Legal Issues That Really Matter in Homicide Cases

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The following compendium is not meant to comprehensively discuss the law of homicide. Instead, it is a collection of cases from the new millennium discussing issues that really matter in homicide cases. Although it does not include cases from 2003 or 2001 and earlier1, it is fairly comprehensive in discussing all other cases decided in the new millennium from the California appellate courts, Ninth Circuit, and United States Supreme Court relevant to the topics specified in the Table of Contents below. To the extent I may have missed something, please accept my apologies.

The components of this collection include the law of homicide and potential defenses to homicide charges, including lesser offenses and special circumstances; gang cases; DUI/Watson murder charges; jury instructional issues on a host of general topics that often come up in murder cases; duties of defense counsel, in terms of both effective representation and potential sanctions for the failure to disclose evidence; prosecution misconduct; permissible closing argument; cases finding insufficient evidence to support murder, gang, or use-of-weapon charges; and protecting holdout jurors. I selected these particular topics because I believe they are important in homicide trials. Because I have geared this collection towards a tool kit for homicide trial lawyers, I have not included topics that address pretrial issues, such as discovery, search and seizure, and funding, or in limine motions or evidentiary issues. Nor have I included discussions of issues specific to death penalty cases. However, you may find comprehensive summaries of holdings on those additional issues in the annual collections of caselaw summaries that I have prepared for the Capital Case Defense Seminars over the years, which are available both online on the ClaraWeb Magazine and in the syllabi for the respective seminar.

Please note that any decision that identifies the day, month and year it was decided is not yet “final” and is subject to a potential grant of review or certiorari.

Good luck in providing the best representation possible for your homicide clients!

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1 Sorry, but I did not write caselaw summaries for those years, and I’m not about to go back and cover them now!
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Legal Issues That Really Matter in Homicide Cases

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I. Homicide Instructions and Related Issues

A. Self-defense

People v. Lam Thanh Nguyen (2015) 61 Cal.4th 1015:

Although the evidence demonstrated that the decedent was holding a gun when he approached defendant’s car before defendant shot and killed him just before he arrived at the driver’s window of defendant’s car, the evidence did not “establish[] self-defense as a matter of law” because a witness testified that defendant smiled as the decedent approached, put his gun to his chest, appeared to be waiting for the decedent’s move, and then fired at the decedent before he fired back at defendant. Thus, it was for the jury to decide whether defendant acted in self-defense. Given the expert testimony that the decedent and defendant were members of rival gangs that were at war with each other, the jury “could reasonably have concluded ... that defendant was engaged in mutual combat”, and self-defense is not available to one who engages in mutual combat unless he satisfies certain conditions. “Mutual combat” means “‘a reciprocal exchange of blows...[with] the preexisting intention to engage in it...’” There must be mutual consent or agreement to fight.

In addition, a slayer is not entitled to claim self-defense unless he acts “on the basis of fear alone” instead of also acting “on a desire to kill his rival.” Once again, it was for the jury to decide whether defendant acted “on the basis of fear alone.” It should be noted, however, that the California Supreme Court expressly declined to decide whether a defendant who acts based on mixed motives may be justified in self-defense “so long as reasonable fear was the but-for cause of his decision to kill.”

1. Initial aggressor generally can’t claim self-defense but can if opponent responds excessively

People v. Ramirez (2015) 233 Cal.A pp.4th 940:

Gang member who provokes a fistfight may claim perfect or imperfect self-defense in killing a rival gang member if the rival acted excessively and used deadly force against defendant. Reversible error to give CALCRIM 3472 because it makes “no allowance for an intent to use only nondeadly force and an adversary’s sudden escalation to deadly violence.”

People v. Frandsen (2011) 196 Cal.A pp.4th 266:

An initial aggressor cannot claim imperfect self-defense unless the other person responds with unlawful force.
2. **Mutual combat**

People v. Lam Thanh Nguyen (2015) 61 Cal.4th 1015:

Trial court has no sua sponte duty to instruct on or explain “mutual combat” to the jury. Instead, a defendant has the obligation to request clarifying language if he believes there is any ambiguity or need for clarification.


Attempted murder and assault convictions reversed due to prejudicial error in giving CALJIC 5.56, which instructed the jury that self-defense was not available to a person who engaged in mutual combat unless that person first communicated to the other combatant that he had withdrawn from further combat. Contrary to the CALJIC instruction, self-defense is available to a mutual combatant despite the failure to withdraw and communicate the withdrawal where the counter assault “is so sudden and perilous that he cannot withdraw” or the other combatant responds to a simple assault with deadly force.

People v. Rogers (1958) 164 Cal.App.2d 555, 558:

In this oldie but goodie case brought to the author’s attention by Michael Wilson (who got it from his post-bar clerk), the court of appeal found it was prejudicial error to give the mutual combat instruction because it was not applicable to the facts although it was a correct statement of the law. The decedent initiated a physical confrontation with defendant’s friend. Both the decedent (the aggressor) and the defendant (who was on his front lawn) were accompanied by their respective friends. At a certain point, defendant joined in the fray, fatally stabbing the decedent. Merely standing by to aid a person who is being confronted by an aggressor is not an agreement to engage in mutual combat. The appellate court distinguished a “situation where two gangs agree to meet for combat.”

3. **Right to self-defense instructions despite defendant’s failure to testify to self-defense**

People v. Clark (2011) 201 Cal.A pp.4th 235:

Although the defense presented no witnesses, the testimony of defendant’s wife—who was called by the prosecution—“warranted self-defense instructions.” However, the trial court limited the applicability of the self-defense instructions to a felony assault charge, excluding the felony charge of child abuse against the same alleged victim. The court of appeal held that “the trial court should have made the self-defense instruction applicable to both the felony assault charge and the felony child abuse charge as well as the lesser included offenses to each.”

4. **Need not retreat, even if defendant is an ex-felon**

People v. Rhodes (2005) 129 Cal.A pp.4th 1339:
Although defendant was an ex-felon, he was not charged with being an ex-felon in possession of a firearm (Penal Code section 12021). Thus, in instructing the jury on defendant’s claim of self-defense, it was prejudicial error to instruct pursuant to CALJIC 12.50 instead of CALJIC 5.50. The former instruction, which is limited to prosecutions for alleged violations of Penal Code section 12021, advised the jury that self-defense is not applicable unless defendant’s use of the firearm was not only reasonable but was resorted to only where “no alternative means of avoiding the danger were available.” On the other hand, with respect to charges of manslaughter, murder or assault, CALJIC 5.50 properly explains that “‘[a] person threatened with an attack that justifies the exercise of the right of self-defense need not retreat [but] may stand [his] . . . ground and defend [himself] . . . by the use of all force and means which would appear to be necessary to a reasonable person . . . . This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.’”

B. Voluntary Manslaughter: Heat of Passion

1. Provocation standard: whether an average person would be provoked to act rashly, not whether they would be provoked to kill

People v. Trinh (2014) 59 Cal.4th 216:

Trial court erred in rejecting defendant’s pinpoint instruction concerning heat-of-passion voluntary manslaughter, which would have explained “that the jury need not find a provocation sufficient to rouse a reasonable person to kill, but only a provocation sufficient to trigger actions out of passion rather than judgment.” Defendant’s pinpoint, which was expressly approved by the California Supreme Court, modified the standard pattern instruction (CALJIC 8.42) to provide: “‘By saying that a defendant is not permitted to set up his own standard of conduct, the court is not instructing you that the question to answer is whether or not a reasonable person would commit the act of killing another because of the provocation that the defendant believed he was under. [¶] Rather the question is whether the provocation was such that a reasonable person would commit any act rashly and from passion rather than judgment because of it.’” (At fn. 3.) However, the error was harmless because “a heat of passion defense must arise from provocation supplied, or reasonably believed to have been supplied, by the victim or victims...,” but the persons defendant killed were not the same ones who provoked him.

People v. Beltran (2013) 56 Cal.4th 935:

The provocative act that may “negate” malice and “reduce” a homicide to heat-of-passion manslaughter does not need to “be of a kind that would cause an ordinary person of average disposition to kill.” (Original emphasis.) Instead, as settled by California law for almost 100 years, the question “‘is whether or not the defendant’s reason was, at the time of his act, so disturbed or obscured by some passion ... 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.’” (Citation omitted.) The
proper standard focuses upon whether the person of average disposition would be induced to react from passion and not from judgment.” In other words, the question is whether the provocation “would cause an emotion so intense that an ordinary person would simply react, without reflection... [that is,] with his reason and judgment obscured.” (Original emphasis.) In the course of so holding, the Court reaffirmed that mere words can be sufficient to constitute adequate provocation, provided they rose to the articulated standard. Further, while it found that the former version of CALCRIM 570 was not erroneous in instructing the jury to consider, inter alia, “how” a person of average disposition “would react in the same situation knowing the same facts... ” (emphasis added), the Court agreed that the prosecutor’s argument “may have introduced ambiguity” by “suggest[ing] that the jury should consider the ordinary person’s conduct and whether such a person would kill. ... [T]his was not the correct standard.”

Author’s note: The current version of CALCRIM is superior to the one at issue in Beltran. CALCRIM 570 (2008 Rev.) now provides in pertinent part: “In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.” Beltran, supra, at fn. 14.

People v. Nelson (2016) 1 Cal.5th 513, 539:

The objective standard for the provocation in heat-of-passion manslaughter requires that an ordinary reasonable person would have been provoked to simply react from emotion due to the provocation. Quoting from People v. Beltran (2013) 56 Cal.4th 935, 950, the court reiterated that, “[f]or purposes of the heat of passion doctrine, ‘provocation is sufficient not because it affects the quality of one’s thought processes, but because it eclipses reflection. A person in this state simply reacts from emotion due to the provocation, without deliberation or judgment.’”

2. No requirement that defendant’s reaction was reasonable

People v. Mills (2010) 48 Cal.4th 158:

In defining the heat of passion present in manslaughter, the trial court erred by mistakenly instructing the jury that, “‘The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act reasonably and without deliberation and reflection, and from such passion rather than from judgment.’ (Italics added.) The correct instruction reads: ‘... to act rashly . . . .’” (Emphasis supplied by the Supreme Court.)

3. Entitlement to instruction, even with defendant’s inconsistent testimony

People v. Thomas (2013) 218 Cal.App.4th 630:
Murder conviction reversed because trial court’s failure to instruct on heat-of-passion manslaughter constituted federal constitutional error “that denies the defendant due process because it relieves the prosecution of the burden to prove malice beyond a reasonable doubt.” (At p. 642.) Where murder is charged, “provocation and sudden quarrel are not elements of voluntary manslaughter … [but] present mitigating circumstances that may afford a defendant a ‘partial exculpation’ for murder that results in a conviction for manslaughter.” (At p. 643.) “Heat of passion manslaughter … negates the element of malice.” (Ibid.; original emphasis.) Thus, “when a defendant puts provocation in issue by some showing that is sufficient to raise a reasonable doubt whether a murder was committed, it is incumbent on the prosecution to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking.” (Ibid.; emphasis added.) On the facts presented, defendant was entitled to his requested instructions on heat-of-passion manslaughter although the evidence may have “fit more precisely with a homicide mitigated by imperfect self-defense…,” which the court did instruct on. (At p. 645.) The two theories were not incompatible. Further, defendant was entitled to the instructions despite his “claim that he unintentionally pulled the trigger [and] the fact that most of his testimony was self-serving….” (Ibid.) For the same reasons, the jury should also “have been instructed under CALCRIM 522 that heat of passion could reduce the degree of murder.” Note that the factual basis for the manslaughter instruction was the evidence that, minutes before the homicide, defendant was in a heated argument and physical altercation with the decedent and his associates; the decedent and his friends “got the better of” defendant during the altercation; defendant was emotionally upset and angry after the confrontation, and retrieved his assault weapon; his father was trying to calm him down when the decedent approached defendant; the decedent lunged at defendant, and defendant thought he was going for defendant’s gun; and defendant “fired because he was afraid, nervous and not thinking clearly.” (At pp. 644-645.)

People v. Millbrook (2014) 222 Cal.App.4th 1122:

Illustrating the close relationship between perfect or imperfect self-defense and heat-of-passion manslaughter, the court of appeal reversed defendant’s conviction for attempted murder because the trial court failed to instruct sua sponte on heat-of-passion attempted manslaughter. Several witnesses gave testimony that reasonably raised the issue of provocation and heat-of-passion. Although defendant’s testimony supported only a claim of perfect or imperfect self-defense, and he expressly denied shooting because the complainant had disrespected his girlfriend, “the jury was entitled to disbelieve [his] reason for shooting and to rely on the other evidence we have identified to find that [he] shot spontaneously and under the influence of extreme emotion.” (Original emphasis.) The evidence the appellate court relied upon included testimony that the complainant “had acted belligerently throughout the party and had engaged in intense arguments with” defendant’s girlfriend and another woman; that the complainant “was the one who escalated the fight with” defendant; that the complainant, “who was much bigger than [defendant], had clenched his fists and ‘lunged’ at [defendant] before being shot;” that the complainant’s friend “intervened in the argument and had his hand on [the complainant] to prevent a physical altercation;” that the complainant “had threatened to get someone to
beat [defendant’s girlfriend] and told [defendant] to ‘check your bitch’ immediately before the shooting;” that defendant “was angered by [the complainant]’s treatment of [his girlfriend];” and that defendant “had been threatened in violent incidents in the past and was intimidated by [the complainant]’s size and by being surrounded by [his] friends.” In so holding, the appellate court observed that “‘[t]he provocative conduct by the victim may be physical or verbal, [as long as it is] sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.’”

People v. Ramirez (2010) 189 Cal.App.4th 1483:

Conviction for first degree murder with gang and firearm-use enhancements reversed because the trial court failed to sua sponte instruct the jury on the lesser offense of voluntary manslaughter based on heat of passion. Defendant, a gang member, shot and killed a rival gang member after defendant’s fellow gang member confronted the decedent over an incident that occurred earlier that day. There was testimony that the decedent punched defendant’s fellow gang member in the neck during the confrontation. However, evidence was also presented that two witnesses told the police that defendant said that the decedent punched him before defendant “dropped” him. The appellate court held that “the evidence that [defendant] immediately responded to the punch by shooting was sufficient to support a reasonable jury finding that [defendant] acted under heat of passion.” Finding the error was prejudicial despite the alternative possibilities that the killing was gang related or that defendant shot the decedent because of racial animus, the court of appeal rejected prosecution complaints that defendant’s fellow gang member “did not act due to any provocation, even though he was more directly involved in the incident than [defendant].” Further, the fact that defendant “shot the victim in the back of his head multiple times as the victim tried to run away” did not excuse the failure to instruct on heat of passion manslaughter because “those multiple shots could have happened in mere seconds, so they could all have been fired under heat of passion.” Finally, responding to the prosecution’s argument that the jury’s finding of premeditated and deliberate murder “necessarily found that [defendant] did not act under the heat of passion . . . ,” the court held that the argument failed “as a matter of law because the Supreme Court has held that the erroneous omission of an instruction on heat of passion voluntary manslaughter is not rendered harmless by a jury determination that the defendant was guilty of first degree murder rather than second degree murder.

4. Words may be sufficient provocation, alone or in combination with conduct

People v. Millbrook (2014) 222 Cal.App.4th 1122:

“[W]hile words alone may not justify self-defense, they may be sufficiently provocative to support a jury’s finding that a defendant acted in the heat of passion [citations omitted], especially when they are coupled with evidence of the kind of threatening behavior that witnesses testified occurred in this case.”

People v. Le (2007) 158 Cal.App.4th 516, 523-529:
Although CALCRIM 917 (words alone can never justify an assault) is a correct statement of the law, it is error to give it in the context of a murder prosecution where the issue is whether defendant was provoked to anger and acted in the heat of passion, making the offense manslaughter instead of murder. To the contrary, People v. Valentine (1946) 28 Cal.2d 121, 140, established that words alone may be sufficient to show the homicide is no more than voluntary manslaughter. The prosecutor compounded the error in closing argument by telling the jury that the insulting words could not reduce the offense to manslaughter. (158 Cal.A pp.4th at p. 526.) Moreover, although the insulting words were not spoken by the decedent, they were still a proper subject for consideration by the jury in assessing the provocation. (At p. 529.)

Defendant’s wife was having an affair with another man that lasted over a substantial period of time despite defendant’s numerous attempts to convince her to end the tryst. On the day that defendant ultimately killed the other man, he and his wife argued over his idea to befriend the man and try to talk him into ending the affair. She did not want him to meet the man and ended up telling him to go suck the man’s penis. Enraged, he left, bought two butcher knives, lured the man into meeting him, and killed him. The appellate court held that the wife’s insulting words were relevant to the provocation issue because her “insult simply served as the spark that caused this powder keg of accumulated provocation to explode.” (158 Cal.A pp.4th 516, 529.) Reversal was required because the erroneous instruction and prosecution argument “discourage[d] the jury from considering the relationship between the accumulated provocation and the insult... .” (Id. at fn. 6.)

5. Some of the provocation must come from the victim, but...

People v. Sattiewhite (2014) 59 Cal.4th 446, 478:

Evidence “that defendant might have acted out of fear of one of his cohorts, not fear of the victim, does not provide substantial evidence to support a finding of heat-of-passion voluntary manslaughter” because that offense “‘requires provocation by the victim[.]’”

However, as described above, People v. Le (2007) 158 Cal.A pp.4th 516, 529, held that the provocative words uttered by defendant’s wife were properly considered in support of his claim that he later killed her paramour in the heat of passion, because her “insult simply served as the spark that caused this powder keg of accumulated provocation to explode.”

C. Voluntary Manslaughter: Imperfect Self-Defense/Defense of Others

1. Entitled to instruction despite lack of testimony by defendant, and although he set in motion the events that led to the victim’s attack


Trial court committed reversible error in refusing to instruct on imperfect self-defense
where prosecution witness's recitation of defendant's admission included defendant's statement that he confronted the victim about the victim having reportedly raped defendant's younger brother years before; the victim reacted by lunging at defendant and began to choke him; and that defendant then pulled out a gun and repeatedly shot the victim, killing him. Thus, there was sufficient evidence to support a finding that defendant actually feared imminent serious injury or death from being choked by the victim. Moreover, the defense of 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.”

2. **Entitled to instruction on imperfect defense of others despite having set in motion the events leading to the shooting**

   People v. Randle (2005) 35 Cal.4th 987:

   Second degree murder conviction reversed because of trial court's errors in jury instructions. First, trial court committed prejudicial error in failing to instruct on the doctrine of imperfect defense of others. Supreme Court held that the doctrine does exist under California law and, therefore, “one who kills in imperfect defense of others—in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury—is guilty only of manslaughter.” (At p. 997.) Defendant shot the victim because the victim was beating defendant's cousin after defendant and his cousin were caught burglarizing a car. Defendant first shot in the air in an attempt to get the victim off of his cousin, but then shot the victim after he continued beating his cousin. The Supreme Court held that defendant could avail himself of the doctrine of imperfect defense of others despite the fact that defendant’s burglary “certainly set in motion the series of events that led to the fatal shooting” because defendant’s subsequent retreat and the victim’s recovery of the stolen goods “extinguished the legal justification” for the victim’s attack on defendant’s cousin. (At pp. 1002-1003.)

3. **Distinguish mistaken perceptions from delusions**

   People v. Elmore (2014) 59 Cal.4th 121:

   Imperfect self-defense, or the doctrine of unreasonable belief in self-defense, does not apply when the “belief in the need to defend oneself is entirely delusional.” Thus, a defendant is not entitled to manslaughter instructions on a theory of unreasonable belief in self-defense that is entirely based on an “insane delusion” because “purely delusional perceptions of threats to personal safety cannot be relied upon to claim unreasonable self-defense.” Instead, they only form the basis of an insanity claim. To be distinguished, however, are unreasonable beliefs based on a mistaken perception, which may be sufficient to reduce a murder to manslaughter under the imperfect self-defense doctrine. “The line between mere misperception and delusion is drawn at the absence of an objective correlate. A person who sees a stick and thinks it is a snake is mistaken, but that misperception is not delusional. One who sees a snake where there is nothing
snakelike, however, is deluded.” Further, the Supreme Court observed that a defendant may “present[] evidence of mental disease, defect, or disorder to support a claim of unreasonable self-defense based on a mistake of fact. A defendant who misjudges the external circumstances may show that mental disturbance contributed to the mistaken perception of a threat…” Thus, “defendants who mistakenly believed that actual circumstances required their defensive act may argue they are guilty only of voluntary manslaughter, even if their reaction was distorted by mental illness.” Moreover, it should be noted that the intermediate appellate court found prejudicial error from the failure to instruct that an unreasonable belief of self-defense based on a hallucination may preclude a conviction for first degree murder, and result in a conviction for second degree murder; the prosecution did not seek review of that holding and the Supreme Court did not quarrel with it.

People v. Ocegueda (2016) 247 Cal.App.4th 1393, 1396:

Trial court committed (harmless) error by precluding the jury from considering evidence of defendant’s mental disabilities in deciding whether he harbored the state of mind required for imperfect self-defense.” Defendant, who was prosecuted for attempted murder among other offenses, presented evidence that he was intellectually disabled. The trial court, however, instructed the jury, based on CALCRIM 3428, that such evidence could be considered only on the issues of whether defendant acted with the intent to kill, and whether he acted with premeditation and deliberation. The court of appeal explained that “California law allows the jury to consider a defendant’s mental disabilities in deciding whether he or she had an actual but unreasonable belief in the need for self-defense. … Therefore, by limiting the jury’s consideration of mental disability evidence to the question of whether defendant had an intent to kill— but not whether he harbored express malice—the trial court’s instruction ran afoul of Section 28.” (At p. 1407.) Further, the appellate court rejected the prosecution’s argument that defendant’s claim that he saw the alleged victim remove a metal object from his waistband, which he thought was a gun, was “purely delusional because no other witness saw [the alleged victim] make such a motion, and no gun or gun-like object was found on [him].” Instead, the court observed that the testimony of “a single witness, even if not inherently credible, may be sufficient… [and] [b]ased on defendant’s statements, the jury reasonably could have inferred that [the alleged victim] actually made some threatening motion or pulled out a metallic object, such as a cell phone, from his waistband.”

4. **May not be entitled to instructions on imperfect self-defense although entitled to instructions on perfect self-defense**

People v. Lam Thanh Nguyen (2015) 61 Cal.4th 1015:

Trial court properly denied defendant’s request for instructions on imperfect self-defense where the decedent approached defendant’s car with a gun, but defendant waited for him to arrive at the driver’s window, then shot him before the decedent shot back. If defendant genuinely had a belief that he was about to suffer imminent great bodily harm, that belief would have been reasonable. Although the jury rejected defendant’s claim of
self-defense, that was because “defendant did not act out of such fear alone” and/or defendant and the decedent were engaged in mutual combat, not because any belief of imminent harm was unreasonable.

5. Voluntary Manslaughter Distinguished From Murder: Burden on Prosecution to Prove Murder, Not on Defendant to Show Manslaughter

People v. Speight (2014) 227 Cal.App.4th 1229:

After agreeing that the issues of heat-of-passion and imperfect self-defense manslaughter were sufficiently raised by the evidence and the trial court properly instructed the jury on those concepts, the court of appeal held that the trial court committed error in failing to sua sponte instruct the jury with CALJIC 8.50, which describes the difference between murder and manslaughter. The prosecutor had argued that, “[i]n order to get to voluntary manslaughter, ... you would have to all find him not guilty of attempted murder.” In response to defense counsel’s objection to that argument, the court agreed with the prosecutor, telling the jury, “You don’t get to the attempted voluntary manslaughter unless there’s a unanimous finding of not guilty to the attempt[ed] murder....” Buoyed by the court’s approval of her tack, the prosecutor then argued that the jury could not get to voluntary manslaughter unless they all agreed that the defendant was not guilty, and “that the defense of heat of passion or the defense of he reasonably was in fear for his life, ... you have to find that in order for you to even get down to voluntary manslaughter.” These arguments and comments implied that the defense had the burden of proving heat of passion or imperfect self-defense, instead of requiring the prosecution to prove murder. The court of appeal held that the trial court erred in failing to “instruct the jury the prosecution had to prove beyond a reasonable doubt that [defendant] did not act as a result of heat of passion.”

E. Felony-Murder

People v. Debose (2014) 59 Cal.4th 177:

“‘It is error to give an instruction that, while correctly stating a principle of law, has no application to the facts of the case.’” Thus, it was error to instruct the jury that, for purposes of the felony-murder rule, a robbery was still in progress as “‘long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property...,'” “because there was no evidence that defendant was pursued.”

People v. Friend (2009) 47 Cal.4th 1, 75-76:

The felony-murder rule acts as a substitute for malice aforethought but is different than malice. Thus, “jury instructions on felony murder should avoid language suggesting that felony murder results in a conclusive presumption of malice.”

1. Duration of Felony
People v. Wilkins (2013) 56 Cal.4th 333:

Trial court committed reversible error in failing to instruct the jury “that, for purposes of felony murder, the felony continues only until the perpetrator has reached a place of temporary safety.” In the context of applying the felony-murder rule to a burglary, the burglar has reached a place of temporary safety— and is no longer subject to the felony-murder rule--“‘if he has successfully escaped from the scene, is no longer being chased[, and has unchallenged possession of the [stolen] property.’”

2. **Merger**

People v. Farley (2009) 46 Cal.4th 1053:

Overruling People v. Wilson (1969) 1 Cal.3d 431, the California Supreme Court abolished the merger doctrine in first degree felony murder cases. Pointing to the legislative specification in Penal Code section 189 that all murders committed in the course of the enumerated felonies constitute first degree murder, the court held that it matters not whether the felonious intent underlying a burglary is the intent to commit an assault. Due to ex post facto concerns, however, the elimination of the merger doctrine in first degree murder cases is prospective only, and cannot be applied retroactively to any homicide committed before Farley was decided (July 2, 2009). Thus, the merger doctrine still applied in Farley, but it was not applicable because defendant’s burglarious entry was made with the intent to assault a woman he did not kill, not one of the people he ultimately killed.

