1-1-1990

The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances

John W. Paulos

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol30/iss2/1

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
ARTICLES

THE LUCAS COURT AND CAPITAL PUNISHMENT: THE ORIGINAL UNDERSTANDING OF THE SPECIAL CIRCUMSTANCES

John W. Poulos*

TABLE OF CONTENTS

I. Introduction ........................................ 335

II. The Evolution Of The Special Circumstance As A Device To Define Death Sentence Eligibility ........................................ 337
   A. The Historical Background ....................... 337
   B. The 1973 Legislation ........................... 342
   C. The 1977 Legislation ........................... 346
   D. The 1978 Death Penalty Initiative .............. 352
      1. Summary Of Changes Wrought By The 1978 Initiative ........................................ 358

III. The Nature Of The Special Circumstances .......... 359
   A. An Introductory Analysis ........................ 359
   B. The Bird Court Precedent ....................... 364
   C. The Lucas Court's Original Understanding ........ 368
      1. Method for Deciding Whether an Element of an Offense or Special Circumstance is Created ........ 389
      2. Role of Jury Instructions on Elements of a Crime of Special Circumstance ................. 393

© 1989 by John W. Poulos.
* Professor of Law, University of California, Davis. A.B., 1958, Stanford University; J.D., 1962, University of California, Hastings College of the Law. I would like to thank my wife, Deborah Nichols Poulos, for reading and commenting on this manuscript during its preparation.

The author recently represented a defendant in his automatic appeal to the California Supreme Court. That appeal has been decided. The opinion in that case is not one of the eleven opinions discussed in this article.
IV. The Law Of The Special Circumstances ........................................ 400
   A. The Heinous-Atrocious-Or-Cruel Special Circumstance .................. 400
   B. The Torture-Murder Special Circumstance .................................. 402
   C. The Felony-Murder Special Circumstance .................................. 406
       1. Introduction ........................................................................ 406
       2. The Carlos Intent-to-kill Rule ......................................... 408
          a. The Bird Court ....................................................... 408
          b. The Lucas Court ................................................... 411
       3. The Green Intent Rule .................................................... 413
          a. The Bird Court ....................................................... 413
          b. The Lucas Court ................................................... 416
       4. The Harris Overlapping-felony Rule ..................................... 420
          a. The Bird Court ....................................................... 422
          b. The Lucas Court ................................................... 425
       5. The Burden Of Requesting The Melton Anti-Inflation Instruction .......... 428
       6. The Unitary Theory Of The Felony-murder Special Circumstance ......... 430
       7. The Underlying Felony .................................................... 434
          a. Litigating The Underlying Felony ................................ 434
             1) The Bird Court ................................................... 434
             2) The Lucas Court ................................................... 435
          b. Lesser Included Offenses ............................................. 436
   D. The Multiple-Murder Special Circumstance .................................. 437
       1. The Turner Intent-to-kill Rule ......................................... 438
          a. The Bird Court ....................................................... 438
          b. The Lucas Court ................................................... 441
       2. Pleading And Proof ........................................................ 442
          a. The Bird Court ....................................................... 442
          b. The Lucas Court ................................................... 442
   E. The Prior-Murder-Conviction Special Circumstance ......................... 444
       1. The Malone Intent-to-kill Rule ......................................... 445
          a. The Bird Court ....................................................... 445
          b. The Lucas Court ................................................... 446
       2. Additional Requirements? ................................................ 446
       3. Pleading And Proof ........................................................ 448
          a. The Bird Court ....................................................... 448
          b. The Lucas Court ................................................... 449
   F. The Financial-Gain Special Circumstance ..................................... 449
       1. The Elements Of The Special Circumstance .............................. 449
       2. The Bigelow Anti-overlap Rule ......................................... 453
          a. The Bird Court ....................................................... 454
          b. The Lucas Court ................................................... 455
       3. A Proposal ....................................................................... 457
       4. A Summary Of The Financial-Gain Special Circumstance ................. 461
I. INTRODUCTION

This article focuses on the development of the law of the special circumstances in California death penalty cases. Since special circumstances were created by the death penalty statutes, the task of elaborating the law regarding the special circumstances has been exclusively undertaken by the courts of California. The job initially fell on the shoulders of the Bird court, for it was during the Bird court's tenure that the 1977 Legislation and the 1978 Initiative became effective. After the Bird court's tenure lapsed, the task was taken up by the Lucas court.

This article examines the work of the first year of the Lucas court with respect to special circumstances, and compares the Lucas court's development of special circumstance doctrine with the development of special circumstance doctrine by the Bird court. Part II chronicles the adoption of the concept of the special circumstances as a device to define death eligibility in the context of the capital punishment controversy in California. Part III examines the general theory of the special circumstances and it explores their purpose, structure and function, and the fundamental principles governing their interpretation. Part IV analyzes the specific law of the special cir-

1. For a general discussion of this area of law see Poulos, Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California, 23 U.C. DAVIS L. REV. 157 (1990). This article traces the history of the capital punishment controversy in California through the retention election of 1986, the decline of the Bird court, and the emergence of the Lucas court in California. It also identifies the changes in the way the two courts have handled automatic appeals under the two statutes (the 1977 Legislation and the 1978 Initiative). It analyzes the way this change was produced, and the voting behavior of each of the justices of the Lucas court. The article ends by assessing the question of whether the Deukmejian appointees have produced this change illegitimately or by the permissible application of the relevant legal principles in a way quite different from the way they were applied by the Bird court.

2. As of March 25, 1988, the last day of the first year of the Lucas court's tenure, the 1978 Initiative had not been amended.

3. Part of this task, of course, was also discharged by the various courts of appeal in California. This occurs when the defendant is prosecuted for first degree murder and a special circumstance and the punishment imposed is life imprisonment without possibility of parole. When this occurs, the appeal is to the appropriate division of the court of appeal. Since this article is exclusively concerned with the Supreme Court of California, the doctrine elaborated by the courts of appeal is beyond the scope of this article.
cumstances as articulated by each court, and compares the two different bodies of law, whenever it is appropriate to do so.

During its first year, which began March 26, 1987, and ended March 25, 1988, the Lucas court decided sixteen automatic appeals. In eleven of these sixteen cases the court disposed of special circumstances issues raised under both the 1977 Death Penalty Legislation and the 1978 Death Penalty Initiative. None of these decisions were written on an entirely clean slate. Nearly a decade of death penalty litigation under both the 1977 Legislation and the 1978 Initiative provided the decisional environment and precedent for the Lucas court’s work this initial year. These eleven special circumstance cases, together with the special circumstance precedent furnished by the Bird court, provide the raw material for this study.

This article has two goals: To analyze and compare the conception of the special circumstances held by the Bird and Lucas courts; and to critically evaluate the specific law of the special circumstances


6. These eleven cases are: Hendricks I, Ghent, Anderson (James), Gates, Miranda, Howard, Kimble, Hendricks II, Melton, Williams, and Wade.

Hendricks II is not an automatic appeal from the retrial of Hendricks I. Edgar Hendricks was charged with having committed two first degree murders in San Francisco with several special circumstance allegations, and with having committed two first degree murders in Los Angeles with several special circumstance allegations. Hendricks I is the automatic appeal from the judgment of death imposed in the Los Angeles County prosecution and Hendricks II is the automatic appeal from the judgment of death imposed in the San Francisco prosecution.
as articulated by each court.

II. THE EVOLUTION OF THE SPECIAL CIRCUMSTANCE AS A DEVICE TO DEFINE DEATH SENTENCE ELIGIBILITY

A. The Historical Background

When California adopted its first penal statutes in 1850, murder was defined as a single offense punishable by a mandatory sentence of death.\(^7\) Six years later, in 1856, following the example set by the Pennsylvania Legislature in 1794,\(^8\) California divided murder into two categories: first and second degree murder.\(^9\) These two degrees of murder were distinguished from one another by the same criteria used in the original Pennsylvania statute.\(^10\) The definitions

\(^7\) An Act Concerning Crimes and Punishments, Cal. Comp. Laws, ch. CXXV §§ 19-21 (1850-1853). The statute was enacted on April 16, 1850. Id. These sections read as follow:

Section 19. Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may by occasioned.

Section 20. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Section 21. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. The punishment of any person convicted of the crime of murder shall be death.

Id.


\(^9\) An Act to Amend an Act Entitled “An Act Concerning Crimes and Punishments,” Ch. CXXXIX § 2, Cal. Stat. 219 (1856). Section 2 reads, in pertinent part, as follows:

Section twenty one of said Act is amended so as to read as follows: ... All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; ... Every person convicted of murder of the first degree, shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the State Prison for a term not less than ten years and which may extend to life.

Id.

\(^10\) The Pennsylvania statute provided, in relevant part, as follows:

That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.

of murder in the first and second degrees as well as the mandatory punishment of death for first degree murder, as provided in 1856, were adopted in the Penal Code of 1872 with only minor changes in phrasing.\(^1\) Two years later, in 1874, California adopted an innovation first created in Tennessee in 1838.\(^2\) Mandatory capital punishment for first degree murder was abolished, and in its place the sentencing authority, whether judge or jury, was given unfettered discretion to choose between the penalty of death and a term of imprisonment.\(^3\) Although, from time to time, there were changes in the definitions of the degrees of murder,\(^4\) the basic structure of the substantive law governing the death penalty for first degree murder remained unchanged for nearly 100 years.\(^5\) Eligibility for the death

Aside from the omission of the word “by” in front of the phrase “lying in wait,” and the spelling of “willful,” the only meaningful difference between the original Pennsylvania statute and the California version is the addition of torture as one of the means by which a murder is classified as first degree rather than second degree murder. \(^6\) See supra note 9. This method of classifying murders is commonly known as the “Pennsylvania formula.”

1. CAL. PENAL CODE §§ 187-190 (Bancroft & Co. 1872). These sections read as follows:

Section 187. Murder is the unlawful killing of a human being, with malice aforethought.
Section 188. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
Section 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all other kinds of murder are of the second degree.
Section 190. Every person guilty of murder in the first degree shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the State Prison not less than ten years.


13. 1873-74 Amendments to the Codes of Calif., Penal Code at 314. (Bancroft & Co. 1874). As amended in 1874, Section 190 read as follows:

Every person guilty of murder in the first degree, shall suffer death or confinement in the State Prison for life, at the discretion of the jury, trying the same; or upon a plea of guilty, the Court shall determine the same; and every person guilty of murder in the second degree, is punishable by imprisonment in the State Prison not less than ten years.

14. For example, the same year that mandatory capital punishment was abolished for first degree murder, the legislature changed the definition of that offense by including a homicide committed during the perpetration or attempt to perpetrate the felony of mayhem within the first degree felony-murder rule. \(^7\) Id. at 314.

15. Since the sentencing decision was discretionary with the sentencing authority, there were no substantive or procedural constraints on the sentencing authorities decision with re-
penalty was determined by the substantive law of the capital offense of first degree murder, and the death penalty was imposed by the exercise of virtually unfettered discretion in the sentencing authority.\textsuperscript{16}

There was, however, one significant change made in the procedures for invoking the death penalty. In 1957 capital trials were bifurcated. The sentencing portion of the capital trial was severed from the guilt determination process. The determination of guilt or innocence of the capital offense, first degree murder in our present inquiry, was determined first. If the jury convicted of first degree murder, then there was a subsequent penalty proceeding before the same jury (unless certain specified situations occurred) to determine the punishment.\textsuperscript{17} These two portions of the capital trial were commonly referred to as the “guilt phase” and the “penalty phase.”

Societal attitudes about capital punishment slowly changed. Beginning in the late 1950’s challenges to the constitutionality of both capital punishment and the structure of the law devised to impose it were made in the state and federal courts.\textsuperscript{18} These challenges were universally rejected by the courts until 1972.\textsuperscript{19} On February 18 of that year the California Supreme Court, in People v. Anderson, held that capital punishment was invalid per se under the California Constitution.\textsuperscript{20} Just over four months later, in Furman v. Georgia,
the Supreme Court of the United States held that unguided jury discretion in capital cases violated the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the due process clause of the fourteenth amendment.\(^{21}\)

The process of restoring capital punishment in California began immediately after the *Anderson* opinion was announced on February 18, 1972. A proposed initiative amendment to article I, section 6 of the California Constitution, which would expressly authorize capital punishment and thus overrule *Anderson*, began circulating within weeks.\(^{22}\) The initiative qualified for the ballot on June 28, 1972, as Proposition 17.\(^{23}\) It was approved by 67 percent of those voting in the general election on November 7, 1972.\(^{24}\) Accordingly, with the passage of Proposition 17, the death penalty was no longer per se unconstitutional under the California Constitution.\(^{25}\)

Having removed the impediment created by the California Constitution, the Legislature turned its attention to drafting a death penalty statute which would comply with the cruel and unusual punishments clause of the eighth amendment as interpreted in *Furman*. *Furman* was unequivocal on only two points: unguided discretion to impose capital punishment upon conviction of a capital offense violated the eighth amendment's cruel and unusual punishments clause; grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. . . . Insofar as Penal Code sections 190 and 190.1 purport to authorize the imposition of the death penalty, they are, accordingly, unconstitutional.\(^{26}\)

*Id.* at 656-57, 493 P.2d at 899, 100 Cal. Rptr. at 171.


22. See *People v. Superior Court (Engert)*, 31 Cal. 3d 797, 808, 647 P.2d 76, 82, 183 Cal. Rptr. 800, 806 (1982).

23. Proposition 17 read as follows:

PROPOSED AMENDMENT TO ARTICLE I, Sec. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.


and under the federal constitution, unlike the Constitution of the State of California as interpreted by the Anderson court, capital punishment was not per se invalid. Capital punishment could thus be restored in California, so long as the sentencing authority was not given unfettered discretion to choose between life and death. Still unresolved, however, was whether any discretion could be conferred on the sentencing authority after Furman.

Two very different interpretations of Furman emerged in the legislative halls of the states wishing to restore capital punishment. One view emphasized the fact that the discretion conferred in the pre-Furman death penalty legislation was virtually unfettered. According to this view, it was the unguided nature of the discretion that produced the constitutional flaw. Since individualized capital sentencing demands a measure of discretion, such sentencing would be constitutionally permissible so long as a way could be found to limit the sentencing authorities' discretion by appropriate legal standards.

These states looked to the American Law Institute's Model Penal Code for guidance, and patterned their new death penalty legislation after section 210.6 of the Code. Between June 29, 1972, the date Furman was announced, and July 2, 1976, the date the United States Supreme Court first addressed the constitutionality of the death penalty legislation enacted in response to Furman, twelve states enacted legislation patterned after Model Penal Code section 210.6. California was not one of these states.

