circumstances. (*Ibid*; *People v. Munn* (1884) 65 Cal. 211, 212.)

Cravens raises an interesting point about the nature of the act that results in the homicide. Under the test for implied malice set forth in Justice Traynor's concurring opinion in *People v. Thomas*, *supra*, 41 Cal.2d 470, 480, the defendant must do "an act that involves a high degree of probability that it will result in death." The Supreme Court, as noted, has said that the two definitions of implied malice "in essence articulated the same standard." (*People v. Knoller*, *supra*, 41 Cal.4th at p. 152.) But in *Cravens*, the majority did not discuss whether the act in that case – a single sucker punch – involved a high probability that it

would result in death. Justice Liu in a concurring opinion, and Justice Kennard in a dissenting opinion, talk about the test from *Thomas*, note that the majority did not mention it, and ask what up with that. Justice Liu noted that the *Thomas* test was not in issue in the *Cravens* case and therefore lets this go. Justice Kennard found, among other things, that the high probability of death was missing. It appears that the question still looms concerning the viability of the high-probability-of-death test in *Thomas*. Given the above history, if someone trying a murder case wants to inject the high probability of death requirement, it appears it would be necessary to draft an instruction to that effect. This is because the standard instruction is deemed to be sufficient and the trial court would have no sua sponte duty to add the "high probability" riff.

There has been litigation and legislation involving 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." (*Id*. 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 the issue of whether the defendant harbored malice aforethought.[9] 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.

Note, however, that mental disease, disorder or defect still can negate implied malice,

[9]Stats. 2012, chapter 162, §118 renumbered section 22 as section 29.4.

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 29.4, 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. Under the reasoning in *Whitfield*, a defendant would be entitled to an instruction informing the jury that mental disease, defect or disorder can negate both express and implied malice. 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.)

C. Second Degree Murder Based on Provocation Sufficient to Negate Premeditation or Deliberation

Penal Code §188 states that malice is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." We have just discussed the meaning of the words following "or." Let's turn to the words preceding it – when no considerable provocation appears.

"Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of both premeditation and malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation." (*People v. Thomas* (1945) 25 Cal.2d 880, 903.) This relates the evidence provocation to the specific legal issue of premeditation and deliberation. It is therefore a pinpoint instruction and the trial court need not instruct on it sua sponte. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879.) Provocation in this context is not a defense. (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1734.) Nor is it a general principle of law. Instead, it relates to the factual issues to the defendant's subjective state of

mind. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32, disapproved on another point in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) Because provocation sufficient to negate premeditation and deliberation is based on the defendant's subjective state of mind – rather than on an objective reasonable-person standard – provocation can be based on a hallucination, which is a perception with no objective reality. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678-680.)

As noted above, provocation can negate premeditation or deliberation, thereby reducing the crime to second degree murder. However, provocation cannot negate first degree murder by lying in wait. (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1496.)

Provocation for purposes of reducing murder from the first to the second degree is different from provocation for the purposes of establishing voluntary manslaughter based on heat of passion. As will be explained below, provocation in the voluntary manslaughter context is objective and based on an ordinary person of average disposition. (*People v. Bryant* (2013) 56 Cal.4th 935, 946-948.) Under this standard, the "defendant's subjective response is immaterial." (*People v. Rich* (1988) 45 Cal.3d 1036, 1112.) But provocation for purposes of reducing the degree of murder is subjective.

Oddly, the CALCRIM No. 522, which defines the effect of provocation on the degree of murder does not state that such provocation is based on a subjective standard. CALCRIM No. 522 provides, in relevant part:

> Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide.
>
> If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]

The language of CALCRIM No. 522 suggests that provocation in both homicide contexts is the same except as to the effect of the provocation. It is doubtful that a jury would know from CALCRIM No. 522 that provocation for purposes of reducing the degree

of murder is based on a subjective standard. Reinforcing this is the fact that the instruction that defines voluntary manslaughter based on provocation states that such provocation is based on an objective standard and states that the defendant "is not allowed to set up (his/her) own standard." (CALCRIM No. 570.) A jury that heard CALCRIM Nos. 522 and 570 would have no way of knowing that provocation for purposes of reducing the degree of murder is subjective rather than objective. In fact, the jury most likely would conclude that both forms of provocation are based on an objective standard. This is because CALCRIM No. 522 suggests they are identical except with respect to their effect, and CALCRIM No. 570, which contains the only definition of provocation in terms of its mental element, says provocation is objective and not subjective.

Also, the Attorney General appears to have held for 47 years the incorrect view that provocation for purposes of reducing the degree of murder was based on an objective standard. Let me explain.

In a case decided in 1917, the California Supreme Court made clear that in the context of negating malice and reducing murder to manslaughter, provocation is based on an objective standard of a reasonable person or an ordinary person of average disposition. (*People v. Logan* (1917) 175 Cal. 45, 49.) In 1945, the California Supreme Court decided a case that recognized for the first time that provocation insufficient to raise a reasonable doubt as to malice (and reduce murder to manslaughter) nevertheless may be sufficient to raise a reasonable doubt as to premeditation or deliberation (and reduce first degree murder to second degree murder). (*People v. Thomas* (1945) 25 Cal.2d 880, 903.) *Thomas* does not mention that provocation in the context of reducing the degree of murder is based on a subjective standard rather than the objective one that reduces murder to manslaughter. Someone reading *Thomas* would not know from that opinion that not only is the effect of provocation different in the two homicide-related contexts, but one is based on a subjective standard and the other is based on an objective one.

The point remained unsettled for years and was finally clarified in 1992. In a case decided that year, the Attorney General argued that a jury must apply an *objective* standard

of provocation to reduce first degree murder to second degree murder, as well as to reduce murder to manslaughter. The Court of Appeal rejected the contention, holding that the proper standard for provocation reducing the degree of murder is subjective. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) If the Deputy Attorney General who handled the *Fitzpatrick* case did not know from the standard instructions that the provocation that reduces first degree murder to second degree murder is based on a subjective standard, and instead argued it is based on an objective standard, it is not reasonable to assume that jurors who have no legal education or background comparable to a Deputy Attorney General handling the *Fitzpatrick* case would know this.

D. Second Degree Felony Murder

1. General Principles of Law

The Penal Code does not expressly set forth any provision for second degree felony murder, yet the concept of second degree felony murder "lies embedded in our law." (*People v. Phillips* (1966) 64 Cal.2d 574, 582, overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12.) It has been referred to as a judge-made doctrine without any express basis in the Penal Code. (*People v. Howard* (2005) 34 Cal.4th 1129, 1135.) How this properly could have come about is not entirely clear. (Penal Code §6 [no act is criminal except as authorized by statute]; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 ["the power to define crimes and fix penalties is vested exclusively in the legislative branch."]; *People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 355 ["it is the Legislature's function to define offenses and to prescribe punishments."].) On the other hand, as a practical matter, courts can do whatever they declare to be within their power to do. If a litigant challenges this, he must do so in court. Good luck with that. The court has already told the litigant what the law is. Their sword is long and their arm is strong. The only things to blunt their sword or weaken their arm are the courts themselves in the form of their stated recognition that the felony-murder rule is an artificial concept of strict liability that erodes the relationship between criminal liability and moral culpability and therefore deserves no extension beyond its required application. (*People v. Howard*, *supra*, 34 Cal.4th

at p. 1135.) Guess who gets to determine when the required application of the rule should be extended.