People v. Chun (2009) 45 Cal.4th 1172:

The merger rule precludes application of the second degree felony murder rule to any assaultive felony, including violations of Penal Code sections 246, 246.3, and 273a. The determination of whether the underlying felony is “assaultive” is based on an evaluation of whether the statutory elements of the crime—not the facts of the case—define a crime “that involves a threat of immediate violent injury.”

People v. Randle (2005) 35 Cal.4th 987:

Defendant could not be convicted of second degree murder on the theory that he committed a violation of Penal Code section 246.3 (grossly negligent discharge of a firearm) because defendant intended to shoot the victim after shooting once in the air. Thus, any violation of section 246.3 merged with the murder charge because defendant’s purpose in shooting the victim was not independent or collateral to any intent to injure the victim. (At p. 1005.)

3. **Duress as Defense to Felony-Murder**

People v. Marlwood (Marlow I) (2004) 34 Cal.4th 1, 100-101 and fn. 31:
Although duress or necessity is not directly a defense to murder because no duress or necessity can justify the killing of an innocent person, “duress can, in effect, provide a defense to murder on a felony-murder theory by negating guilt of the underlying felony.” Such “duress requires a reasonable belief that threats to the defendant’s life (or that of another) are both imminent and immediate at the time the crime is committed [citations omitted], threats of future danger are inadequate to support the defense.” The “trial court should have instructed the jury to consider evidence of duress with respect to felony murder (and the underlying felonies) . . . ,” but the error was harmless.

F. Aiding and Abetting

1. **Must provide assistance before or during the fatal acts**

   People v. McDonald (2015) 238 Cal.App.4th 16:

   In order to find a defendant guilty of murder as an aider and abettor to a felony-murder (robbery), it must be proven beyond a reasonable doubt that “he aided and abetted the robbery before or at the time of the act(s) causing death.” It is not enough that he aided the perpetrators before they reached a place of temporary safety. Thus, the trial court committed reversible error in failing to give the bracketed portion of CALCRIM 540B and CALCRIM 730, which explain this requirement.


   An aider and abettor who does not aid and abet the perpetrator until after the perpetrator inflicted the fatal blow may not be found guilty of felony murder as an aider and abettor because “felony-murder liability does not attach to a defendant who aids and abets the perpetrator of the crime only after the killing.” (At p. 1121.) Although defendant did not rely on this theory at trial and did not request the trial court to instruct the jury with the third, optional paragraph of CALJIC No. 8.27, which discusses this issue, the trial court had a sua sponte duty to give that instruction because there was substantial evidence from which “one or more jurors could conclude that [defendant] was not present when [her daughter] killed [the victim] and that [defendant’s] ‘joint engagement’ in the commission of burglary and/or kidnapping did not arise until after [the victim] was already dead.” (At p. 1118.)

2. **Aider may be guilty of lesser, or greater, crime than perpetrator**

   People v. Loza (2012) 207 Cal.App.4th 332:

   First degree murder conviction reversed because the jury was erroneously instructed, pursuant to CALCRIM 400, that an aider or abettor is equally as guilty as the perpetrator. Instead, an aider and abettor’s liability is dependent on his or her specific intent, and he or she may be guilty of a greater or lesser crime than the perpetrator.

   People v. Lopez (2011) 198 Cal.App.4th 1106:
A perpetrator and an aider and abettor are not always equally guilty of the same crime. Although such an instruction may generally be accurate, it is incomplete in some cases. However, it is incumbent on the defendant to request a modification of the instruction (CALCRIM 400) if she believes it is “misleading on the facts of the case.”


An aider and abettor may not be equally guilty as the direct perpetrator, and both CALJIC 3.00 and CALCRIM 400 can be misleading because they imply that all principals, including aiders and abettors, are necessarily equally guilty. These pattern instructions should be modified to make clear that an aider and abettor may be guilty of a lesser offense than the perpetrator if the aider has a less culpable mental state. Thus, the trial court committed reversible error in simply rereading CALJIC 3.00 to the jury in response to the jury’s question whether an aider may be guilty of a lesser offense. The error was prejudicial because the evidence was sufficient to support the conclusion that defendant was provoked to anger, negating malice and reducing the homicide to voluntary manslaughter, although the perpetrator was guilty of second degree murder.


Just as an aider and abettor may be found “guilty of a greater offense than the direct perpetrator,” the aider and abettor may only be guilty of an offense less than the perpetrator’s “if the aider and abettor has a less culpable mental state.” Such a lesser mental state may be present, e.g., due to the lack of premeditation and deliberation, or the intent to kill, or the presence of an unreasonable belief in the need to act in self-defense. CALCRIM 400 is in error to the extent it eliminates this possibility by instructing the jury that the aider and abettor is equally guilty of the crime committed by the perpetrator.

3. Withdrawal Terminates Liability as Aider and Abettor

People v. Fiu (2008) 165 Cal.A pp.4th 360:

Where defendant is prosecuted for murder under an aiding and abetting theory and raises the defense of withdrawal, the trial court must instruct the jury on the defense if defendant meets his burden of going forward with evidence “that he both notified the other principals of his intent to withdraw and that he did everything in his power to prevent the commission of the crime . . . .” (At p. 383.) If the prosecution theory is that defendant aided and abetted the target crime of murder, defendant must have withdrawn before that target crime (here, murder), was committed. (At pp. 383-384.) If the prosecution theory is that defendant aided and abetted a target crime, and murder was the natural and probable consequence of that crime, defendant may withdraw after the commission of the target crime but must withdraw before the commission of the crime which is the natural and probable consequence of the target crime, i.e., murder. (At p. 384.) Once defendant meets his burden of going forward with such evidence, the burden is on the prosecution to prove beyond a reasonable doubt that defendant did not
withdraw. (At p. 384.) Further, the trial court has a duty to sua sponte instruct the jury on the prosecution’s burden of proof. (At p. 386.) Specifically, the court should instruct the jury that if it “has a reasonable doubt whether or not the defendant effectively withdrew, they should acquit.” (At p. 386.)

4. Duty to Instruct on Aiding and Abetting

People v. Delgado (2013) 56 Cal.4th 480:

Where the evidence would permit a reasonable jury to conclude that “an accomplice, rather than defendant, personally performed the act of asportation necessary to the offense of kidnapping…,” the trial court has a sua sponte duty “to instruct on aiding and abetting liability as a general legal principle raised by the evidence and necessary for the jury’s understanding of the case.” Thus, in any case “where there [is] substantial evidence to support an accomplice liability theory as to one act element … of the … charge, and the prosecutor relie[s] on that theory, the trial court [is] obliged to instruct on aiding and abetting liability … .”

5. Good Faith Belief Perpetrator was Merely Retaking his Property Negates Aider’s Intent

People v. Williams (2009) 176 Cal.App.4th 1521, 1528-1529:

The court of appeal held that “a good faith belief by a defendant, tried as an accomplice, that he was assisting his co-principal retake the principal’s property negates the ‘felonious intent’ element of both larceny and robbery, and that a claim-of-right defense [instruction] must be given where substantial evidence supports such a belief.” Since the “[d]efendant testified that he believed he was assisting his [coprincipal] retake [his] own property” and “[t]here was ample evidence in the record to support a jury finding that such belief was harbored in good faith”, the appellate court held it was (harmless) error to fail to instruct the jury with a modified version of CALCRIM 1863.

6. Natural and Probable Consequences

Rosemond v. United States (2014) 572 U.S. ___ [134 S.Ct. 1240, 188 L.Ed.2d 248]:

While expressly declining to consider whether the “natural and probable consequences” doctrine was a permissible exception to the general rule (at fn. 7), the SCOTUS held that a federal statute prohibiting the possession of a firearm during a drug trafficking crime could not be applied to an aider and abettor unless he actually had advance knowledge of the perpetrator’s possession of the firearm. “[A]n aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime.” Thus, “the intent must go to the specific and entire crime charged…, to the full scope (predicate crime plus gun use)…. ” The question is whether the defendant actually knew about the presence of the gun in sufficient time to allow him to withdraw from the crime.
People v. Chiu (2014) 59 Cal.4th 155:

“[A]n aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine.” (Original emphasis.) However, an aider and abettor can be vicariously liable for “first degree premeditated murder based on direct aiding and abetting principles”—that is, if he or she aided the perpetrator’s commission of premeditated murder with the specific intent to assist the confederate in killing someone—and may still be convicted of first degree felony murder without having any intent to kill.

People v. Smith (2014) 60 Cal.4th 63:

Under the natural and probable consequences doctrine applicable to aiders and abettors, although “the prosecution must prove the nontarget offense was reasonably foreseeable[,] it need not additionally prove the nontarget offense was not committed for a reason independent of the common plan to commit the target offense.” Thus, the defendant is not entitled to such an instruction. On the other hand, “[i]n a given case, a criminal defendant may argue to the jury that the nontarget crime was the perpetrator's independent idea unrelated to the common plan, and thus was not reasonably foreseeable and not a natural and probable consequence of the target crime. But that would be a factual issue for the jury to resolve.” (At p. 617.) Note that the court upheld the convictions of defendant for second degree murder of his fellow gang members by rival gang members after he helped arrange a “jump out” to extricate his little brother from the rival gang.

People v. Bryant (2014) 60 Cal.4th 335, 431:

Although it articulated its ruling in the context of accomplice instructions, the court held that, “There is no doubt that drug dealing and violence commonly go hand in hand, and that the Bryant Family organization historically used violence against those who crossed them. However, those facts standing alone do not establish as a matter of law that one of the reasonably foreseeable results of the drug dealing conspiracy was this particular set of murders.”

7. Transferred Intent of Aider and Abettor

In re Brigham (2016) 3 Cal.App.5th 318:

Even when the aider agrees to assist a premeditated murder, if the aider realizes that the target is the wrong person before the perpetrator takes any action against him, tells the perpetrator that the target is the wrong guy and tries to dissuade him from shooting that guy, and did not have the intent to kill that target, but the perpetrator intentionally and deliberately shoots that guy anyway, the doctrine of transferred intent does not apply. Further, People v. Chiu (2014) 59 Cal.4th 155 prohibits the aider’s conviction for first degree murder on a natural and probable consequences theory.
8. Vagueness Challenges (Natural & Probable Consequences; 2d Degree Felony Murder)


Because it “both denies fair notice to defendants and invites arbitrary enforcement” of the law, due process is violated by allowing conviction of a defendant based on an evaluation of whether the commission of the crime in its “ordinary,” “abstract” sense “presents a serious potential risk of physical injury.” By contrast, criminal liability may attach based on a determination of whether the defendant’s actual conduct the same risk.

California practitioners should be prepared to utilize Johnson in two potential challenges to murder prosecutions. First, the second degree felony murder rule appears to be unconstitutional under Johnson because it is based on whether the underlying felony is “inherently dangerous,” which is an abstract proposition. Second, application of the natural and probable consequences doctrine may be unconstitutional if it is based on an evaluation of the underlying crime in the abstract as opposed to the defendant’s particular conduct on this occasion.

G. Provocative-Act Murder

People v. Concha (2009) 47 Cal.4th 653:

While affirming that a defendant may be convicted of first degree murder under a provocative act theory, where the defendant commits an inherently dangerous felony (here, attempted murder), leading the victim of that crime to kill one of the defendant’s confederates in self-defense, the California Supreme Court held that defendant cannot be convicted of first degree murder unless the defendant “personally . . . acted willfully, deliberately, and with premeditation he committed the attempted murder [i.e., the inherently dangerous underlying felony].” (Original emphasis.)

H. Deliberation is Different Than Premeditation

Chambers v. McDaniel (9th Cir. 2008) 549 F.3d 1191:

Nevada murder conviction reversed because the jury instructions failed to properly define deliberation. The vice of the instruction was that it defined premeditation but failed to define deliberation. Thus, it effectively equated deliberation with premeditation. The error was prejudicial because the evidence failed to “demonstrate the key feature of the element of deliberation: that of a ‘dispassionate weighing process and consideration of consequences before acting.’”

Although this is a case from Nevada, the separate requirements of premeditation and deliberation apply in California murder cases.
I. Reducing First Degree to Second Degree: Provocation Negating Premeditation & Deliberation

People v. Jones (2014) 223 Cal.App.4th 995:

There is no objectivity requirement concerning the type of provocation that may defeat a finding of premeditation and deliberation required for first degree murder. If the provocation subjectively resulted in the lack of premeditation and deliberation, then defendant is not guilty of first degree murder. However, a trial court does not have a duty to give such an instruction sua sponte. Instead, the defendant must affirmatively request the instruction.

J. Right to Second Degree Murder Instructions as Lesser Included Offenses… Where Prosecution Proceeds on Felony-Murder Theory

People v. Banks (2014) 59 Cal.4th 1113, 1160:

Where the information or indictment “allege[s] not merely that defendant killed in the course of a robbery but that he did so willfully and maliciously …,” second degree murder is a lesser included offense under the accusatory pleading test. Under these circumstances, “the trial court [is] required to instruct the jury on second degree murder so long as substantial evidence would … support[,] such a finding.”


Applying the holding from Banks described immediately above, the court of appeal reversed defendant’s conviction for first degree murder with a robbery-murder special circumstance because the trial court failed to instruct the jury on the lesser included offenses of second degree murder and voluntary manslaughter. Although the prosecution proceeded on a felony-murder theory, the information alleged that defendant “‘wilfully, unlawfully, and with deliberation, premeditation, and malice aforethought [committed] murder….’” Thus, under the accusatory pleading test, second degree murder, voluntary manslaughter, and involuntary manslaughter were lesser included offenses. Since defendant’s testimony, if believed, could have led a jury to “reasonably conclude he was guilty of second degree murder or voluntary manslaughter based on imperfect self-defense…,” he was entitled to instructions on those lesser included offenses, and the failure to so instruct required reversal of his conviction.

People v. Anderson (2006) 141 Cal.App.4th 430:

Murder conviction reversed because of failure to instruct on lesser included offenses where there was substantial evidence to support a finding of guilt on second degree murder or voluntary manslaughter. Defendant was charged with murder on a theory of malice, i.e., first degree murder based on premeditation and deliberation. At the close of evidence, however, the prosecution “added” the charge of felony murder. Although California law prohibits instructions on lesser included offenses unless they are
necessarily lesser included offenses of “the charge contained ‘in the accusatory pleading itself’”, the relevant accusatory pleading is the one which “provide[d] notice to the defendant of the charges that he or she can anticipate being proved at trial.” Thus, “[b]ecause second degree murder and voluntary manslaughter are lesser included offenses of the offense charged against defendant in the amended information, defendant was on notice that she might be convicted of that crime or any of its lesser included offenses—and, by the same token, that she could anticipate instructions on these lesser offenses if they were supported by substantial evidence.” Further, the error in failing to give the instructions on the lesser offenses was prejudicial because, although defendant and her codefendant did, in fact, steal money from the victim, there was strong evidence that the intent to steal was not formed until after the fatal force was used to kill the victim, and that the killing may have been motivated by a sudden quarrel or imperfect self-defense or defense of others.

K. Lesser of Express Malice Second Degree Murder

People v. Rogers (2006) 39 Cal.4th 826:

Trial court erred in failing to instruct the jury on the lesser offense of express malice second degree murder. Although the trial court gave the jury an instruction on second degree murder, it only defined second degree murder committed with implied malice, that is, the commission “of an intentional act involving a high degree of probability that it will result in death . . . by a person who knows that his conduct endangers the life of another, and who acts with conscious disregard for human life.” The trial court committed error in “omitting an instruction that second degree murder includes an intentional but unpremeditated murder.” It is not sufficient to merely instruct on a lesser included offense; rather, “the trial court had a duty to instruct on ‘all theories of a lesser included offense which find substantial support in the evidence.’”

L. Instructions on Implied Malice

People v. Calderon (2005) 129 Cal.App.4th 1331:

In prosecution for second degree (implied malice) murder based on the death of another motorist while defendant fled from a police officer in violation of Vehicle Code section 2800.2, trial court committed reversible error by instructing the jury that the Vehicle Code offense “was inherently dangerous to human life if a willful and wanton disregard for the safety of persons was shown.” The instruction was erroneous because “willful or wanton disregard for the safety of persons” is not the legal equivalent of “conscious disregard for human life.” For example, “[a] person might be willing to risk causing minor injuries while attempting to evade police, yet might very well not be willing to risk causing serious injury or death.” Thus, the jury instructions failed to properly define implied malice, requiring reversal of defendant’s second degree murder conviction.

M. Defense of One’s Residence

Trial court committed (harmless) error in refusing to instruct the jury “pursuant to [Penal Code] section 198.5 that a person using force within his or her residence against a person who forcibly entered the residence shall be presumed to have held a reasonable fear of injury to self or another member of the household” on the ground that the apartment was not defendant’s “residence” because he was not legally subletting the unit.” “If the jury believed appellant’s testimony regarding his living situation, it could reasonably have found he had a reasonable expectation of protection against unwanted intruders in unit 930. Appellant had been in the unit for four or five months, paid rent, and had a key to the unit. Moreover, the Housing Authority in fact knew of his presence but had not immediately ejected him, giving him some days or weeks to move.” (At p. 687.) Therefore, a reasonable jury could have concluded the apartment constituted defendant’s “residence for purposes of section 198.5.” (At p. 689.)

II. Gang Cases

A. Umbrella gangs and subsets

People v. Prunty (2015) 62 Cal.4th 59:

“When … the prosecution relies on the conduct of subsets to show a criminal street gang's existence, the prosecution must show a connection among those subsets, and also that the gang those subsets comprise is the same gang the defendant sought to benefit.” Since the prosecution attempted to support the gang enhancement by claiming that, although defendant was a member of a particular Norteno subset, he acted to benefit the “Norteno street gang”, it was required to connect both defendant’s subset and the predicate acts to the so-called umbrella gang because the gang enhancement requires that the same group allegedly benefitted by the charged criminal conduct also “committed the predicate offenses and engaged in criminal primary activities.” Further, where the prosecution presents evidence of offenses committed by the umbrella gang’s alleged subsets, it must prove a connection between the gang and the subsets.” Specifically, “the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization.” (Fn. omitted.)

Defendant was concededly a member of a particular subset of Nortenos, the Detroit Boulevard Nortenos. The offenses offered as the requisite predicate offenses were committed by three other subsets. Although the prosecution gang expert testified that all four subsets identified themselves as Nortenos, neither the prosecution nor the gang expert presented any “specific evidence showing these subsets identified with a larger
Norteno group... [or that they] shared a connection with each other, or with any other Norteno-identified subset.” Thus, the evidence was insufficient to support the gang enhancement.

The mere fact that the various Norteno subsets committed crimes did not establish the required connection between the subsets. Nor did the facts that they shared common colors, identifying signs and symbols, had a common enemy (Sureños), or had a common viewpoint. It is also insufficient to show “merely that a local subset has represented itself as an affiliate of what the prosecution asserts is a larger organization.”

The gang expert’s conclusory opinion that Nortenos were a “criminal street gang” was insufficient because he “did not describe any “facts tending to show an organizational or associational connection among the Norteno subsets he described, nor did he articulate any reasons for concluding that all such subsets are part of a single criminal street gang. Nor did [he] describe the material he relied on in reaching his conclusions... .”

On the other hand, there is no requirement that different subsets must peacefully coexist. While evidence that they are rivals or have been at odds is relevant, it is not dispositive.

By contrast, the majority provided several examples of situations that would establish the requisite connection, including but not limited to: shared bylaws or organizational arrangements; being “controlled by the same locus or hub”; each subset having a “‘shot caller’ who ‘answer[s] to a higher authority’ in the Norteno chain of command”; the subsets “routinely act to protect the same territory or ‘turf’”; conducting “independent, but harmonious, criminal operations within a discrete geographical area” if it shows “that they are part of a single entity whose bosses have divided up a larger territory”; working together “‘in concert to commit a crime’”; and “profess[ing] or exhibit[ing] loyalty to one another.”

People v. Nicholes (2016) 246 Cal.App.4th 836, 845:

Rejecting prosecution attempts to distinguish People v. Prunty (2015) 62 Cal.4th 59 on the grounds that the gang expert never identified any particular subset in which defendant may have belonged but, instead, testified that defendant was a Norteno, the appellate court pointed out that the expert described “the primary activity of the Norteno criminal street gang in our area”, which necessarily implied a reference to a subset in that area. Therefore, Prunty applied and the prosecution was required to “introduce evidence specific to the subsets at issue.” (At p. 848.)

People v. Cornejo (2016) 3 Cal.App.5th 36:

Gang enhancements vacated under People v. Prunty (2015) 62 Cal.4th 59 because the evidence failed to establish “an associational or organizational connection between the Norteno subsets who committed the predicate offenses... and the Norteno subsets to which defendants belonged... .” Sharing the same beliefs is not sufficient. Nor is “testimony that Norteno subsets claim membership in the larger Norteno gang... .”
B. Prosecution Gang Experts


Trial court committed (harmless) error in prohibiting defendant from cross-examining the prosecution’s gang expert if he had “formed an opinion whether every time a member goes along on a ride with somebody else—whether or not they always know what is going to happen before it happens?” The court of appeal held that the question properly “requested an opinion as to whether in gang culture and operation every time a gang member rides with other gang members he or she is aware of what will happen.” “[T]he trial court erred in finding the question speculative [because] [i]t was no more speculative than gang expert opinion that gang members retaliate against someone who disrespects the gang.”

People v. Ewing (2016) 244 Cal. App.4th 359, 382:

Asking a prosecution gang detective “whether defendant specifically committed the alleged crimes for the benefit of the gang was improper.”

People v. Franklin (2016) 248 Cal. App.4th 938:

Evidence was insufficient to support gang enhancements. Although the prosecution’s gang officer claimed that the crime was committed on the turf of defendant’s gang, and explained the reason why gang members commit crimes in their territory, the evidence showed that the crimes did not occur in the territory of defendant’s gang; instead, they occurred in non-gang territory and turf controlled by several gangs, of which defendant’s was only one. Further, there was no factual basis for the “expert’s” claim “that ‘most crimes’ committed by a gang member are committed for the benefit of the gang... [a]nd [there was no support for] the detective’s casual dismissal of the possibility that [defendant] acted for his own benefit rather than for the benefit of his gang.” (At p. 950.) Prosecution evidence that defendant acted with the assistance of friends who were members of other gangs failed to shore up these inadequacies, because “there was no evidence whatsoever to demonstrate any associational or organizational connection among the [various] gangs.” The appellate court also rejected “the detective’s supposition” that defendant “commanded the respect of other gangs and could enlist the assistance of rival gang members” because he was “a senior high ranking member of [his] gang and possibly a valued member of the Mexican Mafia...” “Not a single fact was presented to suggest appellant’s ‘rank’ within the Jim Town gang, nor was there a shred of evidence that appellant had any actual connection to the Mexican Mafia.” (At p. 951.) Finally, the mere fact that defendant used the plural pronoun, “we,” in articulating his threats to the victim failed to support the conclusion that he was acting with the assistance of gang members; “in the absence of any evidence about whom appellant was referring when he used the word ‘we,’ any inference that the threat constituted an invocation of appellant’s gang amounts to pure speculation.” (Ibid.)
C. Relevancy and Evidence Code section 352

People v. Williams (2009) 170 Cal.App.4th 587:

The trial court allowed the prosecution to present evidence of eight separate incidents in order to prove the predicate crimes necessary for the gang enhancements and charges, and also permitted evidence of eighteen other incidents involving crimes committed by defendant or his contacts with law enforcement. The court of appeal held that the trial court erred in allowing the prosecution to over-try the gang allegations, finding that the extensive evidence was cumulative and should have been excluded under Evidence Code section 352, concluding that “it was an abuse of discretion to admit cumulative evidence concerning issues not reasonably subject to dispute. The sheer volume of evidence extended the trial—and the burden on the judicial system and the jurors—beyond reasonable limits, and the endless discussions among the trial court and counsel concerning the admissibility of such evidence amounted to a virtual street brawl.” (Id. at p. 611.)

People v. Ramirez & Villarreal (2016) 244 Cal.App.4th 800:

Since the prosecutor failed to show the required connection between Sureno subsets, defendants’ pretrial motions to dismiss the gang enhancement under Penal Code section 995 should have been granted under People v. Prunty (2015) 62 Cal.4th 59. Further, their motions to dismiss the substantive gang participation charge should have been granted under People v. Rodriguez (2012) 55 Cal.4th 1125 because the prosecutor failed to show that they were “active” participants in the gang. Thus, none of the gang evidence should have been admitted at trial. Although the erroneous dismissal of a 995 motion is not normally a ground for appeal, reversal was required because the inadmissible gang evidence was prejudicial to the defendants in their attempted murder trial, where there was conflicting evidence on whether their conduct was an unprovoked attack or in self-defense. Thus, “the gang evidence erroneously admitted at trial violated defendants’ due process rights and resulted in a fundamentally unfair trial.” (At p. 803.)

D. Gang Evidence may Not be considered for Identity of the Killer

People v. Rivas (2013) 214 Cal.App.4th 1410:

Trial court erred in gang-murder case by modifying CALCRIM 1403 to instruct the jury that they could consider evidence of gang activity “for the purpose of identity,” i.e., to identify defendants as the killers. It was (harmless) error to “invit[e] the jury to consider evidence of Sureno activity to establish defendants’ identities as the perpetrators of the murder ... and the other charged crimes.”

E. Gang Membership Alone is Not Enough to Show Aiding and Abetting

In finding no error in the admission of gang evidence, the court of appeal approvingly quoted from the trial judge’s instruction that, “‘Evidence that a defendant is a member of a gang alone cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement, or instigation needed to establish aiding and abetting.’ (At p. 274.) The court of appeal observed that the acquittal of one codefendant indicated that the jury followed the instruction, thereby demonstrating that the admission of gang evidence did not deny defendant a fair trial.

F. **Not all crimes by gang members come within “Natural and Probable Consequences”**


The mere fact that defendant aided and abetted various gang offenses (burglary and possession of a firearm) that were committed in a rival gang’s territory was insufficient as a matter of law to demonstrate that his accomplice’s commission of witness intimidation was a natural and probable consequence of the gang crimes aided by defendant, requiring reversal of defendant’s conviction for witness intimidation.