In contrast, the National Association of Attorneys General and a majority of the state legislatures focused on the existence of any discretion to impose capital punishment on some, but not all, who were convicted of a given capital offense. Under their analysis of Furman, "a mandatory death penalty for specified offenses" was the "alternative considered most preferred as best withstanding con-

26. The concurring opinions of Justices Brennan and Marshall concluded that capital punishment was per se unconstitutional under the cruel and unusual punishments clause. Furman, 408 U.S. at 257-306 (Brennan, J., concurring); id. at 314-74 (Marshall, J., concurring). The three remaining opinions supporting the Court's terse per curiam opinion reached different conclusions. See Furman, 408 U.S. at 240-57 (Douglas, J., concurring); id. at 306-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring).
27. See Poulos, supra note 8, at 172-80.
28. See Poulos, supra note 8, at 180-200.
29. See Poulos, supra note 8, at 192-200.
30. See Poulos, supra note 8, at 199.
31. See Poulos, supra note 8, at 198-99.
32. See Poulos, supra note 8, at 186-92, 198-200.
stitutional attack." Individualized sentencing for capital murder, first begun in Tennessee in 1838, would have to be abandoned for it is dependent upon a measure of discretion and, according to the majority's analysis, the cruel and unusual punishments clause embargoed all discretion in capital sentencing. Following this second view of Furman, twenty-two states reverted to the common law model: everyone convicted of a capital offense would be automatically sentenced to death.

B. The 1973 Legislation

Following the interpretation of Furman which prevailed in most of the states, California enacted a mandatory capital punishment statute in 1973. Since the enactment of the first penal laws in California in 1850, eligibility for the death penalty for a homicide was determined by the definition of the capital offense of murder, and later by the definition of first degree murder. When the legislature wished to alter the scope of death eligibility for the crime of murder, this was accomplished by an amendment of the substantive offense.

The 1973 mandatory death penalty statute formally departed from this traditional way of defining death eligibility. The definition of first degree murder was not changed. Instead, death eligibility turned upon a conviction of first degree murder committed in one or more of five enumerated "special circumstances." To be death eligible for a homicide, a defendant must first have been convicted of first degree murder. Then if one or more of the enumerated "special circumstances" were charged in the accusatory pleading, the "truth" of the charged special circumstance was to be determined in a further proceeding in which the burden of proof beyond a reasonable doubt was born by the prosecution. Upon a finding by the trier

34. See supra note 12.
35. Poulos, supra note 8, at 199.
37. Id. §5 (codified as former CAL. PENAL CODE § 190.2 (West 1979)).
38. As amended by the 1973 legislation, section 190 provided as follows: "Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1" Id. §2 (codified as former CAL. PENAL CODE § 190 (West 1979)).
39. Id. § 4 (codified as former CAL. PENAL CODE § 190.1 (West 1979)).
of fact that a special circumstance was true, the defendant would automatically be sentenced to death.\textsuperscript{40}

Though the terminology was different and the truth or falsity of the charged special circumstances were determined in a proceeding which followed the determination of guilt of first degree murder,\textsuperscript{41} the five enumerated special circumstances functioned in precisely the same way as the definitional elements of the crime of first degree murder. They defined eligibility for the death penalty in exactly the same way as the elements of first degree murder defined death eligibility under the law as it existed on the day that the Penal Code of 1872 became effective.\textsuperscript{42} Moreover, since the punishment flowed axiomatically from a finding of the “truth” of a charged special circumstance, the special circumstances were undeniably rules of substantive law just as the definitional rules that distinguish murder in the first degree from murder in the second degree are rules of substantive law.

In other words, the special circumstances functioned to divide the crime of first degree murder into a capital crime and a non-capital crime in precisely the same way the rules of first degree murder served to divide the old capital offense of murder\textsuperscript{43} into a capital offense (first degree murder) and a non-capital offense (second degree murder). The newly defined offense of first degree murder with a special circumstance found to be true could just as well have been called “capital murder.” In the words of the California Supreme Court, “the ‘special circumstances’ enumerated in section 190.2 are . . . aggravating factors creating categories of first degree murder for which death is the prescribed penalty.”\textsuperscript{44}

Furthermore, the special circumstances enumerated in the 1973 mandatory capital punishment statute were structured in a manner similar to a rule of substantive law defining a given offense.\textsuperscript{45} Additionally, they are litigated in the courtroom in the same way as are

\begin{footnotes}
\item[40] Id. §5 (codified as former Cal. Penal Code § 190.2 (West 1979)).
\item[41] This subsequent proceeding became known as the “special circumstance phase” of the capital trial.
\item[42] See supra text accompanying notes 7-11.
\item[43] See supra text accompanying note 11.
\item[44] The full quotation is as follows: “The People do not claim that the ‘special circumstances’ enumerated in section 190.2 are other than aggravating factors creating categories of first degree murder for which death is the prescribed penalty.” Rockwell v. Superior Court, 18 Cal. 3d 420, 429, 556 P.2d 1101, 1105, 134 Cal. Rptr. 650, 654 (1976).
\item[45] 1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former Cal. Penal Code § 190.2 (West 1979)).
\end{footnotes}
substantive rules of law. But whether the special circumstances are appropriately classified as "crimes," and the consequences that classification would have on the law of capital punishment in California, will be discussed further below.

As prosecutions under the 1973 mandatory death penalty statute were working their way to the California Supreme Court, in 1976, the United States Supreme Court decided the constitutionality of the death penalty legislation enacted in response to Furman in Georgia, Florida, Texas, North Carolina, and Louisiana. The Georgia, Florida and Texas statutes followed the minority view identified above. They retained individualized capital sentencing, but these statutes limited the sentencing authorities discretion by the use of both aggravating and mitigating circumstances as guidelines. These statutes were upheld. On the other hand, North Carolina and Louisiana followed the majority reading of Furman, and enacted mandatory death penalty legislation. The Supreme Court invalidated these mandatory statutes on the ground that the eighth amendment's proscription on cruel and unusual punishments requires individualized capital sentencing in which factors mitigating both the crime and the personal turpitude of the offender are taken into account.

46. See infra text accompanying notes 165-67.
47. See infra text accompanying notes 145-72.
54. See supra text accompanying notes 28-35.
55. Although the Texas statute differed materially from the statutes enacted in Georgia and Florida, the Court treated the Texas statute as though it expressly provided for a sufficient measure of individualized capital sentencing to pass muster under the cruel and unusual punishments clause of the eighth amendment. Jurek v. Texas, 428 U.S. 262 (1976). Whether the Texas statute does, in fact, provide for a sufficient measure of individualized capital sentencing is a question that has not yet been fully resolved. See, e.g., Penry v. Lynaugh, No. 87-6177, now pending in the Supreme Court of the United States.
57. See supra text accompanying notes 31-35.
58. See Poulos, supra note 8, at 200-26 (discussing the mandatory capital punishment legislation enacted in North Carolina, Louisiana and the other twenty states that adopted mandatory capital punishment in response to Furman).
59. Roberts v. Louisiana, 428 U.S. 325 (1976) (A statute must provide a "meaningful opportunity for consideration of mitigating factors presented by circumstances of the particular crime or by the attributes of the individual offender." Id. at 333). Woodson v. North Carolina,
Shortly after the Supreme Court filed its opinions in the 1976 cases, the California Supreme Court pondered the question of the constitutionality of the 1973 mandatory death penalty legislation. The court framed the issue as follows: No argument was made that the "special circumstances" delineated in section 190.2 failed to meet the court's criterion that those aggravating circumstances which warrant capital punishment be specifically set forth. The inquiry was therefore directed to whether the "sentencing authority" is given the opportunity to consider mitigating as well as aggravating factors and whether it has sufficient guidance as to what mitigating factors should be considered, in deciding whether to impose the death penalty. It follows that it must also be determined whether the defendant was afforded adequate opportunity to present evidence and argument regarding these mitigating factors and their relevance to the appropriate penalty to the sentencing authority.60

The court rejected the Attorney General's suggestion that the mandatory death penalty legislation be amended by judicial decision to meet the requirements of the eighth amendment.61 Finally, the

428 U.S. 280 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304).

Three reasons were articulated for the Court's holdings in Roberts and Woodson that mandatory capital punishment was unconstitutional: (1) mandatory capital punishment exceeded the limits imposed by contemporary standards of decency; (2) mandatory capital punishment did not resolve the question of unbridled sentencing discretion, but simply "papered over" the problem; and, (3) mandatory capital punishment eschews individualized sentencing where factors mitigating both the crime and the personal turpitude of the offender may be taken into account in assessing the penalty. See Poulos, supra note 8, at 226-34 (discussing Woodson and Roberts and their impact on mandatory capital punishment statutes). Nevertheless, the principal reason for invalidating mandatory capital punishment schemes is "the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures." Sumner v. Shuman, 483 U.S. 66, 85 (1987). See Poulos, supra note 8, at 232-34.


61. Id. at 438-45, 556 P.2d at 1112-16, 134 Cal. Rptr. at 661-65. Even the concurring opinion of Justice Clark, which was joined by Justice McComb, rejected the Attorney General's submission:

As Justice Holmes observed, hard cases tend to make bad law. Because our Legislature so clearly intended to enact a constitutional death penalty statute, and because its failure to do so was so clearly caused by the Furman Court's failure to provide intelligible guidelines for legislation, one is tempted to accept the Attorney General's frank invitation to save the law by rewriting it under the guise of interpretation. However, the courts must not, in this case or any other, act as a super-legislature.

Id. at 448-49, 556 P.2d at 1118, 134 Cal. Rptr. at 667 (Clark, J., concurring).
court concluded that because sections 190 through 190.3 fail to pro-
provide "for consideration of evidence of mitigating circumstances as to
the offense or in the personal characteristics of the defendant, and
afford no specific detailed guidelines as to the relevance of such evi-
dence in determining whether death is an appropriate punishment,
they permit arbitrary imposition of the death penalty in violation of
the Eighth and Fourteenth Amendments to the United States
Constitution."  

C. The 1977 Legislation

In 1977 the California Legislature enacted death penalty legis-
lation specifically designed to comply with the 1976 decisions of the
Supreme Court of the United States.  

62. Id. at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665.

Legislation).

64. An Act to Amend Section 190 of, and to Add Section 190.1 to, the Penal Code,
Relating to punishment for Offenses for Which the Penalty is Death or Imprisonment for
supra text accompanying note 17.

65. 1973 mandatory death penalty legislation, supra note 36, § 3, p. 1298. The penalty
phase, being entirely superfluous in a mandatory death penalty scheme, was repealed. The
"special circumstance phase" replaced the penalty phase of the capital trial. Id. § 4. The
purpose for routinely litigating the "truth" of the charged special circumstances in a separate
proceeding which followed the determination of guilt of first degree murder is not apparent to
me. Furthermore, I have been unable to discover a reason for using this procedure indicated in
either the legislative history or the case law discussing this point.

66. 1977 Legislation, supra note 63, §§ 7, 11-12 (codified as former CAL. PENAL CODE
§§ 190.1, 190.3, 190.4 (West 1979)).

67. See supra text accompanying notes 36-40.

68. 1977 Legislation, supra note 63, § 7 (codified as former CAL. PENAL CODE § 190.1
(West 1979)).
circumstances for a contract killer, the killing of a peace officer, 69

69. The provision in the 1977 Legislation reads as follows: “(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim.” 1977 Legislation, supra note 63, §9 (codified as former CAL. PENAL CODE § 190.2 (a) (West 1979)).

The equivalent provision in the 1973 mandatory death penalty statute provided:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. “An agreement,” as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(a) (West 1979)).

I find both of these provisions ambiguous with respect to the liability of the person hiring the actual killer. Given the fact that all of the remaining special circumstances in the 1973 legislation were limited to a defendant who “personally committed the act which caused the death of the victim,” there is a strong argument that both the person who hires the killer and the hired killer fall within the scope of the “contract killer” special circumstance. (1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(a) (West 1979)). Otherwise there would be little point in placing the “contract killer” provision in a separate subsection from the remaining special circumstances. The same argument applies to the 1977 Legislation. All of the other special circumstances apply either to a defendant who “physically aided or committed such act or acts causing death” (1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(b) (West 1979)) or require that the defendant be “personally present during the commission of the act or acts causing death, and with intent to cause death [the defendant] physically aided or committed such act or acts causing death . . . .” Id. (codified as former CAL. PENAL CODE § 190.2(c) (West 1979)). In addition, see infra text beginning at note 624.

It would thus seem that the purpose served by placing the “contract killer” special circumstance in a separate subsection would be to permit application of that special circumstance to the person who hires the killer, even though he or she is not personally present or did not physically aid or commit the act or acts causing death. Thus, despite the change of wording in the “contract killer” special circumstance between the 1973 mandatory death penalty statute and the 1977 Legislation, arguably they had exactly the same scope: both the hired killer and the person who hired the killer fall within this special circumstance. The California Supreme Court has reached the same conclusion in a dictum statement, though the court does not revealing its reasoning. People v. Bigelow, 37 Cal. 3d 731, 750 n.11, 691 P.2d 994, 1006 n.11, 209 Cal. Rptr. 328, 339 n.11 (1984).

70. The provision in the 1977 Legislation reads as follows:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c)(1) (West 1979)).

The equivalent provision in the 1973 mandatory death penalty statute provided:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL
the killing of a witness,\textsuperscript{71} a murder during one of five enumerated felonies,\textsuperscript{72} a prior murder conviction,\textsuperscript{73} and a multiple-murder.\textsuperscript{74} The

\textsuperscript{71} CODE § 190.2(b)(1) (West 1979)).

The special circumstance in the 1977 Legislation was apparently copied from the 1973 mandatory death penalty statute with one amendment. The definition of “peace officer” was expanded in the 1977 Legislation by including the officers defined in subdivision (b) of Section 830.2, and in subdivision (a) or (b) of Section 830.3. Otherwise the two provisions use precisely the same language.

71. The provision in the 1977 Legislation reads as follows:

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

1977 Legislation, \textit{supra} note 63, § 9 (codified as former CAL. PENAL CODE § 190.2 (c)(2) (West 1979)).

The equivalent provision in the 1973 mandatory death penalty statute provided: “(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.” 1973 mandatory death penalty legislation, \textit{supra} note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(b)(2) (West 1979)).

These two provisions are nearly identical except for the last qualifying phrase in the 1977 provision. This phrase significantly narrows the scope of the 1977 special circumstance.

72. The provision in the 1977 Legislation reads as follows:

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim’s risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

1977 death penalty legislation, \textit{supra} note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c)(3) (West 1979)).