The Supreme Court cut through this knotty problem about the statutory basis for second degree felony murder or the lack of such a basis in *People v. Chun* (2009) 45 Cal.4th 1172. The court recognized that it had never explained the statutory basis for second degree felony murder, recognized that it had said the doctrine was one of judicial creation, acknowledged that all crimes in California must be statutory, and went on to hold that the second degree felony-murder doctrine is "simply another interpretation of section 188's 'abandoned and malignant heart language.'" (*Id*. at p. 1183.) I have to say I did not see that one coming. It appears that although the language in section 188 had been around since 1850, the court noticed for the first time in 2009 that it provides a statutory basis for second degree felony murder. The court's explanation of the statutory basis is a marvelous, creative and extended bit of mental gymnastics posing as illumination and cannot be summarized briefly or coherently because there are so many holes in it. If you are looking for an example of how the court can come up with imaginative reasoning, and suddenly see stuff in a statute that it has not seen for 159 years, you can review the analysis on your own. (*Id*. at pp. 1182-1188.)

"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." (*People v. Hansen* (1994) 9 Cal.4th 300, 308.) To put it another way: "The felony-murder rule dispenses with the requirement of malice and replaces it with the specific intent to commit the underlying felony." (*People v. Jones* (2000) 82 Cal.App.4th 663, 667.) If the underlying felony is a specific intent crime, this is the only specific intent that the prosecution must prove – it is not necessary to prove the specific intent to commit each element of the felony. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1175.)

2. Inherently Dangerous Felonies

Under Penal Code §189, deaths occurring during the commission or attempted commission of the listed felonies are first degree felony murder. For second degree felony

murder, the death must occur during the commission of felonies that are "inherently dangerous to human life." (*People v. Hansen*, *supra*, 9 Cal.4th at p. 308.) "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." (*Ibid*., citation and internal quotation marks omitted.) It is the trial court, not the jury, that decides if a felony is inherently dangerous to life. (*People v. Schaefer* (2004) 118 Cal.App.4th 893, 899-902.) An inherently dangerous felony is one which, "by its very nature" "cannot be committed without creating a substantial risk that someone will be killed...." (*People v. Burroughs* (1984) 35 Cal.3d 824, 833.) Also an inherently dangerous felony is one carrying a high probability that death will result. (*People v. Patterson* (1989) 49 Cal.3d 615, 627.)

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);[10] 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);[11] kidnapping for robbery (*People v. Coleman* (1992) 5 Cal.App.4th 646, 649-651); kidnapping

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[10]Although under *Hansen* discharging a firearm at an inhabited dwelling is inherently dangerous to life and therefore ostensibly a proper basis for second degree felony murder, the Supreme Court more recently held that under the merger doctrine, which will be discussed below, discharging a firearm at an occupied vehicle cannot serve as the underlying felony for purposes of the felony-murder rule. (*People v. Chun*, *supra*, 45 Cal.4th at pp. 1200-1201.)

[11]In 1990, kidnapping was added to Penal Code §189's list of 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. Before then, kidnappings were a basis for second degree felony murder.

for ransom, extortion or reward (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1224-1229); reckless and malicious possession of a destructive device or explosive (*People v. Morse* (1992) 2 Cal.App.4th 620, 644-646); 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 evading an officer in violation of Vehicle Code §2800.2 (*People v. Howard*, *supra*, 34 Cal.4th at pp. 1136-1139); 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, 974); 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, 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*, *supra*, 82 Cal.App.4th at p. 669.)

3. The Merger or *Ireland* Doctrine

An important legal principle related to second degree felony-murder is the *Ireland* or merger doctrine. In *People v. Ireland* (1969) 70 Cal.2d 522, 539, the court held that where the felony was assault with a deadly weapon, it was improper to base a conviction on felony-murder because that would "bootstrap" any killing committed with a deadly weapon into murder – a category that includes "the great majority of all homicides" – without the jury making an independent determination concerning actual malice.

Since *Ireland*, the law of merger has been on a roller coaster. Initially, the court found that other types of felonies merged into the killing itself, and thus were 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].) *Smith* remains good law. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 942-943.) *Wilson* has not fared as well. The Supreme Court overruled it in *People v. Farley* (2009) 46 Cal.4th 1053, 1116-1122, holding that the merger doctrine does not apply to first degree felony murder, which is what burglary felony murder is.[12] The merger doctrine also

[12]It is interesting to compare *Farley* with *Chun*. The Supreme Court itself did this in *Farley*, but was not aware of the following anomaly. The primary rationale for *Farley* is that section 189 lists a murder during burglary as first degree murder and the court felt *Wilson* erred by narrowing the Legislature's definition of first degree murder. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1119.) In *Chun*, however, the Supreme Court discovered a basis for second degree felony murder in the words abandoned and malignant heart. One might conclude that this expanded, by means of loose legislative interpretation, the language of section 188, and created a broad crime out of something the Legislature had not authorized. But when it came to interpreting legislation by narrowing a small category of cases based on strong and applicable policy reasons, the Supreme Court overruled the view it expressed earlier (*Wilson*) and construed the statute strictly (*Farley*). It could be argued that the driving principle explaining both rulings is the result-oriented view that felony murder should be construed broadly whenever possible. But that cannot be the case because the Supreme Court has stated that the felony-murder rule should not be extended beyond any rational function it is designed to serve. (*People v. Chun*, *supra*, 45 Cal.App.4th at p. 1189.) Still, it is hard to understand how this underlying rationale for the felony-murder leads to ruling in *Chun* that expansively reads section 188, and the ruling in *Farley* that narrowly and

does not apply to murder based on a conspiracy theory of liability or based on lying in wait, even when the murder is committed by assault with a deadly weapon, because these theories do not apply to second degree felony murder. (*People v. Maciel* (1988) 199 Cal.App.3d 1042, 1048-1049.) In addition, the merger doctrine does not apply to a kidnapping whose sole purpose is to assault the victim. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1010-1013.)

If cases like *Farley* are, metaphorically, the roller coaster of the merger doctrine descending, it also has ascended. In *People v. Hansen*, *supra*, 9 Cal.4th 300, 311-316, the Supreme Court ruled that the merger doctrine did not apply to discharging a firearm at an occupied dwelling. In *People v. Chun*, *supra*, 45 Cal.4th 1172, 1199-1200, the court overruled *Hansen* and held that the merger doctrine applies to discharging a firearm at an occupied vehicle.

When determining whether a crime merges, the court looks to its elements, not to the facts of the case. *(People v. Chun*, *supra*, 45 Cal.4th at p. 1200.) Among the crimes that merge are child endangering by extreme neglect and grossly negligent discharge of a firearm. (*Ibid*.) Another is conspiracy to commit an assault with a deadly weapon. (*People v. Baker* (1999) 74 Cal.App.4th 243, 248-251.) Yet another 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.)

V. Attempted Murder and Attempted Manslaughter

A. Attempted Murder

1. General Legal Principles

Penal Code §664 states that an attempted offense is punishable by one-half the term of imprisonment prescribed upon a conviction of the offense attempted. For an attempt to commit a crime carrying a life term, the punishment is imprisonment for a term of five, seven

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literally reads section 189.

or nine years. However, "if the crime attempted is willful, deliberate and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole." This means that the defendant is eligible for parole in seven calendar years. (Penal Code §3046.)

Attempted murder 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, when 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.) Instead, the court instructs on attempted murder and tells the jury it must make a specific finding whether the offense was willful, deliberate and premeditated. (*People v. Douglas*, *supra*, 220 Cal.App.3d at p. 550.)