III. **DUI/Watson Murder Cases**

A. **Irrelevant and Prejudicial Evidence**


Trial court erred when it permitted two employees of Mothers Against Drunk Driving (MADD) to testify about “their own personal stories of tragedy related to drunk driving accidents.” The testimony was irrelevant and highly prejudicial, and should have been excluded pursuant to both Evidence Code section 350 and section 352.

B. **Impermissible Presumptions**


Second degree murder conviction based on defendant’s driving under the influence of alcohol reversed because the trial court instructed the jury that violation of the basic speed law (Veh. Code § 22350) constituted the “commission of an act inherently dangerous to human life . . . .” The instruction was unconstitutional because it created a mandatory presumption, in violation of defendant’s constitutional rights to due process of law.

C. **DUI/Watson Murder vs. Vehicular Manslaughter**

Defendant was prosecuted for second degree murder and gross vehicular manslaughter while intoxicated. At his first trial, the jury found him guilty of the manslaughter charge but deadlocked on the murder charge. At retrial, the trial court limited the issues to whether defendant was guilty of murder, and refused to instruct the jury on gross vehicular manslaughter or inform them “that defendant had been convicted of that offense in the first trial...”. The court of appeal reversed, “conclud[ing] the trial court erred by instructing defendant’s second jury in a manner that gave the jury the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder.” (At p. 1117.) Further, the prosecutor compounded the error in closing argument by commenting that “now is the time that you have to hold this person accountable... There is only one count in this case that you have to decide on. This is it. Hold him accountable for killing someone.' Although perhaps the argument was technically correct, in that only one count remained for the jury to decide in the second trial, the argument certainly created the misleading impression that unless the jury found him guilty of the murder charge, he would not be held accountable at all for [the victim]'s death.” (Ibid., original emphasis.)

People v. Johnson (December 7, 2016) 6 Cal.App.5th 505:

Conviction for second degree murder reversed because the trial court failed to instruct the jury at defendant’s retrial “that he had been convicted in the first trial of gross vehicular manslaughter while intoxicated....” Accepting that the trial court did inform the jury that there had been a previous trial at which the defendant had been convicted of two of the three charges, and that their task was to decide the remaining charge, the appellate court found that such information was “only a slight variant of the same evil that our holding in [People v.] Batchelor [(2014) 229 Cal.App.4th 1102] was intended to address.” "Although the trial court's instruction excluded the possibility that defendant would suffer no criminal convictions, it left open the distinct possibility that he would, absent a conviction for murder, avoid any conviction holding him directly accountable for the death of the victim.” (At p. 510.) Thus, it still left the jury with an improper “all-or-nothing choice that... should have been placed in context by means of an appropriate instruction.” (At p. 513.) The appellate court also found a second prejudicial error in the jury instructions, a modification of CALCRIM 520 that allowed the jury to convict defendant of second degree murder based on his failure to perform a legal duty to the victim, which improperly suggested that “a finding that defendant failed to drive with adequate care and caution for others—a conceded issue—equates to culpability for second degree murder.” (At pp. 515-516.)

IV. Other Defense Issues

A. Intersection of mental health and 187

People v. Townsel (2016) 63 Cal.4th 25, 63-64:

Trial court’s instruction limiting consideration of defendant’s intellectual disability at the culpability phase “solely on the question whether he formed the mental state required for
the murder charges ... effectively told the jury it must not consider that evidence on any other question...,” including the witness-killing special circumstance and the charge of dissuading a witness. The error was prejudicial, requiring reversal of these allegations, because “the intellectual disability evidence was entirely consistent with, and reinforced, the argument that defendant acted out of jealousy and frustration rather than out of rational thought, a planning process, or a weighing of the consequences.”

People v. Cortes (2011) 192 Cal.A pp.4th 873:

In an excellent explanation of the expansive scope of testimony an expert is allowed to give concerning a defendant’s mental health, including at the time of the alleged crime and how it affected him at that time, the court of appeal reversed defendant’s murder conviction because of improper restrictions on the expert’s testimony. First, the court reiterated settled law permitting a mental health expert to opine that a defendant suffered from a mental illness at the time of the homicide, including not only a description of how that mental illness can affect a person, but also that it “‘can lead to impulsive behavior’” (quoting from People v. Coddington (2000) 23 Cal.4th 529, 582-583, overruled on other grounds in Price v. Superior Court (2001) 25 Cal.4th 1046, 1069, fn. 13). The court also observed that although an expert cannot testify that defendant did not have the ability to form the requisite mental state (because of the abolition of diminished capacity as a defense by Penal Code sections 25 and 28) or that defendant did not harbor the required specific intent (because Penal Code section 29 prohibits testifying to that ultimate fact), “the defendant can call an expert to testify that he had a mental disorder or condition (such as or PTSD, or dissociation), as long as that testimony tends to show that the defendant did or did not in actuality (as opposed to capacity) have the mental state (malice aforethought, premeditation, deliberation) required for conviction of a specific intent crime (as opposed to a general intent crime) with which he is charged, except that the expert cannot offer the opinion that the defendant actually did, or did not, harbor the specific intent at issue. Put differently, sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged.” (Cortes, 192 Cal.A pp.4th at p. 908.) Thus, the trial court erred in precluding the expert from testifying “about defendant’s particular diagnoses and mental condition and their effect on him at the time of the offense, and in limiting [the expert’s] testimony to diagnoses or mental conditions in the abstract and their effects on the general person in the population at large.” (At p. 909.)

“He should [also] have been permitted to testify about defendant’s upbringing and traumatic experiences as a child and/or adolescent, inasmuch as defendant’s prior traumatic experiences informed [his expert] opinion, and explained the connection between defendant’s diagnoses, his mental state and his behavior. He should have been permitted to explain both the psychological condition and the phenomenon of dissociation, and dissociation’s relationship to PTSD and defendant’s upbringing and
traumatic experiences. He should have been permitted to explain the bases for his opinions, including defendant’s statements describing his perception of the stabbing.” (At p. 910.) Further, the trial court erroneously prohibited the expert from testifying that “the defendant’s traumatic experiences as an abused adolescent caused him to suffer several DSM IV diagnosable conditions which were (a) likely to have colored his perceptions of the situation, and (b) impaired his consciousness in specific ways.” (At p. 911.) Although such testimony “would have given the jury a basis to infer that defendant actually did not harbor malice, premeditate, or deliberate, even if [the psychiatrist] did not come out and say that defendant lacked such mental states... [that] is exactly the type of testimony sections 28, 29, and the case law, permit.” (At p. 912.) Finally, the error was prejudicial because the excluded testimony was relevant to questions of whether the defendant was not guilty because he acted in self-defense, or whether he was guilty of manslaughter instead of murder because of imperfect self-defense or heat of passion. (Ibid.)

People v. Herrera (2016) 247 Cal.App.4th 467:

Relying heavily on People v. Cortes (2011) 192 Cal.App.4th 873, the court of appeal reversed defendant’s conviction for first degree murder because of the improper limits imposed on the testimony of defendant’s mental health expert, Dr. Nancy Kaser-Boyd. The trial court prohibited her from expressing opinions on “whether [defendant] was suffering from [peritraumatic dissociative state],” “whether he was psychiatrically impaired,” and “whether he suffered from [PTSD]” on the date of the murder.” (At p. 475.) The appellate court observed that “Cortes does not restrict testimony that the defendant had a particular mental state—only the particular mental state that is an element of the offense.” (At p. 477.) Quoting from Cortes, the court explained that Penal Code “sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged.” (At p. 476.) The trial court’s improper restrictions on the scope of the expert testimony were prejudicial on the issues of self-defense, imperfect self-defense, heat of passion, and provocation, because the proffered expert testimony could have supported the defense theory that defendant “attacked his friend while under a dissociative, PTSD-induced fog”, and explained “that a person whose PTSD symptoms were triggered, causing him to kill his longtime friend based on actual but objectively unreasonable perceptions, would panic afterwards and choose not to call the police…,” which would have rebutted the prosecutor’s argument that defendant “‘suffered no significant injuries’ and fled the scene of the crime….” (At p. 479.)

People v. Larsen (2012) 205 Cal.App.4th 810:

Trial court erred in refusing to give CALCRIM 3428 where the evidence showed that defendant suffered from Asperger’s Syndrome and he testified he didn’t intend to kill,
that he was just role playing when he was talking about having a witness killed (the alleged minor victim of his unlawful sexual intercourse). “Asperger’s Syndrome is a recognized mental diagnosis that warrants a mental disorder instruction....” (At p. 825.) Defendant was not required to demonstrate that A sperger’s impaired his ability to form the intent to kill. (At p. 827.) Further, the trial court could not reject the instruction on the grounds that it did not believe defendant’s testimony.

B. Other Expert Testimony Concerning Defendant’s Perspective

People v. Sotelo-Urena (October 26, 2016) 4 Cal.App.5th 732, 736-737:

First-degree murder conviction reversed because the trial court committed prejudicial error in excluding expert testimony that people who are homeless, such as defendant, suffer a significantly higher rate of victimization and consequently “experience a heightened sensitivity to perceived threats of violence.” Such evidence was not only relevant to defendant’s claims of perfect and imperfect self-defense, but was a proper subject of expert testimony because it was beyond the common experience of jurors. The proposed expert was not a mental health expert but a retired judge who was qualified to give his opinion concerning chronic homelessness. In reversing defendant’s conviction, the appellate court emphasized that in evaluating defendant’s claims of self-defense, “the jury was [required] to evaluate defendant’s belief in the need to use lethal force from his perspective. Evidence that would assist the jury in evaluating the situation from defendant’s perspective was thus relevant.” (At p. 745, original emphasis.) The proffered expert testimony was relevant because it “would have explained [defendant’s] heightened sensitivity to aggression and why he was inclined to react more acutely to the perceived threat.” (At p. 746.) The expert testimony was relevant not only to “bolster[] defendant’s credibility by providing a context within which the jury could assess [his] claims that he felt threatened by [the decedent’s] aggressive and belligerent demeanor and voice in the dark alleyway—and why defendant’s ‘adrenaline just jumped up’ in response...” (at p. 752), but also to the reasonableness of defendant’s belief of imminent harm because the “question before the jury was what a reasonable person would have believed about the need to use lethal force, taking into consideration defendant’s situation and knowledge” (ibid.). Thus, it was relevant on both the subjective and objective prongs of the self-defense issue.

C. Unconsciousness

People v. James (2015) 238 Cal.App.4th 794:

Mental illness can support the complete defense of unconsciousness under Penal Code section 26. Thus, where defendant presents expert testimony that his mental illness caused him to suffer a psychosis during which he was not aware of what was occurring at the time of his alleged criminal conduct, he is entitled to have the jury instructed on unconsciousness. “A state of unconsciousness from whatever cause at the time of committing an alleged crime vitiates both specific and general criminal intents. Thus, we
hold that the complete defense of unconsciousness under section 26 applies regardless of whether the actor's mental state of unconsciousness is induced by ‘unsound mind,’ including that caused by mental illness, and not just to those who are rendered unconscious by physical or organic conditions.” A defendant's mental illness may support an unconsciousness defense even if it would also support an insanity defense.

People v. Gana (2015) 236 Cal.App.4th 598:

Unconsciousness may form a complete defense to a murder charge except when it is caused by voluntary intoxication. In that situation, a defendant is guilty of involuntary manslaughter. The trial court erred in rejecting defendant's requested instructions on both involuntary intoxication and the complete defense of unconsciousness because there was substantial evidence supporting the instructions. Defendant, who shot and killed her husband, was charged with murder and also charged with attempted murder of her two sons. She suffered from an aggressive form of breast cancer, had a double mastectomy, and “was placed on a chemotherapy regimen that involved four separate drugs... [that] can cause patients to suffer memory loss,” among other conditions. She presented expert testimony that she suffered “from a psychotic depression on the day of the shooting... , [and] was experiencing a delirium, which is a kind of fluctuating level of consciousness....” Defendant testified about many of the events immediately before and after she shot her husband, but could not remember loading or firing the gun, although she recalled hearing a gunshot. A responding deputy sheriff testified that “she was silent and had her eyes closed” when he approached her. “He nudged her and ... [she] ‘star[ed] straight ahead’ with what he described as ‘a thousand mile stare.’ He asked defendant ‘who shot,’ and she responded, ‘I did, I did, please kill me.’” The combination of her inability to recall the act of shooting, the deputy’s observation of her “thousand mile stare”, her lack of emotion and silence “when asked a series of standard questions...” by paramedics, and the expert testimony explaining how her cancer medication could affect her mental state, including causing delirium and a “fluctuating level of consciousness,” “supported instructions on unconsciousness.” (At pp. 609-610.)

D. Voluntary Intoxication

People v. Letner and Tobin (2010) 50 Cal.4th 99:

Citing People v. Mendoza (1998) 18 Cal.4th 1114, 1130-1133, the Court reaffirmed that “(1) evidence of voluntary intoxication is relevant to the extent it establishes whether an aider and abettor knew of the direct perpetrator’s criminal purpose and intended to facilitate achieving that goal, even in cases in which the perpetrator intended to commit a ‘general intent’ crime; and (2) any instructions to the jury concerning voluntary intoxication should inform the jury of the possible effect of voluntary intoxication upon the aider and abettor’s mental state.” (Citations omitted.)

People v. Pearson (2012) 53 Cal.4th 306:
Voluntary intoxication is admissible on the issue of whether or not a defendant charged with torture acted with the specific intent to cause cruel or extreme pain for the purpose of revenge, extortion, persuasion, or any sadistic purpose. Thus, it was (harmless) error to fail to instruct the jury that they should consider evidence of his voluntary intoxication in deciding whether he acted with the specific intent required for the torture charge.

Note that Penal Code section 29.4 arguably creates a dichotomy of questionable constitutionality: a defendant who killed with the specific intent to kill but in the mistaken belief of the need to act in self-defense is entitled to present evidence of voluntary intoxication for purposes of establishing his mistaken belief, whereas a defendant who killed with implied malice (i.e., without the intent to kill) in the same mistaken belief is not allowed to have the jury consider evidence of his voluntary intoxication in assessing whether he actually had such mistaken belief.

Another dichotomy (but not challengeable on constitutional grounds) is created where defendant raises the claim that he acted in the heat of passion—i.e., intoxication would be relevant only where defendant specifically intended to kill—although even where defendant intended to kill, the intoxication evidence would not be relevant on the question of whether the decedent’s conduct was objectively provocative to the extent of arousing an ordinary person to act out of passion; instead, it would be limited to the subjective question whether defendant acted while under the influence of such passion.

E. Prosecution Attempts to Require Defendant to “Demonstrate” the Killing on Cross-Examination

People v. Rivera (2011) 201 Cal.App.4th 353:

Trial court abused its discretion in permitting the prosecution to cross-examine defendant by asking him “to ‘show us how you killed’” the decedent. (At p. 726.) Although the decedent was an adult male, the prosecutor used “a female mannequin wearing a blue dress, a pink ribbon, and hat... “ (Ibid.) “During the protracted demonstration, defendant was directed by the prosecutor and the court at different times, over his own objections and that of his counsel, to stand in certain positions, take a strap from a trash can in the district attorney’s office, place the strap around the mannequin’s neck, and apply force, as his acts were described for the jury. Basically, defendant was ‘led’ by the court or prosecutor on what to do during the courtroom demonstration.” (Ibid. at p. 727.) Recognizing that the demonstrative evidence was offered to prove malice and the intent to kill, which were elements of the murder charge, the court of appeal nonetheless held that the evidence was improperly admitted because those elements “were convincingly established by defendant’s testimony” apart from the demonstration. (At p. 730.) Thus, “the strangulation demonstration was merely cumulative evidence that had exceedingly slight probative value on the crucial issues presented at trial”, which were whether defendant killed as the result of provocation or imperfect self-defense. (Ibid.) “The minimal probative value... was diminished further by the absence of similarity of both the setting and the circumstances of the demonstration.” (Ibid.) Moreover, the demonstrative evidence “was inflammatory. It is one thing for the jury to hear a
defendant’s verbal account of a murder. Watching the defendant strangle a substitute for the victim is more likely to inflame the emotions of the jury and evoke an emotional bias, while having exceedingly negligible probative value, if any, on the issues.” (At p. 731.) Therefore, although the prejudicial effect was not great, it “exceeded its comparatively inconsequential probative value.” (Ibid.)

V. Involuntary Manslaughter

A. Mental Illness and Involuntary Manslaughter

People v. McGehee (2016) 246 Cal.App.4th 1190, 1208:

“[I]nstructions on involuntary manslaughter are required where there is substantial evidence that may come in the form of evidence of the defendant’s mental illness, raising a question as to whether or not that defendant actually formed the intent to kill.”

B. Involuntary Manslaughter as a lesser of Murder: Assault Without Malice

People v. Brothers (2015) 236 Cal.App.4th 24:

“[A ]n instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony.” (At p. 34.) Further, “when the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault.” (At p. 35.) “However, when, as here, the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter.” (Ibid.)

People v. Bryant (2013) 56 Cal.4th 959:

A person who unintentionally kills during the inherently dangerous felony of assault with a deadly weapon, but without implied malice (i.e., a conscious disregard for human life), may be guilty of involuntary manslaughter but is not guilty of either murder or voluntary manslaughter. The second degree murder rule does not apply because the merger doctrine precludes its application to an inherently dangerous felony that is assaultive in nature. Moreover, voluntary manslaughter does not apply because of the absence of the requisite mental state: intent to kill or a conscious disregard for human life.
People v. Bryant (2013) 222 Cal.App.4th 1196:

On remand from People v. Bryant (2013) 56 Cal.4th 959, the court of appeal held that, assuming—without deciding—“an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of involuntary manslaughter...,” the trial court has no sua sponte duty to so instruct because there is no settled authority squarely holding it is involuntary manslaughter.

C. Involuntary as a lesser of Felony-Murder (Robbery-Murder)

People v. McDonald (2015) 238 Cal.App.4th 16:

Where the evidence is sufficient to warrant an instruction on grand theft as a lesser offense of robbery, and defendant is prosecuted on the theory that the victim’s death is a natural consequence of robbery, the trial court must instruct the jury on involuntary manslaughter. Where a defendant lacked the intent to aid a robbery but only to aid a grand theft person, and the victim died of a heart attack related to the theft, the death is too remote to be considered a natural and probable consequence, and the jury may “find involuntary manslaughter based on the fact that the victim was killed in the commission of a felony that was not inherently dangerous.”

VI. Special Circumstances

A. Felony Murder: Requisite Intent

People v. Monterroso (2004) 34 Cal.4th 743:

Error, but harmless, to instruct that the felony murder special circumstance required that the murder was committed while the defendant was engaged in the commission or attempted commission of the specified felony or the murder was committed to carry out or advance the commission of the specified felony, or facilitate the escape or to avoid detection therefrom. Instead, the law requires both elements. (See CALJIC 8.81.17.)

1. Actual Killer

People v. Rountree (2013) 56 Cal.4th 823, 854:

There is no requirement that the actual killer must have acted with the specific intent to kill in order for the felony-murder special circumstance to apply. As long as the defendant is the actual killer, the defendant is guilty of both first degree murder and the underlying felony, and the felony was not merely incidental to the murder, the felony-murder special circumstance applies. The only intent required of the actual killer is the intent to commit the underlying felony “‘before or during the killing.’”

People v. Huggins (2006) 38 Cal.4th 175, 209-211:
In capital prosecution based on felony-murder special circumstance for a murder committed during the Carlos window (Carlos v. Superior Court (1983) 35 Cal.3d 131, later overruled by People v. Anderson (1987) 43 Cal.3d 1104), which required the specific intent to kill as an essential element of the felony murder special circumstance, it was error to instruct the jury that intent to kill is shown where, “‘if you act in a certain way, knowing that a result, death, is likely to follow, whether you want to kill or not, you still have the intent to kill because if you act in a certain way, knowing that the result, death, is likely to happen, whether you desire to kill or not doesn’t make any difference. You still have the intent to kill.’” The trial court erred by instructing that intent to kill is demonstrated where defendant knew that death was “likely” to result; instead, it must be shown that defendant knew, “‘to a substantial certainty,’’ that death would occur.

People v. Haley (2004) 34 Cal.4th 283:

Jury must be instructed that the felony murder special circumstance requires the specific intent to kill where the homicide occurred during the Carlos-Anderson window (i.e., between 12/12/1983 and 10/13/1987). Special circumstance and death sentence reversed because the jury could have found that defendant strangled the victim only to prevent her from screaming; therefore, the failure to instruct on intent to kill was prejudicial error.

2. Aider and Abettor

People v. Banks (2015) 61 Cal.4th 788:

Application of the felony-murder special circumstance to aiders and abettors requires “both a special actus reus ..., major participation in the crime, and a specific mens rea..., reckless indifference to human life.” The mere intent to commit the underlying felony (e.g., robbery) is insufficient, and the “defendant’s personal involvement must be substantial, greater than the actions of an ordinary aider and abettor to an ordinary felony murder....” (At p. 802.) “The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create.” (At p. 801.) Among the factors to be considered in determining whether the defendant is death eligible “are these: What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation ‘in criminal activities known to carry a grave risk of death’” was sufficiently significant to be considered “major”. (At p. 803, citations and footnote omitted.)
Further, these standards concerning the applicability of the special circumstance “apply equally to cases” where the prosecution seeks a sentence of LWOPP or death.

Applying the foregoing standard to defendant Matthews (the codefendant of Mr. Banks), the California Supreme Court held that the evidence was insufficient to satisfy either the actus reus or mens rea requirement. The evidence failed to show that he was a major participant because “[t]here was no evidence he saw or heard the shooting, that he could have seen or heard the shooting, or that he had any immediate role in instigating it or could have prevented it.” Although the underlying crime he aided was an armed robbery, there was no evidence that he or the perpetrators had “previously committed murder, attempted murder, or any other violent crime.” “[I]n short, [he was] no more than a getaway driver, guilty like Earl Enmund of ‘felony murder simpliciter’ but nothing greater.” (At p. 805.) He “did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance.” (At p. 807.)

The evidence likewise failed to establish reckless indifference to human life because there was nothing to prove that defendant Matthews “knew his own actions would involve a grave risk of death. There was no evidence [he] intended to kill or ... knowingly conspired with accomplices known to have killed before.” (Ibid.) “Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient....” (At p. 808.) Further, there was no evidence that he “knew there would be a likelihood of resistance and the need to meet that resistance with lethal force....” (At p. 811.)

People v. Clark (2016) 62 Cal.4th 522, 610-623:

Robbery-murder and burglary-murder special circumstances reversed because the evidence was insufficient to show that defendant, who was not the actual killer, “acted with reckless indifference to human life. The evidence demonstrated that defendant was the mastermind behind a robbery of a Comp USA store. Defendant was waiting across the street while the perpetrator shot the unanticipated victim while securing the store. Although part of the plan was for the perpetrator to be armed with a gun in order to scare the robbery victims into submission, and the use of a gun exceeds “the bare statutory requirements for first degree robbery felony murder, this mere fact, on its own and with nothing more presented, is not sufficient to support a finding of reckless indifference....” (At p. 617.) The confederates brought only one gun to the scene, it was carried by the perpetrator, not defendant, and “had only been loaded with one bullet.” Further, there was no evidence that defendant “instructed [the perpetrator] to use lethal force. Nor did defendant have an opportunity to observe [his] response to [the victim]’s unanticipated appearance or to intervene to prevent her killing.” Further, although defendant fled from the scene instead of providing aid to the victim, he was aware that the police were arriving, “and the ambiguous circumstances surrounding his hasty departure make it difficult to infer his frame of mind concerning [her] death.” (At p. 620.) “[T]he period of interaction between perpetrators and victims was designed to be limited...[and] was insufficient to show... that defendant exhibited reckless indifference to human life.” (At
pp. 620-621.) There was no evidence that the perpetrator “was known to have a propensity for violence, let alone... that defendant was aware of such a propensity.” And because the perpetrator was not in defendant’s view during the first phase of the robbery, “defendant had no opportunity to observe anything in [his] actions just before the shooting that would have indicated that [he] was likely to engage in lethal violence.” (At p. 621.) Although the evidence “that defendant planned the crime with an eye to minimizing the possibilities for violence... does not, by itself, necessarily preclude a finding of reckless indifference... , [there was] nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery.” Therefore, the evidence was insufficient to support the felony-murder special circumstances. (At p. 623.)

People v. Covarrubias (2016) 1 Cal.5th 838:

In order for a defendant who was not the actual killer to be subject to the felony-murder special circumstance under the theory that he was a co-conspirator, he must act with the intent to kill or as a major participant with reckless indifference.

People v. Johnson (2016) 243 Cal.App.4th 1247:

Distinguishing the more culpable mental state required to establish the special circumstance, the court of appeal held that, “consistent with the principle that only the most culpable may be subjected to the death penalty (Banks, supra, 61 Cal.4th at p. 797, 189 Cal.Rptr.3d 208, 351 P.3d 330), the ‘reckless indifference to life’ necessary for death penalty eligibility requires subjective awareness of a higher degree of risk than the ‘conscious disregard for human life’ required for conviction of second degree murder based on implied malice.”

People v. Perez (2016) 243 Cal.App.4th 863, 887:

Evidence was insufficient to support the robbery-murder special circumstance as a matter of law where it merely showed that defendant was the getaway driver in the armed robbery in which the victim was shot and killed because it failed to establish that defendant acted as a major participant and with reckless disregard to human life.

People v. Mil (2012) 53 Cal.4th 400:

Trial court erred in failing to instruct that, as applied to a defendant who was not the actual killer, the felony-murder special circumstance requires that the defendant must have acted with either (1) the intent to kill or (2) “with reckless indifference to human life and as a major participant in the commission of the underlying felony.” (At p. 405.) The error was prejudicial because defendant denied that he acted with reckless indifference and “the record supports a reasonable doubt as to that element... .” Specifically, the evidence “supported a finding that defendant used only his fists, that he did not use deadly force..., [and] that [he] was unaware that [the actual killer] planned to use any force, that she was armed with a knife, or that she stabbed [the victim].” (At p. 419.)
B. Arson-Murder

People v. Debose (2014) 59 Cal.4th 177, 195:

The arson-murder special circumstance did not apply to a situation where the victim “was placed in the trunk of her car and shot several times, after which the car was set on fire...,” because she did not use her car for dwelling purposes, and the special circumstance requires arson of “an inhabited structure or property.”

