

Murder Most Foul

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- “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”
Penal Code §187(a).

“Manslaughter is the unlawful killing of a human being without malice.”

Penal Code §192

“[M]alice 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.”

Penal Code §188.

“A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter.”

CALCRIM 500.

- “The defendant acted with express malice if (he/she) unlawfully intended to kill.” (CALCRIM 520.)
- “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.)

CALCRIM 520

- “The defendant acted with implied malice if:
- 1.(He/She) intentionally committed an act;
- 2.The natural and probable consequences of the act were dangerous to human life;
- 3.At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life;
- AND 4.(He/She) deliberately acted with conscious disregard for (human/ [or] fetal) life.”
- A conscious disregard of the risk of serious bodily injury does not suffice. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

PENAL CODE §189

- “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.”

- 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.”].)

For felony murder: “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.” *People v. Berryman* (1993) 6 Cal.4th 1048, 1085.

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.)

Second degree murder with malice exists when (1) the malice is implied as opposed to express, (2) the malice is express but there is no premeditation and deliberation, and (3) there is subjective provocation sufficient to negate premeditation and deliberation.

Second degree felony murder exists during the commission of a felony not listed in section 189 as long as that felony is inherently dangerous to human life when its elements are viewed in the abstract as opposed to in light of the facts of the case.

Malice is implied “when no considerable provocation appears.” (Penal Code §188.) Provocation sufficient to raise a reasonable doubt as to premeditation or deliberation reduces a murder from the first to the second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903.)

There are three generally recognized theories of voluntary manslaughter: (1) sudden quarrel or heat of passion based on provocation by the victim; (2) imperfect self-defense; and (3) imperfect defense of others.

Involuntary manslaughter is a killing in which there is no intent to kill and no conscious disregard for life, and therefore no malice. It is based on criminal (gross) negligence.

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.)

Criminal negligence is frequently found in the unintentional killing by a gun. (*In re M.* (1969) 70 Cal.2d 444, 461.)

“No one has ever contended that death resulting from the negligent discharge of a firearm supports anything but a conviction for involuntary manslaughter....” (*People v. Taylor* (1970) 11 Cal.App.3d 57, 62, fn. 3, Kaus, P.J.)

There are three generally recognized theories of involuntary manslaughter: (1) homicide during the commission of a lawful act in an unlawful manner or without due caution; (2) homicide during the commission of an unlawful act not amounting to a felony which is inherently dangerous in the manner in which it was committed; and (3) homicide during the commission of a felony that is not listed in section 189 and that is not inherently dangerous when viewed in the abstract.

A trial court must instruct not only on every lesser included offense, but also on every theory of a lesser included offense. *People v. Breverman* (1998) 19 Cal.4th 142, 153, 156, 162. *Breverman* reaffirms that heat of passion and imperfect self-defense are different theories of voluntary manslaughter.

A trial court must give “pinpoint” instructions only on request. *People v. Saille* (1991) 54 Cal.3d 1103, 1119. Pinpoint instructions relate to evidence such as intoxication that raises a doubt about whether the defendant has the requisite mental state. They relate particular facts to a legal issue, or pinpoint the crux of the defendant’s case.

“Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” Penal Code §29.4(b).

“Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.” Penal Code §28(a).

CALCRIM 522

“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.]

For purposes of voluntary manslaughter, provocation is viewed from the perspective of an ordinary person of average disposition. *People v. Logan* (1917) 175 Cal. 45, 49.

For purposes of second degree murder, provocation is viewed from the subjective perspective of the defendant. *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.

Federalize.

1. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), citations and internal quotation marks omitted.

Federalize

2. Conde v. Henry, 198 F.3d 734 (9th Cir. 1999). Finding federal constitutional error in the failure to instruct on simple kidnapping as a lesser included offense of kidnapping for robbery.

FEDERALIZE

People v. Thomas, 218 Cal.App.4th 630 (2013), ruling that the failure to instruct on provocation reducing a murder to voluntary manslaughter was federal constitutional error. *Id.* at 633. The error inhered in the fact that the failure to instruct on provocation results in an erroneous charge on an element of murder because it relieves the prosecutor of the burden of proving malice beyond a reasonable doubt. *Id.* at 641-42. That is, provocation and sudden quarrel present mitigating circumstances that may afford a defendant “partial exculpation” from murder, resulting in a conviction for voluntary manslaughter. *Id.* at 642.

First degree felony murder can be reduced to involuntary manslaughter if the underlying felony during which the homicide occurred is a non-inherently dangerous felony (such as grand theft or false imprisonment) instead of a felony listed in section 189 (such as robbery or kidnapping).

This is true even if the underlying felony is not separately charged – involuntary manslaughter is a lesser included offense of murder.

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.)

CALCRIM 505

- Self defense applies if
- 1. The defendant reasonably believed that (he/she was in imminent danger of being killed or suffering great bodily injury;
- 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;
- AND
- 3. The defendant used no more force than was reasonably necessary to defend against that danger.

CALCRIM 571

- A defendant acts in imperfect self-defense if:
 1. The defendant actually believed that she was in imminent danger of being killed, raped, or suffering great bodily injury;
- AND 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;
- BUT 3. At least one of those beliefs was unreasonable