When the defendant is charged with attempted premeditated murder, premeditation, deliberation and willfulness constitute the functional equivalent of an element of the offense, and the court must instruct the jury sua sponte of the need to find these facts beyond a reasonable doubt. (*People v. Banks* (2014) 59 Cal.4th 1113, 1151-1152.) Under *People v. Favor* (2012) 54 Cal.4th 868, 872, when the prosecution proceeds against the defendant using the natural and probable consequence theory of aiding and abetting liability, the trial court can instruct the jury to find that attempted murder, rather than premeditated attempted murder, is a natural and probable consequence of the target offense that the defendant aided and abetted. In *People v. Mateo*, No. S232674, the Supreme Court granted review to determine the viability of this holding in *Favor*. The Supreme Court most likely will decide *Mateo* in 2018. It is likely, but not certain, that *Mateo* will overrule *Favor*.

The California Supreme Court has recognized for more than 120 years that even though a person need not intend to take life in order to be guilty of murder, he must harbor this intent to be guilty of *attempted* murder. (*People v. Mize* (1889) 40 Cal. 41, 43. For murder, implied malice – a conscious disregard for life – suffices. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) However: "Attempted murder requires the specific intent to kill and

the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 624.) The mental state of intent to kill is "coincident with express malice." (*People v. Guerra* (1985) 40 Cal.3d 377, 386.) "Intent to unlawfully kill and express malice are, in essence, one and the same." (*People v. Smith*, *supra*, 37 Cal.4th at p. 739, internal quotation marks and citation omitted.) Accordingly: "Attempted murder requires express malice, i.e., intent to kill. Implied malice—a conscious disregard for life—suffices for murder but not attempted murder." (*People v. Stone* (2009) 46 Cal.4th 131, 139-140.)

What if the defendant intends to kill someone but misses and hits someone else who survives the wound. Or what if the defendant fires at a group of people in close proximity with the intent to kill one or more of them but without the intent to kill any specific person (sometimes characterized as there being no primary target or there only being random targets). Generally speaking, these questions involve transferred intent and the kill zone. Transferred intent, however, does not apply to inchoate crimes like attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 317, 326-331.) Kill zone does.

Before addressing kill zone, it is important to note that there must be an intent to kill each victim that is the basis of an alleged count of attempted murder, and this is true regardless of whether the victim was particularly targeted or randomly chosen. (*People v. Perez* (2010) 50 Cal.4th 222, 230.) Where, for example, a defendant fires a single shot at a group of eight people, he can be convicted of only one count of attempted murder unless it is clear he meant to kill more than one person with the single shot. (*Id*. at pp. 224-225, 231.) The Court also concluded in *Perez* that the facts of the case – the firing of a single shot from a moving car at a distance of 60 feet at a group of eight people – did not create a kill zone even though they were standing in relatively close proximity to one another. This is because the indiscriminate firing of a single shot at a group of people, without more, does not amount to an attempted murder of everyone in the group. (*Id*. at p. 232.) But the targeted shooting of victim A, knowing that someone else is in the line of the bullet, can result in two counts of attempted murder, so long as the evidence supports a finding that the defendant intended

to kill both victims with the single shot. (*People v. Smith*, *supra*, 37 Cal.4th at pp. 742-743.)

2. Kill Zone

The basis for the kill zone doctrine is the recognition that the intent to kill a particular person does not preclude a finding that the shooter, in addition, concurrently intends to kill other people within the kill zone. This concurrent intent arises when the defendant intends to harm the primary target by harming everyone in the vicinity of the target. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 329-330.) An example would be where defendant intends to kill A, and in order to ensure A's death, drives by a group consisting of A, B and C and fires an automatic weapon in a manner that could kill everyone in the group. In such a situation, the defendant has created a kill zone to ensure the death of the primary victim. His conduct supports the inference that he intended to kill not only A but everyone in A's immediate vicinity. The means the defendant employed to commit the crime against A created a zone of harm around that victim and the factfinder can reasonably infer that the defendant intended to harm everyone in the zone. (*Id*. at p. 330.)

The kill zone theory applies in two contexts: (1) where the shooter has a primary target who is near other people, and (2) where the shooter has no primary target and shoots into a group of people.

The first context, involving a primary target, was the situation in *Bland*, *supra*. Explaining this situation, the California Supreme Court stated that the kill zone theory "addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can also be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone* (2007) 46 Cal.4th 131, 138.) In this context, the kill zone "is defined by the nature and the scope of the attack." (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 392.) "[T]he attack must reasonably allow the inference that defendant intended to kill some primary victim by killing everyone in that primary victim's vicinity." (*Ibid*.) A defendant may not be found guilty of the attempted murder of someone he does not intend to kill simply because the victim is in a zone of danger. (*Id*. at p. 393.) Instead, "to be found guilty of attempted murder, the defendant must either have intended to kill a

particular individual or individuals or the nature of his attack must be such that it is reasonable to infer that the defendant intended to kill everyone in a particular location as the means to some other end, e.g., killing some particular person." (*Ibid*.)

The second context, in which there is no primary target, came before the Supreme Court in *People v. Stone*, *supra*, 46 Cal.4th 131. There, the Court noted that *Bland* was a case involving a primary target, and in *Bland* the Court did not consider or express any view about the application of the kill zone theory to a situation in which there is no primary target. (*Id*. at p. 140.) In *Stone*, there was no primary target. The defendant fired a single shot into a group of about 10 people from a distance of four to 15 feet. The information charged the defendant with a single count of attempted murder and alleged that Joel F. was the victim. Joel testified that the gun had not been pointed directly at him, but was near him. (*Id*. at pp. 135, 136.) The question in *Stone* was whether a person can be convicted of attempted murder when he shoots into a group intending to kill one person in the group but not caring which one. The Supreme Court held that he could because the mental state for attempted murder is the intent to kill a human being, not a particular human being. (*Id*. at p. 134.)

In *Stone*, the trial court instructed the jury on the kill zone theory discussed in *Bland*. (*People v. Stone*, *supra*, 46 Cal.4th at pp. 136, 138.) The Supreme Court held that the trial court erred when instructing on this theory, explaining the reason for its holding as follows:

> The kill zone theory simply does not fit the charge or facts of this case. That theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can also be convicted of attempting to murder other, nontargeted, persons. Here, defendant was charged with but a single count of attempted murder. He was not charged with 10 attempted murders, one for each member of the group at which he shot. As the Court of Appeal explained, "There was no evidence here that [defendant] used a means to kill the named victim, Joel F., that inevitably would result in the death of other victims within a zone of danger. [Defendant] was charged only with the attempted murder of Joel F. and not with the attempted murder of others in the group on which [defendant] fired his gun."

(*Ibid*.) The Court then addressed the question of whether the error was prejudicial. The Court of appeal held it was. The Supreme Court noted that this holding may have been based, at least in part, on the view that attempted murder requires the intent to kill a particular person, which was the primary question presented for review. (*Id*. at pp. 138-139.)

The Supreme Court concluded that a person who intends to kill can be guilty of attempted murder even if that person has no specific target in mind, reasoning that an indiscriminate would-be killer is just as culpable as one who targets a specific person. (*People v. Stone*, *supra*, 46 Cal.4th at p. 140.) Accordingly, a defendant is guilty of attempted murder even if he intends to kill a random person rather than a specific one. (*Id*. at p. 141.)