Clark v. Brown (9th Cir. 2006) 450 F.3d 898:

At least until the issuance of the California Supreme Court’s decision in People v. Clark (1990) 50 Cal.3d 583, California’s arson-murder special circumstance required that the arson (1) “must have been committed for a purpose ‘independent’ of the murder, and (2) the murder must have been committed in order to advance that ‘independent felonious purpose.’” Further, the California Supreme Court violated defendant’s federal due process when it substantially reinterpreted the definition of the arson-murder special circumstance, retroactively changing these requirements in the course of affirming defendant’s death sentence on his automatic appeal, because the decision constituted a retroactive application of an unforeseeable judicial enlargement of the special circumstance. Moreover, the arson-murder special circumstance, as it was defined at the time of defendant’s trial, did not apply to the intentionally setting of a fire to the victim’s house in order to drive the victim out of the house and kill him outside of the house.

C. Burglary-Murder

People v. Riccardi (2012) 54 Cal.4th 758:

The burglary-murder special circumstance does not apply if the defendant entered the building or residence for the sole purpose of killing the victim because the burglary is merely incidental to the murder under those circumstances. (At pp. 836-837.) The trial court erred in failing to sua sponte instruct the jury on the “merely incidental” rule, and the error required reversal of the special circumstance because the evidence was sufficient to support the inference that the defendant entered the victim’s residence for the sole purpose of killing the victim. (At pp. 838-839.)

D. Kidnap-Murder

Pensinger v. Chappell (9th Cir. June 2, 2015) 787 F.3d 1014:

Kidnap-murder special circumstance and death sentence vacated because the trial court failed to instruct the jury that the special circumstance required proof that the kidnapping was committed for an independent purpose, not merely incidental to the murder. (At p. 1032.) Although the California Supreme Court has since modified the “independent
felonious purpose” requirement, the murder occurred in 1981, when governing California precedent included that requirement. (At p. 1025.)

E. Robbery-Murder

People v. (Lanell) Harris (2008) 43 Cal.4th 1269, 1299:

Although the trial court attempted to use CALJIC 8.81.17 to instruct on the elements of the felony-murder special circumstance, the judge described the elements in the disjunctive instead of the conjunctive. Specifically, the court instructed that the jury was required to find “’1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery or [¶] 2. The murder was committed in order to carry out or advance the commission of the crime of robbery.’” Thus, the trial court erred because the special circumstance requires both elements.

People v. Ledesma (II) (2006) 39 Cal.4th 641:

Robbery-murder special circumstance and related robbery conviction reversed because of failure to instruct on the lesser included offense of theft. Defendant stole the murder victim’s boots and money, either just before or just after the killing. The evidence demonstrated that defendant murdered the victim to eliminate him as a witness to a previous robbery defendant had committed against that same victim. While there was strong evidence of defendant’s motive to eliminate him as a witness, there was only weak evidence to support an inference that defendant formed the intent to steal before he killed the victim. Thus, there was substantial evidence to support a reasonable conclusion that defendant formed the intent to steal only after the murder, which would make “the offense theft rather than robbery”, and defeat the robbery-murder special circumstance. Therefore, the failure to instruct on the lesser offense of theft required reversal of the robbery conviction and the related robbery-murder special circumstance.

People v. Stanley (2006) 39 Cal.4th 913, 956:

Trial court erred in instructing on the robbery-murder special circumstance in the disjunctive, as opposed to the conjunctive, concerning the requirement that the murder was committed during the commission, attempted commission or immediate flight after the commission of a robbery; and the murder was committed in order to facilitate the robbery or the escape therefrom.

F. Hate Crime

People v. Lindberg (2008) 45 Cal.4th 1, 39:

The hate-crime special circumstance (Pen. Code section 190.2, subd. (a)(16)) requires that “[t]he victim was intentionally killed because of his or her race, color, religion, nationality or country of origin.’” Where the defendant acted with concurrent purposes (here, both to take the victim’s property and to kill the victim because of racial
prejudice), the special circumstance requires proof that the defendant’s bias was a substantial factor in motivating the defendant to kill the victim.

G. Heinous, Atrocious or Cruel

People v. Carrasco (2014) 59 Cal.4th 924, 970:

The California Supreme Court reiterated that the “heinous, atrocious, or cruel” special circumstance (Pen. Code § 190.2, subdivision (a)(14)) is unconstitutionally vague.

H. Lying in Wait

People v. Nelson (2016) 1 Cal.5th 513:

Lying-in-wait special circumstance reversed because the evidence was insufficient to establish any period of watchful waiting, as required under the former definition of the special circumstance as it was in effect in 1993. (Note that the 2006 amendment changed the definition from a murder committed “while lying in wait” to one committed “by means of” lying in wait.) The evidence established that defendant killed his former coworkers at Target after they arrived for work early in the morning. He rode his bicycle to the area, hid his bike, and came up to the victims from behind before shooting them. However, there was no evidence that he “arrived before the victims or waited in ambush for their arrival.” Thus, there was no evidence that was sufficient to demonstrate, beyond a reasonable doubt, that he killed them after “a distinct period of watchful waiting.”

People v. Hajek (2014) 58 Cal.4th 1144, 1185:

Evidence was insufficient to support the lying-in-wait special circumstance as a matter of law. Even if the evidence established that “defendants engaged in a period of watchful waiting before entering [the victim’s] house using the element of surprise, it was followed by ‘a series of nonlethal events’ over the course of several hours, ‘and then a cold, calculated, inevitable and unsurprising dispatch’ of the victim.” “Thus, even when the evidence is considered in a light most favorable to the judgment, it simply fails to establish that defendants’ concealment was contemporaneous with a substantial period of watching and waiting for an opportune time to act, or that their concealment allowed them to launch a surprise attack on an unsuspecting victim from a position of advantage. Although the evidence shows [the victim] was killed in a most horrifying manner, it falls short of establishing she was killed while defendants were lying in wait for her. [¶]

Accordingly, we conclude the evidence was insufficient to show that defendants ‘intentionally killed the victim while lying in wait,’ as required under the former law.” (Original emphasis.) Note, however, that the language of special circumstance has been amended since the 1991 murder at issue in Hajek. The current version of Penal Code section 190.2, subdivision (15), only requires that “defendant intentionally killed the victim by means of lying in wait” (emphasis added), as opposed to the former statute, which required that “defendant intentionally killed the victim while lying in wait” (former
section 190.2, subdivision (15), emphasis added), in other words, “that the killing take place during the period of concealment and watchful waiting...’” (Hajek, at p. 1184, emphasis supplied by the court.)

People v. Lewis (2008) 43 Cal.4th 415, 508-509:

Evidence was insufficient to support the lying in wait special circumstance where the evidence showed that an accomplice “collided with [the victim’s] truck, that defendant decided to take the truck, and that defendant approached [the victim] and shot him in order to take the truck. In the alternative, the evidence showed a collision, an altercation, a decision to kill, and the taking of the truck. Although the prosecutor argued that defendant and his companions followed [the victim] for a substantial period of time before intentionally bumping his truck,” no admissible evidence supported that argument. (At pp. 508-509.)

People v. Lewis (2008) 43 Cal.4th 415, 513-515:

Evidence was insufficient to support the lying in wait special circumstance as to three other murder victims because the murders did not occur “‘during the period of concealment and watchful waiting’”. (At p. 513.) “The facts here show that these killings did not occur in the course of lying in wait. The defendants accomplished the forcible kidnapping of each victim while lying in wait, but then drove the still living victims around in their cars for periods of one to three hours, while withdrawing money from the victims’ bank accounts, before killing them. By the time of the killings, the concealment, the watchful waiting, and the surprise attack all had taken place at least one and up to three hours earlier.” (At p. 514.) “[A]lthough the jury could have concluded that defendant and his accomplices lay in wait intending to rob and to kill thereafter, and that they then carrying out the intent to rob immediately after the lying in wait ended, there was no evidence that the defendants carried out their intent to kill immediately.” (Ibid., original emphasis.) As summarized by the Supreme Court, “in each of the cases at issue here, there was a period of watchful waiting culminating in surprise kidnapping, a series of nonlethal events, and then a cold, calculated, inevitable, and unsurprising dispatch of each victim.” (At p. 515.)

By contrast, the court held that the evidence was sufficient to support the lying in wait special circumstance as to the fifth murder victim. The evidence showed that defendant waited outside of the victim’s restaurant until after the restaurant closed, continued to wait until the victim walked outside into “an open part of the alley where he was vulnerable to attack”, and then drove into the alley, blocked his path, and shot him. (At p. 510.) Thus, the evidence was sufficient to demonstrate a period of watchful waiting immediately followed by the killing.

Further, defense counsel must beware that the language of the lying in wait special circumstance was changed by Proposition 18 on March 7, 2000, changing the requirement of murder “while” lying in wait to murder “by means of” lying in wait. Lewis did not discuss whether or not the change in statutory language would have had
any impact on the sufficiency of evidence to support the three lying-in-wait special circumstances it reversed. (See, p. 512, fn. 25.)

People v. (Dean) Carter (II) (2005) 36 Cal.4th 1215, 1261-1262:

Lying-in-wait special circumstance set aside for insufficiency of evidence where the special circumstance was “unduly reliant upon the inference . . . that defendant arrived prior to [the victim’s] return home in order to attack her by surprise.” The evidence demonstrated that defendant killed five women in their homes on separate occasions after having attempted to develop some type of relationship with each of them. With regards to the lying-in-wait allegation, the evidence of wood chips broken from the door frame supported the conclusion that defendant broke into the residence. However, the evidence failed to support an inference that defendant entered before the victim returned home as opposed to after she returned home. Moreover, the fact that defendant’s car was idling contradicted the inference that he arrived in advance and was attempting to surprise the victim because an idling car would likely have attracted attention.

People v. Johnson (2016) 62 Cal.4th 600, 630:

“A lying-in-wait special circumstance can apply to a defendant who, intending that the victim would be killed, aids and abets an intentional murder committed by means of lying in wait. [Citations omitted.] In this factual setting, the questions are whether the defendant, with the intent to kill, aided and abetted the victim’s killing, and whether the actual killer intentionally killed the victim by means of lying in wait.”

People v. Johnson (2016) 62 Cal.4th 600, 634-636:

The 2000 amendment to the lying-in-wait special circumstance enacted by Proposition 18, changing the definition from a murder committed “while lying in wait to a killing by means of lying-in-wait” had the effect of “eliminating the temporal distinction between the special circumstance and lying-in-wait first degree murder, and thereby expand the class of cases in which the special circumstance could be found true... .” (Original emphasis.) Nonetheless, the court held that the provision continued to adequately distinguish lying-in-wait special circumstance murders from other first degree murders to satisfy the Eighth Amendment. Indeed, the court held the constitutional requirement would be satisfied “even were the amendment to have made the special circumstance identical to lying-in-wait first degree murder.” (Original emphasis.)

I. Multiple Murder

People v. Nunez and Satele (2013) 57 Cal.4th 1, 44-45:

The multiple-murder special circumstance does not apply to an aider and abettor unless he acted with the specific intent to kill. Thus, the trial court erred in instructing the jury that it could find the special circumstance to be true if defendant was a major participant in the multiple murders and acted “‘with reckless indifference to human life...’” The
lesser mental state (i.e., reckless indifference) applies only to the felony-murder special circumstance.

People v. Covarrubias (2016) 1 Cal.5th 838:

The Tison standard (major participant who acts with reckless indifference) is not applicable to the multiple-murder special circumstance. Thus, unless the jury concludes that the defendant was the actual killer, it must find beyond a reasonable doubt that he or she acted with the intent to kill.

People v. Zamudio (2008) 43 Cal.4th 327, 363:

Only one multiple murder special circumstance may be charged or found true in any proceeding, regardless of the number of people killed or the number of murder counts.

J. Murder of Police Officer

People v. Boyce (2014) 59 Cal.4th 672, 695:

The special circumstance for killing a peace officer in retaliation for the performance of his duties (Pen. Code § 190.2, subd. (a)(7)) does not require that the peace officer was in the performance of his duties at the time of the killing.

K. Torture-Murder

People v. Hajek (2014) 58 Cal.4th 1144:

Trial court’s instruction concerning the applicability of the torture-murder special circumstance in this codefendant case was erroneous because it only required that “‘A defendant... intended to kill ... and inflicted extreme cruel physical pain and suffering.” (At p. 1216; emphasis supplied by the court.) The instruction was erroneous because it failed to convey the requirement that each defendant must have “intended to kill the victim.” (At p. 1217.)

People v. Streeter (2012) 54 Cal.4th 205, 250:

For any murder committed after Proposition 115 was passed in 1990, the torture-murder special circumstance requires that the murder must “be ‘intentional’ and ‘involv[e] the infliction of torture,’ which includes a torturous intent.” However, it no longer requires “the infliction of extreme cruel physical pain on a living victim....”

People v. Pearson (2012) 53 Cal.4th 306, 322:

The torture-murder special circumstance (Pen. Code section 190.2, subd. (a)(18)) requires proof that the defendant acted with the specific intent to kill, “regardless of whether the defendant personally killed the victim or assisted an accomplice in doing so.” The
exception for a “major participant” who acts “with 'reckless indifference' to human life[] applies only to the felony-murder special circumstance ... , not to the torture-murder special circumstance... .”

People v. (Martin) Jennings (2010) 50 Cal.4th 616:

The torture-murder special circumstance (Pen. Code § 190.2, subd. (a)(18)) requires “proof that the defendant intended to kill and torture the victim, and ... proof of the infliction of an extremely painful act upon a living victim.” However, although the death must involve the infliction of torture, the acts constituting the torture do not have to be the cause of death.

People v. (Lester) Wilson (2008) 44 Cal.4th 758, 803:

“[T]he torture-murder special circumstance requires proof that the defendant himself intended to torture the victim.” It is not sufficient that defendant aided and abetted a codefendant who tortured the victim. Thus, in a codefendant case, it was error to instruct the jury that, in order to find the torture-murder special circumstance to be true, the jury must find that “‘a defendant intended to inflict extreme cruel physical pain and suffering . . .’” (Original emphasis.)

People v. Mungia (2008) 44 Cal.4th 1101:

Evidence was insufficient to support the torture-murder special circumstance as a matter of law. The torture-murder special circumstance (Pen. Code, sec. 190.2, subd. (a)(18)) requires more than simply the infliction of extreme pain; it also requires proof of “‘an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose.’” (At p. 1136; emphasis added.) Although the evidence was sufficient to demonstrate that defendant intended to kill the 73-year-old victim, and that he personally struck her 23 times in the head and face, the evidence failed to establish that he intended to cause cruel or extreme pain. While the prosecution pathologist described the “injuries as extremely painful and some of the most brutal that he had ever seen”, he also testified that his examination revealed that “they were ‘inflicted in a frenzy almost’ (that is, she received ‘a lot of blows in a short period of time’) . . .” (At p. 1110.) Moreover, the Supreme Court contrasted the facts to every other case in which it upheld a finding of a torture-murder special circumstance, observing that in every such case, “the evidence has shown that the defendant deliberately inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering.” (At pp. 1137-1138.) Further, although there was evidence that defendant bound the victim before killing her, that was insufficient, by itself, to establish “an intent to inflict sadistic pain. Here, defendant bound the victim in the course of robbing her; it is not uncommon for robbers to bind their victims to prevent them from resisting or escaping.” (At p. 1138.) In reversing the torture-murder special circumstance finding, the court observed that “there is no evidence that defendant deliberately inflicted nonfatal wounds to the victim in an attempt to increase her suffering. Nor is there evidence that
defendant was angry at the victim or that he had any motive to inflict ‘“pain in addition to the pain of death.”’” (Ibid.)

People v. (Lester) Wilson (2008) 44 Cal.4th 758, 803:

“[T]he torture-murder special circumstance requires proof that the defendant himself intended to torture the victim.” It is not sufficient that defendant aided and abetted a codefendant who tortured the victim.

L. Witness Killing

People v. Clark (2016) 62 Cal.4th 522, 628:

The witness-killing special circumstance is not limited to killings of eyewitnesses.

M. Prior Murder

People v. Johnson (2016) 62 Cal.4th 600, 641-642:

There is no requirement that the prior-murder special circumstance (Penal Code section 190.2, subd. (a)(2)) be based on a murder that occurred before the commission of the murder for which the defendant is presently on trial. Instead, the special circumstance is satisfied if defendant was convicted of the other murder before he is convicted of the murder in the present proceeding. “‘The order of the commission of the homicides is immaterial.’”

XIV. Instructions on Other Relevant Issues

A. Accomplice Testimony

People v. Letner and Tobin (2010) 50 Cal.4th 99:

Where a codefendant testifies at a joint trial, the trial court is “required to give accomplice instructions . . . to the extent that [the testifying codefendant’s] testimony tended to incriminate” the defendant. The failure to do so was error, albeit harmless.

In this codefendant murder trial, where each defendant “took the stand in his own defense and denied culpability, and each gave testimony that incriminated the other...,” the trial court erred in instructing the jury that both defendants were accomplices as a matter of law (CALCRIM 335). Instead, the jury should have been instructed that it was a factual question whether either or both defendants were accomplices, pursuant to CALCRIM 334. (At p. 336.)

People v. Hartsch (2010) 49 Cal.4th 472:
Instructions concerning the question of whether a witness is an accomplice, and therefore requiring his or her testimony to be viewed with distrust, must explain to the jury that the accomplice instructions apply to aiders and abettors, not merely direct perpetrators. In the felony-murder context, the instructions must further explain that an aider and abettor to the underlying felony, such as robbery, is an aider and abettor to the felony murder, requiring the accomplice’s testimony to be viewed with distrust in connection with the murder charges.

**People v. Whisenhunt (2008) 44 Cal.4th 174, 213-214:**

Although the trial court gave the general instructions concerning how to evaluate the testimony of an accomplice, it erred in failing to instruct the jury “that it had to determine that [the specific witness at issue] was an accomplice [or] that she was an accomplice as a matter of law.” The court was required to identify the witness as to whom the accomplice instructions applied, and to instruct the jury either to determine whether the witness was an accomplice or that she was an accomplice as a matter of law.

**People v. Ybarra (2008) 166 Cal.App.4th 1069, 1083:**

Penal Code section 1111, requiring the jury to be instructed that an accomplice’s testimony must be viewed with caution, applies to out-of-court statements made by an accomplice, including prior inconsistent statements that are admitted under Evidence Code section 1235.

1. **Evidence of testifying accomplice’s guilty plea to murder**

**People v. (George Brett) Williams (2013) 56 Cal.4th 630, 668:**

Distinguishing United States v. Halbert (9th Cir. 1981) 640 F.2d 1000, the California Supreme Court rejected defendant’s claim that the trial court erred in failing to give a limiting instruction concerning evidence that his testifying accomplices had pled guilty to second degree murder based on the same murder charged against defendant. In Halbert, the Ninth Circuit held that the defendant was prejudiced by the trial court’s failure to give a limiting instruction after his codefendants testified, over the defendant’s objection, that they had pled guilty to the same crime “for which the defendant was on trial.” By contrast, the defendant in Williams not only failed to object to such testimony but affirmatively stipulated to his accomplices’ guilty pleas, and failed to request a limiting instruction. Further, the trial court had no sua sponte duty to give a limiting instruction.

2. **Other Instructions About Testifying Co-Participants**

**People v. Cornwell (2005) 35 Cal.4th 50, 88:**

Error (harmless) to instruct jury, pursuant to CALJIC 2.11.5, not to consider why a person other than defendant “is not here on trial” where that other person has testified before the jury. The instruction should not be given where the witness testifies for either
the defense or prosecution because the instruction might improperly “suggest to the jury that it need not consider the factors it otherwise would employ to weigh the credibility of these witnesses, such as the circumstance that the witness has been granted immunity from prosecution in return for his or her testimony.”

B. Informants

People v. Davis (2013) 217 Cal.App.4th 1484:

Trial court erred in “failing to instruct the jury sua sponte that the testimony of a so-called jailhouse informant must be corroborated.” Although the informant was no longer in custody at the time he contacted the district attorney’s office and informed on defendant, he was housed together with defendant in the county jail at the time defendant made the admissions to him. Therefore, he was a jailhouse informant within the meaning of Penal Code section 1111.5, and the court was required to instruct the jury on the corroboration requirement. Further, the statute requires the corroboration evidence to “directly connect the defendant with the crime... .” (Note, however, that the error was found to be harmless, leaving defendant’s murder conviction intact.)

C. Other-Crimes Evidence/Consideration of Other Counts

People v. Lucas (2014) 60 Cal.4th 153, 284:

The jury was properly instructed concerning its ability to use evidence of some murder counts in determining defendant’s guilt on other murder counts under Evidence Code section 1101, subdivision (b) (on issues of identity, motive, intent, and common scheme or plan) because “the instructions ... require[d] the jury to determine whether the facts or circumstances of the other crimes had been proved beyond a reasonable doubt before it could use that evidence to convict defendant.”

People v. Foster (2010) 50 Cal.4th 1301:

Finding no error from the trial court’s instructions on the use of other crimes evidence that was admitted under Evidence Code section 1101, subdivision (b), for the purposes of demonstrating defendant’s intent and establishing a common scheme or plan, the California Supreme Court observed that the instructions “properly informed the jury that ... if the evidence of prior crimes was necessary to prove an essential fact [i.e., defendant’s intent], the jury could not rely upon that evidence unless the prosecution proved the prior crimes beyond a reasonable doubt.”

People v. Manriquez (2005) 37 Cal.4th 547, 579:

Defendant was charged with (and convicted of) four separate murders that were not cross-admissible but were consolidated for trial. Defendant proposed a special instruction advising the jury in pertinent part that: “There is no evidence that has been presented on one count that can be considered by you as proof of any of the other counts.
You are instructed to deliberate on each count separately, as though it were the only count for you to decide.’” The Supreme Court found any error in failing to give the proffered instruction to be harmless in light of the trial court’s instruction (modifying CALJIC 17.02) that: “‘You must decide each count separately as though it were the only count for you to decide. . . . When one count is decided, you must turn your attention to the next count without regard for the decision that you have reached in the previous counts.’”

D. Consciousness of Guilt from False Statements

People v. Page (2008) 44 Cal.4th 1, 51:

The Court reiterated its previous holding in People v. Crandell (1988) 46 Cal.3d 833, 871, that the consciousness of guilt instruction (CALJIC 2.03) refers to “‘consciousness of some wrongdoing” from false statements rather than “consciousness of having committed the specific offense charged.’” Further, the consciousness of guilt instruction does “‘not address the defendant’s mental state at the time of the offense . . . .’”

People v. McGeehee (2016) 246 Cal.App.4th 1190, 1204:

Trial court erred in murder prosecution where defendant presented evidence of mental impairments by failing to modify CALCRIM 3428 to permit the jury to consider evidence of his impairment “in determining whether certain untruthful statements were knowingly made, and therefore evidenced his consciousness of guilt.” The pattern instruction limited consideration of mental illness to the mental state required for murder, specifically, whether he acted with malice aforethought, premeditation and deliberation, but should have been modified to permit its consideration on consciousness of guilt. “If ... defendant’s mental illness or impairment prevented him from knowing those statements were false, the statements would not have been probative of his consciousness of guilt.” (At p. 1205.)

People v. Beyah (2009) 170 Cal.App.4th 1241:

Expressing its belief that the pattern jury instruction allowing a jury to infer a consciousness of guilt from the making of false statements by a defendant, CALCRIM 362, should be limited to allegedly false statements that were made before trial, and doubting that it “was intended to be used when the basis for an inference of consciousness of guilt is disbelief of defendant’s trial testimony . . .”, the appellate court urged “the CALCRIM committee to clarify its intended use of the instruction.”

E. Flight

People v. Millbrook (2014) 222 Cal.App.4th 1122:
While “immediate flight may reflect a defendant’s consciousness of guilt, ... [there is no authority] supporting the proposition that defendants tend to flee only when they have committed certain crimes but not others. We do not buy the argument that [defendant]’s flight demonstrates an awareness of guilt of attempted murder but not of attempted voluntary manslaughter.”

People v. Avila (2009) 46 Cal.4th 680:

Although the pattern instruction (CALJIC 2.52) allows the jury to draw an inference that defendant’s flight evinces a consciousness of guilt, “the instruction properly allow[s] ‘the jury to determine to which offenses, if any, the inference [of consciousness of guilt] should apply.’”

People v. Hartsch (2010) 49 Cal.4th 472:

In rejecting defense arguments that the trial court should have given a flight instruction concerning a prosecution witness who left California, the court found that any error in the omission of the instruction was harmless. The proposed instruction, which was based on CALJIC 2.52, would have advised the jury: “‘The flight of a person immediately after the commission of a crime, although not sufficient to establish guilt, is a fact which, if proved, may be considered by you in the light of all other proved facts in judging the testimony, credibility, and culpability of the witness.’”

F. Prosecution’s Destruction of Evidence

United States v. Sivilla (9th Cir. 2013) 714 F.3d 1168:

Although the destruction of or failure to preserve evidence does not violate due process and require a dismissal without a showing that the destruction was in bad faith (Arizona v. Youngblood (1988) 488 U.S. 51, 56-57) or it was apparent that the evidence had a materially exculpatory value that cannot be replaced by other evidence (California v. Trombetta (1984) 467 U.S. 479, 489), the lesser sanction of a remedial jury instruction does not require a showing of bad faith. Instead, the question of whether a jury instruction is required depends on a balancing of “‘the quality of the Government’s conduct’ against ‘the degree of prejudice to the accused...’” Since the loss of evidence (the jeep used to transport narcotics) was due to the government’s “negligence” in failing to adhere to reasonable standards of care...,” and defendant’s inability to have his expert examine the jeep was prejudicial because the photographs of the engine area of the car (where the narcotics were hidden) were of such poor quality that they were “difficult to decipher”, “a remedial jury instruction was warranted.”