The equivalent provision in the 1973 mandatory death penalty statute provided:

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim’s risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of
1977 Legislation added two special circumstances not found in the 1973 statute: murder perpetrated by means of a destructive device or explosive,76 and murder by torture.78

The 1977 Legislation also expanded the scope of the special circumstances in another important way. In the 1973 mandatory capital punishment statute, with the single exception of the contract killer,77 the special circumstances applied only to defendants convicted of first degree murder who "personally committed the act which caused the death of the victim."78 With a similar exception for

Section 261.
(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.
(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(b)(3) (West 1979)).

These two special circumstances are identical.

73. See infra note 74.

74. The provision in the 1977 Legislation reads as follows:
   The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c)(5) (West 1979)).

The equivalent provision in the 1973 mandatory death penalty statute provided:
   (4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(b)(4) (West 1979)).

The ambiguity in the 1973 statute was virtually eliminated in the 1977 provision.

75. This special circumstances is defined as follows: "(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive." 1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(b) (West 1979)).

76. "(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain." 1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c)(4) (West 1979)).

77. 1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(a) (West 1979)). See supra note 61.

78. 1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2(b) (West 1979)).
the contract killer⁷⁹ and for murder by means of a destructive device or explosive,⁸⁰ the 1977 Legislation expanded the remaining special circumstances to include defendant’s who were “personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death.”⁸¹ The 1977 Legislation thus expanded the scope of the special circumstances by including defendants who were personally present and who “physically” aided the commission of the act or acts causing death.⁸² “Accomplices” were not liable for the death penalty under the 1973 mandatory death penalty law.⁸³ They were eligible, under specified conditions, for the death penalty under the 1977 Legislation.⁸⁴

Despite the specific changes in the reach of the special circumstances defined in the 1977 Legislation as compared to the 1973 statute, the purpose and function of the special circumstances are precisely the same in both statutes. They define eligibility for the death penalty.

⁷⁹. See supra note 37.
⁸⁰. See supra note 37. The reason for not requiring the defendant to be personally present for this special circumstances should be quite obvious.
⁸¹. 1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c) (West 1979)).
⁸². 1977 Legislation, supra note 63, § 9 (codified as former CAL. PENAL CODE § 190.2(c) (West 1979)). It is conceivable, but not obvious, that the 1977 legislation also might have narrowed the scope of the special circumstances set forth in the 1973 mandatory death penalty statute. The 1973 statute required the defendant to personally commit the act which caused death, whereas the 1977 Legislation required a defendant to be personally present and commit the act or acts causing death. If a defendant can personally commit an act without being personally present when the act is committed, then the 1977 Legislation narrowed the liability from that provided by the 1973 statute. I doubt this was intended to restrict the liability of a defendant who personally commits the act causing death. Instead, it was probably meant to limit the liability of the defendant who “aided” another to commit the act or acts causing death.
⁸³. See 1973 mandatory death penalty legislation, supra note 36, § 5 (codified as former CAL. PENAL CODE § 190.2 (West 1979)).
⁸⁴. The statute provides that except where death eligibility is predicated on either the “contract killer” or the murder perpetrated by means of a destructive device or explosive special circumstances, “the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.” 1977 Legislation, supra note 63, § 13 (codified as former CAL. PENAL CODE § 190.5(b) (West 1979)). For the purposes of the foregoing provision, “the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.” 1977 Legislation, supra note 63, § 13 (codified as former CAL. PENAL CODE § 190.5(c) (West 1979)). All parties classified at common law as an accessory before the fact, as a principal in the first degree or a principal in the second degree are liable as principals in California. CAL. PENAL CODE § 31 (West 1988).
penalty as a matter of the substantive criminal law in the same manner as the elements of the crime of first degree murder defined eligibility for the death penalty under the pre-Anderson law of California. They effectively divide the crime of first degree murder into a capital offense (first degree murder with a special circumstance) and a non-capital offense.

Conformity with the United States Supreme Court's 1976 death penalty decisions, and with Rockwell, was achieved by creating sentencing standards to be employed by the sentencing authority at the penalty phase of the capital trial. These standards are known as the "factors" or "circumstances" in aggravation and mitigation. The process by which the sentencing authority is to arrive at its decision is also specified by the statute:

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.87

Finally, the special circumstance phase of the 1973 mandatory death penalty statute was abolished, except in instances in which the special circumstance was a prior conviction of murder in the first or second degree. Since special circumstances are apparently distinguishable from the elements of first degree murder only by their respective names, it made little sense to litigate the "truth" or "falsity" of the special circumstance in a separate proceeding. The obvious reason for making an exception for the prior-murder-conviction special circumstance is to protect the defendant from the prejudice inherent in the trier of fact learning that the defendant has been previously convicted of murder while the question of the defendant's guilt of first degree murder is still being decided. The Legislature's general abolition of the special circumstance phase of the capital trial further confirms that the special circumstances are simply capital offenses under another name.

The 1977 Legislation thus embraced the basic structure of the

85. See supra text accompanying notes 37-44.
86. 1977 Legislation, supra note 63, § 11 (codified as former Cal. Penal Code § 190.3 (West 1979)).
87. 1977 Legislation, supra note 63, § 11 (codified as former Cal. Penal Code § 190.3 (West 1979)).
88. See supra text accompanying note 39.
89. 1977 Legislation, supra note 63, § 7 (codified as former Cal. Penal Code § 190.1(a) (West 1979)).
1973 mandatory death penalty statute with respect to the special circumstances, amended several of the special circumstances and added two more. Furthermore, the Legislature excised the provisions for an automatic sentence of death, restored the penalty phase and individualized capital sentencing from pre-Furman law. However, the Legislature guided the sentencing authority’s decision by aggravating and mitigating factors.

D. The 1978 Death Penalty Initiative

Almost immediately, the opponents of the 1977 Legislation abandoned the legislative halls and took to the streets. Their purpose was to repeal the 1977 statute, which was regarded as “weak” death penalty legislation and replace it with a “stronger” statute enacted by the People through the initiative process. State Senator John V.

90. A glimpse of the process of compromise that produced the 1977 Legislation is described by Cynthia Roberts in the California Journal:

In this year’s controversy over reinstatement of capital punishment, Republican Senator George Deukmejian could have maneuvered almost any bill he wanted through the Senate. The key question, as always, was whether he could get anything from the Assembly Criminal Justice Committee—even though there was a majority waiting on the Assembly floor to vote for a death-penalty measure.

As it turned out, the committee passed a weak capital punishment measure out of political necessity. The alternative would have been a strong bill written on the floor. And the committee won an agreement from Deukmejian not to accept any amendments that would stiffen the bill. This meant that even if Governor Brown’s anticipated veto were overridden, California would have a relatively weak law. . . .

It is only under extraordinary circumstances, such as with the death penalty, that the committee can’t take the heat and must allow a bill to survive that it would rather kill. The key vote for Deukmejian’s bill was cast by Democrat Frank Vicencia, who said he was doing so because of political realities and not because he favors capital punishment. Negotiations on the substance of the measure were conducted by Majority Leader Howard Berman, another death-penalty opponent and Speaker Leo McCarthy’s main man on the committee. If the issue had not been so political, with Democrats fearing the consequences of a strong death-penalty measure on the ballot next year, the bill would have died.

The committee, from a liberal viewpoint, did the next best thing. It made sure that the bill sent to the floor was the weakest bill obtainable.


It is unfortunate that much of the political debate about the restoration of capital punishment in California centered around “tough” and “weak” legislation (see id.), and what would pass constitutional muster under the eighth amendment. See supra note 61. What we needed was a debate about the death penalty and public policy. But, for the most part, issues about the wisdom of capital punishment, public policy, and appropriate death penalty provisions were ignored in the race to restore capital punishment. See Poulos, supra note 8, at 198-200, 233-34.
Briggs, the sponsor of the death penalty initiative, claimed "that the California citizenry want[ed] a tough, effective death-penalty law to protect the state's families from ruthless killers. But every attempt to enact such a law ha[d] been thwarted by the powerful anti-capital punishment members of the Legislature . . . . The current law was drafted in such a way as to make it as weak and ineffective as possible . . . , but this initiative would give Californians the toughest death-penalty law in the country."91

The 1978 death penalty initiative qualified for the ballot on June 27, 1978, as Proposition 7. It was approved by 72 per cent of the voters at the general election held on Tuesday, November 7, 1978.92 Except for crimes committed before its effective date,93 the 1978 Initiative currently governs capital punishment in California.94

Senator Briggs' hyperbole promised a revolution. The initiative produced quite ordinary changes in the law. The structure of capital punishment law established in the 1977 Legislation is maintained without change. Death eligibility remains dependent upon conviction of first degree murder and a finding of the truth of at least one of the enumerated special circumstances.95 The "truth" or "untruth" of the special circumstances is still to be decided in the guilt phase of the capital trial with the same single exception of the prior-murder-conviction special circumstance.96 The special circumstances still function as rules of substantive law effectively sub-dividing the offense of first degree murder into a capital and a non-capital offense.97 Once death eligibility is established in this manner, the sentence is deter-

93. Since the 1977 Legislation contained an urgency provision, it became effective on August 11, 1977 when the bill was passed over the Governor's veto (Governor Edmund G. Brown, Jr.) and filed with the Secretary of State. 1977 Legislation, supra note 63, § 26, at 1266. As an initiative measure, the 1978 Initiative became effective when it was approved by the voters on November 7, 1978. Since the 1978 Initiative cannot be applied to a crime committed before its effective date, a capital crime committed between August 11, 1977 and November 7, 1978 is governed by the 1977 Legislation. People v. Easley, 34 Cal. 3d 858, 671 P.2d 813; 196 Cal. Rptr. 309 (1983); People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982). A capital crime committed before August 11, 1977 is not subject to the death penalty inasmuch as both the 1973 mandatory death penalty statute, and its predecessor statute, are unconstitutional, and the 1977 Legislation may not be applied retroactively. People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979).
94. The 1978 Initiative is codified as CAL. PENAL CODE sections 190, 190.1, 190.2, 190.3, 190.4, 190.5 (West 1988).
95. Id. §§ 190.1, 190.2.
96. Id. § 190.1(a), (b).
97. See supra text accompanying notes 85-86.
mined in the familiar penalty phase of the trial by weighing the aggravating factors against the mitigating factors.

Important changes were made, however, in the contents within this structure. Ten new special circumstances were added:

1. murder to prevent arrest or to escape from lawful custody;
2. murder of a federal law enforcement officer;
3. murder of a fireman;
4. murder of a prosecutor;
5. murder of a judge;
6. murder of other specified government officials;
7. an "especially heinous, atrocious, or cruel" murder;
8. murder by lying in wait;
9. murder because of the victim's "race, color, religion, nationality or country of origin"; and murder by poison.

The 1978 Initiative also substantially amended the actus reus of five of the special circumstances shared with the 1977 Legislation. Each of these changes enlarged the scope of the special circumstance from what it had been under the 1977 Legislation. The "contract killer" special circumstance was replaced by a murder for "financial gain" special circumstance. The murder of a peace officer special circumstance was changed by expanding the definition of "peace officer". Witness-murder was expanded by including within its

98. CAL. PENAL CODE §§ 190.1(c), 190.3, 190.4 (West 1988).
99. Id. § 190.3.
100. Although the 1977 Legislation defined eight special circumstances (see supra text accompanying notes 69-76) and the 1978 Initiative defines nineteen (see infra text accompanying notes 101-34), one of the special circumstances enumerated in the 1977 Legislation was divided and its actus reus narrowed in the 1978 Initiative. Former section 190.2(b) defined a special circumstance in terms of a willful, deliberate, and premeditated murder "perpetrated by means of a destructive device or explosive." Two special circumstances were defined in terms of a murder by "means of a destructive device, bomb, or explosive" in the 1978 Initiative: when the device, bomb or explosive was concealed (§ 190.2(a)(4) (West 1988)); and when the device, bomb or explosive was mailed or delivered (§ 190.2(a)(6) (West 1988)). Since the actus reus of both of these special circumstances is included within the physical acts prohibited by the corresponding single special circumstance in the 1977 Legislation, ten, not eleven, special circumstances were added by the 1978 Initiative.
102. Id. § 190.2(a)(8).
103. Id. § 190.2(a)(9).
104. Id. § 190.2(a)(11).
105. Id. § 190.2(a)(12).
106. Id. § 190.2(a)(13).
107. Id. § 190.2(a)(14).
108. Id. § 190.2(a)(15).
109. Id. § 190.2(a)(16).
110. Id. § 190.2(a)(19).
111. See supra note 69.
scope the intentional killing of a witness "in retaliation for his testimony in any criminal proceeding."

The felony-murder special circumstance was apparently expanded in three ways. First, the list of qualifying felonies was augmented by adding four felonies (sodomy, oral copulation, arson, and train wrecking). Second, the limitations on the qualifying felonies of kidnapping, rape, and burglary were removed. Third, in addition to applying while the defendant is engaged in the commission or attempted commission of one of the enumerated felonies, the felony-murder rule is expressly made applicable to murders committed in "the immediate flight" after committing or attempting one of the qualifying felonies. On its face, the 1977 provision applies only during the commission or attempted commission of one of the listed felonies. Finally, the torture-murder special circumstance was amended by the addition of the following sentence: "For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration."

Of equal importance, the mens rea requirements specified in the special circumstances carried forward from the 1977 Legislation were substantially altered. The general requirement that the defendant act with the "intent to cause death" was repealed. In addi-

115. Id. § 190.2(a)(17)(i), (ii), (iv), (v), (vi), (ix).
116. The kidnapping felony in the 1977 Legislation contained the following limitation: "Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph." Former CAL. PENAL CODE § 190.2(c)(3)(i) (West 1978). This limitation was omitted in the 1978 Initiative's felony-murder provision. CAL. PENAL CODE § 190.2(a)(17)(ii) (West 1988).
117. The felony of rape referred to in the 1977 Legislation's felony-murder rule contained the following limitation: rape "by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261." Former CAL. PENAL CODE § 190.2(c)(3)(ii) (West 1978). The initiative's equivalent provisions simply specifies, "Rape in violation of Section 261." CAL. PENAL CODE § 190.2(a)(17)(ii) (West 1988).
118. The felony-murder special circumstance in the 1977 Legislation specified the felony of burglary, but limited the qualifying offense to burglary "in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape." Former CAL. PENAL CODE § 190.2(c)(3)(v) (West 1978). The equivalent provision in the initiative reads, "Burglary in the first or second degree in violation of Section 460." CAL. PENAL CODE § 190.2(a)(17)(vii) (West 1988).
120. Former CAL. PENAL CODE § 190.2(b), (c) (West 1979).
tion, four special circumstances in the 1977 Legislation (the "de-
structive device or explosive,"124 the witness-murder,125 the felony-
murder,126 and the torture-murder127 special circumstances) required
that the murder be willful, deliberate, and premeditated. Each of
these requirements was eliminated by the 1978 legislation.