The Supreme Court then discussed how to plead such an offense. In *Stone*, the information alleged that the defendant attempted to kill Joel F. The Supreme Court found this allegation problematic in view of the fact that the prosecution could not prove that the defendant targeted a specific person rather than simply someone within the group. The Court concluded that it would have been better if the information had charged the attempted murder count differently. The Court noted that the information did not need to name a specific victim of the attempted murder count and could have stated that the defendant attempted to murder a member of a group of people at a certain location. (*People v. Stone*, *supra*, 46 Cal.4th at p. 141.) The Court further observed that there were other ways to charge the offense, although it did not specify their wording. (*Id*. at p. 142.) Finally, the Court remanded the case to the Court of Appeal to "consider any issues regarding the variance between the information – alleging defendant intended to kill Joel F. – and the proof at trial – showing defendant intended to kill someone, although not specifically Joel F." (*Ibid*.)

Under *Stone*, it is important to determine the basis for the kill zone theory, how attempted murder is pleaded, and the nature of the instructions on kill zone. If there is one shot and a named victim, the kill zone theory does not apply. If there is more than one shot and there are multiple counts – one or some of which name a victim and one or some of which do not – it is important to study the kill zone instructions carefully to make sure they

do not screw up the intent requirement. There must be an intent to kill a named defendant, and that defendant is not subject to the kill zone. But often the instruction will permit a conviction of the named defendant based on the kill zone theory, and often the instruction will (1) allow the jury improperly to view named and unnamed victims the same and (2) allow two separate counts to be based on the identical act.

Recent Court of Appeal cases have reversed convictions for attempted murder based on the kill zone. (E.g., *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1242-1246; *People v. Cardona* (2016) 246 Cal.App.4th 608, 613-616, review granted on July 27, 2016; *People v. Sek* (2015) 235 Cal.App.4th 1388, 1392-1400, review granted on July 22, 2015; *People v. McCloud* (2012) 211 Cal.App.4th 788, 796-804.) Pending in the Supreme Court is a case involving the parameters of the kill zone. (*People v. Canizales*, No. S221958.)

B. Attempted Manslaughter

If the defendant intends to kill someone and attempts to commit the murder but the victim lives, the defendant can be convicted of attempted voluntary manslaughter if he acted in the heat of passion and/or in imperfect self defense or imperfect defense of another person. This is because there is no plausible reason to have these facts reduce a completed murder to voluntary manslaughter but not have them reduce an attempted murder to an attempted voluntary manslaughter. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824.) Like attempted murder, attempted voluntary manslaughter is based on an intent to kill (express malice) and cannot be based on implied malice. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.)

California does not recognize the crime of 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.)

VI. Voluntary Manslaughter

Manslaughter is the unlawful killing of a human being, but without malice. (Penal Code §192.) "Punishment is mitigated for this offense, which the law deems less

blameworthy than murder because of the attendant circumstances and their impact on the defendant's mental state." (*People v. Elmore* (2014) 59 Cal.4th 121, 133.) 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 more recently held that intent to kill is not required and that voluntary manslaughter includes both intentional and unintentional killings. (*People v. Blakely* (2000) 23 Cal.4th 82, 87-91; *People v. Lasko* (2000) 23 Cal.4th 101, 107-111.)

Penal Code §192, subdivision (a) defines voluntary manslaughter as the unlawful killing of a human being without malice "upon a sudden quarrel or heat of passion." This is commonly referred to as heat of passion voluntary manslaughter. This definition of voluntary manslaughter was enacted in 1850. (Stats. 1850, ch. 99, §22, p. 231.) Case law recognizes two other categories of voluntary manslaughter. One is a 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.) This is commonly referred to as imperfect or unreasonable self-defense. The other is imperfect defense of others. (*People v. Randle* (2005) 35 Cal.4th 987, 995-997, overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

There used to be another 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." (*Id*. at p. 1114.)

Under *Saille*, voluntary manslaughter cannot be based on diminished capacity. But what if we ignore any diminishment of the defendant's capacity and look instead at whether

the defendant in fact could not harbor malice (diminished actuality). If the defendant lacked this ability due to intoxication, he cannot argue this as a basis for voluntary manslaughter. This is because of the language of Penal Code §29.4, subdivision (b), which states that evidence of intoxication is admissible on the issue of whether or not the defendant harbored *express* malice. What this means is that intoxication cannot negate implied malice. The rule is different if the defendant is suffering from a mental disease, defect or disorder. Under Penal Code §28, subdivision (a), evidence of such a condition is admissible with respect to whether the defendant actually "harbored malice aforethought." What this means is that mental disease, defect or disorder should be a basis for finding both express and implied malice to be absent. When malice is absent, the crime is some form of manslaughter. The most likely form would be voluntary manslaughter. The Supreme Court, however, has indicated that the elimination in *Saille* of diminished capacity effectively eliminated the option of voluntary manslaughter based on diminished actuality. (*People v. Nelson* (2016) 1 Cal.5th 513, 556; *People v. Wright* (2005) 35 Cal.4th 964, 979.) But if diminished actuality cannot result in a verdict of voluntary manslaughter, it necessarily can result in a verdict of involuntary manslaughter. This is because Penal Code §28, subdivision (a) says that mental disorder can negate malice and an unlawful killing without malice is manslaughter. If the manslaughter is not voluntary manslaughter, it must be involuntary manslaughter.

Although imperfect self-defense is a basis for voluntary manslaughter, imperfect duress is not. (*People v. Son* (2000) 79 Cal.App.4th 224, 231-240.)

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.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215; *People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Barton* (1995) 12 Cal.4th 186, 199.) The California Supreme Court has held that the failure to instruct on a lesser included offense is an error of state law that is subject to the state test for reversible error in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 164-179.) However, in *People v. Thomas* (2013) 218 Cal.App.4th 630, the Court of Appeal concluded that the heat of passion that is the basis for voluntary manslaughter puts the murder element of malice in issue and requires the prosecution to prove the absence of heat of passion beyond a reasonable doubt. The court concluded that the failure to instruct on heat of passion constitutes federal constitutional error that is subject to the test for reversible error in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Thomas*, *supra*, 218 Cal.App.4th at pp. 642-644.) *Breverman* deals with sua sponte instructions on lesser included offenses, but in *Thomas* the defendant requested the instruction on voluntary manslaughter. (*Id*. at p. 644.) However, the central point of the analysis in *Thomas* is the relationship between the element of malice and heat of passion. The presence or absence of a request for the instruction on voluntary manslaughter based on heat of passion has no bearing on this relationship. Also, the reasoning in *Thomas* concerning federal constitutional error applies to voluntary manslaughter based on imperfect self-defense.

A. Sudden Quarrel/Heat of Passion

Where the evidence raises a question concerning the presence of sudden quarrel or heat of passion, the burden is on the prosecution to prove its absence. "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." (*People v. Bloyd* (1987) 43 Cal.3d 333, 349, citation and internal quotation marks omitted.) However, such proof may "be inferred from the circumstances of the homicide." (*Ibid*.) The factor which forms the basis

for heat of passion is provocation. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) The victim must be the source of the provocation, or the defendant must reasonably believe that the victim engaged in the provocation. (*Ibid*.) "Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran* (2013) 56 Cal.4th 935, 943.)

Because 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.) Both provocation and heat of passion must be affirmatively shown. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143.) One alone is not sufficient. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719.)

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.) Accordingly, the "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, emphasis in original.) Because provocation sufficient for voluntary manslaughter is based on an objective reasonable-person standard, provocation cannot be based on a hallucination, which is a perception with no objective

reality. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678-680.)