G. Instructions on Discovery Violations

People v. (Alex) Thomas (2011) 51 Cal.4th 449, 483-484:
Trial court erred in giving the 1996 version of CALJIC 2.28 in response to defense counsel’s tardy provision of discovery to the prosecution, instructing the jury “that defendant failed to timely disclose the evidence offered by [the] defense expert witness ... and that ‘[t]he weight and the significance of any delayed disclosure are matters for your consideration.’” (Footnote omitted.) “It was misleading to suggest that “the defendant” bore any responsibility for his attorney’s failure to provide discovery, and the instruction was also deficient in informing the jury that ‘“[t]he weight and significance of any delayed disclosure are matters for your consideration,”’ because it offered ‘no guidance on how this failure might legitimately affect their deliberations’.” (Citations omitted.) Further, “there was no evidence that the ‘tardy disclosure’ had actually deprived the prosecutor ‘of the chance to subpoena witnesses or marshal evidence in rebuttal.’” (Citation omitted.) “The prosecutor declined the trial court’s offer of a continuance and vigorously cross-examined the expert witness.” Therefore, the instruction was erroneous.

**People v. Bell** (2004) 118 Cal.App.4th 249:

Second degree murder conviction reversed because of prejudicial error in giving CALJIC 2.28, which instructed the jury that it could consider defense counsel’s failure to timely provide discovery to the prosecution in determining whether to find defendant guilty. It was unfair to allow the jury to find defendant guilty based on the discovery violations by defense counsel and his investigator.

**People v. Cabral** (2004) 121 Cal. App. 4th 748:

Court of Appeal expressly agrees with the holding in People v. Bell (2004) 118 Cal.App.4th 249, and reverses forgery conviction because instructing the jury pursuant to CALJIC 2.28 constituted reversible error. (Note: People v. Saucedo (2004) 121 Cal.App.4th 937 [non-capital] likewise follows Bell in finding that CALJIC 2.28 should not have been given, but found the error to be harmless.)

**People v. Riggs** (2008) 44 Cal.4th 248, 304-306:

Proper to give a jury instruction as a sanction for tardy disclosure of alibi witnesses where the capital defendant represented himself in pro per, the alibi witnesses were his family members, and defendant knew their names, but delayed discovery until 5 days before they testified for the defense, more than one month after the guilt phase began, and three weeks after the prosecution rested. Defendant claimed he did not know their addresses but that was no excuse for the failure to disclose their names. Although the trial court instructed the jury that it should decide whether a discovery violation occurred, the Supreme Court was careful to note that it was “express[ing] no view regarding whether a defendant actually is or is not entitled to have the jury revisit the question whether a discovery violation occurred.” (At p. 701, fn. 28.)

**H. NO inference of guilt on murder from possession of stolen property**
People v. Rogers (2013) 57 Cal.4th 296, 334-335:

Trial court erred in giving the pattern jury instruction (CALJIC 2.15) permitting the jury to infer that defendant is guilty of the charged crime from his conscious possession of recently stolen property. Although the instruction is proper concerning a theft-related charge, it is improper for non-theft-related crimes. Since defendant was charged with murder and arson, the instruction was improper.

People v. Gamache (2010) 47 Cal.4th 347, 376:

Even if a defendant is found in possession of stolen property, “instructing that possession of stolen property may create an inference that a defendant is guilty of murder, as was done here, is error.”

People v. Marlow (Marlow I) (2004) 34 Cal.4th 1, 101-102:

Error (but harmless) to give the standard CALJIC 2.15 instruction “that the jury could infer from defendants’ conscious possession of stolen property their guilt of the ‘crimes alleged,’ without limitation to theft-related offenses.”

I. Viewing Defendant’s Statements With Caution

People v. Mungia (2008) 44 Cal.4th 1101:

CALJIC 2.71, admonishing the jury to decide for themselves whether defendant made an admission and to view admissions with caution, must be given even where defendant’s extrajudicial statements do not directly admit any facts used against him but, instead, are exculpatory statements which the prosecution asserts are false.

People v. (Andre) Wilson (2008) 43 Cal.4th 1, 19:

CALJIC 2.71.7, admonishing the jury to view a defendant’s statements with caution, applies to a defendant’s pre-offense statements as described by a coparticipant in the offense. Thus, where defendant’s coparticipant testified against defendant at trial and recounted defendant’s statements in the minutes leading up to the crime, it was error to fail to instruct the jury to view with caution defendant’s statements of planning or intent.

J. Reasonable Doubt

People v. Capistrano (2014) 59 Cal.4th 830, 879-880:

Although it would be error to instruct the jury “that a reasonable doubt ‘is a doubt for which a juror can give a reason if he or she is called upon to do so in the jury room,’” [or] “‘[i]t must be a doubt based upon the evidence or the lack of evidence in this case’”’, CALJIC 2.90 does not “suffer from this deficiency.”
People v. Aranda (2012) 55 Cal.4th 342, 358:

The failure of jury instructions “to explain that the defendants could not be convicted ‘unless each element of the crimes charged was proved to the jurors’ satisfaction beyond a reasonable doubt’” violates the federal constitutional guarantee to due process of law.

People v. Hunter (2011) 202 Cal.App.4th 261:

Trial court erred in giving prosecution’s pinpoint instruction because it “restrict[ed] the use of circumstantial evidence to raise a reasonable doubt.” The instruction concerned the sufficiency of evidence to prove that defendant used a real gun as opposed to a toy gun, stating: “When a defendant … display[s] an object that looks like a gun, the object’s appearance and the defendant’s conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm. The victim’s inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt as a matter of law….” The appellate court found two problems with the instruction: it was unduly argumentative because it was equally accurate to advise the jury that the circumstantial evidence supported a finding that it was not a firearm; and it lightened the prosecution’s burden of proof because it effectively declared “that evidence … properly before the jury [was] … as a matter of law, insufficient to create reasonable doubt about an issue the district attorney was required to prove….” (At pp. 275-276.) Although the trial court based the instruction directly on a reported appellate decision finding the evidence sufficient to establish the authenticity of a gun, the court of appeal repeated cautions that the question of sufficiency of evidence is much different than the propriety of a jury instruction, and the instruction was improper for the reasons stated above.


Convictions for second degree murder and other crimes reversed because trial court diminished the constitutional standard of beyond a reasonable doubt during jury selection by likening it to “the kind of decisions you make every day in your life”, explaining that “some doubt” was permissible, and comforting jurors that they were not making a moral decision.

Stoltie v. Tilton (9th Cir. 2008) 538 F.3d 1296, affirming and adopting the opinion in Stoltie v. California (C.D. Cal. 2007) 501 F.Supp.2d 1252:

Assault conviction reversed because the trial judge gave a “confused and confusing explanation of reasonable doubt” to the jury. During deliberations, the foreperson of the jury indicated that there was a deadlock and asked the court to further explain “reasonable doubt.” The judge’s response included an explanation that “it has to be based on reason and logic . . . .” (501 F.Supp.2d at p. 1253.) The jury was still unable to reach a decision and asked for more guidance, leading the judge to emphasize “it is not the same thing as proof to an absolute certainty … on TV shows you hear proof beyond a shadow of a doubt. There’s no such thing as that. It’s proof beyond a
reasonable doubt. And once again I will emphasize that the doubt must be based on reason and logic.” (At p. 1254.) He also told the jury to “‘use your own common-sense interpretation of what’s reasonable and what isn’t. Reasonable doubt, not some doubt, not some possible doubt.’” Finally, the judge used an analogy in an attempt to illustrate the difference between a reasonable doubt and a doubt that was not reasonable: “‘I’m gonna go [to Blythe] in the middle of July [when the average high temperature is 108 degrees Fahrenheit] and I am taking my skis with me because it snows every July, you might say, I doubt it. And that would be a reasonable doubt, wouldn’t it? But if I told you I am going to Blythe and I am taking my swimming suit and water skiis [sic] to go skiing in the Colorado River in the middle of July, but I am afraid it might be too cold, you’d think, I doubt it, but maybe that’s not so unreasonable. Reason and logic apply.’” (At p. 1255.) The judge’s explanation violated the due process clause because the “‘skiing in Blythe’ analogy, when taken in context of the overall charge, raised the degree of doubt required for acquittal from [beyond] a reasonable doubt to [beyond] an extreme doubt.” (At p. 1264.) Further, it is noteworthy that although the district court did not reach any holding concerning the validity of the standard California jury instruction on reasonable doubt (see Penal Code section 1096 and CALCRIM 220), which uses the term “abiding conviction” to convey the subjective certainty required by the due process clause, it observed that the term is antiquated and “likely leaves jurors confused.” (At p. 1262.)

K. Unanimity

People v. Hernandez (2013) 217 Cal.App.4th 559:

Where the prosecution presents evidence of two distinct acts, each of which would suffice to demonstrate commission of the charged offense, but fails to elect which act to submit as the limited basis for the jury’s consideration, the Due Process Clause of the Fourteenth Amendment requires the court to give the jury a unanimity instruction sua sponte. The error was reversible because the prosecutor not only argued both incidents to the jury, creating a risk that the jury might “divide as to which act constituted the charged conduct,” but the circumstances surrounding each incident were “significantly different” and “defendant proffered a different defense to each instance of conduct, which ‘raise[d] the problem the unanimity instruction was designed to prevent.’”

People v. Johnson (2016) 243 Cal.App.4th 1247, 1277-1281:

Trial court erred in instructing the jury pursuant to CALCRIM 548 that they did not need to unanimously agree on which of the two theories under which the defendants were being prosecuted for murder (felony murder and malice murder) because it potentially misled the jurors “into thinking that they need not all agree on whether defendants were guilty of first or second degree murder...,” since felony murder would necessarily be first degree murder but malice murder could have been second degree murder. The error was prejudicial because second degree murder was presented to the jury as a possible verdict.

People v. Sanchez (2013) 221 Cal.App.4th 1012:
Trial court committed prejudicial error in instructing the jury that they could convict defendant of murder without unanimously agreeing on the underlying theory as long as they all agreed he was guilty of murder, because there was only a single theory of guilt for first degree murder and the other theory of guilt was limited to second degree murder. Consequently, the verdict finding defendant guilty of first degree murder could have resulted from some of the jurors finding defendant guilty of only second degree murder. Although a jury is generally not required to agree on the theory underlying a guilty verdict (see CALCRIM 548), that rule applies only when there are two or more theories supporting defendant’s conviction on the identical charge. It does not apply when each theory is limited to a different charge.

L. Lesser Offenses: How to Approach

People v. Olivas (2016) 248 Cal.App.4th 758, 774:

“[T]rial court’s answer ... of ‘No’ to the jury’s question whether they were ‘able to consider’ [the alternative and lesser count] if the jurors were hung on the more severe aggravated ... count” was reversible error under People v. Kurtzman (1988) 46 Cal.3d 332, 335. Note that the appellate court applied the identical “acquittal-first rule” Kurtzman articulated with respect to lesser offenses. (At p. 774.) While the jury could not return a verdict on the lesser of the alternative counts if it was hung on the greater counts, it was nonetheless able to consider those counts in their deliberations.

People v. (Ronald) Moore (2011) 51 Cal.4th 386, 411:

Trial courts should not instruct jurors either that (1) if they are convinced beyond a reasonable doubt that the defendant has committed a murder but they unanimously agree that they have a reasonable doubt whether it is first or second degree murder, they must return a verdict of second degree murder; or (2) if they unanimously agree that the prosecution has proven beyond a reasonable doubt that the killing was unlawful but they unanimously agree that they have a reasonable doubt whether it is murder or manslaughter, they must find it to be manslaughter. Although the California Supreme Court did not hold it is error to give the foregoing instructions (CALJIC Nos. 8.71 and 8.72 (6th ed. 1996)), it “conclude[d] the better practice is not to use” these instructions because they “carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.”

M. Inapplicable Instructions Should Not be Given

People v. Cross (2008) 45 Cal.4th 58:

It is error to give an “instruction that is correct as to the law but irrelevant or inapplicable”, although reversal is not required unless defendant is prejudiced by the error.
People v. Marlow (Marlow I) (2004) 34 Cal.4th 1, 100-101 and fn. 31:

Although duress or necessity is not directly a defense to murder because no duress or necessity can justify the killing of an innocent person, “duress can, in effect, provide a defense to murder on a felony-murder theory by negating guilt of the underlying felony.” Such “duress requires a reasonable belief that threats to the defendant’s life (or that of another) are both imminent and immediate at the time the crime is committed [citations omitted], threats of future danger are inadequate to support the defense.” The “trial court should have instructed the jury to consider evidence of duress with respect to felony murder (and the underlying felonies) . . .,” but the error was harmless.

VIII. Ineffective Assistance of Counsel

A. Duty to Investigate Innocence/Guilt Issues


Where defense counsel is aware that defendant denies guilt and intends to testify, counsel has “a duty to inquire whether [defendant’s] testimony could be supported by others regardless [of] whether [defendant] came forward with this information.” Further, it is a conflict of interest for appointed counsel to fail to investigate the possibility of percipient witnesses based on an “investigator shortage”, which reserved the limited investigative resources to more serious cases. Where counsel’s “failure to seek investigative assistance [is] the result of the excessive caseload of the sole investigator made available to him by the county, [counsel must] file a motion with the trial court requesting permission to withdraw from the case on that basis and pursu[e] appellate review if the motion [is] denied.” “A public defender who believes there is a genuine basis upon which to make such withdrawal motion, but fails to do so, participates in the denial of his or her client’s Sixth Amendment rights.”

Hardy v. Chappell (9th Cir. August 11, 2016) 832 F.3d 1128:

Special circumstance murder convictions and death sentence vacated because defendant was denied the effective assistance of counsel. Defendant was prosecuted and convicted under a theory that he was the actual killer in a murder for hire plot. Defense counsel failed to give an opening statement and did not present any evidence at the culpability phase. Defendant was convicted, in large part, on the testimony of a key witness that a coconspirator said that defendant “was the killer, and [that he saw defendant and the coconspirator] together just a few hours after the murder . . . .” The habeas investigation, however, revealed that this prosecution witness “made very incriminating statements after the murders, [his] alibi for the night of the murders was a sham, and [defendant] had refused to participate in the crimes.” Thus, it appeared likely that it was the key prosecution witness, not defendant, who brutally stabbed the female victim and her eight-year-old son. The Ninth Circuit held that the California Supreme Court’s denial of defendant’s habeas petition was contrary to clearly established federal law because it
failed to apply the standard of Strickland v. Washington (1984) 466 U.S. 668; instead of determining ‘whether there is a reasonable probability that, absent the errors [by counsel], the factfinder would have had a reasonable doubt respecting guilt’ …,” the California court simply concluded that defendant suffered no prejudice from his attorney’s deficient performance because there was “substantial evidence” against defendant.

Yun Hseng Liao v. Junious (9th Cir. April 1, 2016) 817 F.3d 678:

Defendant was convicted of attempted premeditated murder after unsuccessfully presenting the defense “that the incident happened while he was in a state of unconsciousness during an episode of sleepwalking, and thus, that he lacked the intent required for the crimes...” (At p. 681.) Defense counsel hired a sleep disorder expert, who recommended that defendant “undergo a medical examination and a ‘sleep study,’ formally known as polysomnogram.” Counsel dutifully submitted a request to authorize funding for these procedures, but when his “associate later called the court to inquire about the status of the request, a court clerk erroneously told him that the motion had been denied when in fact it had been granted ....” (At p. 683.) The prosecution conceded that the failure to check the court file and learn the order had been granted “amounted to constitutionally ineffective assistance...” (Ibid.) When the sleep study was conducted during the habeas investigation, it revealed that defendant was, in fact, a sleepwalker. The data would have greatly supported the credibility of the defense expert at trial, who was “clobbered” because he lacked the very study that he believed was “an important component of the evaluation...” Thus, counsel’s failing was prejudicial and the court of appeals vacated his convictions.

Duncan v. Ornoski (9th Cir. 2008) 528 F.3d 1222:

Death sentence and special circumstance finding vacated based on ineffective assistance of counsel in failing to investigate and present serological evidence which tended to demonstrate that defendant did not personally kill the victim. Defendant was convicted of the capital murder of a clerk who worked in a small “money room” at the Los Angeles Airport. She had suffered multiple stab wounds. Defendant’s shoe prints, fingerprint and palm prints were found in the money room. Thus, the evidence was sufficient to demonstrate that defendant was at least an aider and abettor to the robbery-murder of the victim. The ineffective assistance of counsel issues centered on three blood samples which were found at the scene, none of which matched the victim’s blood. At trial, the prosecution’s expert could not opine whether or not they matched defendant’s blood type because the expert did not have a sample of defendant’s blood. Defense counsel at trial did not attempt to have defendant’s blood compared to these samples, nor did he consult a serological expert. Ultimately, postconviction counsel arranged to have defendant’s blood tested, and it did not match any of the three samples. Thus, it was apparent that the blood samples were left by an accomplice. Moreover, since the “money room” where the killing occurred was too small to accommodate more than two people at a time, only the killer and victim were in the room during the killing. Further, given other evidence which established that there had been a struggle between the victim and her assailant, and that the blood samples in question were shed on the night of the killing (the floor had
been mopped that night, before the homicide), the neglected evidence “strongly support[ed] the theory that the accomplice” killed the victim, suffered a wound in the process, and left the blood samples that were found at the scene. (At p. 1241.) Reversal of the special circumstance was required, not merely the death sentence, because the killing occurred during the Carlos window (Carlos v. Superior Court (1983) 35 Cal.3d 131, 153-154), during which the robbery-murder special circumstance required proof that an aider and abettor had the specific intent to kill. Since there was no evidence to demonstrate that defendant had the intent to kill if he was not the actual killer, the special circumstance was vacated. (At pp. 1246-1247.)

In re Thomas (2006) 37 Cal.4th 1249:

Defense counsel was incompetent, having “failed to conduct a reasonable investigation for evidence to corroborate [his key defense witness’s] testimony and support the theory that someone other than [defendant] was the actual killer. His decision to proceed with [her] testimony alone was a consequence of this unreasonably limited investigation and thus was not a justifiable tactical decision.” The defense witness had testified at the preliminary examination and “[h]er testimony pointed to a third party . . . as potentially responsible for the murders.” Defense counsel, however, had concerns about his witness, including having been informed that she “might be unreliable” and his “concern[] that she might not present well on the stand. Indeed, [counsel’s] concerns were sufficiently strong that he preferred not finding [her] and having her preliminary hearing testimony reread at trial to finding her and having her testify live . . . .” Under these circumstances, it was necessary to conduct an investigation in an effort to corroborate her testimony.

Reynoso v. Giurbino (9th Cir. 2006) 462 F.3d 1099:

Defendant was convicted of murder and robbery based on the testimony of two eyewitnesses and two other witnesses who claimed that defendant made admissions, although one of the latter two recanted this claim at trial. Defense counsel knew that a reward had been offered concerning the murder during the more than three years it was unsolved before the eyewitnesses came forward. However, counsel did not know whether either of the eyewitnesses were aware of or had applied for the reward, and counsel did not cross-examine either of them about the reward. Further, during the habeas proceedings, she claimed that she would not have questioned them about the reward even if she had learned that they knew about it. The Ninth Circuit affirmed the district court’s grant of relief, holding that counsel was ineffective in failing to investigate the reward issue, and that her failure to cross-examine them about the reward was equally unreasonable. Moreover, the error was prejudicial, requiring reversal of the murder and robbery convictions, because the eyewitnesses were, in fact, aware of the reward, had discussed the reward with the prosecutor before testifying at trial, and actually collected $7,500 each as their share of the reward; the rewards were contingent on the conviction of the murderer; the rewards created a motive and bias for the eyewitnesses to testify against defendant; but the prosecution stressed, in closing argument, that neither witness had any bias and there was “‘no reason for them to come forward and say it’s the defendant if it’s not the defendant’.” Therefore, reversal was required even under the strict standards of AEDPA.
Rolan v. Vaughn (6th Cir. 2006) 445 F.3d 671:

Trial counsel was ineffective in failing to interview or present two witnesses defendant identified as being able to testify that defendant killed the decedent in self-defense. Without ever interviewing or investigating these witnesses, counsel erroneously described them as alibi witnesses, and instead of interviewing them, counsel notified the prosecution of their identities in order to comply with the jurisdiction’s notice of alibi statute. The prosecution interviewed both witness; one refused to cooperate, saying only that he would not testify for the prosecution, and the other simply stated that, when he saw defendant immediately after the fatal confrontation, he commented that the decedent didn’t even stab defendant. The Sixth Circuit upheld the district court’s grant of habeas relief, observing that the first witness testified at the post-conviction hearing that he saw the decedent come at defendant with a knife, yelling, “I’ll kill you motherfucker,”; and although the second witness died between defendant’s trial and the habeas review, his initial statement to the police inferred that he had also seen the decedent with a knife when he confronted defendant. Thus, both witnesses corroborated defendant’s self-defense claim, establishing that defendant was prejudiced by counsel’s failure to interview these witnesses.

Terry v. Jenkins (Ga. 2006) 627 S.E.2d 7:

Murder convictions vacated because trial counsel failed to conduct more than a rudimentary— if that— investigation into defendant’s claims that he did not commit the robbery-murders charged against him. Counsel admitted that he believed that a person associated with the key prosecution witness was either directly involved in the robbery-murders or committed them himself. After learning that the third person provided an alibi for the time of the murders, however, counsel failed to conduct any investigation into the truth of his alibi. Apparently, the lack of investigation was the result of miscommunication between lead and second counsel, each of whom thought the other was responsible for supervising the investigation. Fortunately, habeas counsel interviewed the alleged alibi witnesses, who denied that the third party was with them at all. Further, habeas counsel also uncovered several witnesses who observed the third party driving the victim’s white van shortly after the murders, and the third party and the key prosecution witness getting out of the victim’s van and acting strange soon after the murders. This evidence raised at least a reasonable probability that defendant would not have been convicted of the murders had counsel conducted a competent investigation and presented the evidence that the third person, not defendant, committed the murders.

B. Duty to Try to Overcome Communication Problems with Difficult Clients

Daniels v. Woodford (9th Cir. 2005) 428 F.3d 1181:

Capital defendant was denied the effective assistance of counsel at guilt phase where counsel failed to resolve his communication conflicts with defendant despite recognizing that defendant’s testimony was critical to the guilt phase defense. Although defendant
distrusted counsel, who had just left the district attorney's office and was representing
defendant as his first client in a criminal case, counsel made no effort to try to enlist the
aid of a private attorney who had previously represented defendant for assistance in
overcoming the communication barrier despite knowing that defendant trusted and
confided in the latter attorney. Further, although defendant did not testify despite the fact
that his testimony was essential to the only valid defense strategy, counsel failed to
“press” defendant to testify, explain to defendant “that his testimony was critical to his
defense”, or explain “how his testimony during the guilt phase would benefit his penalty
phase presentation.”

C. **Duty to Raise Meritorious Motions**

*People v. Booth (2016) 3 Cal.App.5th 1284 [noncapital]:*

Murder conviction reversed because trial counsel was ineffective in “failing to move to
dismiss the case based on precharging delay.” Defendant raised the issue at a motion for
new trial after he discharged his trial lawyer. Thus, the appellate court had the benefit of
a record describing the reasons, if any, for the failure to raise the precharging delay issue.
The court then rejected the prosecution’s argument that trial counsel had a tactical reason
to forego the motion, observing that trial counsel testified at the new trial hearing that “he
could not ‘recall why [he] did not file ... some type of due process motion.’” Further, the
court found that defendant was prejudiced by the failure to bring the motion because the
delay resulted in the loss of “a witness to the crime who explicitly exonerated” defendant.
That witness was “an eyewitness who told the police [defendant] was not among the
group of men that carried out the shooting....” Although the prosecution attempted to
discredit the value of the lost eyewitness because of his subsequent convictions for
spousal abuse and perjury, those convictions did not occur until 6 and 12 years after the
murder, respectively; thus, they “would not have been available to impeach” the
eyewitness had defendant “been tried within a reasonable time of the murder....” Finally,
while the justification for the delay was strong because it was exclusively based on
investigative delay, the prejudice was substantial enough—especially in consideration of
the weakness of the prosecution’s case—that it was “at least reasonably probable the trial
court would have found the delay violated [defendant’s] right to a fair trial.” Therefore,
defendant was denied the effective assistance of counsel. However, instead of requiring a
dismissal of the case, the court of appeal concluded that the proper remedy was to allow
“the jury to hear the exculpatory statements that [the eyewitness] made to the police after
the shooting. Despite the hearsay nature of those statements, their admission is
necessitated by [the eyewitness]’s unavailability and the unusual circumstances presented
in this case. Since [his statements have been preserved on tape, the jury will be able to
hear exactly what he said and how he said it.”

*Moore v. Czerniak (9th Cir. 2008) 534 F.3d 1128:*

Counsel was ineffective in failing to move to exclude defendant’s tape recorded
confession to the police which was obtained in violation of his constitutional rights.
Although the confession was obtained at the police station, counsel believed there were
no meritorious grounds to suppress the confession because defendant had not yet been arrested and was therefore not in custody. Counsel also felt that the confession was not prejudicial because defendant had told others about the crime. The confession was unlawfully obtained for two independent reasons: it was obtained in violation of defendant’s right to counsel, and “was impossibly extracted as the result of a promise of leniency made by the interrogating officers”. Defendant’s right to counsel under Edwards v. Arizona (1981) 451 U.S. 477 was violated when the officers persisted in the interrogation after defendant invoked his right to counsel by stating “that he wanted to, ‘[a]s quick as possible, talk to a lawyer,’” and his brother followed by asking, “‘If there was some way we could maybe get an attorney in here for a consultation’.” The circumstances which led to the finding of promises of leniency began with the officers telling defendant “that they ‘would go to bat for [him] as long as [they] got the truth’”, and defendant’s brother then reassuring defendant that he could “vouch for the officers’ assurances”. Defendant’s brother recounted how an officer had once gone to bat for him, stood behind his word, and become one of “‘the best friends I have in the world.’” The officer then left for a while, telling defendant that he was going to call the DA to make sure that he “would not ‘jam’ [defendant] so long as he confessed.” When he returned, he confirmed that he had spoken to the DA. The district court found that defendant confessed to the murder “‘based on [a] false promise’ of leniency, which ‘rendered [his] confession involuntary.’” The prosecution did not challenge that finding on appeal. Thus, it was clear that counsel acted unreasonably in failing to realize that defendant’s confession was obtained in violation of his constitutional rights.