Presently, the "destructive device or explosive" special circum-
stance128 requires that "the defendant knew or reasonably should
have known that his act or acts would create a great risk of death to
a human being or human beings."129 The witness-murder special
circumstance requires that the witness be "intentionally killed for the
purpose of preventing his testimony in any criminal proceeding."130
The provisions governing the felony-murder special circumstance in
the 1978 legislation are so ambiguously worded that its mens rea
requirement cannot be easily determined,131 although it is clear that
the murder need not be willful, deliberate, and premeditated.132
Lastly, the torture-murder special circumstance is written to require

---

123. This general requirement expressly applied to all of the special circumstances ex-
cept for the "contract killer" and the "destructive device or explosive" special circum-
cstances. Former CAL. PENAL CODE § 190.2(c) (West 1979). This general provision was frequently
redundant. Of the eight special circumstances enumerated in the 1977 Legislation, four re-
solved that the murder be "willful, deliberate, and premeditated." See infra notes 124-27.
Since the term "willful" murder is an intent-to-kill murder, the general requirement added
nothing to these special circumstances. E.g. People v. Wiley, 18 Cal. 3d 162, 170, 554 P.2d
881, 884, 133 Cal. Rptr. 135, 138 (1976); California Jury Instructions, Criminal No. 8.20
(1979 Revision) (West 1979) [hereinafter CALJIC]. The "destructive device or explosive"
special circumstances also specified that an "intent to cause death" was required. Former CAL.
PENAL CODE § 190.2(b) (West 1979). The peace officer-murder special circumstance specifically
required that the officer be "intentionally killed" so that the general provision added
nothing to that special circumstance (id. § 190.2(c)(1)); and the "contract killer" special cir-
cumstance contains an intentionality requirement as well. Id. § 190.2(a). Thus the only special
circumstances that could have been effected by the general provision that the defendant act
with the intent to cause death was the prior murder conviction and the multiple-murder spe-
cial circumstances. It was thus understandable that the general provision was eliminated in the
1978 Initiative.

124. Former CAL. PENAL CODE § 190.2(b) (West 1979).
125. Id. § 190.2(c)(2).
126. Id. § 190.2(c)(3).
127. Id. § 190.2(c)(4).
128. See supra note 100.
130. Id. § 190.2(a)(10). The witness-murder special circumstance required the same
mens rea, but also added that the "murder was willful, deliberate, and premeditated." Former
CAL. PENAL CODE § 190.2(c)(2) (West 1979). It should also be noted that this special circum-
cumstance requires proof of a specific intent—that the purpose of the intentional killing was either
to "prevent the testimony of the witness in a criminal proceeding or in retaliation for such
131. See infra text accompanying notes 388-422.
only an intentional murder,\(^{133}\) though it is not without some ambiguity.\(^ {134}\)

Several other critical changes were made in the death eligibility of both perpetrators and accomplices in the 1978 legislation. Under the predecessor legislation, except for the "contract killer"\(^ {135}\) and the "destructive device or explosive"\(^ {136}\) special circumstances, both perpetrators and accomplices had to meet the following criteria:

The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists . . . \(^ {137}\)

The requirement of personal presence was completely eliminated by the 1978 Initiative. Thus the rule with respect to the "contract killer" and the "destructive device or explosive" special circumstances in the 1977 Legislation was extended to all defendants, whether perpetrators or accomplices.

Accomplices were death eligible under the 1977 Legislation (except for the "contract killer" special circumstance) only if, in addition to personal presence, they physically aided in the commission of the act or acts causing death.\(^ {138}\) The physical aid requirement was given a restrictive statutory definition:

For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.\(^ {139}\)

This physical aid limitation, like the requirement of personal presence, was abandoned as well. Accomplice liability, and perhaps the liability of some perpetrators,\(^ {140}\) is governed by the following ex-
Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in the state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated... has been charged and specially found under Section 190.4 to be true.1

Though important changes were also made in the aggravating factors which guide the sentencing authority in the penalty phase of the trial, and in the penalty phase procedures, those topics are reserved for discussion on another day.142

Before turning to the court's understanding of the nature of the special circumstances, a short summary of the changes in the special circumstances wrought by the 1978 Initiative should prove helpful.

1. **Summary Of Changes Wrought By The 1978 Initiative**

The structure of the death penalty law established by the 1977 Legislation was retained, but many important changes were made in the content of the law. All of the special circumstances defined in the 1977 Legislation were carried forward into the 1978 Initiative. However, five of these eight special circumstances were expanded by amending the reach of their actus reus. Ten new special circumstances were added.

The general requirement that the defendant act with intent to cause death was removed, and all requirements that the murder be willful, deliberate, and premeditated were eliminated. Nevertheless, the 1978 Initiative usually defined each special circumstance to require some form of mens rea.143

The requirement that both principals and accomplices be personally present during the commission of the act or acts causing death was eliminated. Furthermore, the 1977 Legislation's limitation of accomplice liability to defendants who physically aided the act or acts causing death was eliminated as well, as was the restrictive defi-
nition of physical aid. The evolution of the law with respect to these changes is discussed in Section IV. Before the specific law of the special circumstances is discussed, however, the general theory of the special circumstances will be explored. The following section of this article, Part III, examines the purpose, structure, and function of the special circumstances, and the fundamental principles governing their interpretation.

III. THE NATURE OF THE SPECIAL CIRCUMSTANCES

A. An Introductory Analysis

The death penalty statutes of California create or rely on three types of legal rules which serve three distinct purposes. First to be discussed are the rules of the substantive criminal law. These rules define the several crimes and the various forms of justification, excuse and mitigation. Under all three of the recent death penalty statutes, one must first be found guilty of murder in the first degree before a "special circumstance" can attach and render the culprit eligible for the death penalty. Quite obviously, the rules defining the crime of murder in the first degree are matters of substantive criminal law governed by established constitutional, statutory, and common law principles.

These rules of substantive criminal law have two essential purposes: They define what is prohibited by the criminal law, and they define eligibility for the imposition of the criminal sanction for those who violate the substantive offense. All three of these California

144. See infra text following note 338.
145. See supra text accompanying notes 38, 68, 95.
146. For example, the due process clause of the fourteenth amendment requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. E.g., Francis v. Franklin, 471 U.S. 307 (1985); Sanstrom v. Montana, 442 U.S. 510 (1979); People v. Roder, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983).
147. California Penal Code section 20 codifies a fundamental principle of the criminal law: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." CAL. PENAL CODE § 20 (West 1988). In Green, the California Supreme Court said, "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." People v. Green, 27 Cal. 3d 1, 53, 609 P.2d 468, 519, 164 Cal. Rptr. 1, 53 (1980). In Martinez, the court said, "It is a basic premise of our criminal law that 'with crimes which require both some act or omission and mental fault, no crime is committed unless the mental fault concurs with the act or omission, in the sense that the mental state actuates the act or omission.' " People v. Martinez, 150 Cal. App. 3d 579, 580-81 (1984).
148. It is, for example, part of the common law tradition to analyze crime in terms of the actus reus (the physical part of the crime) and the mens rea (mental part of the crime) of the given offense. See, e.g., Martinez, 150 Cal. App. 3d 579, 580-81 (1984).
death penalty statutes (the 1973 and 1977 statutes and the 1978 Initiative) use the crime of first degree murder and all of the substantive rules governing criminal homicide as the foundation upon which eligibility for the death penalty is based.\textsuperscript{149}

The three death penalty statutes also create rules of criminal procedure. These rules govern the process by which the substantive law is invoked. For example, each statute creates separate phases in the capital trial,\textsuperscript{150} specifies the prosecution’s burden of proof with respect to the special circumstances,\textsuperscript{151} and designates other procedural matters such as the identity of the trier-of-facts\textsuperscript{152} and the consequences of a hung jury.\textsuperscript{153}

Procedural rules are also governed by established constitutional,\textsuperscript{154} statutory,\textsuperscript{155} and common law\textsuperscript{156} principles, but these constraints are frequently different from those governing the substantive criminal law. Though the distinction between substantive and procedural rules may not often arise, the distinction can be of critical importance, as we shall see below.\textsuperscript{157}

The third species of legal rules created by two of the three death penalty statutes are rules governing the sentencing decision in capital cases. Since the 1973 mandatory death penalty statute provided an inexorable sentence of death on conviction of first degree murder coupled with a finding of truth of at least one of the enumerated special circumstances, the 1973 statute did not create sentencing rules. Instead, the death sentence automatically flowed from a con-

\textsuperscript{149}. See supra text accompanying notes 38, 68, 95.

\textsuperscript{150}. See supra text accompanying notes 39, 66, 98.

\textsuperscript{151}. See supra notes 39, 68, 95.

\textsuperscript{152}. See supra notes 40, 68, 96.

\textsuperscript{153}. See supra text accompanying notes 36, 63, 95.

\textsuperscript{154}. For example, the federal constitution applies to such procedural matters as the use of “victim impact” statements at the penal phase of a capital trial (Booth v. Maryland, 482 U.S. 496, (1987)), the voir dire examination of prospective jurors (e.g., Turner v. Murray, 476 U.S. 28 (1986); Wainwright v. Witt, 469 U.S. 412 (1985)), the prosecutor’s argument during the penalty phase (e.g., Caldwell v. Mississippi, 472 U.S. 320 (1985)), and jury instructions in a capital case (e.g., California v. Brown, 479 U.S. 1020 (1987); Francis v. Franklin, 471 U.S. 307 (1985)), among a multitude of procedural rules governed by the federal constitution.

\textsuperscript{155}. For example, the California Penal Code provides that “No part of it is retroactive, unless expressly so declared.” CAL. PENAL CODE § 3 (West 1988). And that “[w]henever in this Code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this Code.” Id. § 13.

\textsuperscript{156}. For example, the rules governing prosecutorial misconduct during the argument in a death case are frequently viewed as being based upon common law notions of fairness, unless the argument is so outrageous as to violate due process of law. See, e.g., Ford v. Wainwright, 477 U.S. 411 (1986).

\textsuperscript{157}. See infra text accompanying notes 168-72.
conviction under the substantive law. But both the 1977 Legislation and the 1978 Initiative create sentencing rules which guide, if not govern, the sentencing authority's selection of the penalty: death or life without possibility of parole. These sentencing rules are the aggravating and mitigating factors specified in both statutes. In conjunction with the procedural rules which regulate the sentencing process, it is the purpose of these rules to give substantive guidance for assessing the punishment.

Sentencing rules are a recent innovation in the law of capital punishment. They were initially adopted in response to Furman's holding that unfettered sentencing discretion violates the eighth amendment. Their primary goal is to implement the constitutional mandate for individualized capital sentencing by guiding and limiting that discretion "so as to minimize the risk of wholly arbitrary and capricious action." Lacking roots in the common law, there are few, if any, existing common law principles that directly govern these sentencing rules. The same may be said of guiding statutory principles. Although the federal constitution does place some limits on the nature and content of these sentencing rules, we are still in the early stages of articulating those constitutional principles. There are still many more constitutional questions than there are answers. And because these sentencing rules are of such recent vintage, we have only begun the process of creating new common law principles to govern them.

How then should the "special circumstances" be classified? Are they elements of a crime, procedural rules, sentencing rules, or some type of sui generis category of rule unique to the law of capital punishment? Should the special circumstances be governed by the rules pertaining to the substantive criminal law, to criminal procedure, to sentencing rules, or an entirely new body of law yet to be created? Or to put the question slightly differently, to what body of law should lawyers and judges look to properly construe and apply the special circumstances?

The choice of governing law should be determined by looking to

158. See supra text accompanying notes 66, 99.
159. See supra notes 66, 99.
160. See infra text accompanying notes 161-63, 170-72.
161. See supra note 162.
164. See infra text accompanying notes 170-72.
the purpose and function of the special circumstances. They are rules of law defining prohibited conduct and fixing liability for punishment for those who breach them. Since that is the purpose of the substantive criminal law, they should be governed by the rules of the substantive criminal law, unless they function in such a way as to make those rules inappropriate for their governance.

To establish guilt of a crime at trial the prosecution has the burden of (1) pleading, and (2) proving (3) beyond a reasonable doubt (4) to the trier of fact (5) by evidence produced in open court (6) the existence of (7) specified historical facts (the actus reus and the mens rea) (8) which must be unanimously found, (9) and translated into a verdict (10) which permits only one of two choices, "guilty" or "not guilty." The verdict establishes the defendant's liability for punishment and implements the very purpose for the law's existence, the goals of retribution, deterrence, and sometimes rehabilitation.

The special circumstances function in precisely the same way. The prosecution has the burden of (1) pleading (charging) one or more of the special circumstances enumerated in Section 190.2, and (2) proving, (3) beyond a reasonable doubt, (4) to the trier of fact (5) by evidence produced in open court (6) the existence (the "truth") (7) of the charged special circumstances (which are historical facts), (8) which must be unanimously found (9) and translated into a finding (a verdict), (10) which permits only two choices, "true" or "not true." As noted above, the effect of the finding of the truth of the special circumstance fixes liability for punishment and implements the very purpose of the law's existence, deterrence and retribution in the case of capital punishment. Thus, it functions in the same way as a "guilty" verdict of murder in the first degree did under the pre-Furman law of California.

Given their purpose and function in the process of the criminal law, the special circumstances should be found to be governed by the principles of the substantive criminal law. They should be labeled as

---

165. The California Supreme Court has recognized that the determination of the "truth" or "non-truth" of the special circumstances requires a factual determination in precisely the same way that a jury's verdict on the guilt or innocence of a crime requires a factual determination. People v. García, 36 Cal. 3d 539, 552, 684 P.2d 826, 833, 205 Cal. Rptr. 265, 272 (1984); People v. Superior Court (Engert), 31 Cal. 3d 797, 803, 647 P.2d 76, 79, 183 Cal. Rptr. 800, 803 (1982).