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.) "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; accord *People v. Manriquez* (2005) 37 Cal.4th 547, 584 ["the defendant must actually, subjectively, kill under the heat of passion."].)

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*, 45 Cal.3d at p. 1112.) The passion "need not mean 'rage' or 'anger' but may be any 'violent, intense, high-wrought or enthusiastic emotion.'" (*People v. Berry*, *supra*, 18 Cal.3d at p. 515.) However, revenge cannot be a valid "passion." (*People v. Logan*, *supra*, 175 Cal. at p. 49.) It is not necessary that the provocation be of a kind that would cause an ordinary person of average disposition to kill. Instead the proper standard is whether such a person "would be induced to react from passion and not from judgment." (*People v. Beltran* (2013) 56 Cal.4th 935, 938-939.) "[P]rovocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id*. at p. 949, italics in original.)

Some conduct by the victim is not such as to provoke an ordinary person into killing rashly or without due deliberation and reflection. (*People v. Pride* (1992) 3 Cal.4th 195, 250 [criticism of defendant's work performance received three days before the homicide is insufficient as a matter of law to arouse feelings of homicidal rage or passion in an ordinarily reasonable person]; *People v. Rich* (1988) 45 Cal.3d 1036, 1112 [victim's resistance to the criminal act of rape is not sufficient provocation]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740 [laughing and smirking at the defendant and giving him dirty looks is not sufficient provocation]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556 [refusal of victim to engage in sexual relations after being provided drugs is not sufficient provocation to cause a reasonable person to develop a homicidal rage]; *People v. Burnett* (1993) 12 Cal.App.4th 469, 478 [heat of passion does not include drug dealers being put out of sorts by the vicissitudes of their trade]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 [jealousy because defendant's former girlfriend is dating the victim is not sufficient provocation].) Provocation also is insufficient for voluntary manslaughter if it consists of taunting words, a technical battery or a slight touching. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826.)

Because 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.) "[I]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." (*People v. Avila*, *supra*, 46 Cal.4th at p. 705, citation and internal quotation marks omitted.) No particular time period needs to elapse between the passion-producing quarrel and the killing for there to be cooling sufficient to obviate heat of passion. (*People v. Brooks* (1986) 185 Cal.App.3d 687, 695.) Heat of passion has been found to exist after time gaps of 15-30 minutes (*People v. Edgmon* (1968) 267 Cal.App.2d 759, 762-763, 766), two hours (*People v. Brooks*, *supra*, 185 Cal.App.3d at pp. 696-696) and 20 hours. (*People v. Berry* (1976) 18 Cal.3d 509, 516.)

Provocation can occur over a considerable period of time, even a period weeks.

(*People v. Wharton* (1991) 53 Cal.3d 522, 571.) There can be a relationship between premeditation and heat of passion, and it is error to instruct the jury there is no relationship between the two. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251.)

In *People v. Wickersham*, *supra*, 32 Cal.3d at pages 327-328, the Supreme Court 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." (Footnote omitted..) 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.)

The fact that the defendant is the initial aggressor does not mean that the victim's provocatory conduct cannot be a basis for voluntary manslaughter in the heat of passion. The initial aggressor rule applies to self-defense, not to heat of passion. (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1492.)

B. Imperfect Self-Defense

In *People v. Flannel* (1979) 25 Cal.3d 668, 674, the court held: "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.[13] The court further held: "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.) The doctrine has been described as being entirely one of state common law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1013-1014.) However, the Supreme Court views it as having some statutory basis, but only in the sense that malice is a statutory requirement for

[13]It also has been described as involving an "unreasonable but good faith belief." However, the most accurate description is that it consists of an "actual but unreasonable belief." (*People v. Elmore* (2014) 59 Cal.4th 121, 134.)

a murder conviction and imperfect self-defense negates malice and reduces the crime to manslaughter. (*In re Christian S.* (1994) 7 Cal.4th 768, 773-774.) It has thus been described as being "founded on both statute and the common law." (*People v. Elmore* (2014) 59 Cal.4th 121, 133.)

In *In re Christian S.*, *supra*, 7 Cal.4th 768, the Supreme Court explained as follows some of the parameters of imperfect self-defense:

> [T]he 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*. Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense.

(*Id*. at p. 783, emphasis in original.)[14]

In *People v. Wickersham* (1982) 32 Cal.3d 307, 329, 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 such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" The Supreme Court, however, later 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.)

Imperfect self-defense cannot be based *solely* on delusional thinking or hallucinations even though this is the basis for the unreasonable belief in the need for self defense. (*People*

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[14]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. (*Id*. at p. 773.)

v. Elmore (2014) 59 Cal.4th 121, 130, 138-139; *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1445-1461.) But if evidence of mental disease, disorder or defect is only part of the basis for a defendant's incorrect judgment concerning the need to defend, and if the mental disease, disorder or defect does not amount to insanity, the jury can return a verdict of voluntary manslaughter based on imperfect self-defense. (*People v. Elmore*, *supra*, 59 Cal.4th at p. 146.)

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 least 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.

(*Id*. at p. 1189.)

Imperfect self-defense does not apply to felony murder because felony murder does not have the element of malice that can be negated by imperfect 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; *People v. Rangel* (2016) 62 Cal.4th 1192, 1226.) However, imperfect self-defense "is available when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180 [a case in which the defendant's action in setting the chain events in motion was to confront the victim with an accusation, resulting in the

victim lunging at the defendant and choking him].) Although simple trespass is not an assault or a felony, 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.)

C. Imperfect Defense of Others

California recognizes that a defendant can be found guilty of voluntary manslaughter rather than murder based on the imperfect defense of others. (*People v. Randle* (2005) 35 Cal.4th 987, 994-1001, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) Imperfect defense of others requires an actual fear of imminent harm. (*People v. Butler* (2009) 46 Cal.4th 847, 868.) It is based on the actual but unreasonable belief by the defendant that he must defend another from imminent danger of death or great bodily harm. (*People v. Genovese* (2008) 168 Cal.App.4th 817, 829.) Imperfect defense of others is not tested from the point of view of the person the defendant was seeking to defend, but rather from the defendant's point of view. (*People v. Randle*, *supra*, 35 Cal.4th at p. 1000.) Even if the defendant's criminal conduct set in motion the series of events that led to the homicide, imperfect defense of others still applies if intervening events extinguish the right of the victim to attack the third person. (*Id*. at p. 1002.)

VII. Involuntary Manslaughter

Involuntary manslaughter is an unlawful killing in which the defendant does not harbor malice and does not intend to kill the victim. (*People v. Rogers* (2006) 39 Cal.4th 826, 884; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197; *People v. McManis* (1954) 122 Cal.App.2d 891, 898; *People v. Kelley* (1914) 24 Cal.App.54, 62.) There are three common forms of involuntary manslaughter – misdemeanor involuntary manslaughter, lawful act involuntary manslaughter, and involuntary manslaughter during the commission of a felony that is not inherently dangerous to human life (referred to in this outline as felony involuntary manslaughter).

The state of mind for all three common forms of involuntary manslaughter is criminal negligence, also called gross negligence. (*People v. Butler* (2010) 187 Cal.App.4th 998,

1006-1007.) This is an objective standard and it differs from the subjective standard that governs implied malice. "Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. In contrast, involuntary manslaughter merely requires a showing that a reasonable person would have been aware of the risk." (*Id*. at p. 1008.) Thus even if the defendant has a subjective, good faith belief that his or her actions pose no risk to life, involuntary manslaughter based on criminal negligence applies if the defendant's belief was objectively unreasonable. (*Id*. at pp. 1008-1009.) "If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice." (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1027, internal quotation marks and citation omitted.)