Further, the court of appeals found that the failure to exclude the confession was prejudicial, despite the assertion that defendant had confessed to others, because an informal confession to two lay witnesses paled in comparison to a tape recorded confession to the police. First, the taped confession was extremely damaging because it depicted defendant “himself describ[ing] in detail, in his own words and his own voice, his participation in a killing in response to detailed questioning by trained investigators in the police station.” The taped confession would “be far more persuasive” than defendant’s statements to the lay witnesses which they “might or might not have been willing to recount, but that would in any event have lacked the flavor, details, specificity and completeness of the taped confession.” In addition, there was no clear record of the specific contents of defendant’s to the lay witnesses. Moreover, the court held that it was “likely that, but for counsel’s failure to file a suppression motion, [defendant] would have not entered into the plea agreement that required him to plead no contest to a felony murder charge with a mandatory twenty-five year sentence.” Therefore, it vacated defendant’s murder conviction.

D. Duty to Provide Competent Representation at Trial


Court of Appeal affirmed the trial court’s grant of a new trial, vacating defendant’s special circumstance murder conviction, based on ineffective assistance of counsel. Defendant was convicted on a felony-murder theory based on the testimony of informants
who claimed that she assisted in drugging the victim, facilitating the kidnaping and robbery-murder. Counsel was ineffective in (1) failing to impeach the informants with evidence of the suspicious circumstances under which they came forward with their information; (2) failing to present expert testimony which would have supported a defense of duress to the underlying felony which, in turn, would have been a defense to the felony-murder charge; and (3) dissuading defendant from testifying when her only chance depended on her testifying to refute the informants and support the duress defense, which was otherwise not available on the evidence.

IX. Prosecution Discovery and Defense Evidence

People v. Lam Thanh Nguyen (2015) 61 Cal.4th 1015:

The day before defense counsel presented a witness, he disclosed the report of his investigator’s interview of that witness nine months earlier, explained that he had not previously decided to call the witness, and agreed that he would limit his examination to the contents of the report. During his direct examination of the witness, however, counsel asked him about an additional subject. The trial court ruled “that defendant could not ask [the witness] this question for the first time on the witness stand without first interviewing him on this subject and providing a report of this interview to the prosecutor.” The California Supreme Court held that “[t]he trial court did not abuse its discretion in declining to permit defense counsel to ask the witness that question for the first time at trial, which would have had the effect of circumventing the parties’ agreement that defense counsel would give the prosecutor advance notice of the evidence he planned to present. In any event, defendant cannot demonstrate prejudice resulting from the court’s ruling because the record before us does not reflect how the witness would have answered the question.” (At p. 204.)

People v. Hajek (2014) 58 Cal.4th 1144, 1233:

Trial court properly prevented a defense mental health expert from testifying at penalty phase because defense counsel first failed to disclose his intention to call the expert until after he began presentation of his penalty phase case, and then failed to disclose 20 pages of the expert’s handwritten notes and the results of the tests the expert administered to defendant. “[W]hile representing that Dr. Berg had not prepared a report, Vo’s counsel neglected to mention that Berg had prepared 20 pages of handwritten notes and administered psychological tests to Vo. These materials constituted a report for purposes of the statute.” Further, the trial court acted properly in denying “counsel’s request to withdraw from the case on the ground that a conflict of interest had emerged in the wake of the court’s preclusion of Dr. Berg’s testimony as a discovery sanction.” (At p. 1234.) The California Supreme Court disagreed with “the proposition that an adverse ruling, even one accompanied by a finding of defense counsel’s bad faith, creates a conflict of interest between counsel and his or her client.” (Ibid.)

X. Prosecutorial Misconduct
A. Attacks on Defense Counsel or Experts

1. Denigrating Defense Counsel

People v. Seumanu (2015) 61 Cal.4th 1293:

“The prosecutor ... committed misconduct in closing argument in two ways: she implied defense counsel knew his client was guilty, and that counsel ‘put forward’ a sham defense, i.e., one he knew was false.” It is improper “for a prosecutor to claim that defense counsel does not believe in his or her client’s innocence... .” Thus, “[t]he prosecutor crossed the ethical line when she suggested defense counsel did not personally believe his client’s story and, in fact, believed that defendant personally shot the [murder victim].” Specifically, she committed misconduct when she argued that defense counsel was “hedging his bets by” taking a particular tack in cross-examination “‘because he knows that you know [his client] is the shooter.’ This argument makes clear the prosecutor improperly argued defense counsel did not believe in his client’s innocence.” (Original emphasis.) She also committed misconduct by asserting that defense counsel presented a “sham” defense. “To the extent the prosecutor here did not simply argue the defense was unsupported by facts and thus a sham, but that defense counsel ‘put forward’ a sham, the argument improperly implied that counsel was personally dishonest.” (Original emphasis.)

People v. Ledesma (II) (2006) 39 Cal.4th 641:

Prosecutor committed misconduct by denigrating defense counsel in closing argument when he “stated that there had been a ‘concerted effort in this case to introduce things for your consideration that were introduced perhaps by inappropriate questions. I think you know what I am referring to.’”

People v. (Robert) Young (2005) 34 Cal.4th 1149, 1193:

Prosecutor committed misconduct in guilt phase closing argument when he “characterized defense counsel as ‘liars’ or accused counsel of lying to the jury,” and when he misled the jury by misstating portions of the defense closing and then attacked the misrepresented defense argument. He also committed misconduct in penalty phase closing argument by misstating the evidence. (At p. 1223.) The errors, however, were harmless.


Among the several instances of prejudicial misconduct committed by the prosecutor was the argument that the defense witnesses “‘were conjured up in the last week and a half’”, which denigrated defense counsel and “effectively argued that defense counsel suborned perjury.”

Butler v. Nevada (Nev. 2004) 102 P.3d 71:
Prosecution committed misconduct in penalty closing argument by disparaging defense counsel in exhortations to “keep your eye on the ball. The defense is holding the ball in the dirt. They want you to be distracted from what the issue is, look away from the crime that was committed”, and that the defense was “marketing” the “product that the defendant doesn’t merit death for his actions” by resorting to the “technique” “that his childhood, his experiences, and because of that circumstance that he was in, which probably many, many, many thousands, millions, are in, is somehow a mitigator, somehow mitigates against that brutal murder that occurred in the desert. . . . It should be insulting.” Penalty reversed due to cumulative errors.

2. **Commenting on Objections by Defense Counsel**

**People v. Vance (2010) 188 Cal.App.4th 1182:**

In addition to other incidents of prosecutorial misconduct in closing argument, it was misconduct for the prosecutor to respond to defense counsel’s objections to her improper argument by commenting that, “‘Defense is objecting because the defense believes that I’m painting too graphic a picture…’” Although the trial court sustained defendant’s objections to the latter comments, it failed to curb the misconduct and ensure that the jury was not misled by the improper comments.


Prosecution committed misconduct on at least six occasions where “the prosecutors responded to defense objections with either personal attacks on opposing counsel or with suggestions that the objections were attempts to improperly divert the jury’s attention.”

3. **Denigrating Defense Experts**

**People v. Parson (2008) 44 Cal.4th 332, 362-363:**

Prosecutor committed misconduct by going too far in denigrating a defense psychiatrist. Although the prosecutor properly argued that the psychiatrist “may have been biased given his status as a paid witness”, his reference to the psychiatrist “as ‘a washed-up doctor’ was inappropriate because it did not appear tied to any evidence.”

**Butler v. Nevada (Nev. 2004) 102 P.3d 71:**

Prosecution committed misconduct in penalty closing argument by attacking “hi falootin” defense experts, criticizing their testimony as an “infomercial, and complaining about the expert witness fees that were paid by the County and that it was a waste of taxpayer money. Penalty reversed due to cumulative errors.

B. **Personal Belief**
People v. Alvarado (2006) 141 Cal.App.4th 1577:

Prosecutor committed prejudicial misconduct in closing argument, requiring reversal of defendant’s conviction despite the lack of an objection by defense counsel, because the misconduct was so egregious that no admonition would have been able to cure the prejudice. The misconduct consisted of the prosecutor’s statement in her rebuttal argument that “I have a duty and I have taken an oath as a Deputy District Attorney not to prosecute a case if I have any doubt that the crime occurred. [¶] The defendant charged is the person who did it.” Although the comment was made in response to defense counsel’s argument which suggested that the prosecutor coached the robbery victim, that did not diminish the prosecutor’s misconduct, even if it could be assumed that defense counsel unfairly attacked the prosecutor.

People v. Smith (2005) 35 Cal.4th 334, 359-360, 373:

Prosecutor committed misconduct in closing argument when he argued, based on inferences deduced from circumstantial evidence, that “we know . . .”, referring to the knowledge shared by the jury and the prosecutor. It was improper for the prosecutor to assert knowledge of facts which “were not matters of direct proof, but only of inference”. The error, however, was harmless.

People v. Monterroso (2004) 34 Cal.4th 743:

Prosecutor should not have described his personal knowledge of the criminal justice system, describing a whole industry of defense experts who bounce around from trial to trial, state to state; and his personal knowledge of “the procedures for a guilty plea, for the assignment of prisoners by the Department of Corrections, and for reporting child abuse.”

United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142:

Prosecutor committed misconduct in closing argument when he said that “I don’t believe” the testimony of defendant.

C. Vouching

People v. Fuiava (2012) 53 Cal.4th 622, 693-694:

Prosecutor impermissibly vouched for the credibility and reputation of the deputies who were either victims of or witnesses to the capital crime. They were part of a group of deputies known as the “Vikings”, and the prosecutor wore a “Vikings” pin during his argument, telling the jury he was doing so only with their permission. The latter transgression was particularly improper because it came after the prosecutor had successfully convinced the trial judge to exclude substantial evidence of the bad reputations associated with the “Vikings.”

It was misconduct for the prosecutor to argue that if there was any evidence that the police officer “was a bad cop, that he did something that was misconduct or inappropriate or wrong in this day and age, you’d have heard about it”, and the reason they did not hear about it was “‘because it doesn’t exist.’” The argument could only be interpreted to mean that the prosecutor knew that the officer “had never engaged in misconduct”, which constituted improper vouching.

The prosecutor committed further misconduct in referring to matters not in evidence by arguing that the 12 to 15 officers who worked together in the drug operation would not risk their “careers, pensions, house notes, car notes . . . [,] bank accounts, and children’s tuition” just to arrest defendant for a small amount of cocaine. The court of appeal stressed that only a few officers testified, making it improper to imply that the other “officers would have testified to the same facts as the officers who testified”; and there was no evidence that the 12 officers had worked in more serious cases or that they had mortgages, car loans, or children in private schools. This misconduct violated defendant’s “Sixth Amendment rights to confront and cross-examine uncalled prosecution witnesses.”

People v. Roldan (2005) 35 Cal.4th 646, 744:

“It is improper argument for a prosecutor to suggest that the jury should accord some weight to the decision of the district attorney’s office to seek the death penalty.”

People v. Turner (2004) 34 Cal.4th 406, 433:

Prosecutor committed misconduct in vouching for the credibility and integrity of court-appointed mental health experts at competency hearing in defendant’s capital trial by referring to matters outside the record, and by expressly basing his opinions on “his personal knowledge of these witnesses and his prior use of these experts when he was a defense attorney.”

People v. Monterroso (2004) 34 Cal.4th 743:

Prosecutor should not have described his personal knowledge of the criminal justice system, describing a whole industry of defense experts who bounce around from trial to trial, state to state; and his personal knowledge of “the procedures for a guilty plea, for the assignment of prisoners by the Department of Corrections, and for reporting child abuse.”

United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142:

Prosecutor committed prejudicial misconduct by improperly vouching for the credibility of his police officer witness. “Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or
suggesting that information not presented to the jury supports the witness’s testimony [citation omitted].” The prosecutor committed misconduct by stating that the officers had “‘no reason to lie in this case or not tell the truth’”, and by belittling the defense case, which was dependent on finding the officers not credible, by commenting that “‘[t]hese are officers that risk losin’ their jobs, risk losin’ their pension, risk losin’ their livelihood. A nd, on top of that if they come in here and lie, I guess they’re riskin’ bein’ prosecuted for perjury. Doesn’t make sense because they came in here and told you the truth, ladies and gentlemen.’”

United States v. Combs (9th Cir. 2004) 379 F.3d 564:

Conviction reversed due to prosecution misconduct in cross-examining defendant about whether the federal agent made up his testimony and lied, and then compounded the misconduct in closing argument by stating that the agent would not throw “‘his ten-year career down the toilet’” just to falsely convict defendant. The prosecutor impermissibly vouched for the credibility of the agent by “‘arguing that in order to acquit Combs, the jury had to believe that agent Bailey risked losing his job by lying on the stand.’”

D. Aligning With Victim/Lack of Impartiality

People v. Seumanu (2015) 61 Cal.4th 1293:

It is misconduct for a prosecutor in a murder trial to tell the jury that the decedent is her “‘client.” “‘The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. “The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of “The People” includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.’””

E. Inflammatory

People v. Sanchez (2014) 228 Cal.App.4th 1517:

The prosecutor also committed “misconduct by arguing that defendant hoped that at least one of the jurors would be ‘gullible,’ ‘naïve,’ and ‘hoodwinked’ into believing defendant’s arguments, and that defendant would then have a good laugh at the jury’s expense.” These comments were improper because they “were designed to offend and intimidate the potential holdout juror who doubted defendant’s guilt.” “[T]hey created a risk that a juror would ... find defendant guilty to avoid being viewed as gullible, naïve, or hoodwinked.” Moreover, the appellate court found that the “statement that ‘defendant can go home and have a good laugh at your expense’ was independently inappropriate” because it “impl[ied] that defendant is a person who would hoodwink the jurors into believing he is innocent and then laugh at them for doing so.” (Original emphasis.)
Combined, these “statements could have had a chilling effect on the jury’s deliberative process.”

People v. Fuiava (2012) 53 Cal.4th 622, 693-694:

Prosecutor committed numerous instances of misconduct, although the California Supreme Court found that reversal was not required. The defendant was charged with (and convicted of) the murder of a police officer but claimed self-defense. During the evidentiary portion of the trial, the prosecutor presented the slain deputy’s partner, who wept while testifying that he was wearing the same blood-stained uniform he was wearing at the time of the fatal gun battle. The court observed that this improper testimony was inflammatory.

Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892:

Prosecutor committed misconduct by stating in closing argument that defendant kidnapped the young girl “in order to ‘rape’ her” because the prosecution had already withdrawn the lewd and lascivious conduct charge against defendant and, even if there was circumstantial evidence to support a molestation charge, “there was no indication that [defendant] intended to or attempted to rape her.”

F. Inflammatory Appeals to View Crime Through Victim’s Eyes

People v. Seumanu (2015) 61 Cal.4th 1293:

The prosecutor (Deputy Alameda County DA Angela Backers) committed misconduct in her guilt-phase closing argument “by asking the jury to view the crime through the eyes of the victim.” Specifically, she committed misconduct by giving a narrative in which she asked the jury to “[i]magine begging for your life, begging to be let go...[¶] Imagine trying to save your own life, giving them the most you can give them, and you are being called a liar and having a gun pointed at you.” (Italics deleted.)

People v. Vance (2010) 188 Cal.App.4th 1182:

Murder conviction reversed because of prosecutor’s misconduct in closing argument, when she “invite[d] the jury to put itself in the victim’s position and imagine what the victim experienced.” It is also “misconduct for a prosecutor to argue that the jury in a noncapital case— or in the guilt phase of a capital case— should consider the impact of the crime on the victim’s family.”

G. Inflammatory Appeals to Racism and to View Crime Through Victim’s Eyes

Zapata v. Vasquez (9th Cir. 2015) 788 F.3d 1106:

Gang murder conviction reversed because the prosecutor committed prejudicial misconduct in his rebuttal closing argument when he asked the jury to “picture” the last
words the victim heard before he was shot dead, and improperly argued that it was a “reasonable inference” that the defendant called him a “’Fuckin’ scrap. You fuckin’ wetback. Can you imagine the terror and the fear [the victim] must have felt...’” The Ninth Circuit agreed with the holding by the California Court of Appeal for the Sixth Appellate District that these comments were wholly speculative and pure fiction, spun out of whole cloth. The Ninth Circuit also agreed with the California Court of Appeal’s condemnation that “the fiction thus spun by the prosecutor was both inflammatory and wholly extraneous to any issue properly before the jury. . . . The prosecutor could have no reason for mentioning it other than to inflame the jury’s sentiments. There was simply no occasion for the jury to contemplate the victim’s subjective experience at the time of his murder, even if there had been an evidentiary basis to do so. By deliberately drawing the jury’s attention to that irrelevant and improper consideration, the prosecutor committed serious misconduct.”

Cudjo v. Ayers (9th Cir. 2012) 698 F.3d 752, 769:

Agreeing with the holding of the California Supreme Court on direct appeal (while disagreeing on the issue of prejudice), the Ninth Circuit affirmed “that a prosecutorial statement [in closing argument] that includes racial references likely to incite racial prejudice[] violates the Fourteenth Amendment.” In rebuffing the defendant’s claim that he and the decedent had consensual sexual intercourse before someone else (identified as defendant’s brother) killed her, the prosecutor had urged the jury to find it “implausible that ‘this woman is going to have intercourse with a strange man— frankly any man— a black man, on her living room couch with her five year old in the house.’” (Original emphasis.) Further, the error was prejudicial.

H. Inflammatory Appeals to Other Prejudices

People v. Garcia (2014) 229 Cal.App.4th 302, 304-305:

Female defendant “was charged with sexually abusing a girl she babysat.” “[T]he prosecutor attempted to show she is a lesbian. The prosecutor asserted during closing argument that her supposed attraction to other women gave her a motive to sexually abuse the victim.” The appellate court held that defendant’s sexual orientation was not relevant and the prosecutor committed prejudicial misconduct by “repeatedly attempt[ing] to make an issue out of appellant's sexual orientation and emphasiz[ing] this issue to the jury in closing argument.” Bluntly condemning the prosecutor’s tactics, the court observed that a California court of appeal long ago “considered the idea of using evidence of a defendant’s homosexuality to prove they molested a child of the same sex about as farfetched as using evidence of a defendant’s heterosexuality to prove they committed rape. It is painful to find this battle still being fought 58 years later.” (At p. 313.) Summing it up, the Garcia court held that “evidence of appellant’s sexual orientation was [not] relevant to her prosecution. Period.” (At p. 314.) Finding the misconduct prejudicial, the court explained that “the prosecutor employed logic that was tantalizingly attractive on its face but deeply flawed and fundamentally unfair at its core.
Considering all of the evidence and argument on the issue, we simply do not believe 
apellant was afforded her right to a fair trial.” (At p. 318.)

I. Inflammatory Comparisons to Other Sensational Crimes

People v. Jackson (2016) 1 Cal.5th 269, 350:

“[P]rosecutor’s comparison of [defendant’s] crimes to the highly publicized and 
unrelated murders and sexual assaults of children such as Polly Klaas was gratuitous at 
the guilt phase and therefore improper. ‘‘‘In general, prosecutors should refrain from 
comparing defendants to historic or fictional villains, especially where the comparisons 
are wholly inappropriate or unlinked to the evidence.’’” (Citation omitted.) By 
contrast, such comparisons are not improper at the punishment phase because, “unlike in 
the guilt phase, the prosecutor’s references to the child murders and sexual assaults 
illustrated a larger point about how particularly brutal crimes against the most vulnerable 
in our society—children and elderly women—must be punished, especially when 
committed in their homes.” (At p. 368.)

J. Inflammatory Appeals to Public Pressure

People v. Shazier (2014) 60 Cal.4th 109, 144-145:

Prosecutor’s comments about how the juror’s friends or families might react to learning 
that the juror returned a verdict in defendant’s favor were improper and “cannot be 
condoned.” “Because the specter of outside social pressure and community obloquy as 
improper influences on the jurors’ fairness and objectivity is so significant, we cannot 
countenance argumentative insinuations that jurors may confront such difficulties if they 
make the wrong decision.”

United States v. Weatherspoon (9th Cir. 2005) 410 F.3d 1142:

Prosecutor committed still more misconduct in closing argument by exhorting the jury 
that punishment of the crime at issue was necessary to “protect” the public, and the jury 
would “feel comfortable” after convicting defendant. A’s such, “the prosecutor 
impermissibly urged the jury to convict in order to alleviate societal problems.”


Prosecutors committed prejudicial misconduct in penalty phase closing argument when 
they “repeatedly argued that the jurors would be responsible for the murders that Bates 
would inevitably commit unless sentenced to death . . . [and when they] suggested that 
failing to support the death penalty for [defendant] would make them ‘accomplices’ to his 
crime and to future crimes.”

Commonwealth v. DeJesus (Pa 2004) 806 A.2d 102:
Death sentence reversed due to prosecution misconduct by telling the jury to “send a message” in his closing argument. Prosecutor argued: “When you think of the death penalty, there are messages to be sent. There’s a message on the street saying, look at that, he got death, you see that, honey, that’s why you live by the rules, so you don’t end up like that. Because they’re in these bad neighborhoods.... You also send a message in prisons. When you peep in that bus and talk and whisper, you can say, death penalty. Maybe you’ve got just one inmate sitting there going, well, he got death, this is serious, I don’t want to end up like that. Maybe your penalty you’ll save one guy, to scare him straight.” Moreover, the Court exhorted all parties to refrain from such arguments in the future because they distract the jury from reaching a verdict based solely on the facts and the law.

**K. Manufacturing Evidence**


Dismissal was an appropriate sanction for outrageous and prejudicial prosecution misconduct where the prosecutor “deliberately altered an interrogation transcript to include a confession that could be used to justify charges carrying a life sentence, and he distributed it to defense counsel during a period of time when [he] knew defense counsel was trying to persuade defendant to settle the case. ... This is egregious misconduct [that] ... directly interfered with defendant’s attorney-client relationship.” (At p. 447.)

**L. Arguing Facts Known to be False**

*People v. Bryant (2014) 60 Cal.4th 335, 428-429:*

“It is misconduct for a prosecutor to urge a failure of proof and argue the contrary is true, when the prosecutor knows or should know the assertion is, in fact, false.” Thus, it was improper for the prosecutor to suggest that defendant lied when he testified that he could not have been selling drugs in 1986 because he was in custody in juvenile facilities at the time. The prosecutor argued that there was no evidence to show when defendant was in custody. Although literally true, the prosecutor possessed defendant’s juvenile records, which showed that that defendant “was arrested in 1985, committed to the county juvenile hall, then a California Y outh A uthority facility, and ultimately paroled in November 1987. There is no indication that [he] was ever released from custody, even temporarily, during that time. It was improper to suggest that a failure to produce the records could be relied upon to show that [defendant]’s testimony was not true when the prosecutor knew or should have known the records appeared to corroborate [defendant].”

**M. Napue**

*Dow v. Virga (9th Cir. 2013) 729 F.3d 1041:*

Prosecution misconduct violated defendant’s constitutional rights to due process of law, requiring reversal of his robbery conviction under *Napue v. Illinois (1959) 360 U.S. 264,*
because (1) the prosecutor presented “testimony [that] was actually false, (2) the
prosecutor knew it was false, and (3) the false testimony was material....” Defendant
participated in a pretrial lineup. Defense counsel, who was present at the lineup, was
concerned that the victim “might false identify [defendant] because [he] was the only
lineup participant with a facial scar.” Thus, at counsel’s request, “each individual in the
lineup wore a bandage to cover the area under his right eye, the area in which [defendant]
had a small scar.” But during the direct examination by the prosecutor, the police
detective testified that the band-aids were used at defendant’s request, which the
prosecutor knew was incorrect. The prosecutor then took advantage of the
misrepresentation in closing argument, arguing that defendant asked for the band-aid to
cover the scar, and—over defendant’s objection—encouraged the jury to draw a
consciousness of guilt from that evidence. Not only did the misrepresentation violate
defendant’s rights under Napue, but the misconduct “was particularly egregious because
it adversely affected [defendant’s] due process interest in a lineup that was not unduly
suggestive.”

Hayes v. Brown (9th Cir. 2005) 399 F.3d 972:

Ninth Circuit vacated San Joaquin County, California, death sentence because the
prosecution “knowingly presented false evidence to the jury and made false
representations to the trial judge as to whether the State had agreed not to prosecute [a
crucial prosecution witness] on his pending felony charges.” Defendant and the witness
agreed that they were together shortly after the murder. The witness, however, testified
that defendant told him that he had “‘offed’” the victim and described the murder in
detail. The prosecution gave the witness transactional immunity in exchange for
testifying against defendant and agreed to dismiss three unrelated felony theft charges as
well as a misdemeanor charge. However, the prosecution communicated his promises to
dismiss the unrelated charges only to the witness’ attorney, with instructions not to tell
the witness about the deal, and the attorney agreed. “The idea was that [the witness]
would be able to testify that there was no deal in place, without perjuring himself,
because [he] would not personally be informed of the arrangement.” (At p. 980.) The
Ninth Circuit held that the prosecutor violated defendant’s Fourteenth Amendment rights
to due process of law under Napue v. Illinois (1959) 360 U.S. 264, 269, “by presenting
Kansas (1942) 317 U.S. 213], by failing to correct the record following the presentation
of false evidence.” (At p. 980.) Moreover, the error was prejudicial despite the fact that
defendant impeached the witness extensively at trial even without evidence of the
concealed promise to dismiss the felony charges. (At pp. 987-988.) Fittingly, the en
banc majority observed in closing that “this is not the first time we have been confronted
in recent years with schemes to place false or distorted evidence before a jury.” (At p.
988.)