167. See supra text accompanying notes 7-11.
elements of the capital crime of first degree murder with a special circumstance. Using this same criteria, the law governing procedural and sentencing rules should be rejected as having any unique relevance to special circumstance issues. Special circumstances have neither the purpose nor the function of procedural rules. They do not concern the process of the capital trial, the way the capital trial is conducted. Rather, their determination, along with that of the underlying offense, is the goal of the guilt phase of the capital trial.\textsuperscript{168}

Moreover, the special circumstances do not function as do the sentencing rules, the aggravating and mitigating factors, at the sentencing phase of the capital trial. The sentencing process is not the same as the guilt determination process. In the guilt phase, and the special circumstance phase if required,\textsuperscript{169} the jury (or the judge as the case may be) finds the facts and applies the law to the facts so found to reach a verdict. The special circumstance is either true or untrue under the facts as found and the law as applied.

At the sentencing phase, the jury's role changes from "trier of fact" to "sentencing authority." The jury's role at the sentencing phase is "inherently moral and normative, not factual."\textsuperscript{170} It expresses "the conscience of the community on the ultimate question of life or death."\textsuperscript{171} Given the different function of the sentencing jury, the aggravating and mitigating circumstances serve a different purpose than do either the special circumstances or other rules of substantive law. They guide the jury's sentencing discretion rather than dictate the verdict once the facts are found.\textsuperscript{172}

\textsuperscript{168} Except for the case of a prior murder conviction special circumstance, the truth of the charged special circumstances are determined in the guilt phase of the capital trial under both the 1977 Legislation and the 1978 Initiative. \textit{See supra} notes 89, 96. For a reason unknown to me, the 1973 mandatory death penalty legislation provided for the determination of the special circumstances in a separate phase of the capital trial. \textit{See supra} note 65.

\textsuperscript{169} This would occur under either the 1977 Legislation or the 1978 Initiative only if the charged special circumstance is a prior murder conviction. \textit{See supra} text accompanying notes 89, 96.


\textsuperscript{172} Should the sentencing jury conclude that one or more aggravating factors existed beyond a reasonable doubt and that there were no mitigating factors, a verdict of death would not be required. \textit{People v. Brown}, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), \textit{rev'd on another ground} in California v. Brown, 484 U.S. 1014 (1987) (accord). On the other hand, if the jury were to conclude that a special circumstance was proven beyond a reasonable doubt, the jury would be required to return a verdict that the special circumstance were true (unless the jury refused to apply the law).
How then has the California Supreme Court treated the "special circumstances"?

B. The Bird Court Precedent

This question was initially confronted by the Bird court. The court rejected attempts to classify special circumstances as both procedural rules and as sentencing factors or enhancements. But the court vacillated between characterizing the special circumstances as "categories of first degree murder" on the one hand, and as sui generis rules on the other. But even under the sui generis theory, the court appeared to be more concerned with the label than with the applicable substantive law. The sui generis theory was first articulated in Garcia:

Seeking to distinguish Sandstrom, the Attorney General argues that a special circumstance is not a "crime," and an element of a special circumstance thus is not an "element of a crime." His argument is technically sound; special circumstances are sui generis—neither a crime, an enhancement, nor a sentencing factor. In People v. Superior Court (Engert) (1982) 31 Cal. 3d 797, 803 [183 Cal. Rptr. 800, 647 P.2d 76], we said: "In the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or

---

176. Garcia, 36 Cal. 3d at 552, 684 P.2d at 832, 205 Cal. Rptr. at 271.
by life imprisonment without possibility of parole. The fact or set of facts to be found in regard to the special circumstance is not less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which, when found by a jury, define the crime rather than a lesser included offense or component."... Engert therefore held that the standards of specificity applicable to statutes defining criminal offenses applied equally to special circumstances...

As we noted in Carlos v. Superior Court, supra, 35 Cal. 3d 131, 134, "[a] finding of murder with special circumstances requires the trier of fact to choose between only two alternatives—death or life imprisonment without possibility of parole—the most severe punishments permitted under our law." It is, moreover, an essential prerequisite to the imposition of the unique and extreme sanction of death. In view of the importance of a special circumstance finding, we do not believe the courts can extend a defendant less protection with regard to the elements of a special circumstance than for the elements of a criminal charge. If failure to instruct on the element of a crime is a denial of federal due process, the same consequence should attend failure to instruct on the element of a special circumstance. 177

While the court thus refused to characterize special circumstances as crimes out of "technical" accuracy, recognizing that the purpose and function of the special circumstances are precisely the same as the purpose and function of crimes, the court held that the elements of a special circumstance are governed by the same body of law governing the elements of crimes. The virtue of initially labeling a special circumstance as a crime is obvious. It immediately informs counsel and the lower courts of the body of law to which they should look in interpreting and applying the special circumstances. Quite obviously, the cause of justice is best served when the law is correctly fashioned and applied in the lower courts. 178

Nevertheless, the courts of California, at least before the emer-

177. Id.
178. Since the special circumstances were an innovation in California law, it was inevitable that the courts would be presented with a wide variety of situations in which the nature of the special circumstances must be decided. Had the California Supreme Court adhered to initial position in Rockwell and clearly labeled special circumstances as crimes in Teron, reversals in a number of the later cases may have been avoided because both counsel and the lower courts may have understood that they were governed by the familiar principles of the substantive criminal law. See infra note 179.
gence of the Lucas court, have universally applied the law governing substantive crimes in interpreting and applying the special circumstances.\textsuperscript{179} Indeed, research fails to disclose a single instance in

\textsuperscript{179} Listed here are the major decisions of the California Supreme Court and the courts of appeal which treat special circumstances as though they were crimes. In each instance, the court applied the rules governing crimes to the interpretation and application of the special circumstances.


(2) The torture-murder special circumstance of the 1978 Initiative requires an intent to inflict extreme pain despite the fact that the provision does not explicitly mention an intent requirement with respect to the torture element of the special circumstance. People v. Davenport, 41 Cal. 3d 247, 710 P.2d 861, 221 Cal. Rptr. 794 (1985); People v. Leach, 41 Cal. 3d 92, 710 P.2d 893, 221 Cal. Rptr. 826 (1985) (accord). In the parlance of California criminal law, the torture-murder special circumstance is a "specific intent" special circumstance. People v. Wade, 44 Cal. 3d 975, 994-95, 750 P.2d 794, 805, 244 Cal. Rptr. 905, 916 (1988). See Ortega v. Superior Court, 135 Cal. App. 3d 244, 185 Cal. Rptr. 297 (1982). The torture-murder special circumstance is discussed \textit{infra} at notes 349-76.

(3) The witness-murder special circumstance in the 1978 Initiative applies only to the murder of a witness to a crime, as opposed to a juvenile proceeding; and the defendant's subjective intent is crucial. The defendant must intentionally kill the victim for the purpose of preventing the victim from testifying in an imminent criminal proceeding. People v. Weidert, 39 Cal. 3d 836, 705 P.2d 389, 218 Cal. Rptr. 836 (1985). This means that the defendant must have two intents: first the defendant must intend to kill the victim; and second, the defendant must do so for the purpose of preventing the victim from testifying in an imminent criminal proceeding. The witness-murder special circumstance should be considered a "specific intent" special circumstance for precisely the same reason that the torture-murder special circumstance is considered to be a "specific intent" special circumstance.

(4) The special circumstance of murder-to-perfect-an-escape in the 1978 Initiative requires that the killing be motivated by the goal of escaping custody, and must take place before the defendant has reached a place of temporary safety outside the confines of the prison. People v. Bigelow, 37 Cal. 3d 731, 691 P.2d 944, 209 Cal. Rptr. 328 (1984). The requirement of "purpose" to perfect an escape from lawful custody, like the equivalent requirement in the witness-murder special circumstance, means that the defendant must both intend to kill and that the intentional killing be done for the purpose of perfecting an escape from lawful custody. It is a "specific intent" special circumstance for the reasons noted above.


(6) The murder-of-a-peace-officer special circumstance in the 1978 Initiative is constitu-
which an appellate court has looked to any other body of law for


(7) A felony-murder special circumstance is barred by the statute of limitations governing the underlying felony. People v. Superior Court (Jennings), 183 Cal. App. 3d 636, 228 Cal. Rptr. 357 (1986).

(8) Under CAL. PENAL CODE § 3, a special circumstance enacted after the crime was committed cannot be applied retroactively to the defendant's conduct in the absence of explicit statutory language to the contrary. People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979); People v. Payne, 75 Cal. App. 3d 601, 142 Cal. Rptr. 320 (1977) (also suggesting that to do so would violate the ex post facto clause).

(9) The double jeopardy clause prevents the application of a subsequently enacted valid death penalty statute to a person who has been tried, convicted and sentenced under a previously enacted unconstitutional death penalty statute. People v. Harvey, 76 Cal. App. 3d 441, 142 Cal. Rptr. 887 (1978); People v. Payne, 75 Cal. App. 3d 601, 142 Cal. Rptr. 320 (1977).

(10) The double jeopardy clause bars the retrial of a special circumstance which has been set aside after trial on the ground that there was insufficient evidence to support the finding. E.g., People v. Weidert, 39 Cal. 3d 836, 705 P.2d 389, 218 Cal. Rptr. 836 (1985); People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980); People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

(11) The rules for appellate review of the sufficiency of the evidence governing claims of alleged deficiencies in proof of the elements of a crime are equally applicable to claims of deficiencies in the proof of the elements of a special circumstance. People v. Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980).

(12) The due process clause requires the same specificity in defining special circumstances that it requires in the definition of crimes. People v. Superior Court (Engert), 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). See Maynard v. Cartwright, 486 U.S. 356 (1988) (holding that a similar Oklahoma provision was unconstitutionally vague under the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the fourteenth amendment).

(13) A special circumstance is an “action” within the meaning of CAL. PENAL CODE § 1385, so that a special circumstance may be dismissed by the trial court in furtherance of justice under that section in the same manner as a crime. People v. Williams, 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981).

(14) The adequacy of the preaccusatory evidence to support a charged special circumstance allegation is reviewable under CAL. PENAL CODE § 995 in the same manner as is the sufficiency of the evidence to support a charged crime. E.g., Jones v. Superior Court, 123 Cal. App. 3d 160, 176 Cal. Rptr. 430 (1981); Ghent v. Superior Court, 90 Cal. App. 3d 944, 153 Cal. Rptr. 720 (1979).

(15) A special circumstance is a “public offense” within the meaning of CAL. PENAL CODE § 871 and thus a magistrate may dismiss or strike a special circumstance allegation if the evidence presented at the preliminary hearing does not provide sufficient cause to support the allegation. Ramos v. Superior Court, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982).

(16) A special circumstance is an “offense” within the meaning of CAL. PENAL CODE § 1387 so that a second dismissal of a special circumstance by a magistrate pursuant to CAL. PENAL CODE § 871 bars any further prosecution for that special circumstance. Ramos v. Superior Court, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982).

(17) A special circumstance allegation in an indictment may be dismissed pursuant to the rule of Johnson v. Superior Court when the district attorney has withheld evidence tending to negate guilt from the indicting grand jury. Page v. Superior Court, 90 Cal. App. 3d 959, 153 Cal. Rptr. 730 (1979).

(18) A special circumstance is a “public offense” which may be challenged by demurrer
guidance in interpreting and applying the special circumstances.\(^{180}\)

C. *The Lucas Court's Original Understanding*

On the day the Lucas court took office the only distinction between a special circumstance and a crime may have been the fact that special circumstances were not formally characterized as crimes. Yet in view of the inconsistency in the terminology used by the California Supreme Court in classifying special circumstances, even that distinction was unclear.\(^{181}\)

The Lucas court did little to clarify the law of special circumstances during its first year. The question of the proper characterization of special circumstances, whether they are crimes or *sui generis* rules, was never addressed. More importantly, the court treated the special circumstances inconsistently in several of the automatic appeals decided in its first year. In two cases, the court's resolutions of special circumstance issues were *consistent with* Bird court precedent and with the conception that the special circumstances are crimes dividing the crime of first degree murder into capital and non-capital offenses. But in a third decision, the Lucas court treated the special circumstances inconsistently with prior law and its own precedent.


180. A dissenting opinion by Justice Poche in *People v. Superior Court* (Engert), when that case was decided by the Court of Appeal, First District, Division 4 on May 1, 1980, suggested that special circumstances may not be governed by the same law applicable to the definition of crimes. People v. Superior Court (Engert), 164 Cal. Rptr. 374, 214-15 (1980). The majority held otherwise. *Id.* at 210-14. A hearing was granted by the California Supreme Court and thus the decision by the court of appeal was vacated. The opinion does not appear in the official reports. The opinion of the California Supreme Court treated the special circumstance there at issue, the "heinous-atrocious-or-cruel" special circumstance, as though it were the definition of a crime and held that it was void for vagueness under the due process clause of the fourteenth amendment. People v. Superior Court (Engert), 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). See Maynard v. Cartwright, 486 U.S. 356 (holding that a similar Oklahoma provision was unconstitutionally vague under the cruel and unusual punishments clause of the eighth amendment as made applicable to the states by the fourteenth amendment).

Although a portion of Justice Poche's dissent in *Engert* was quoted with apparent approval in *Allen* (Allen v. Superior Court, 113 Cal. App. 3d 42, 55-56, 169 Cal. Rptr. 608, 617 (1981)) the *Allen* court did not rest its analysis on the proposition that the body of law governing the validity and interpretation of special circumstances was different than the law applicable to crimes. *Id.* at 50-58, 169 Cal. Rptr. at 613-19. *Allen* was disapproved by the supreme court in *Engert*, supra.

181. See *supra* text accompanying notes 175-78.
That decision also suggests that the court has no theory, no conception, of how the special circumstances do or should fit into the law of capital murder in California. The court’s decisions in the remaining eight cases resolving special circumstance issues this year do not affect either the theory of the special circumstances or the method for resolving special circumstance issues. The two cases which treat special circumstances issues consistently with prior law are *Wade* and *Howard*.

As already noted, under Bird court precedent the special circumstances were interpreted by applying the law governing the interpretation of crimes. The torture-murder special circumstance at issue in *Wade*\(^\text{182}\) provides an excellent example. Torture was included as an element of first degree murder when murder was divided into degrees in 1856.\(^\text{183}\) Using the familiar method of the substantive criminal law, the California courts have defined both the actus reus and the mens rea of murder in the first degree on the theory of murder by torture. With respect to the actus reus of first degree murder by torture, the defendant must commit acts designed\(^\text{184}\) to cause cruel pain and suffering to the victim,\(^\text{185}\) and those acts must cause the victim’s death.\(^\text{186}\) There are two mens rea requirements. First, of course, is the mental element for murder. An intent to kill is not required.\(^\text{187}\) “Implied malice,” to use the California term for what is more generally known as a “depraved-heart” murder,\(^\text{188}\) “extremely reckless” murder,\(^\text{189}\) or “wanton and willful disregard” murder,\(^\text{190}\) are sufficient.\(^\text{191}\) The aggravating mental element elevating the murder to first degree is an intent to cause cruel

---

\(^{182}\) People v. Wade, 44 Cal. 3d 975, 750 P.2d 794, 244 Cal. Rptr. 905 (1988).