In addition, there must be a showing that the defendant's conduct proximately caused the victim's death. (*People v. Butler* (2010) 187 Cal.App.4th at p. 1009.) Where there are concurrent causes of death, the defendant's conduct must be a substantial factor contributing to the death, but need not be the primary factor causing death. (*Ibid*.)

A. Misdemeanor Involuntary Manslaughter

Penal Code §192, subdivision (b), lists two theories of involuntary manslaughter. One theory applies when a homicide occurs "in the commission of an unlawful act, not amounting to a felony. . . ." (*Ibid*.) This language has been construed as applying when the unlawful act is a misdemeanor or an infraction, although the term misdemeanor is commonly used to describe both such predicate unlawful acts. (*People v. Cox* (2000) 23 Cal.4th 665, 675, fn. 5; *People v. Wells* (1996) 12 Cal.4th 979, 982, fn. 2.) The underlying misdemeanor must be inherently dangerous to human life under the circumstances of its commission in the pending case, as opposed to being dangerous to life in the abstract based on its statutory elements, and must be committed with criminal intent or criminal negligence. (*People v. Cox*, *supra*, 23 Cal.4th at pp. 670-676; *People v. Wells*, *supra*, 12 Cal.4th at pp. 985-989.) 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].)

Criminal (or gross) negligence is negligence that is "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." (*People v. Penny* (1955) 44 Cal.2d 861, 879; citation and internal quotation marks omitted; accord, *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) Under this definition, the homicide is not the result of misadventure but is instead the natural and probable consequence of the defendant's act. (*People v. Penny*, *supra*, 44 Cal.2d at p. 880.) However, the requisite mental state is not based solely on criminal negligence and can also be based on criminal intent within the meaning of Penal Code §20. (*People v. Cox*, *supra*, 23 Cal.4th at pp. 671-672; *People v. Stuart* (1956) 47 Cal.2d 167, 173-174.)

In addition there must 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.)

In the context of misdemeanor manslaughter, the trial court must give an instruction sua sponte defining the misdemeanor. (*People v. Williams* (1975) 13 Cal.3d 559, 562-564; see also *People v. Cox* (2000) 23 Cal.4th 665, 672, fn. 3.) A wobbler cannot be a misdemeanor for purposes of the misdemeanor manslaughter rule. (*People v. Morse* (1992) 2 Cal.App.4th 620, 647; contra *People v. Freeman* (1936) 16 Cal.App.2d 101, 103-104.).)

One of the misdemeanors that provides a basis for involuntary manslaughter is brandishing a firearm in violation of Penal Code §417. (*People v. Thomas* (2012) 53 Cal.4th

771, 814 ["an accidental shooting that occurs while the defendant is brandishing a firearm in violation of section 417 could be involuntary manslaughter.']; *People v. Carmen* (1951) 36 Cal.2d 768, 775; *People v. Lee* (1999) 20 Cal.4th 47, 60-61; *People v. Hubbard* (1923) 64 Cal.App. 27, 33, 37.) Another is carrying a loaded gun in a public place in violation of Penal Code §12031. (*People v. Ramirez* (1979) 91 Cal.App.3d 132, 139-140.) Others include misdemeanor battery and misdemeanor assault (*People v. Cox* (2000) 23 Cal.4th 665, 670- 676; *People v. Jackson* (1962) 202 Cal.App.2d 179, 182-183) and aiding and abetting in the use of heroin. (*People v. Edwards* (1985) 39 Cal.3d 107, 112-117.)

B. Lawful Act Involuntary Manslaughter

The second statutorily-based theory of involuntary manslaughter is when the homicide occurs "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Penal Code §192, subd. (b).) The phrase "without due caution and circumspection" refers to criminal negligence of the same sort that is applicable in cases of involuntary manslaughter in the commission of an unlawful act not amounting to a felony. (*People v. Penny*, *supra*, 44 Cal.2d at pp. 869-880.) 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.)

Gross negligence and implied malice bear "a general similarity" but are not identical. (*People v. Watson* (1981) 30 Cal.3d 290, 296.)

> Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which is absent in gross negligence. [¶]Furthermore, we have applied different tests in determining the required mental states of gross negligence or malice. A finding of gross negligence is made by applying an objective test: if a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard.

(*Id*. at pp. 296-297, citations omitted.)

In *People v. Bennett* (1991) 54 Cal.3d 1032, the court defined gross negligence in the context of vehicular manslaughter as follows:

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

(*Id*. at p. 1036, citations and internal quotation marks omitted.)

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.

C. Felony Involuntary Manslaughter

In the leading case of *People v. Burroughs* (1984) 35 Cal.3d 824, the court dealt with the question of whether an unintended killing in the course of a felony which is not dangerous to life 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." (*Id*. at p. 835.) For purposes of involuntary manslaughter, the felony is viewed in the abstract to determine if it is noninherently dangerous to life. In *Burroughs*, the felony in question was practicing medicine without a license. The Supreme Court determined that the felony was not inherently dangerous in the abstract and then ruled that, as such, if could be a basis for a verdict of involuntary manslaughter. (*Id*. at pp. 828-836.) The noninherently dangerous felony must be committed without due caution and circumspection. (*Id*. at p. 835.) This is the equivalent of criminal negligence. (*Id*. at p. 835, fn. 9.)

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; *People v. Phillips* (1966) 64 Cal.2d 574, 580-583.) But there are many others, including homicide during evading an officer in violation of Vehicle Code §2800.2 (*People v. Howard* (2005) 34 Cal.4th 1129, 1136-1139); 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, 974); 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).

There is a case indicating that if the defendant commits an noninherently dangerous felony by deliberately committing an act of violence, his conduct involves more than criminal negligence and the homicide resulting from his act cannot be involuntary manslaughter. (*People v. Huynh* (2002) 99 Cal.App.4th 662, 679.) This reasoning confuses the mens rea underlying the noninherently dangerous felony with the mens rea for the homicide. The mens rea for the homicide is gross negligence – that an objective person would be aware of the risk of death. The fact that the defendant deliberately commits a felony is different than this awareness vis-a-vis the homicide. What the court really seemed concerned about in *Huynh* is that the independent crime was a violent one that might have resulted in death. But this does not matter in this context. The defendant's intent when deliberately committing that offense relates to the defendant's subjective state of mind, but the focus of gross negligence is the state of mind of a reasonable person, not the defendant.

D. Additional Theories of Involuntary Manslaughter

Although the three theories of involuntary manslaughter listed above are the most common ones, there are a few others that deserve mention.

One such theory relates to intoxication and requires a bit of historical background. It involves a situation in which a defendant 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. 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.

(*Id*. at p. 31, citation omitted.)

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*, 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. (*People v. Saille*, *supra*, 54 Cal.3d at pp. 1120-1121.) A defendant is free to show that because of mental illness or voluntary intoxication that he did not intend to kill. If this showing gives rise to a reasonable

doubt as to express and implied malice, the offense is involuntary manslaughter. (*Id*. at pp. 1116-1117; see also *People v. Rogers* (2006) 39 Cal.4th 826, 884.) The basis for involuntary manslaughter premised on intoxication is that when a person renders himself unconscious through voluntary intoxication, and kills in that state, the killing is attributed to his negligence in self-intoxicating to this point and is treated as involuntary manslaughter. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1227.)