People v. Dickey (2005) 35 Cal.4th 884, 909-910:

Although the error was harmless, the prosecution knowingly created a false impression
by eliciting testimony from a prosecution witness that he never received anything from
the prosecution when the truth was that the prosecution had arranged for free room and board for the witness in exchange for an IOU backed by the reward money the witness was hoping to receive, and even drafted an agreement permitting the district attorney’s office “to discharge his IOU’s before he received the remainder of the reward.” Further, the prosecution exploited that false impression in closing argument by stating that “the prosecution had done nothing for [the witness] that might reflect on his credibility.”

N. Trivializing or Misstating Reasonable Doubt

1. Using Puzzles or Diagrams

People v. Centeno (2014) 60 Cal.4th 659, 662:

Prosecutor committed misconduct by “us[ing] a diagram showing the boundaries of California and urg[ing] the jury to convict based on a ‘reasonable’ view of the evidence [because] [t]he argument unduly risked misleading the jury about the standard of proof.” The use of easily recognizable “images necessarily draw on the jurors’ own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Aditionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion.” (At p. 669.) The court held that it is “misleading to analogize a jury’s task to solving a picture puzzle depicting an actual and familiar object unrelated to the evidence.” (At p. 670.) On the other hand, the court observed “that not all visual aids are suspect. The use of charts, diagrams, lists, and comparisons based on the evidence may be effectively and fairly used in argument to help the jury analyze the case.” (At p. 671, original emphasis.)

People v. Otero (2012) 210 Cal.App.4th 865, 867:

“[P]rosecutor’s use of a diagram of California to explain proof beyond a reasonable doubt was misconduct.” Specifically, the prosecutor asked the jury to name the state at the left of a diagram, using a PowerPoint slide consisting of the outlines of California and Nevada, depicting a dollar sign in southern Nevada, and the word “ocean” “to the left of California.” The diagram also listed the names of various major cities in California but incorrectly depicted some of their locations. At the bottom of the slide was the statement, “Even with incomplete and incorrect information, no reasonable doubt that this is California.” Observing that “[i]t is misconduct for a prosecutor to misstate the law during argument” (at p. 870), the court held the prosecutor committed misconduct because the diagram “is simply not an accurate analogy to a prosecutor’s burden” of proof (at p. 873). Although the court found the misconduct to be harmless on the facts presented, it warned that “[t]he manner in which these diagrams or puzzles are used trivializes the prosecution’s burden to prove each element of a charged offense beyond a reasonable doubt and if their use continues, eventually the error will be prejudicial and result in a reversal of a conviction.” (At p. 867.)

Prosecutor’s use of a PowerPoint graphic in closing argument to diminish reasonable doubt constituted prosecutorial misconduct. The slide show depicted eight puzzle pieces which formed a picture of the Statue of Liberty. The first six pieces appeared on the screen sequentially. At that point, the prosecutor argued that the jurors knew beyond a reasonable doubt that the full picture was the Statue of Liberty although there were still two pieces missing from the puzzle, then added the two remaining pieces to confirm that it was, in fact, the Statue of Liberty. The appellate court held that the presentation misrepresented the standard of proof, leaving “the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invites the jury to guess or jump to a conclusion, a process completely at odds with the jury’s serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.” The presentation was also misconduct for a second reason: it “improperly suggested a quantitative measure of reasonable doubt,” by “inappropriately suggesting a specific quantitative measure of reasonable doubt, i.e., 75 percent [i.e., 6 of 8 puzzle pieces].” Further, the court of appeal “caution[ed] prosecutors who are tempted to enliven closing argument with visual aids that using such aids to illustrate the ‘beyond a reasonable doubt’ standard is dangerous and unwise.”

2. Misstating the Burden of Proof and Burden Shifting

People v. Centeno (2014) 60 Cal.4th 659:

The prosecutor’s argument constituted misconduct because “[i]t strongly implied that the People’s burden was met if its theory was ‘reasonable’ in light of the facts supporting it.” (At p. 671.) While a prosecutor is permitted to urge the jury “‘to believe what is reasonable to believe versus unreasonable to believe” and to “accept the reasonable and reject the unreasonable…,’” “it is error for the prosecutor to suggest that a ‘reasonable’ account of the evidence satisfies the prosecutor’s burden of proof.” (IId. at p. 672, original emphasis.) Thus, it was misconduct for the prosecutor to ask the jury if, given the evidence, it was reasonable that the defendant is guilty. (Id. at pp. 671-673.) The argument misstates the burden of proof because it would allow a jury to “‘convict due to its reasonable belief that a defendant committed a crime while still having a reasonable doubt as to guilt.’” (IId. at p. 673, citation omitted.) Further, it is “error to state that ‘a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.’” Thus, although the prosecution “can surely point out that interpretations proffered by the defense are neither reasonable nor credible…, even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden. The prosecution cannot suggest that deficiencies in the defense case can make up for shortcomings in its own.” (Ibid.)

People v. Ellison (2011) 196 Cal.App.4th 1342:
Prosecutor committed misconduct in closing argument by misstating the burden of proof. The prosecutor argued that the burden of proof meant, "is it reasonable that the defendant [is] innocent." (At p. 1352.) The argument was improper because the question is not whether or not the defendant’s innocence is reasonable, but whether the evidence has proven the defendant guilty beyond a reasonable doubt. (At p. 1353.)


Prosecutor committed prejudicial misconduct in closing argument in several respects. After defense counsel challenged credibility of the police officer witness, prosecution responded by commenting that defense counsel did not produce one witness who testified to misconduct by the officer and that defense counsel was “obligated to put the evidence on from that witness stand.” The court of appeal held it was misconduct to argue that defendant was “obligated to put” on evidence because it suggested that defendant had a burden of production or proof, which violated his federal constitutional rights to due process of law.

Trillo v. Biter (9th Cir. 2014) 769 F.3d 995:

Prosecutor committed misconduct in closing argument in murder trial by diminishing the meaning of proof beyond a reasonable doubt, telling the jury that reasonable doubt was “‘something that makes you comfortable with your decision today,’ so that each member of the jury could ‘go explain … it to your neighbor….’” The prosecutor argued further that the jurors needed to consider their neighbor’s reactions if they acquitted defendant, suggesting that if they explained to their neighbor that, “‘gosh, we got the instructions about reasonable doubt, and we walked him. Your neighbor’s going to be, you did what? And you’re going to be very uncomfortable.’” The Ninth Circuit held the argument was improper because “prosecutors cannot imply that jurors should convict a defendant because failure to do so would endanger their neighbors”, nor can they urge jurors “to convict simply because they might be uncomfortable with” an acquittal. However, the error was not so egregious that reversal was required.

O. Self-Defense: Misstating the Law

People v. Lloyd (2015) 236 Cal.A pp.4th 49:

Reversal required because of prosecution misconduct in rebuttal argument when the prosecutor diminished the burden of proof by arguing, “‘Well, what does not guilty mean? It means he did not commit a crime.’” (At p. 52.) In this self-defense case, the prosecutor also committed misconduct by misstating the law when “[s]he argued, “‘If you find there is self-defense, you are saying his actions, the defendant’s conduct was absolutely acceptable.’” The argument misstated the law because a defendant does not have to establish that the self-defense claim was true. Instead, “‘if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was justified, then he is entitled to an acquittal.’” (At p. 62.)
P. Imperfect Self-Defense: Misstating the Law

People v. Peau (2015) 236 Cal.App.4th 823:

It was improper for prosecutor to “characterize[] imperfect self-defense as a ‘loophole’ that would permit [defendant] to avoid responsibility for ... murder.” (At pp. 832-833.) It was also improper to suggest that imperfect self-defense would allow defendant to “walk out” the door. (At p. 833.)

Q. Heat of Passion Manslaughter: Misstating the Law

People v. Disa (2016) 1 Cal.App.5th 654, 675:

The provocative conduct that may lead to heat-of-passion voluntary manslaughter may be verbal. “Thus, it would be incorrect for a prosecutor to argue that verbal conduct can never amount to provocation.” (Original emphasis.) Further, the provocation must only be sufficient to cause an ordinary person of average disposition to act rashly, not to “move an ordinary person to kill.” “Thus, it would be improper to argue that the test for provocation is whether an ordinary person of average disposition would act in the same way defendant acted in this case.” (Original emphasis.)


Prosecutor committed misconduct in closing argument by misstating the legal differences between murder and manslaughter. First, the prosecutor erred by describing voluntary manslaughter as a “legal fiction.” (At pp. 220-221.) Second, the prosecutor erred by describing a stabbing in the “heat of passion, sudden quarrel” as second degree murder; instead, such a killing is voluntary manslaughter. (At p.221.) Third, the prosecutor erred in stating that a person would be guilty of voluntary manslaughter if they killed someone who was molesting their child under circumstances that would inflame a reasonable person; instead, such a killing may be justified in the lawful defense of another person. (At p. 222.) Finally, the prosecutor committed misconduct in asserting that, even where the defendant is acting under a heat of passion, the crime is still murder unless a reasonable person would also kill in the same circumstances. Instead, a homicide is “upon ‘a sudden quarrel or heat of passion’ [i.e., voluntary manslaughter] if the killer’s reason was obscured by a ‘‘provocation’’ sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. The focus is on the provocation–the surrounding circumstances–and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.” (At p. 223.)

R. Violating Court Orders

People v. Peoples (2016) 62 Cal.4th 718, 795:
Although defendant was not prejudiced by the prosecutor’s improper conduct, the prosecutor engaged in improper conduct nonetheless when he “flouted” the trial court’s orders “(1) not to use the word ‘murder’ or its cognates to refer to the homicides at issue in the guilt phase trial, (2) not to examine [a witness] regarding drug tests that he performed on other employees … , (3) not to mention a nonfunctioning shotgun found at defendant's apartment, and (4) not to display wooden mannequins representing each of the five victims when the mannequins were not being used as demonstratives.”

**People v. Trinh** (2014) 59 Cal.4th 216:

Prosecutor committed “clear misconduct” by repeatedly asking questions that were ruled improper in response to defendant’s in limine motions.

**People v. Friend** (2009) 47 Cal.4th 1, 33:

Prosecutor committed misconduct on redirect examination in asking witness what third person had told him, after the trial court instructed the prosecutor not to have the witness mention what the third person told him. “In directly posing a question about [the hearsay] statement, the prosecutor violated the trial court’s prior evidentiary ruling, and, whether done intentionally or not, committed misconduct.”

**People v. Wallace** (2008) 44 Cal.4th 1032, 1071:

Court agreed that the prosecutor committed misconduct in cross-examining defendant about the contents of a defense investigator’s report after the trial court ordered him not to do so.

### S. Speaking Objections

**People v. Friend** (2009) 47 Cal.4th 1, 79-80:

During the prosecution’s questioning of a sheriff’s classification deputy at penalty phase, the prosecution asked why the deputy had reclassified defendant after a particular incident. The trial court sustained defendant’s relevancy objection because the reclassification was not an aggravating factor. The prosecutor, however, protested that the answer was “‘because Mr. Friend is a danger -.’” The California Supreme Court agreed that the prosecutor’s comment was misconduct but found no prejudice because the trial court admonished the jury to disregard the comment and explained it was for them “to decide whether or not defendant was a danger.”

### T. Doyle

**People v. Hollinquest** (2010) 190 Cal.A pp.4th 1534:
Prosecutor committed misconduct by presenting evidence and commenting in closing argument on defendant’s post-arrest silence in conversations with his friend while defendant was in custody. Defendant had over one hundred telephone conversations with a close friend while he was in the jail awaiting trial. The calls were recorded, and an investigator testified that defendant never explained incriminating evidence or the other facts of the case to his friend. However, institutional warnings were repeated during their telephone conversations that ‘everything you say here is being recorded.’ Further, “the context of defendant’s recorded phone conversations with [his friend] are indicative of an exercise of his constitutional rights to silence and counsel.” Thus, “[b]y drawing attention to the fact that defendant never explained the [incriminating evidence] or mentioned the other facts of the case to [his friend], the prosecutor violated the precepts of Doyle.” “[T]he prosecutor committed misconduct by asserting to the jury that defendant’s ‘silence in the face’ of discussions with [his friend] could be considered as evidence of guilt....”

People v. Hinton (2006) 37 Cal.4th 839, 867:

Prosecutor committed error under Doyle v. Ohio (1976) 426 U.S. 610, in violation of defendant’s Fourteenth Amendment Due Process rights, by eliciting testimony that the police detective attempted to interview defendant on a particular date and time “but defendant refused to waive his rights.” Although the prosecutor attempted to justify his conduct by explaining that there were so many interviews of defendant that he was just trying to differentiate which particular interview the witness was referring to, it remained Doyle error nonetheless.

U. Griffin

People v. Sanchez (2014) 228 Cal.App.4th 1517:

Prosecutor committed Griffin error in closing argument. The defendant was arrested when he was found hiding in the wheel well of a truck. He did not testify at trial. In closing, the prosecutor told the jurors that “the defendant is still in that wheel well in a very real sense, and this time he’s hiding from all of you.” The appellate court held the comments violated Griffin because they were most reasonably interpreted as an argument “that defendant was ‘hiding’ from the jury in a figurative sense by not testifying; he was hiding because he refused to get on the stand and tell the jury why he was [at the scene of the theft] the night of the incident.” Further, “[t]he prosecution compounded this effect by asking the jury to ‘[p]ull him out of that wheel well one last time.’”

People v. Carr (2010) 190 Cal.App.4th 475:

Finding that the trial court’s admonition was sufficient to cure any Griffin error in the prosecution’s closing argument, the court of appeal saw no need to reverse defendant’s conviction for multiple murder with special circumstances. In rebuttal argument, after defense counsel criticized the inadequacy of the police investigation in her closing argument, the prosecutor argued, inter alia, “…you didn’t hear from the defense. You
didn’t hear— the defense did not provide any alibi witnesses.’” Defense counsel objected and the trial court agreed that the prosecution’s comments were problematic because there was no evidence that there were any alibi witnesses who could be called. Thus, the trial court admonished the jury, “‘... the defense has no obligation to present evidence. The defendant has no obligation to testify in this case. And I’m striking the prosecutor’s last comment about the failure to call any alibi witnesses and you’re to disregard it in its entirety. It should not even be brought up in your discussion.”

Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892:

Prosecutor violated Griffin v. Illinois (1965) 380 U.S. 609, 615, by stating in closing argument that the non-testifying defendant “‘never said anything to you about why, why he did these things’”, and—in regards to whether or not defendant used a knife to kill the young girl—said that defendant “‘never told you anything different.’” Griffin error also resulted from the prosecutor’s statement that “‘there’s nothing different’” because it “naturally and necessarily implicates [defendant’s] decision not to testify as [defendant] is the only person who could definitively answer the question of whether he used a knife.”

V. Commenting on Demeanor of Nontestifying Defendant

People v. Houston (2012) 54 Cal.4th 1186, 1223:

It is improper to comment on a nontestifying defendant’s demeanor in closing argument during the guilt phase of the trial. Thus, it was misconduct for the prosecutor to contrast defendant’s crying during the defense closing argument with defendant’s failure to show any emotion when the victims were discussed. Asking “the jury to note defendant’s lack of crying ... implied a lack of remorse.”

People v. Boyette (2002) 29 Cal.4th 381, 434:

“[C]omment during the guilt phase of a capital trial on a defendant’s courtroom demeanor is improper unless such comment is simply that the jury should ignore a defendant’s demeanor.” (Citations omitted.) Thus, it is misconduct for a prosecutor to suggest “that the jury should find defendant was duplicitous [or remorseless] based on his courtroom misconduct.”

W. Misstating Facts

People v. Fuiava (2012) 53 Cal.4th 622, 693-694:

The prosecutor committed misconduct in closing argument in describing how the testifying deputy felt about his emotional breakdown on the witness stand, which impermissibly argued facts not in evidence. The prosecutor also went too far in describing defendant as a “killing machine” and asking the jury “how many other
[victims] are there?”, despite the lack of any evidence that defendant ever killed anyone else. These comments called for improper speculation. (At pp. 728-729.)

People v. Souza (2012) 54 Cal.4th 90, 135-136:

While finding the prosecutor’s misstatements inconsequential, the Court agreed that the prosecutor was wrong to state in closing argument that defendant would benefit from privileges such as family and conjugal visits in prison. “Prisoners serving sentences of life without the possibility of parole are not entitled to conjugal or overnight visits with family.”

People v. Collins (2010) 49 Cal.4th 175:

Although the prosecutor had used the transcript of a witness’s statement to the police during her cross-examination of defendant, the witness “was never questioned about the quoted portion’s accuracy. Therefore, no foundation was laid for its admissibility.” Thus, it was improper for the prosecutor to read from the statement during her closing argument because no such facts were in evidence.

People v. Tate (2010) 49 Cal.4th 635, 704, fn. 39:

Prosecutor committed misconduct in his penalty phase closing argument by referring “the jury to a series of questions as to which objections had been sustained . . . .”

People v. Friend (2009) 47 Cal.4th 1, 82:

During his cross-examination of defendant at penalty phase, the prosecutor asked defendant about the contents of certain letters which the prosecutor believed defendant had written. The California Supreme Court inferred that the prosecutor had a good faith belief that defendant had authored the letters but still found that the prosecutor committed misconduct in his closing argument when he described his factual basis for believing that defendant wrote the letter because those facts were not in evidence.


In reversing defendant’s conviction due to numerous incidents of prosecution misconduct, the appellate court found that the prosecutor argued facts not in evidence when the prosecutor tried to bolster the officer’s credibility by describing drug dealers as being so brazen that “‘kids . . . drive their cars right up to the curb, put their hand out, exchange some money and drive off. It is a regular swap meet in Los Angeles County right now . . . . If you want the drugs, you can pretty much drive up to any street in Los Angeles.’” Since there was no such evidence and these were not matters of common experience, it was misconduct to make these statements.

People v. Boyette (2002) 29 Cal.4th 381, 452:
Prosecutor in a death penalty case committed misconduct in her closing argument when she tried to explain her failure to prove certain hypothetical facts in her questions by stating that, “‘I did not waste your time with that type of information.’” (Emphasis supplied by the Court.) The Supreme Court held that “[s]uggesting that she had witnesses who would have testified to certain facts when she did not call such witnesses is misconduct.”

X. Speculation/Misstating Evidence

People v. Shazier (2014) 60 Cal.4th 109, 148:

Although it held that defendant was not prejudiced by the prosecutor’s insinuations that he had committed other crimes the jury never heard of, the California Supreme Court found it “doubtful the prosecutor had a proper basis to imply, either substantively or for purposes of impeachment, that contrary to defendant’s claim, he had committed an unknown number of further crimes.”

Y. Misconduct During Voir Dire


Prosecutor committed misconduct during jury voir dire by referring to matters outside the record, specifically, “the experiences of the prosecutor and of the victims’ families in other cases on which the prosecutor had worked.” (At p. 386.) The improper comments included statements that the prosecutor handled only rape and molestation cases, the number of years he had been handling those cases, and the emotional reactions of victims’ families during jury deliberations in other cases, followed by later asking jurors why it took them so long to reach their guilty verdicts. (Ibid.)

Z. Improper References to Jury Voir Dire

People v. Johnson (2016) 62 Cal.4th 600, 652:

It is improper for counsel to quote a seated juror’s voir dire responses or to utilize a chart “displaying questionnaire comments” in closing argument. Further, “[a]rguments should be addressed to the jury as a body and the practice of addressing individual jurors by name during the argument should be condemned rather than approved….” However, defendant’s failure to object waived any appellate claim that the prosecutor committed misconduct by individually asking each of the twelve jurors whether they were “‘indignant yet’” because of the harm caused by defendant. The prosecutor asked these questions in the course of his punishment phase closing argument that “‘justice will be served when those who are not injured by crime feel as indignant as those who are.’”

People v. Riggs (2008) 44 Cal.4th 248, 324-326:
It was improper for the prosecutor to use a chart in penalty closing which contained "enlarged copies of 12 handwritten responses from jury questionnaires" stating the jurors’ "views regarding the purpose served by the death penalty." Although the prosecutor never expressly stated that these statements were made by any of the jurors, the implication was inescapable because the jurors were able to recognize their own handwriting. Thus, the chart was improper because it "offered facts not in evidence . . . and quoted individual jurors . . . ." (At p. 326.) Moreover, the 12 responses included responses from seven seated jurors, two alternates, and three potential jurors who were excused during jury selection and did not serve on the jury, but the chart was misleading because of the implication that the 12 responses were from the 12 jurors who served at penalty phase. (Ibid.)

AA.  Biblical References

People v. (Cedric) Harrison (2005) 35 Cal.4th 208, 247:

A prosecutor’s biblical reference in an appeal to religious authority is improper at the guilt phase of a trial, not just the penalty phase.

People v. Fuiava (2012) 53 Cal.4th 622:

The California Supreme Court condemned portions of the prosecutor’s penalty phase closing argument, while finding the objections had been waived and were therefore not a basis for reversal. First, the prosecutor improperly invoked biblical passages. Although the prosecutor prefaced his comments by stating that “jurors should not let their ‘religious convictions save [defendant’s] life,” his reminder that “‘Whoso sheddeth man’s blood by man shall his blood be shed for in the image of God made He man’ (Genesis 9:6) was improper “even taken in context” of the prosecutor’s argument. (53 Cal.4th at p. 727.)

People v. Roldan (2005) 35 Cal.4th 646, 743:

It is “’patent misconduct’” for the prosecutor to refer “to portions of the Bible he asserted conveyed approval of capital punishment.” “When prosecutors invoke religious rhetoric (‘[‘”an eye for an eye, a tooth for a tooth”’]), when they rely on what they purport to be ‘God’s will’, or when they argue based on what they take to be the true meaning of scriptural passages, all to convince a jury to impose the death penalty, they create and encourage an intolerable risk that the jury will abandon logic and reason and instead condemn an offender for reasons having no place in our judicial system.” (Citations omitted.) The Court, however, found that no such prejudicial error occurred in Roldan.

People v. Vieira (2005) 35 Cal.4th 264, 296-297:

Prosecutor committed “misconduct by referring to the Bible and religion in order to persuade the jury to sentence defendant to death”, although reversal was not required because defendant forfeited the issue by his failure to object at trial, the failure to object did not necessarily constitute ineffective assistance of counsel, and the misconduct was
not prejudicial. The improper argument consisted of the following: “Something I want to touch on. And I want to tell you this is not an aggravating factor. I only bring up the subject in the event any of you have any reservations about it, then hopefully I can... help with that. That’s the subject of religion. This is not aggravating at all. People from time to time have a problem because they say, “Gee, in the Bible it says ‘Thou shall not kill,’ and ‘Vengeance is mine sayeth the Lord. I will repay.’” That’s found in Romans. But in the very next passage... , it goes on and calls for capital punishment and says, “[t]he ruler bears not the sword in vain for he is the minister of God, a revenger to execute wrath upon him that doeth evil.” He’s talking about the ruler, the government, whatever. Judeo-Christian ethic comes from the Old Testament I believe the first five books called the Torah in the Jewish religion. And there are two very important concepts that are found there. And that’s, one, capital punishment for murder is necessary in order to preserve the sanctity of human life, and, two, only the severest penalty of death can underscore the severity of taking life. [¶] The really interesting passage is in Exodus, chapter 21, verses 12 to 14: “Whoever strikes another man and kills him shall be put to death. But if he did not act with intent but they met by act of God, the slayer may flee to a place which I will appoint for you.” Kind of like life without possibility of parole, haven, sanctuary. “But if a man has the presumption to kill another by treachery, you shall take him even from my altar to be put to death.” There is no sanctuary for the intentional killer, according to the Bible. [¶] Now, I’ll leave it at that. That was just in the event any of you have any reservations about religion in this case.” Moreover, defense counsel must recognize the Supreme Court’s warning against such biblical arguments in the future. The Court noted that the prosecutor’s argument in Vieira was given before the series of California Supreme Court decisions in 1992-1993 “clearly condemning prosecutorial reliance on biblical authority in penalty phase closing argument”, and therefore cautioned that “[w]e do not decide whether prosecutorial biblical argument that postdates and deliberately contravenes the holdings in those decisions constitutes a more serious form of prosecutorial misconduct warranting reversal of the penalty phase judgment.” (At p. 298, fn. 11.)

BB. Media Communications

People v. McKinzie (2012) 54 Cal.4th 1302, 1326-1327:

After the prosecutor repeatedly baited defendant during jury selection despite being cautioned by the trial judge, defendant said, “I’ll tear his head off.” Before the hearing on whether defendant’s statement would be admissible in aggravation, the prosecutor gave a reporter a transcript of the hearing including defendant’s comments. The California Supreme Court held that the prosecutor’s conduct constituted misconduct. “Whether intended to influence the trial court’s pending decision regarding the admissibility of defendant’s statements or to put before prospective jurors potentially prejudicial and inadmissible evidence regarding defendant’s character, [the prosecutor]’s conduct derogated from his duty to act as an impartial public fiduciary sworn to promote the even-handed administration of justice.” (At p. 1327.)

CC. Cannot Argue “Precedent”; Denigrating Right to Jury Trial
People v. Jasso (2012) 211 Cal.App.4th 1354:

Reiterating that prosecution misconduct in closing argument is more aptly described as “prosecutorial error” and does not require any showing of bad faith, the court of appeal held that the prosecutor committed error in his closing argument by stating “that the California Supreme Court and the California Court of Appeal had upheld guilty verdicts on facts similar to those before the jury…” He should not have invoked the authority of any court that one or more jurors could surmise outranks the trial court.” He “implied that the California Supreme Court would expect the jury to return a guilty verdict [by stating that] ‘the California Supreme Court … says that the act of purposely firing a gun at another human being, at close range, provides the inference that the shooter acted with the intent to kill. The shooting alone proves the Defendant’s intent. That’s it.’” The error was exacerbated by his further argument “that the state was just going through the motions in trying defendant because the case against him was so strong. He said, ‘We are here because the Defendant has this right to this process…. And that is the only reason we are here, because he has this right.’” The prosecutor also committed misconduct by misstating the evidence. As the court held, his “erroneous description of the evidence … by definition constituted misconduct.”