\(^{183}\) See supra text accompanying note 9.

\(^{184}\) There is no requirement that the victim actually suffer pain. *E.g.*, People v. Wiley, 18 Cal. 3d 162, 554 P.2d 881, 133 Cal. Rptr. 135 (1976).

\(^{185}\) *E.g.*, see People v. Wiley, 18 Cal. 3d 162, 554 P.2d 881, 133 Cal. Rptr. 135 (1976); People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976); People v. Tuby, 34 Cal. 2d 72, 207 P.2d 52 (1949).


\(^{188}\) *E.g.*, W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 617-21 (2d ed. West 1986) (hereinafter LAFAVE & SCOTT).

\(^{189}\) *E.g.*, J. DRESSLER, UNDERSTANDING CRIMINAL LAW 461-62 (Matthew Bender 1987).

\(^{190}\) *E.g.*, R. PERKINS & R. BOYCE, CRIMINAL LAW 50-60 (3d ed. Foundation Press 1982).

\(^{191}\) *E.g.*, Wiley, 18 Cal. 3d 162, 554 P.2d 881, 133 Cal. Rptr. 135; Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161; People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971).
pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose. Without this aggravating mens rea, a murder committed by torturous means is murder in the second degree. The California Supreme Court has explained the critical importance of the aggravating mens rea for first degree murder by torture:

The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. . . . Rather, it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal gain or satisfaction—which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder.

When the Bird court was presented with the question of the proper interpretation of the torture-murder special circumstance in the 1978 Initiative, the court applied the method of the substantive criminal law to determine its meaning. The language of the provision suggests that the defendant's mental state with respect to the torture is irrelevant. The critical factor is the experience of pain by the victim.

The section applies when “[t]he murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.” When this language is compared with the language of the 1977 special circumstance, one could easily infer that the Initiative meant to abolish the requirement of an aggravating mens rea for the torture-murder special circumstance and

192. Wiley, 18 Cal. 3d at 168-73, 554 P.2d at 883-87, 133 Cal. Rptr. at 137-41; Steger, 16 Cal. 3d at 544-47, 546 P.2d at 667-70, 128 Cal. Rptr. at 163-66.

Though it is unclear whether this intent must be “willful, deliberate and premeditated” (compare Steger with Wiley), the standard jury instructions include that requirement, thus resolving the ambiguity in favor of a “willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.” CALJIC No. 8.24 (1987 Revision) (West Supp. 1987).

193. Steger, 16 Cal. 3d at 546, 546 P.2d at 669, 128 Cal. Rptr. at 165. (citation omitted). See also People v. Tubby, 34 Cal. 2d 72, 77, 207 P.2d 51, 54 (1949).


195. “The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.” Former CAL. PENAL CODE § 190.2(4) (West 1979).
replace it with proof that the victim suffered extreme physical pain though not necessarily for a prolonged period of time. Furthermore, if one also focuses on the phrase "infliction of extreme physical pain" in the definition of the special circumstance, then quite obviously the statute is ambiguous.

Finding the provision ambiguous, the court applied substantive criminal law analysis and held that,

Proof of a murder committed under the torture-murder special circumstance therefore requires proof of first degree murder, . . . proof the defendant intended to kill and to torture the victim . . . , and the infliction of an extremely painful act upon a living victim. . . . The special circumstance is distinguished from murder by torture under section 189 because under section 190.2, subdivision (a)(18) the defendant must have acted with the intent to kill.

196. In Davenport, the Bird court recognized that the 1978 provision abolished the requirement in the 1977 torture-murder special circumstance that the pain be "prolonged." People v. Davenport, 41 Cal. 3d 247, 260, 710 P.2d 861, 868, 221 Cal. Rptr. 794, 801 (1985).

197. Id. at 271, 710 P.2d at 875, 221 Cal. Rptr. at 808 (citations omitted). The Davenport court identified three reasons for reaching this conclusion: (1) that a different interpretation would "overthrow the long-established definition of torture"; (2) that a contrary construction of section 190.2(a)(18) would "lead to a possibly absurd result"; (3) and, finally, that such a conclusion would raise grave questions as to the constitutional validity of the statute." Id. at 269, 710 P.2d at 874, 221 Cal. Rptr. at 807.

Arguably, the first degree torture rule and the torture-murder special circumstance are distinguishable by more than the fact that the murder must be intentional to qualify for the special circumstance. For the first degree rule, the murder must be "perpetrated by means of . . . torture," CAL. PENAL CODE § 189 (West 1988), whereas the special circumstance requires that the first degree murder "was intentional and involved the infliction of torture." Id. at § 190.2(a)(18). Under the first degree provision the torturous acts must be the cause of death. E.g., People v. Talamantez, 169 Cal. App. 3d 443, 215 Cal. Rptr. 542 (1985). In other words, the torture must be the means by which the killing was accomplished. This is what is meant by the word "perpetration" in section 189, whereas the change in language in the special circumstance suggests that the torturous acts need not be the cause of death to satisfy the special circumstance. In the one case to consider this issue, the court of appeal so held. People v. Hoban, 176 Cal. App. 3d 255, 221 Cal. Rptr. 626 (1985).

Hoban seems to be correct on principle. This means that there is a difference in both the actus reus and the mens rea between the first degree rule and the torture-murder special circumstance. Although both require the intent to torture, the first degree rule defines the minimum mens rea for guilt as "implied malice," whereas the special circumstance requires that the murder be intentional. From this perspective, the class of first degree torture murderers is narrowed by the special circumstance to those who intentionally kill. On the other hand, because of the difference in the wording of the actus reus of the special circumstance, the defendant would not need to be guilty of first degree murder on a theory of torture for there is no requirement that the killing be caused by the torture. As long as the defendant is guilty of an intentional first degree murder, if the defendant also commits torturous acts with the requisite torturous intent, the defendant is guilty of both first degree murder and the torture-murder special circumstance.
In Wade the defendant attacked the torture-murder special circumstance on the same ground urged in Davenport. It was contended that it is "unconstitutionally vague and overbroad in that it fails to 'meaningfully narrow the group of those subject to the death penalty and serves only as a vehicle for arbitrary and capricious action, to be used whenever jurors and prosecutors, in their sole and unguided discretion, so desire.'" The court rejected these arguments on the ground that the interpretation of the torture-murder special circumstance in Davenport fully answered his contentions.

Wade also reaffirmed the Bird court's holding that special circumstances are to be treated in precisely the same way as are crimes with respect to the specificity with which they are defined. In Engert, the Bird court held that the due process clause of the fourteenth amendment requires the same specificity in defining special circumstances that it requires in the definition of crimes. Wade followed Engert and likewise held that the "heinous, atrocious or cruel" special circumstance was unconstitutionally vague.

By reaffirming Davenport and Engert, the Lucas court reaffirmed that the interpretation and application of the special circumstances are governed by the rules of the substantive law pertaining to the elements of crimes. With a great deal more subtlety, the court reached the same result in Howard.

In Howard the trial court instructed the jury on the bare language of the statute. In order to find the financial-gain special circumstance true the jury was told that it must find that "the mur-

198. People v. Wade, 44 Cal. 3d 975, 993, 750 P.2d 794, 804, 244 Cal. Rptr. 905, 915 (1988).
199. Id.
201. Wade, 44 Cal. 3d at 993, 750 P.2d at 804, 244 Cal. Rptr. at 915.
202. The court also rejected an argument that the torture-murder special circumstance finding must be vacated because the trial court failed to instruct the jury on the requirement of intent to torture. The court held that in view of the proper instructions on the first degree torture rule and the arguments of counsel, "we are confident that the jury understood the basic elements of the torture-murder special circumstance, and that the special circumstance finding was not based on a mere accidental or unintentional infliction of cruel pain." Id. at 995, 750 P.2d at 805, 244 Cal. Rptr. at 916. A discussion of this aspect of Wade is beyond the scope of this article. For a discussion of the Lucas court's use of the arguments of counsel to "cure" defects in penalty phase jury instructions, see Poulos, supra note 142.
204. The financial-gain special circumstance in the 1978 Initiative simply provides: "The murder was intentional and carried out for financial gain." CAL. PENAL CODE § 190.2(a)(1) (West 1988).
...der was intentional and carried out for financial gain. The defendant proposed three instructions defining "financial gain," but the trial court refused all three. The defendant's principal contention was that "financial gain" means that the murder "was carried out pursuant to an agreement by the person committing the murder to accept valuable consideration for the act of the murder from some person other than the victim." In affirming the trial court's action and rejecting the defendant's agreement theory, Chief Justice Lucas wrote that,

the fundamental problem with defendant's claim . . . [is his focus] . . . on the terms of the agreement which was reached before the murder occurred. The special circumstance focuses on the defendant's intention at the time the murder was committed. Even if the agreement would have been satisfied by less than the victim's murder, the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.

At another point in the opinion the court emphasized that "nothing in the special circumstance's language requires a preexisting 'agreement' before the circumstance is found true. What is relevant is the particular defendant's purpose, whether or not achievable." It was further noted that "no such agreement was necessary. The issue was defendant's intent at the time the murder was committed, not whether that intent arose pursuant to a contractual agreement."

The court's reliance upon the defendant's mens rea to give meaning to the financial-gain special circumstance falls squarely within the tradition of the substantive criminal law of California, and the precedent established by both the Bird court and Chief

---

205. *Howard*, 44 Cal. 3d at 407, 749 P.2d at 296, 243 Cal. Rptr. at 860.
206. *Id.* at 407 n.8, 749 P.2d at 296 n.8, 243 Cal. Rptr. at 860 n.8.
207. Although the opinion does not specify the trial court's reasoning in denying each of the three requested instructions, the court does tell us that the prosecutor objected on the grounds that the phrase "was a matter of common understanding and the Legislature (sic) did not intend that its meaning be restricted, certainly not in the manner sought by defendant." *Id.* at 407-08, 749 P.2d at 296-97, 243 Cal. Rptr. at 860-61. Presumably the court agreed with the prosecutor's arguments.
208. *Id.* at 407 n.8, 749 P.2d at 290 n.8, 243 Cal. Rptr. at 860 n.8.
209. *Id.* at 409, 749 P.2d at 298, 243 Cal. Rptr. at 861 (emphasis in original).
210. *Id.* at 410 n.10, 749 P.2d at 298 n.10, 243 Cal. Rptr. at 862 n.10 (emphasis added).
211. *Id.* at 410 n.12, 749 P.2d at 298-99 n.12, 243 Cal. Rptr. at 862 n.12 (original italics).
212. *See supra* notes 179-80.
Justice Lucas' later opinion in *Wade*. It is the defendant's mental state, the defendant's intention to obtain financial gain from the intentional killing, which justifies the harsher punishment and its desired deterrent effect.214

Like the torture-murder special circumstance, the financial-gain special circumstance has two mental elements: first, the defendant must intentionally kill his victim; and second, the defendant must intend to obtain financial gain by the killing. More specifically, in regard to the second element, the murder must have been committed for the purpose of obtaining financial gain. To use the precise language of Chief Justice Lucas, the second intent requires that the "defendant committed the murder in the expectation that he would thereby obtain the desired financial gain."215

Furthermore, Chief Justice Lucas' interpretation of the financial-gain special circumstance sensibly flows from the language used to define that special circumstance. The words "carried out for financial gain" mean nothing less than "done for the purpose of financial gain."216 Having construed the financial-gain special circumstance in this manner, the court correctly rejected each of the defendant's three proffered instructions. Rejection was based on the fact that each instruction focused on the definition of "financial gain" rather than on the critical words "carried out for" financial gain, and each offered an incorrect interpretation of that phrase.217

The court's interpretation of the financial-gain special circumstance in *Howard* is solidly in line with prior authority holding that the interpretation and application of the special circumstances are governed by the rules of the substantive law pertaining to the elements of crimes.218 However, *Howard* neither mentions how the spe-
cial circumstances should be classified, nor cites to the fundamental principles of the substantive criminal law in concluding that the culpable mental element of this special circumstance includes an intent to obtain financial gain by the killing.

The next topic to be discussed is that case which treats the special circumstances *inconsistently* with both the principles articulated by the Bird court and with the Lucas court’s own precedent. Indeed, this decision suggests that the Lucas court has no conception of how the special circumstances do or should fit into the law of capital murder in California.

The problematic case is *People v. Kimble.* The defendant broke into the home of Harry and Avone Marguilies, stole a set of keys to the couple’s stereo store from Mr. Marguilies, raped Mrs. Marguilies, and after placing tape over the eyes and mouth of each victim securing their hands behind their backs, he killed each with a single .45 caliber shot to the chest. Later, with the assistance of two accomplices, the defendant used the stolen keys to enter the stereo store and steal a number of boxes of stereo equipment.

Defendant was convicted of two murders, two burglaries, robbery, and rape (along with several enhancements). With respect to the murder of Harry Marguilies, two special circumstances were found true: felony-murder (robbery), and multiple-murder. Three special circumstances were found to be true in connection with the murder of Avone Marguilies: felony-murder (robbery), felony-murder (rape) and multiple-murder. The jury eventually returned a verdict imposing the sentence of death. The prosecution was under the 1977 Legislation.

During the course of his summation, the prosecutor relied on the theory that the murders were committed for revenge. The trial judge instructed the jury that in order to find the various felony-murder special circumstances true, the jury would have to find “that the murder was committed during the commission of” the felony upon which the special circumstance was based. Note that this instruction simply repeats the language of the statute. On ap-
Appeal defendant challenged this instruction on the ground that it failed to properly inform the jury of the law applicable to the felony-murder special circumstances as articulated in *People v. Green.*

In *Green,* the defendant took his wife to a remote area and forced her to remove her clothes at gun point. He then shot her to death and removed the rings from her finger. The victim’s clothes and her rings were taken from the scene. Defendant was charged with the felony-murder (robbery) special circumstance in the 1977 Legislation. Although it was clear from the evidence that the defendant took the clothes and rings to conceal the crime by making the body difficult to identify, the prosecutor argued that the robbery of the clothing supported the felony-murder special circumstance.

The trial court in *Green* instructed the jury in the same language used in *Kimble:* that the jury need only find that the murder was committed “during the commission” of the robbery for the felony-murder special circumstance to apply. The California Supreme Court in *Green* recognized that at the very least “the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.” The court held that the “Legislature’s goal is not achieved, however, when the defendant’s intent is not to steal but to kill and the robbery is merely incidental to the murder . . . .” The critical factor is the defendant’s intent, not “semantics or simple chronology.”