There is, however, some controversy on whether voluntary intoxication can be used to reach a verdict of involuntary manslaughter. One Court of Appeal case considered *Ray*, *Saille* and *Rogers* and concluded the answer was no, based primarily on the fact that Penal Code §22 (currently §29.4) was amended in 1995 so as to preclude intoxication from negating implied malice. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1373-1377.) However, under Penal Code §28, mental disease can negate implied malice and therefore can form a basis for involuntary manslaughter. (*People v. McGehee* (2016) 246 Cal.App.4th 1190, 1208.) However, a verdict of involuntary manslaughter cannot be based on what is essentially a defense of insanity and based on facts showing a belief in self-defense based on hallucination. (*Id*. at p. 1209-1211.) The *Elmore* case, discussed above, which precludes hallucinations from being a proper basis for voluntary manslaughter due to imperfect self-defense, applies to involuntary manslaughter based entirely on hallucinations. (*Ibid*.)

The Supreme Court has also indicated that involuntary manslaughter can, in some circumstances, be based on unreasonable self-defense. In *People v. Blakeley* (2000) 23 Cal.4th 82, 88-89, the Supreme Court held that when a defendant, acting with a conscious disregard for life (which is the same as implied malice), unintentionally kills in unreasonable self-defense, the killing is voluntary manslaughter, not involuntary manslaughter. In a dissent, Justice Mosk stated that if the defendant did not act with a conscious disregard for life, and instead acted without due caution and circumspection (which is the same as gross negligence), he is guilty of involuntary manslaughter. (*Id*. at pp. 98-99.) The majority responded to this by saying: "In his dissenting opinion in this case, Justice Mosk contends that a defendant who kills in unreasonable self-defense may sometimes be guilty of

involuntary manslaughter. We have no quarrel with this view. We conclude only that a defendant who, *with the intent to kill or with conscious disregard for life*, unlawfully kills in unreasonable self-defense is guilty of voluntary manslaughter." (Id. at p. 91.) Thus if the defendant kills the victim in imperfect self-defense and with gross negligence (i.e., without due caution and circumspection) but without intent to kill (express malice) and without a conscious disregard for life (implied malice), the crime is involuntary manslaughter.

In addition, 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. (*People v. Graham* (1969) 71 Cal.2d 303, 316-317; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 418; *People v. Ochoa* (1998) 19 Cal.4th 353, 423-424.)

In the previous subsection we saw 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 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." (*Id*. at p. 603, italics in original.) However, the *Cameron* court reversed itself, finding that such a result would be absurd. It held:

> if 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.

(*Id*. 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. Blakely* (2000) 23 Cal.4th 82, 87-91; *People v. Lasko* (2000) 23 Cal.4th 101, 107-111.) It can be argued that *Cameron* still is good law (1) because involuntary manslaughter still is an unlawful killing committed without malice and without an intent to kill or (2) because it really should give rise to a verdict of involuntary manslaughter under *Blakely* and *Lasko* since involuntary manslaughter includes unintentional homicides in which malice is absent.

People v. Garcia (2008) 162 Cal.App.4th 18, treats a *Cameron* situation in a sophisticated way, but alas ends up with a holding that the crime cannot be involuntary manslaughter. There, the defendant struck the victim in the face with the butt of a shotgun, causing him to fall, hit his head on the sidewalk, and die. The issue was whether the jury could have found the defendant guilty of involuntary manslaughter, rather than second degree murder or voluntary manslaughter, based on his testimony that he reacted automatically when the victim lunged at the shotgun and did not intend to kill the victim. (*Id*. at p. 22.) The Court of Appeal recognized that under the merger doctrine, the underlying assault with a deadly weapon merged with the homicide and could not be the basis for a second degree murder conviction based on a felony-murder theory. (*Id*. at pp. 28-29.) The court, however, viewed the crime of assault with a deadly weapon as an inherently dangerous felony and therefore not subject to the felony involuntary manslaughter theory. The court held that the homicide could be voluntary manslaughter and limited *Cameron*, following it only to the extent it supported this result. (*Id*. at pp. 29-32.) In the court's words "an unlawful killing

during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*Id*. at p. 32.) The Supreme Court, however, disapproved *Garcia* to the extent it suggested that voluntary manslaughter would be a proper verdict. (*People v. Bryant* (2013) 56 Cal.4th 959, 970.)

Bryant left open the question of whether assault with a deadly weapon might not be an inherently dangerous felony and that a death during the commission of such a felony might be involuntary manslaughter under *People v. Burroughs*, *supra*, 35 Cal.3d 824. (*People v. Bryant*, *supra*, 56 Cal.4th at pp. 970-971.) A later Court of Appeal case concluded that an unlawful killing without malice during the course of an inherently dangerous assaultive felony is involuntary manslaughter. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33-35.)

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.)

VIII. Vehicular Manslaughter

Vehicular manslaughter comes in different forms and is based on either of two types of negligence – gross negligence and ordinary negligence.

Gross negligence "contemplates a higher degree of culpability than that involved in ordinary negligence." (*People v. Soledad* (1987) 190 Cal.App.3d 74, 80.) For purposes of the provisions of the Penal Code, negligence "import[s] a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." (Penal Code §7, subdivision (2).) This definition has been in effect for well over a century, as it appears in section 7 as enacted in 1872. When a Penal statute describing vehicular homicide requires negligence, but not gross negligence, negligence of the sort described in section 7 suffices. (See *People v. Pociask* (1939) 14 Cal.2d 679, 681-687.) Under California case law, the negligence required for a conviction for vehicular manslaughter without gross negligence is ordinary negligence, which is

negligence of the sort required to establish liability in a civil case. (*People v. De Spenza* (1962) 203 Cal.App.2d 283, 290-291, cited with approval in *In re Dennis B.* (1976) 18 Cal.3d 687, 696; *People v. Bussel* (2002) 97 Cal.App.4thSupp. 1, 4-5; *People v. Driggs* (1931) 111 Cal.App. 42, 47.) Civil negligence is conduct inconsistent with that of a reasonable person in similar circumstances and does not require behavior that is gross, aggravated or reckless. (*In re Jorge M.* (2000) 23 Cal.4th 866, 891.)

As the California Supreme Court noted 100 years ago, gross negligence is the same as criminal negligence. (*Grossetti v. Sweasey* (1917) 176 Cal. 793, 800.) And criminal negligence is the same as the lack of due caution and circumspection. (*People v. Penny*, *supra*, 44 Cal.2d at p. 879.) Ordinarily, criminal negligence, and therefore gross negligence, is defined in terms of the amount of negligence involved. Thus, for example, in *Penny*, the California Supreme Court quoted with approval language from American Jurisprudence stating that criminal 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.... Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life. The facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen. It must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act.

(*Id*. at pp. 879-880, internal quotation marks omitted.) This description of gross negligence has been cited with approval and quoted in part in later cases. (See, e.g., *People v. Ramirez* (2009) 45 Cal.4th 980, 989; *People v. Sargent* (1999) 19 Cal.4th 1206, 1215; *Walker v.*

Superior Court (1988) 47 Cal.3d 112, 135; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47.)

The above-quoted language from *Penny* focuses primarily on the degree of the defendant's negligence – the amount of carelessness or recklessness inherent in the defendant's conduct. In cases involving gross negligence in which the defendant's act resulted in death, a separate but important factor is the degree of the risk that the defendant's conduct might result in death. If, for example, the defendant acts very carelessly with relationship to conduct that contains little risk of death or great bodily injury, a reasonable man in his position would not believe that his conduct might result in death. Such conduct would not be sufficient for a manslaughter verdict because even though the amount of recklessness or negligence may have been great, the risk of death or great bodily injury was small.