DD. References to Punishment are Improper

People v. (Alex) Thomas (2011) 51 Cal.4th 449, 486:

Prosecutor committed misconduct in closing argument at the guilt/innocence phase when he stated that “[t]he defense strategy … is to beat the special circumstance…. [I]f you don’t find . . . the special circumstance to be true, that’s a win for [defendant]. Life in prison with the possibility of parole.’” The Supreme Court held: “It was improper for the prosecutor to argue to the jury that defendant could be released on parole if it did not find the special circumstances allegation true.”

People v. Ellison (2011) 196 Cal.App.4th 1342:

Prosecutor committed misconduct in closing argument by misstating the burden of proof. The prosecutor argued that the burden of proof meant, “‘is it reasonable that the defendant [is] innocent.’” (At p. 1352.) The argument was improper because the question is not whether or not the defendant’s innocence is reasonable, but whether the evidence has proven the defendant guilty beyond a reasonable doubt. (At p. 1353.)

EE. Misconduct in Examination of Witnesses

People v. Tate (2010) 49 Cal.4th 635, 689-690:

Prosecutor committed misconduct by “attempting to inject extraneous evidence of defendant’s propensity for violence” during his direct examination of defendant’s aunt at the guilt phase. After defendant’s aunt described defendant entering the house sometime
before the murder, the prosecutor asked her if everyone else left the house once he entered. Not satisfied with the aunt’s answer that defendant went to see his mother inside the house and the aunt did not time his stay, the prosecutor asked if she had previously told the police “‘that when [defendant] entered the house that everyone ran out because [defendant] is very violent’” and asserted that “‘[defendant] had kicked in the door in your house’”. The Supreme Court agreed that “the prosecutor committed misconduct,” but found that the trial court cured any prejudice by preventing the witness from answering the question, “sustaining the defense objection, instruct[ing] the jury to disregard the question, and admonish[ing] the prosecutor in front of the jury.”

**People v. Tate** (2010) 49 Cal.4th 635, 701-704:

Prosecutor committed misconduct through his insinuations during his cross-examination of defendant’s mother at penalty phase. Among other aspects of defendant’s life history, she testified that “the family ‘fell apart’” after the death of her father when defendant was a teenager, with family tensions sometimes exploding into violence. Although the California Supreme Court found that certain questions were proper, albeit presenting “a close question”, to the extent they tended to show that some of defendant’s violent conduct against other family members continued well after the death of his grandfather, the Court held that the prosecutor committed misconduct in asking questions about defendant’s assault on a nonrelative, and a “‘throat-cutting’ assault” against another relative who was not involved in problems she had described on direct examination.

**People v. Hinton** (2006) 37 Cal.4th 839, 866:

Prosecutor committed misconduct in cross-examining defendant on matters upon which the prosecutor had no evidence to support the insinuations posed by his cross-examination. Prosecutor asked “whether defendant could have obtained a gun in his neighborhood. Defendant agreed that he could have done so. The prosecutor then asked whether defendant could have obtained a gun in ‘the area of [his] car’ and, when defendant said, ‘no,’ asked whether defendant kept a gun in his car, had ever kept a gun there, and whether a gun had been found in his car when he was arrested. At this point, the defense objected, and the parties conferred at sidebar. The court observed that ‘there has to be some evidence of the fact there was a gun in the car when he was arrested ... for you to be asking these questions’ and asked for an offer of proof. After reviewing the arrest report, defense counsel pointed out that the gun had actually been recovered from defendant's person. The court granted the defense motion to strike and informed the jury that ‘the questions and answers related to a gun being found in the defendant’s car have been stricken. You are instructed to disregard them as though they were never asked or answered.’” The Supreme Court cited to the trial court’s admonition in finding that defendant was not prejudiced by the prosecutor’s misconduct.

**People v. Boyette** (2002) 29 Cal.4th 381, 450-452:

The prosecutor in this a death penalty case committed misconduct by propounding no fewer than six unfounded hypothetical questions to a defense psychiatrist. The court
reiterated that “a party cannot [use hypothetical questions] to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.” (At p. 449.)

**FF. Misconduct During Testimony of Witnesses (Conduct and Gratuitous Comments)**

People v. Collins (2010) 49 Cal.4th 175:

Prosecutor’s gratuitous comments about defendant’s answers during cross-examination were improper although there was no prejudice because the comments were de minimus. The specific comments were, “‘A quick thinker, aren’t you, Mr. Collins?’” and, “[i]n another incident, . . . ‘Pretty sharp thinking, pretty smooth.’”

People v. (Bob Russell) Williams (2006) 40 Cal.4th 287:

Prosecutor (Kern County District Attorney Ed Jagels) committed misconduct during defendant’s direct examination at penalty phase. When defendant testified that his stepmother had sexually molested him, the prosecutor slammed down a binder or notepad and rolled his eyes. The Supreme Court agreed that the prosecutor committed misconduct and approved of the trial court’s admonition to the prosecutor.


Prosecutor committed misconduct after defendant’s mother requested a chance to compose herself before cross-examination, when the prosecutor responded, “‘A performance like that, I can understand why.’“ The retort was improper because it clearly communicated the prosecutor’s belief that defendant’s mother was being untruthful in her testimony.

**GG. Prosecutor’s Behavior During Closing Argument**


Prosecutor committed misconduct in closing argument when he stood immediately across from defendant at counsel table, yelling and pointing at him repeatedly as he spoke directly to defendant. The Oklahoma Court of Criminal Appeals reversed defendant’s death sentence because, among other errors, “the manner in which the prosecutor presented his closing argument—yelling and pointing at the defendant as he addressed him directly—was highly improper and potentially prejudicial.”

**HH. Intimidation of Witnesses**

Earp v. Ornoski (9th Cir. 2005) 431 F.3d 1158, cert. den. (2006) 547 U.S. 1159:

Defendant was entitled to an evidentiary hearing in support of his claim of prosecutorial misconduct because, if true, evidence that the prosecution dissuaded a defense witness
from testifying might demonstrate sufficient prejudice to vacate his death sentence. Specifically, a prosecution witness (Morgan) testified at trial, directly contradicting defendant’s testimony that defendant did not kill the victim but had left the prosecution witness (Morgan) inside the victim’s residence alone with the victim and later returned to find the victim dead while the witness (Morgan) was still present. The prosecution witness testified that he had never been inside the victim’s home and did not even know where it was. During jury deliberations, however, a jailhouse witness told a defense investigator that he overheard the prosecution witness (Morgan) tell another inmate that he had, in fact, visited the victim’s house on the date in question. Later on the same day in which the witness made these disclosures, the witness received a visit from the prosecutor, who “verbally abused him, and told him that he would never get out if he stood by his statement.” Thus, the jailhouse witness retracted his statement and did not testify, although he insisted that his initial statement to the defense investigator was true and he only “capitulated in the face of the prosecutor’s threats . . . .”

II. Interference With Defense Team: Eavesdropping on Confidential Communications

People v. Shrier (2010) 190 Cal.App.4th 400:

Where the prosecution has eavesdropped on confidential communications between the defendants and defense counsel while they reviewed the physical evidence in the prosecution’s office, sanctions are required. “At a minimum, [the trial court] shall bar the use of any information gleaned from the eavesdropping and any derivative evidence which may have flowed therefrom. The People shall have the burden to show that any People’s evidence sought to be introduced has an independent origin from the eavesdropping. The burden of proof is beyond a reasonable doubt. In addition, the superior court may make any other order or impose any other sanction which it deems appropriate.” The court of appeal, however, ruled that dismissal was not required because, among other reasons, the eavesdropping was orchestrated by a law enforcement agent, who apparently acted unilaterally, “not the prosecutor who was unaware of the eavesdropping plan.”

JJ. Inconsistent Factual Scenarios in Severed Trials

In re Sakarias (2005) 35 Cal.4th 140:

Defendant and his codefendant were prosecuted at separate trials by the same prosecutor. The evidence demonstrated that both defendants participated in the fatal attack, which was committed with a knife and a hatchet. However, the prosecutor argued to the separate juries that each defendant inflicted the fatal blows, although only one could have inflicted each of these blows. The Supreme Court vacated the death sentence against one defendant (Peter Sakarias) because “the prosecutor violated his due process rights by intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials, attributing to each [defendant] in turn culpable acts that could have been committed by only one person.” (At p. 145.) “[F]undamental fairness
does not permit the People, without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where, as in Sakarias’s case, the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained.” (At pp. 155-156.) Further, manipulation of the evidence for the purpose of pursuing inconsistent theories establishes the prosecutor’s bad faith.” (At p. 162; original emphasis.) Moreover, “[a]t least where the punishment involved is death, due process is as offended by the People’s inconsistent and irreconcilable attribution of culpability-increasing acts as by the inconsistent and irreconcilable attribution of crimes.” (At p. 160.)

**J J. No Bad Faith Required**

*People v. Bramit* (2009) 46 Cal.4th 1221, 1241:

A showing of bad faith is not required to establish prosecutorial misconduct.

**K K. Preserve the Issue!**

*People v. Covarrubias* (2016) 1 Cal.5th 838, 893-894:

An objection that the prosecutor’s closing argument misstates the law fails to preserve the appellate claim that the prosecutor’s argument constituted an improper appeal to the passions of the jury.

*People v. Reyes* (2016) 246 Cal.App.4th 62, 76-77:

Although defense “counsel objected to the prosecutor’s comments on grounds they misstated or minimized the standard [of proof], he did not object that the prosecutor’s statements constituted misconduct. Counsel forfeited any claim of prosecutorial misconduct in connection with these remarks by failing to assign misconduct to the prosecutor’s statements.”

*People v. Peoples* (2016) 62 Cal.4th 718, 801:

Although defendant did not make a contemporaneous objection to the asserted misconduct committed by the prosecutor in his initial closing argument, the issue was preserved for appeal because he moved for a mistrial the following day, “before defense closing arguments began, thus providing the trial court with an opportunity to admonish the jury prior to the start of deliberations. Moreover, defendant’s objections were specific enough for the trial court to craft suitable corrective instructions.”
People v. Burney (2009) 47 Cal.4th 203, 265-266:

In holding that the defendant had failed to preserve any claim of prosecutorial misconduct in penalty phase closing argument because defendant did not object to the closing argument, the California Supreme Court held that defendant’s subsequent “request for a special jury instruction is not the equivalent of or a substitute for a required objection to prosecutorial misconduct.”

People v. Wallace (2008) 44 Cal.4th 1032, 1095:

Defendant failed to preserve his claim of prosecutorial misconduct in questioning a prosecution witness, despite his specific relevance objection to the question, which was sustained by the trial court, because he failed to request an admonition. Likewise, defense counsel failed to preserve a claim of prosecutorial misconduct in closing argument, despite objecting to the prosecutor’s comment, because he “did not ask the jury to disregard it.”

XI. Permissible Closing Argument

A. References to other, well-known cases or literature

People v. Dykes (2009) 46 Cal.4th 731:

Although the California Supreme Court has repeatedly criticized defense counsel’s invocation of specific references to other murder cases in arguing that the defendant, by comparison, should not be sentenced to death because his crimes were not as aggravated as the other murders, the court found no error in allowing the prosecutor to specifically identify notorious cult murders in arguing there was a lack of mitigation in defendant’s case because, unlike those cult murders, defendant was not influenced by anyone else.

People v. Bramit (2009) 46 Cal.4th 1221, 1242-1243:

Pointing out that it “has repeatedly held that in closing argument attorneys may use illustrations drawn from common experience, history, or literature”, the court found no error in the prosecutor reading “a passage from a magazine article entitled, ‘Sorry I Killed You, but I Had a Bad Childhood...’” in her penalty closing argument. The lengthy excerpt was quoted in full in the opinion, and expressed the law’s need to prioritize strict personal accountability over “imperfect social science, which seeks to explain behavior...” (id. at p. 1242, fn. 16.)

People v. Loker (2008) 44 Cal.4th 691, 741-742:

Prosecutor did not commit misconduct in discussing a book in closing argument, including the title, author and theme of the book. “The wide latitude given to advocates during penalty closing argument generally allows comments drawn from common
experience, history, or literature”, and it is proper to refer “to a viewpoint that was a matter of common experience.”


It is permissible to refer to well-known incidents which illustrate the point of counsel’s closing argument because counsel is permitted to make references to matters of common experience or knowledge.

People v. Jablonski (2006) 37 Cal.4th 774, 836-837:

It is not misconduct to briefly refer to other well known cases as examples of cases which raise the same issues presented in the case at hand, as long as counsel does not compare the defendants or the facts in the different cases.

B. Right to re-open closing argument

People v. Ardoin (2011) 196 Cal.A pp.4th 102, 129:

Trial court was required to reopen closing arguments to allow defense counsel to give a rebuttal closing argument after the court gave a clarifying instruction to the jury during its deliberations which allowed the jury to consider a new theory of guilt. Penal Code section 1093.5 requires the court to “inform counsel of ‘all instructions to be given’ before the ‘commencement of argument . . . .’” Before closing argument, the court and counsel agreed that the felony-murder and aiding-and-abetting instructions should refer only to the codefendant. During jury deliberations, however, the jury asked if defendant could be convicted under a felony-murder theory. The trial court replied that he could. In response, defense counsel unsuccessfully moved to reopen argument. The appellate court found no error in giving the clarifying instruction, but held “that once the trial court decided to clarify the felony-murder instruction to include both defendants, fairness dictated that the court also reopen the case for the limited purpose of granting [defendant’s] counsel the right to offer rebuttal argument.” “If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of section 1093.5 and the defendant’s right to a fair trial may be compromised.”

XII. Sufficiency of Evidence

People v. Pedroza (2014) 231 Cal.A pp.4th 635:

Double jeopardy precluded further prosecution of defendant for a gang-related first degree murder and other charges where the trial judge granted defendant’s motion for new trial based on its finding that the evidence was insufficient as a matter of law to support the jury’s verdict. The conviction was dependent on the testimony of an accomplice. However, in ruling on defendant’s new trial motion, the court expressly
found that “the evidence corroborating the testimony of the accomplice was insufficient...” and the court of appeal found that the trial court did not “err in finding the evidence was insufficient as a matter of law.” Although independent evidence of a defendant’s motive may be sufficient corroboration where it shows that “defendant in particular had a motive to participate in the ... killing ...,” “evidence that corroborates portions of the accomplice’s testimony, but which does not tend to connect the defendant to the crime, is not enough by itself to constitute sufficient corroboration under section 1111.” “The evidence showed defendant belonged to a gang in which unspecified members killed other members, for unspecified reasons, and he was in the company of one admitted perpetrator, ..., at least three hours after the murder took place. Yet “it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime, but evidence independent of the testimony of the accomplice must tend to connect a defendant with the crime itself, and not simply with its perpetrators.”” (At p. 651.)

People v. Boatman (2013) 221 Cal.App.4th 1253:

First degree murder conviction reduced to second degree murder because the evidence was insufficient to support a finding of premeditation and deliberation as a matter of law. Defendant’s girlfriend was shot after defendant cocked his loaded revolver and pointed it at her. Defendant said that the gun accidentally discharged after the two had been playing with the gun. Defendant told his friend to call 911 immediately after the shooting, attempted to resuscitate his girlfriend, and was visibly upset when the police arrived. Applying the factors set forth in People v. Anderson (1968) 70 Cal.2d 15, the appellate court observed there was no evidence of planning, motive, or that the killing was “‘execution-style.’” Although defendant “gave multiple false versions of how [she] was shot...,” disbelief of his statements, without more, did not affirmatively establish “‘that defendant did that which he denied doing.’” Further, while cocking a loaded firearm was sufficient to establish malice, standing alone it failed “to support a finding of premeditation and deliberation.” The appellate court also discounted a neighbor’s pretrial statement that she heard “a loud screaming argument” for a few minutes before the gunshot because she explained at trial that she only heard “loud talking” before the shooting, and heard the screaming after the shot was fired, characterizing it as if “‘someone was panicking, like yelling or screaming like out of fear.’”

People v. Pearson (2012) 53 Cal.4th 306, 318-319:

Finding that defendant had personally used a deadly weapon reversed because the evidence was insufficient to support it as a matter of law. The victim was beaten and penetrated with a wooden stake. Defendant attributed those actions to the other assailants, “and no other statements or testimony from percipient witnesses was introduced at defendant’s trial.” Further, “no physical evidence tied defendant specifically to the stake, which police did not recover.” Thus, despite evidence that defendant kicked and raped the victim, “[n]o witness testified defendant used the stake, no out-of-court statements to that effect were introduced, and no physical evidence
indicated he had used it." The mere possibility that he may have used it was insufficient to prove that he did use it.

People v. Velazquez (2011) 201 Cal.App.4th 219:

Trial court erred in denying defendant’s motion for directed verdict on several counts, which was made after the defense rested, because the evidence at that point failed to support those counts. Mere “[d]isbelief of defendant’s testimony, without more, does not constitute ‘other facts’ from which logically flows the conclusion, beyond a reasonable doubt, that defendant did that which he denied doing.” Moreover, although “the prosecution’s evidence in rebuttal provided the missing evidence, and thus would support the convictions…,” such evidence could not be considered in evaluating the motion for directed verdict which was made before that time.


Ninth Circuit vacated juvenile adjudication finding minor guilty of first degree murder because the evidence was insufficient as a matter of law to prove the minor guilty beyond a reasonable doubt, in violation of the Due Process Clause of the Fourteenth Amendment. Victim was murdered in a gang related shooting. Minor had previously made gang gestures and stared down a neighbor who was walking with the victim at the time the victim was killed. About one and one-half hours before the killing, someone had fired shots into minor’s residence. At the time of the murder, minor’s brother confronted the neighbor and victim and asked “if they ‘were the ones that shot up his pad.’” Minor had followed his brother to that location and was standing behind his brother at the time, when his brother shot and killed the victim. Minor “did not say anything, make any gestures, or otherwise encourage” his brother during the shooting. Afterwards, his brother fled, and minor ran to his family’s home. As police arrived at their residence, where a hostile crowd had gathered, minor and the rest of his family were attempting to drive away. During his subsequent interrogation, minor falsely claimed that he had been inside the family home during the shooting. The Ninth Circuit held that no factfinder could reasonably conclude that the minor “provided ‘backup,’ in the sense of adding deadly force or protecting his brother in a deadly exchange”, merely by standing unarmed behind his brother. “That [he] stood behind his older brother after the family home had been attacked, even if he knew his brother was armed, does not permit the rational inference that he knew his brother would, without provocation, assault or murder the victims.” (At p. 1278.) Further, “[n]o reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting, regardless of whether the home was in the same general direction as the car of a fleeing suspect. Likewise, any rational factfinder would find little or no evidence of guilt in the fact that Juan H. attempted, along with the rest of his family, to leave his home as it was being surrounded by an angry mob of neighbors.” (At p. 1277.) Finally, it was “bare conjecture” and “mere speculation” to conclude that the minor’s false alibi reflected a consciousness of guilt sufficient to prove him guilty because he “might have made a false statement to law enforcement for any number of reasons, especially given that any statements he made as a witness would likely be used to prosecute his older
brother, a member of his immediate family.” (Ibid.) Therefore, the California Court of Appeal decision affirming his adjudication of guilt “was an unreasonable application of the Fourteenth Amendment requirement that the prosecution present evidence sufficient to prove every element of a crime beyond a reasonable doubt.” (Ibid.)

XIII. Protecting Holdout Jurors

People v. Allen and Johnson (2011) 53 Cal.4th 60:

Death sentence and murder convictions reversed because trial court erroneously discharged a juror for allegedly (1) prejudging the case and (2) relying on facts outside of the record where the record did not establish either basis “to a demonstrable reality”.

“A lthough the record amply demonstrates that during deliberations Juror No. 11 did say words to the effect that, ‘When the prosecution rested, she didn’t have a case,” the precise meaning of his statement is not entirely clear.” Further, the juror’s “statement was made during deliberations, and only made in reference to his previous state of mind at a single point during the trial. It did not indicate an intention to ignore the rest of the proceedings.” In reversing the trial court’s finding of prejudging the case, the Supreme Court observed that the juror “voted ‘undecided’ on the fifth day of deliberations” and participated in the deliberative process. Moreover, the Court cautioned against “relying on the opinions of jurors” it interviewed during its investigation into potential juror misconduct. (Original emphasis.) It is proper for a trial court to rely on a juror’s description of the conduct or statements of other jurors, but “[t]he jurors’ opinions” about the comment by the juror in question “should not have played a role in the court’s ruling.”

The Supreme Court also held that the juror did not rely on facts that were not in evidence, emphasizing that a juror is entitled to rely “on his or her life experience when evaluating evidence.” (Original emphasis.) The context of the specific issue involved an assessment of the credibility of an eyewitness whose testimony was contradicted by his timecard at work. The eyewitness claimed that his Hispanic friend punched in for him at work. The juror, however, told the other jurors during deliberations that he knew Hispanics and they don’t cheat on timecards. The Supreme Court held that the juror’s “remark did not constitute misconduct . . . [because] [i]t was an application of his life experience, in the specific context of timecards and the workplace, that led him to conclude [the eyewitness] was not telling the truth about the shootings.”

By contrast, the Supreme Court agreed that misconduct was committed by two of the jurors who complained about the discharged juror. Those two jurors had met separately and discussed their complaints about the discharged juror. Although they did not discuss the facts or law, they committed misconduct by meeting separately to discuss their complaints concerning the other juror. (At fn. 7.)

Sanders v. Lamarque (9th Cir. 2004) 357 F.3d 943:
Murder conviction vacated because of the improper removal of the lone holdout juror during deliberations. During the course of investigating whether the holdout juror was participating in deliberations or actually biased against the prosecution, the trial court learned that the juror had lived within the vicinity of a gang neighborhood 20 years before the murder occurred in the same neighborhood. The trial court then removed the juror because she had failed to disclose such information in jury voir dire. The trial court agreed that the juror was not actually biased against the prosecution but removed her based on the prosecutor’s representation that he would have used a peremptory challenge to disqualify her had he known of the additional information. The Ninth Circuit, however, ruled that the juror could not be faulted for failing to disclose the additional information; instead, the prosecution’s “failure to discover [the] information . . . was due to its own lack of diligence and not any concealment or deliberate withholding of information by” the juror.

People v. Armstrong (2016) 1 Cal.5th 432, 437:

Death sentence and all convictions reversed—including three counts of special circumstance murder, two counts of premeditated attempted murder, and five other felony counts—because “the trial court discharged a juror for failing to deliberate” during the culpability phase deliberations but the record failed to “show as a demonstrable reality that the juror was unable to perform her duty....” After a nine-day trial, the jury deliberated two full days before declaring it was deadlocked on all counts. Some of the jurors provided notes to the judge. Two notes claimed that the defense juror was biased; in turn, the defense juror claimed a pro-conviction juror was biased. The trial judge excused both jurors, the defense juror “for refusing to deliberate”; the other “for implied bias based on his friendship with defendant’s cousin and failure to report the relationship to the court.” (The latter claimed that the cousin “described defendant as a ‘cold, heartless, killer, and an active criminal.’”) In discharging the defense holdout, the trial court concluded “that although [she] ‘has deliberated with the other jurors, [she] is now of a fixed opinion, is not deliberating further.’” (At p. 449.) The supreme court held that the trial court abused its discretion in discharging that juror. “That [the juror] was not willing to engage in further discussion, by itself, does not show as a demonstrable reality that she was failing to deliberate. It is not uncommon, or grounds for discharge, ‘for a juror (or jurors) to come to a conclusion about the strength of a prosecution’s case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors.’” (At p. 453.) Further, the mere fact that the juror “looked at a book and a cell phone ‘one or two times’ for ‘a few minutes...’” after refusing to change her mind was “de minimis ... and [did] not support a determination that [she] was refusing to deliberate.”

People v. Nelson (2016) 1 Cal.5th 513:

Trial court committed reversible error in subjecting jurors to a written questionnaire and orally questioning some jurors concerning the deliberation process after they had declared they were deadlocked, and then removing a holdout juror based on the information it learned. After 6 days of deliberation at the punishment phase, the jury
announced it was deadlocked 10-2. There was no allegation of juror misconduct. However, the impatient prosecutor asked the court to give the jurors a questionnaire concerning their deliberations, and the judge did so over defendant’s objection. Condemning the trial court’s actions, the California Supreme Court observed that, although a trial judge “may intervene in jury deliberations where it receives reports of juror misconduct or in response to an impasse, ... such interventions must be limited and undertaken with the utmost respect for the sanctity of the deliberative process. In this case, the trial court went considerably beyond any permissible intervention and took action that undermined the sanctity of jury deliberations and invaded the jurors’ mental processes. Based solely on the reported impasse, the court subjected the jurors to a detailed questionnaire that asked them to report on the thoughts and conduct of their fellow jurors—specifically, whether the jurors were refusing to deliberate, whether they were basing their position on anything other than the evidence and jury instructions, and whether they were expressing views about the inappropriateness of the death penalty or life without parole based on anything other than evidence and law. It was clear to the jury that the purpose of this inquiry was to solve the problem of the jury’s deadlock, and the inquiry therefore communicated to holdout jurors that their deliberative processes would be reported by fellow jurors and scrutinized by the court. This was improper.” (At pp. 569-570.) Although the trial court ultimately found that the holdout juror had made an “intentional ‘misrepresentation’ on her original juror questionnaire...,” the Supreme Court observed that “the information that led to the removal of [the juror] came to light only when the court improperly gave the questionnaire to the jurors. The questionnaire fostered a selective disclosure process: It was clear that the point of the questionnaire was to expose the conduct and thought processes of the holdout jurors, not jurors in general.” (At p. 572.) “The selective scrutiny to which [the juror] was subjected and the dubiousness of the trial court’s grounds for excusing her further highlight the impropriety of the court’s unwarranted intrusion into the deliberative process and its coercive effect.” (At p. 573.)