In *People v. Thompson,* the court again emphasized that the question turns on the defendant’s intent. “[T]his determination,”

---

224. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).
225. Id. at 59-60, 609 P.2d at 504, 164 Cal. Rptr. at 37.
226. Id. at 61, 609 P.2d at 505, 164 Cal. Rptr. at 38.
227. Id.
228. Id.
said the court, "involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed ... in order to advance an independent felonious purpose.' Applying Green to the Thompson facts, the court said,

The question presented under People v. Green is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such intended thefts were "merely incidental to the murder." Viewing the record as a whole in the light most favorable to the jury's verdicts, as this court must, it is impossible to conclude that the prosecution sustained its burden of proof on this issue. Thus the Thompson court concluded that the evidence was insufficient to support the jury finding that the felony-murder special circumstance was true.

The analysis used in Green and Thompson to ferret out the meaning of the felony-murder special circumstance follows the general theory employed in interpreting the other special circumstances. Their interpretation is based upon the fundamental principles and policies of the substantive criminal law. Under that body of law, it is the defendant's mental state, the defendant's intention, which generally justifies the use of harsher punishment and its desired deterrent effect. Since the purpose of the felony-murder special circumstance is to create "a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those

---

229. People v. Thompson, 27 Cal. 3d 303, 322, 611 P.2d 883, 893, 165 Cal. Rptr. 289, 299 (1980). More specifically, the court wrote:
Since the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not, the determination as to whether or not a murder was committed during the commission of robbery or other specified felony is not 'a matter of semantics or simple chronology.' Rather, this determination involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed in cold blood in order to advance an independent felonious purpose, e.g. [has] carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping, or a rape.' A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder ... because its sole object is to facilitate or conceal the primary crime.'

Id. at 322, 611 P.2d at 893, 165 Cal. Rptr. at 299 (citations omitted).

230. Id. at 324, 611 P.2d at 894, 165 Cal. Rptr. at 300 (footnote omitted).

231. See supra notes 146, 179, 193 and accompanying text; infra notes 333-35 and accompanying text.
who do not," the legislative distinction was based upon the defendant's mental state at the time of the crime. To paraphrase Chief Justice Lucas' opinion in Howard, the special circumstance focuses on the defendant's intention at the time the murder was committed. The relevant inquiry is whether the defendant committed the murder to advance an independent felonious purpose. Moreover, although the statutory provision does not explicitly articulate the mens rea requirement, both the language used by the legislative body and the statute's goals imply an additional mens rea requirement.

In this respect, the felony-murder special circumstance is treated in precisely the same way as both the torture-murder and the financial-gain special circumstances treatment by the Bird court, and by Chief Justice Lucas' opinions in Wade and Howard. In both the torture-murder and the financial-gain special circumstances, the additional mental state was implied from the statute's language and goals. The same is true of the felony-murder special circumstance.

Furthermore, the additional mens rea for the felony-murder special circumstance makes the required culpable mental state for that special circumstance even more nearly similar to the mens rea requirements necessary for the torture-murder and the financial-gain special circumstances. For torture-murder there must be the requisite mens rea for first degree murder coupled with the intent to cause cruel pain and suffering to the victim. For financial-gain there must be the requisite mens rea for first degree murder coupled with the intent to acquire financial gain from the murder. For felony-murder there must be the requisite mens rea for first degree murder coupled with the intent to advance an independent felonious purpose. In other words, in addition to the culpable mental state necessary for first degree murder, the defendant must intend to acquire some felonious gain other than the "gain" acquired from the murder. Simply put, the murder must be the means by which the culprit's goal, which is some other felonious gain, is acquired.

Returning to the Kimble case, the trial judge instructed on the felony-murder special circumstance contained in the bare lan-

233. Howard, 44 Cal. 3d at 409, 749 P.2d at 297, 243 Cal. Rptr. at 861.
234. See supra notes 179, 197, 202, 211.
235. See infra text accompanying notes 360-61.
236. See infra text accompanying notes 636-37.
237. See supra text accompanying notes 219-24.
guage of the statute. To find the special circumstance true, the jury must find that the murder was committed “during the commission” of the felony. The defendant’s complaint was that the phrase “during the commission” of the felony did not fairly inform the jury that it must find that the defendant intended to advance an independent felonious purpose from the murder. Although the defendant’s precise claim does not appear in the report of the case, Green and Thompson require an instruction telling the jury that in order to find the felony-murder special circumstance true, the jury must find that the murder was committed with the intent “to carry out or advance the commission of the crime of [ ], or to facilitate the escape therefrom or to avoid detection.”

It is fundamental that a trial judge has a sua sponte duty to instruct the jury on all of the elements of the offense charged. Apparently, this was one of the principles invoked by Kimble to support his claim that the trial judge should have instructed on the Green intent requirement.

Given the Chief Justice’s opinions in Wade and Howard, it is surprising that the defendant’s argument was rejected. “Preliminarily,” wrote Chief Justice Lucas, “we reject the dissent’s novel suggestion that Green’s clarification of the scope of felony-murder special circumstances has somehow become an ‘element’ of such special circumstances, on which the jury must be instructed in all cases regardless of whether the evidence supports such an instruction.”


239. This is a paraphrase of the relevant provisions of CALJIC No. 8.81.17 (West pamph. 1987). I have substituted the words “with the intent to” for the phrase “in order to” which appears in the instruction. The phrase “the murder was committed in order to carry out or advance the commission of the crime” does not clearly inform the jury that it must determine this question on the basis of the defendant’s intent at the time of the killing. This instruction is discussed at infra text accompanying notes 423-63.


Advising his fellow judges on their duty to give sua sponte instructions in criminal cases, Judge Richards wrote in Appendix A (1979) of CALJIC, “Obviously the requirement of sua sponte instructions to cover the ‘general principles of law governing the case’ includes instructions to be given by the court in the absence of a request which delineate the elements of the offense charged.” RICHARDS, CRIMINAL LAW—SUA SPONTE INSTRUCTIONS, Appendix A, CALJIC (West 1979).

241. I have not read the briefs in Kimble, but I assume that defendant’s lawyer would argue the “element rule” as one of the foundations for her argument that the trial judge had a sua sponte duty to instruct on Green’s intent requirement.

242. Kimble, 44 Cal. 3d at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161.
The fundamental question then is whether Green's intent requirement is an element of the special circumstance. Two reasons are given by the Chief Justice for the conclusion that it is not: (1) Green, Thompson, and Robertson,\(^{243}\) the three leading cases, "have not treated Green in this fashion;\(^{244}\) and (2) the court has not treated other "clarifying" holdings in analogous settings as elements of the crime they "clarify."\(^{245}\)

But before turning to an analysis of the Chief Justice's argument, the argument supporting the proposition that Green's intent requirement is, indeed, an element of the felony-murder special circumstance should be clearly in mind. When discussing the elements of a crime, the actus reus and the mens rea, or the definition of the offense itself, is that which is customarily referred to.\(^{246}\)

As noted above, the purpose of the felony-murder special circumstance is to separate first degree murderers into two categories: first degree murderers "who," in the words of Chief Justice Lucas, "deserve to be considered for the death penalty and those who do not."\(^{247}\) According to Green and its progeny, the dividing line selected by the Legislature is between "those defendants who killed in cold blood in order to advance an independent felonious purpose" and all other first degree felony murderers.\(^{248}\) In other words, Green's intent rule is the Legislature's definition of death eligible and non-death eligible first degree felony murderers.

Accordingly, the "truth" or "untruth" of the felony-murder special circumstance is solely dependent upon the existence of the Green intent at the time the murder is committed. Thus, Green articulates the Legislative definition of the felony-murder special circumstance and provides the only dividing line between those who are death eli-

---

\(^{243}\) People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

\(^{244}\) Kimble, 44 Cal. 3d at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161.

\(^{245}\) Id.

\(^{246}\) E.g., LaFave & Scott, supra note 188, at 48. The Model Penal Code includes within its concept of a "material element of an offense" not only the actus reus and the mens rea (though those terms, of course, are not used) but also conduct, attendant circumstances and the results of conduct that negatives an excuse or justification for such conduct. MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENT PART II) § 1.13 (1980) [hereinafter MODEL PENAL CODE]. The Model Penal Code is thus somewhat broader than customary usage.

\(^{247}\) See supra text accompanying note 177.

\(^{248}\) Kimble, 44 Cal. 3d at 500, 749 P.2d at 815, 244 Cal. Rptr. at 161 (quoting from Robertson).

\(^{249}\) Id. The reasoning is obvious enough. A defendant who commits a first degree murder to achieve some other felonious goal has not only the moral culpability of a first degree murderer, but the additional moral depravity which flows from treating fellow human beings as objects to be removed because they stand in the way of his achieving another felonious goal.
gible and those who are not. Defendant's who kill with the intent “to advance an independent felonious purpose” are “guilty” and those without this intent are not. Thus the Green intent must exist in the mind of each defendant when the killing occurs.

In the traditional terms of actus reus and mens rea, all first degree felony-murder shares the same actus reus. The distinction between those who are guilty of the felony-murder special circumstance and those who are not is Green’s mens rea requirement. Again, this requirement is the defendant’s intent to carry out or advance the commission of the enumerated felony or to facilitate the escape therefrom or to avoid detection for its commission. If the element concept means anything, it must mean that the mens rea distinction between the guilt or “innocence” of a crime is an element of that crime. It also must mean that the mens rea distinction between the “truth” or “untruth” of a special circumstance is an element of the special circumstance.250

Chief Justice Lucas takes issue with none of the above. His first argument is that Green, Thompson and Robertson do not treat “Green in this fashion.”261 He is clearly wrong with respect to Green and Thompson, and Robertson is sufficiently ambiguous that it does not provide an adequate basis for concluding that the Green intent is not a element of the felony-murder special circumstance.

In Green the Attorney General conceded “that . . . murder was the prime crime and that the robbery was incidental to that murder, since the underlying motive for the robbery was to leave Karen’s corpse bereft of anything whatsoever by which she could be identified.”262 Given these facts, the court held the “evidence insufficient as a matter of law to support the jury’s finding of the truth of the robbery special circumstance alleged in count I.”263 Though Green did not involve an instructional issue, surely it is beyond argument that an element of an offense or a special circumstance must be proved by

250. It might prove helpful here to note again that the Green intent requirement performs exactly the same purpose and function as the mens rea requirements for (1) first degree murder on the theory that the murder was “willful, deliberate, and premeditate (see supra text accompanying notes 9, 16, 37), (2) the financial-gain special circumstance (see infra text accompanying notes 635-39), (3) the arrest-escape special circumstance (see supra note 216), (4) the torture-murder special circumstance (see infra text accompanying notes 354-61), (5) race-color-religion-nationality-or-country-of-origin special circumstance (see supra note 216), and (6) in six of the different “victim” special circumstances (see supra note 216). From the previous discussion of these crimes and special circumstances it seems clear that each of these mens rea requirements is an element of the crime or the special circumstance.

251. Kimble, 44 Cal. 3d at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161.

252. Green, 27 Cal. 3d at 62, 609 P.2d at 506, 164 Cal. Rptr. at 39.

253. Id.
the prosecution beyond a reasonable doubt.254 Consequently, if the evidence fails to establish that element in accordance with the appropriate standards, then the reviewing court should reverse or vacate the verdict or finding on the basis of the insufficiency of the evidence. Little would be gained by repetition of the above analysis of Green and why it establishes the defendant’s independent felonious intent at the time of the killing as an element of the special circumstance. Suffice it to say that Green simply held that the prosecutor had not borne the People’s burden of proof on the issue of the defendant’s intent at the time of the murder. The Supreme Court accordingly set aside the special circumstance finding on the traditional ground of insufficiency of the evidence to support the verdict. Indeed, nothing in Green remotely suggests that the rule it created operates in any other way. Certainly the simple assertion that Green did not treat the intent requirement as an element of the special circumstance may be dismissed on the ground that a conclusion is entitled to no more weight than the rationale upon which it is based. Having offered neither a rationale for his conclusion nor an analysis of Green, little more can be said of Chief Justice Lucas’ opinion on this point.

Chief Justice Lucas also claimed that Thompson255 “never treated” Green as creating an element of the felony-murder special circumstance.256 In Thompson precisely the same claim was presented as in Green. The sufficiency of the evidence to support the felony-murder special circumstance finding under Green was challenged. The court’s reasons for sustaining the defendant’s claim are more than mildly interesting:

The question presented under People v. Green is whether the shootings were done to advance an independent felonious purpose of stealing the car and keys or whether instead such intended thefts were “merely incidental to the murder.” Viewing the record as a whole in the light most favorable to the jury’s verdicts, as this court must, it is impossible to conclude that the prosecution sustained its burden of proof on this issue. . . .

When the whole record is viewed . . . it establishes at

---

254. For example, the due process clause of the fourteenth amendment requires the prosecution to prove every element of the crime charged beyond a reasonable doubt. E.g., Francis v. Franklin, 471 U.S. 307 (1985); Sanstrom v. Montana, 442 U.S. 510 (1979); People v. Roder, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983).
most a suspicion that appellant had an intent to steal independent of his intent to kill. . . . The evidence against appellant on the question of the truth of the special circumstances is "so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt." . . . It is insufficient to establish that the crime appellant committed was "in fact a murder in the commission of a robbery [rather than] the exact opposite, a robbery in the commission of a murder." 257

The following factors were critical to the Thompson analysis of the sufficiency of evidence claim: (1) the prosecution had the burden of proof on the issue of the Green intent requirement; (2) the standard of proof was the traditional requirement of proof beyond a reasonable doubt; 258 (3) the evidence had to affirmatively establish that the defendant killed the victims to further an independent felonious purpose; and (4) the verdict must be set aside unless the evidence was sufficient to establish, beyond a reasonable doubt, that the defendant in fact killed to further that independent felonious purpose.