If, for example, a person is grossly negligent or even reckless in the way he throws a marshmallow at another person, this would not amount to gross negligence if the act resulted in death. This is because there is only an extremely small risk of death from throwing a marshmallow even under the worst of circumstances.

The portion of American Jurisprudence quoted in *Penny* addresses this point by talking in terms of a disregard for life and the fatal consequences of the negligent act being reasonably foreseeable and being the probable result of the act. But actually, more is required. "It is generally held that an act is criminally negligent when a man of ordinary prudence would foresee that the act 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.)

Penal Code §191.5 describes two forms of vehicular manslaughter while intoxicated – with gross negligence (Penal Code §191.5(a)) and without gross negligence (Penal Code §191.5(b)). Both forms arise when the death is the proximate result of the commission of an unlawful act not amounting to a felony, or of the commission of a lawful act that might produce death but done in an unlawful manner.

In *People v. Thompson* (2000) 79 Cal.App.4th 40, 51, the court indicated that the

distinction between the term unlawful act and the term lawful act performed in an unlawful manner tends to disappear in the context of vehicular manslaughter. The court nevertheless stated that the latter concept does have independent meaning. The court concluded that a lawful act committed in an unlawful manner means the commission of the lawful act with negligence – without reasonable caution and care. (*Id*. at p. 53.) This implies that an unlawful act would require gross negligence. But this cannot be the case because under Penal Code §191(b), the crime of vehicular manslaughter while intoxicated but without gross negligence can be based on the commission of an unlawful act. The proper distinction appears to be on the nature of the act vis-a-vis the law – is the act unlawful, or is it a lawful act done in an unlawful way? Also, what difference would it make how the act is described since the statute covers both unlawful acts and lawful acts done in an unlawful way? The safer analysis would be to say "who cares, instruct on both." *Thompson* further holds that when the conviction is based on an unlawful act, that act must be dangerous under the circumstances of its commission so that death was reasonably foreseeable. (*Id*. at p. 54-55.)

Penal Code §192(c)(1) and (2) parallel Penal Code §191.5(a) and (b). Penal Code §192(c)(1) applies to vehicular manslaughter while "driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." Penal Code §192(c)(2) applies to vehicular manslaughter while: "Driving a vehicle in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence."

For purposes of vehicular manslaughter, the reasonableness or unreasonableness of the conduct of others is not a relevant consideration. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46.) If, for example, the victim failed to secure his seatbelt, and would have lived if he had done this, his conduct would be unreasonable, even unlawful. However, this would not be a reason to find the defendant not guilty of vehicular manslaughter because the defendant is liable for the crime irrespective of the presence of concurrent causes

contributing to the death. (*People v. Wattier* (1996) 51 Cal.App.4th 948, 952-955.)

IX. Justification and Excuse

Penal Code §199 declares that justifiable and excusable homicides are not punishable. Penal Code §§196-198.5 set forth the definitions of justifiable homicide.

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 resisting an attempt to murder, to commit a felony, or to do some great bodily injury; (2) when committed in defense of habitation, property or person 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 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 ...."

The statutory basis for excusable homicide is set forth in Penal Code §195. Excusable homicides are those: (1) committed by accident and misfortune, 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.

A homicide based on accident and misfortune is excusable because it amounts to a

claim that the defendant acted without the mental state necessary to make his or her actions a crime. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370.) When a defendant draws a weapon in self-defense, but fires accidentally, the shooting is not considered self-defense, but rather excusable homicide committed by accident and misfortune. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 53-54.)

X. 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. Blair* (2005) 36 Cal.4th 686, 745; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344; *People v. Cooper* (1991) 53 Cal.3d 771, 827.) Second degree murder with express malice but without premeditation and deliberation, and second degree murder with implied malice, are both lesser included offenses of first degree murder. (*People v. Coddington* (2000) 23 Cal.4th 529, 591.) Second degree felony murder, based on a death occurring during the inherently dangerous felony of violating Penal Code §347 – administering a poison by a person who knows or should know a person would take the poison to his injury – is a lesser included offense of first degree murder by poison. (*People v. Blair* (2005) 36 Cal.4th 686, 745-746.) Ordinarily, even if the prosecutor is proceedings solely on a theory of felony murder, the accusatory pleading will phrase the charge as murder with malice. When this occurs, the defendant is entitled to instructions on the lesser included offenses of murder with malice (such as second degree murder, voluntary manslaughter and involuntary manslaughter) even if these crimes are not lesser included offenses of felony murder and even if the only instruction on first degree murder the jury hears is based on first degree felony murder. (*People v. Banks* (2014) 59 Cal.4th 1113, 1159-1161; *People v. Campbell* (2015) 233 Cal.App.4th 148, 157-165.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215; *People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Barton*

(1995) 12 Cal.4th 186, 199.)

It has been held that although 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.)

Involuntary manslaughter is a lesser included offense of murder. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145; *People v. Prettyman* (1996) 14 Cal.4th 248, 274; *People v. Thomas* (1987) 43 Cal.3d 818, 824; *In re McCartney* (1966) 64 Cal.2d 830, 831; *People v. Smith* (1901) 134 Cal. 453, 454-455; *People v. Pearne* (1897) 118 Cal. 154, 157; *People v. Gilmore* (1854) 4 Cal. 376, 380.) 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.)

Gross vehicular manslaughter while intoxicated in not a lesser included offense of murder because murder does not include all elements of the lesser offense, the missing elements being intoxication and death by vehicle. Accordingly, the greater offense of murder can be committed without necessarily committing the lesser offense. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988-989.)

Because 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 imperfect self-defense manslaughter. (*People v. Lostaunau* (1986) 181 Cal.App.3d 163, 170.)

Manslaughter is not a lesser included offense of murder of a fetus because manslaughter involves only the killing of human beings, not fetuses. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1591-1593.)

Assault with a deadly weapon is not a lesser included offense of murder because a murder can be committed without using a deadly weapon. (*People v. Sanchez* (2001) 24

Cal.4th 983, 988.) Accessory after the fact is not a lesser included offense of murder because a murder can be committed without the murderer being an accessory after the fact. (*People v. Majors* (1998) 18 Cal.4th 385, 408.)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2009) 167 Cal.App.4th 1133, 1138-1140.)

Vehicular manslaughter while intoxicated is a lesser included offense of gross vehicular manslaughter while intoxicated. (*People v. Verlinde* (2000) 100 Cal.App.4th 1146, 1165-1166.)

Attempted murder of a fetus is not a lesser included offense of murder because the crime of murder of a human being does not include as an element the murder of a fetus and because human beings are murdered all the time without any involvement of a fetus. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 642.)

Driving under the influence causing injury is a lesser included offense of vehicular manslaughter while intoxicated. (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1145-1150.)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1379; *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822-825; *People v. Tucciarone* (1982) 137 Cal.App.3d 701, 704-707; *People v. Kozel* (1982) 133 Cal.App.3d 507, 525; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1025-1026; *People v. Heffington* (1973) 32 Cal.App.3d 1, 10-12.)

Child endangerment is not a lesser included offense 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 included offense of attempted murder. (*People v. Solis* (2015) 232 Cal.App.4th 1108, 1116; *People v. Gragg* (1989) 216 Cal.App.3d 32, 41.) Mayhem is not a lesser included offense of attempted murder. (*People v. Solis*, *supra,* 232 Cal.App.4th at p. 1116.)