This is, of course, the precise analysis that a court would use to evaluate the sufficiency of the evidence of a conceded element of a crime or special circumstance. Let us suppose, for example, that the special circumstance required an intent-to-kill as in the case of the financial-gain special circumstance. 259 The prosecution would be obliged to prove the defendant's intent-to-kill beyond a reasonable doubt. If the evidence was insufficient to sustain that factual finding, then the special circumstance would have to be set aside. In short, the prosecution's failure to prove intent-to-kill would be analyzed in exactly the same way that Thompson analyzed the failure of the prosecution to prove that the defendant killed to further an independent felonious goal. Thus, like Green, Thompson supports the classification of the Green intent rule as an element of the special circumstance. 260

However, the Chief Justice correctly asserts that Robertson 261

257. Thompson, 27 Cal. 3d at 324-25, 611 P.2d at 894-95, 165 Cal. Rptr. at 300-01.
258. In this respect the court later indicated that the burden of proof beyond a reasonable doubt was constitutionally mandated for the Green intent requirement. Id.
259. CAL. PENAL CODE § 190.2(a)(1) (West 1988). Until the court overruled the Carlos intent-to-kill requirement, the felony-murder special circumstance under discussion did have such a requirement. See infra text accompanying notes 389-421.
260. In Williams, the court was willing to assume that the Green intent instruction is routinely required in a felony-murder special circumstance case. The court then went on to hold that the assumed error was not prejudicial and therefore a reversal was not required. People v. Williams (Keith), 44 Cal. 3d 883, 927-29, 751 P.2d 395, 424-25, 245 Cal. Rptr. 336, 365-67 (1988). See infra text accompanying notes 454-59.
does not treat Green as an element of the felony-murder special circumstance. Robertson also fails to speak to the question of whether Green’s intent rule is an element of the special circumstance or “something else.”

The defendant made two claims in Robertson. The first was the same issue presented in Green and Thompson: the insufficiency of the evidence to support the finding that the defendant committed the murder for an independent felonious purpose. The court rejected this contention on the ground that the evidence was indeed sufficient to support the necessary findings under Green. The holding on this first issue in Robertson, like Green and Thompson, supports the element theory.

The defendant’s second contention was that the special circumstance finding had to be “reversed because the trial court failed to instruct the jury sua sponte on the ‘incidental robbery’ theory enunciated in Green.” The court rejected this claim in a single paragraph:

In light of the significant differences between the facts of this case and the facts of Green, however, we do not believe that case’s “incidental robbery” doctrine can properly be characterized as a general principle of law “closely and openly connected with the facts before the court.” (See People v. St. Martin (1970) 1 Cal. 3d 525, 531 [83 Cal. Rptr. 166, 463 P.2d 390]; People v. Sedeno (1974) 10 Cal. 3d 703, 715 [112 Cal. Rptr. 1, 518 P.2d 913]) as to which a sua sponte duty to instruct could arise.

It is clear that the Robertson court is not treating Green’s intent rule as an element of the special circumstance. It is equally clear that Robertson does not even consider that question. The duty of a trial court to instruct the jury on every element of an offense (or a special circumstance) was not involved in either St. Martin or Sedeno, the two cases on which the Robertson court relies.

In addition to the sua sponte instruction obligation for the elements of an offense, a trial court must give instructions sua sponte
on "general principles of law relevant to the issues raised by the evidence. . . . The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."\footnote{268}

The Robertson court found no sua sponte duty to instruct on what the court called Green's "'incidental robbery' theory" because the facts before the trial court did not indicate that the instruction was called for as it was in Green. Accordingly, the court's answer in Robertson is irrelevant to the question presented in Kimble of whether Green's intent rule is an element of the felony-murder special circumstance. The rationale of Green and Thompson indicate that it is, Robertson simply does not address the issue.

The second reason given by the court for refusing to recognize Green's intent rule as an element of the special circumstance is that the court has not "so treated other 'clarifying' holdings in analogous settings."\footnote{269} He offers the example of the Daniels-aggravated-kidnapping rule.\footnote{270}

In Daniels, the court held that movements of a victim constitute kidnapping for robbery\footnote{271} only if the movements are not merely incidental to the commission of the robbery and if they substantially increase the risk of harm beyond that inherent in the robbery.\footnote{272} Both prongs of the rule must be met before there is an asportation sufficient for aggravated kidnapping.\footnote{273} The courts recognize that at least the second prong of the Daniels rule is essentially a factual determination,\footnote{274} but they have disagreed over whether the judge\footnote{275} or jury is the proper entity to make this determination.

Although the California Supreme Court has never resolved this
issue,\textsuperscript{277} practice in California has. The \textit{Daniels} rule is now routinely submitted to the jury under appropriate instructions.\textsuperscript{278} Practically speaking then, the current practice in California treats the \textit{Daniels} rule as though it is an element of the crime of aggravated kidnapping. Thus, the \textit{Daniels} instruction is given to the jury regardless of the evidence in the case.\textsuperscript{279} As a general rule, this is similar to the nature of an element of the crime.\textsuperscript{280} The instruction is given regardless of the evidence because the prosecution bears the burden of proof. The lack of evidence does not mean that the instruction should be withheld, rather it means that the defendant should be acquitted.

Assuming that the lower California courts,\textsuperscript{281} Justice Stanley Mosk\textsuperscript{282} and the Committee on Standard Jury Instructions are correct,\textsuperscript{283} then the \textit{Daniels} analogy does not support Chief Justice Lucas' argument that \textit{Daniels} and its progeny "disclose that the mere act of 'clarifying' the scope of an element of a crime or a special

\begin{itemize}
    \item \textsuperscript{277} Compare People v. Thornton, 11 Cal. 3d 738, 768-69 n.20, 523 P.2d 267, 287-88 n.20, 114 Cal. Rptr. 597-98 n.20 (1974) (discussing the "instruction approach" without either accepting or rejecting it) with Earley, 14 Cal. 3d at 128, 534 P.2d at 725, 120 Cal. Rptr. at 885 ("Nothing in People v. Stanworth, supra, 11 Cal. 3d 588, is inconsistent with the requirement that to convict a defendant of violating section 209 the jury must find both of the foregoing matters.").
    \item \textsuperscript{278} See, e.g., CALJIC No. 9.23 (1979 Revision) (West pamph. 1987); People v. John, 149 Cal. App. 3d 798, 197 Cal. Rptr. 340 (1983).
    \item \textsuperscript{279} See \textit{John}, 149 Cal. App. 3d 798, 197 Cal. Rptr. 340 (1983) In \textit{John}, the court said: "The parties agree that CALJIC No. 9.23, which was given at the trial in this case, accurately states the elements which must be proved in order to establish a violation of section 209." \textit{Id.} at 804, 197 Cal. Rptr. at 343 (emphasis added). \textit{John} went on to reverse the conviction of aggravated kidnapping on the ground that the jury's verdict finding the existence of the \textit{Daniels} factors was not supported by sufficient evidence. \textit{Id.} at 804-07, 197 Cal. Rptr. at 343-46.
    \item \textsuperscript{280} See infra text accompanying notes 309-20.
    \item \textsuperscript{281} See supra note 279.
    \item \textsuperscript{282} Justice Mosk wrote for the majority in \textit{Daniels}. \textit{Daniels}, 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897 (1969). The court was nearly unanimous; only Justice McComb failed to join the Mosk opinion. His objection was a single sentence: "I would affirm the judgments in their entirety. \textit{Id.} at 1143, 459 P.2d at 241, 80 Cal. Rptr. at 913. In \textit{Thornton}, Justice Mosk dissented, in part, on the ground that "[t]he jury was not required to consider the length or duration of the movement, nor to find any increase whatever in the risk of harm caused by that movement, less still a substantial increase in the risk. \textit{Yet these are essential elements, under Daniels, of the offense of kidnapping for the purpose of robbery.}" People v. Thornton, 11 Cal. 3d 738, 771, 523 P.2d 267, 289, 114 Cal. Rptr. 467, 489 (1974). It was this aspect of the Mosk dissent that provoked the majority into discussing the "instruction approach" (see supra note 277), but the instructional issue was not resolved by the majority because the error was either harmless or the instruction was unsupported by the evidence. \textit{Id.} at 768-69 n.20, 523 P.2d 267, 487-88 n.20, 114 Cal. Rptr. 467, 287-88 n.20.
    \item \textsuperscript{283} CALJIC No. 9.23 (1979 Re-revision) (West Supp. 1987) treats the \textit{Daniels} rule as an element of the offense.
\end{itemize}
circumstance does not create a new and separate element of that crime or special circumstance.886

However, since a majority of the California Supreme Court has treated Daniels with "elemental" ambiguity, it may be assumed that the "clarifying" ruling in Daniels does not create "a new . . . element of that crime . . ." Even with this concession, Daniels and its progeny lend no support to the Chief Justice's argument that the Green intent rule is not an element of the felony-murder special circumstance.

There is no magic in a "clarifying" ruling of a court. Some clarifying rulings recognize new elements of an offense and some do not. Indeed, the history of the common law of crimes is little more than the history of clarifying rulings which recognize the elements of substantive crimes. It is far too late in our experience with the judicial process to deny that much of the work of defining the elements of the various offenses is allocated in one way or another to the courts. Furthermore, a moment's reflection reveals that Justice Lucas' opinion in Kimble confirms, rather than refutes, this fundamental power in the courts and the force of "clarifying" rulings. A "clarifying" ruling which holds that a particular rule is not an element of an offense or a special circumstance bespeaks the authority to reach the opposite conclusion: that it is an element of the felony-murder special circumstance. Neither pronouncement is more legitimate than the other from the viewpoint of judicial power and authority.

It is thus not a question of the authority of courts to recognize a new element of an offense by a "clarifying" ruling. Clarifying rulings undeniably recognize new elements of an offense or special circumstance even at the hands of the Lucas court. For example, in Davenport the court interpreted the statutory language of the torture-murder special circumstance to require a specific intent to torture.886 Chief Justice Lucas' opinion in Wade embraced Davenport's "clarifying" interpretation of the felony-murder special circumstance in the following excerpt:


285. See supra note 277. It is true that in Thornton the majority failed to recognize that the Daniels rule was an element of the offense; and in Earley the court's statement that "the jury must find both of the foregoing matters" (see supra note 277) is dictum. Nevertheless, the California Supreme Court has never resolved the question of whether the Daniels rule creates an element of the offense.

In sum, we find that the words used in section 190.2, subdivision (a)(18) must be understood in light of the established meaning of torture. Proof of a murder committed under the torture-murder special circumstance therefore requires proof of first degree murder, . . . proof the defendant intended to kill and to torture the victim, . . . and the infliction of an extremely painful act upon a living victim. . . .” (Davenport, supra, 41 Cal. 3d at p. 217, citations omitted.)

Defendant contends that, given the Davenport holding, the torture-murder special-circumstance finding in this case must be reversed because the special circumstance instruction failed to inform the jury that the specific intent to torture was an element of the special circumstance.

. . . Under these circumstances, we are confident that the jury understood the basic elements of the torture-murder special circumstance, and that the special circumstance finding was not based on a mere accidental or unintentional infliction of cruel pain.287

Wade thus relies on the court’s legitimate authority to articulate new elements of a special circumstance to effect the legislative body’s intent or to further some overriding public policy.288 The same is true of Chief Justice Lucas’ opinion in Howard.289 Yet Chief Justice Lucas professes to be mystified by the argument that a “clarifying” interpretation can recognize a new element of a special circumstance:

Preliminarily, we reject the dissent’s novel suggestion that Green’s clarification of the scope of felony-murder special circumstances has somehow become an “element” of such special circumstances . . . .290

The Chief Justice’s opinion in Wade demonstrates how a clarification of the scope of a special circumstance produces an element of that special circumstance and that the result is not “novel” but a typical ruling on the substantive criminal law. Accordingly, it can only be assumed that the court wished to avoid the task of deciding when a clarifying interpretation produces an element of the crime or special circumstance and when it does not.

This distinction is a matter of continuing importance. Subse-

289. See supra text accompanying notes 203-18.
quently, the balance of this section will discuss a method for deciding whether a particular ruling creates an element of a crime or special circumstance. That method will then be applied to Chief Justice Lucas' analysis in *Kimble* to test the validity of his assertion that the *Green* intent rule is not an element of the felony-murder special circumstance.

1. **Method for Deciding Whether an Element of an Offense or Special Circumstance is Created**

Whether a clarifying ruling on the scope of a crime or special circumstance creates or recognizes a new element depends entirely upon the substance of the clarification. Initially the ruling must affect either the physical part of the special circumstance (the actus reus) or its mental part (the mens rea). These are the foundation blocks upon which our fundamental conception of the crime or the special circumstance is based. This is a necessary, but not the sole condition, for not all rulings which affect the actus reus or the mens rea qualify as articulating an element.\(^{291}\) Not only must the ruling relate to the actus reus or the mens rea of the crime or special circumstance, but also an element of the crime must define what is to be deterred by the law. Additionally it must announce the circumstances under which punishment will be exacted, or (in the case of non-capital crimes) rehabilitation undertaken, when nothing more is shown.\(^{292}\) In other words, standing alone, the elements of a crime or special circumstance translate the purposes of the criminal law into prohibited physical acts and culpable mental states.\(^{293}\)

---

\(^{291}\) For example, evidence of voluntary intoxication relates to the *mens rea* of the homicide offenses by negating the existence of a required specific intent, but the absence of intoxication is not an element of the offense—the positive *mens rea* is. *See, e.g.*, *Cal. Penal Code* § 22 (West 1988); 1 B. Witkin, *Cal. Crimes* §§ 144, 300, 321, 485 (1963). The various forms of justification (e.g., self-defense) and excuse (e.g., "insanity") also relate to the *actus reus* and the *mens rea*, but they qualify our basic concept of the crime and thus they are not elements of the crime.

\(^{292}\) *Id.*

\(^{293}\) Within certain ill defined federal constitutional constraints a legislative body, or a court (under certain circumstances), has the power to redefine a crime or special circumstance to allocate what was previously an element to the status of a "defense." The existence of this power does not affect my analysis for we are here concerned with the fundamental meaning of an element of a crime or special circumstance, not with the question of how that element could or should be transformed into some other aspect of criminal liability. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977). The physical part of the crime can, and frequently does, include other elements such as the description of the subject matter of the crime, a human being in the case of the homicide offenses (*see infra* note 297), and the attendant circumstances which must exist for the particular crime in question. In order to avoid obviously awkward wording, I have have generally focused on the acts or acts prohib-
An element of a crime generally presents both legal and factual questions. When the issue is the definition of one of the terms used in the actus reus or the mens rea, the issue is primarily a legal question for resolution by the court. When the legal definition is applied to the facts of the case, the question is primarily factual for determination by the jury. But on rare occasions there are elements of a crime which do not require a factual determination. This is mentioned only to emphasize that the mere fact that a jury issue is not tendered does not mean that an element of the crime is not involved. A few examples should now be helpful.

The actus reus of all of the homicide offenses and the murder special circumstances includes a homicide: the killing of a human being. To be more specific, the word "killing" means "an act or omission causing the death" of a human being. Each of the component concepts of a homicide is an element of the actus reus, and the definition of each of these terms presents a question of law for the court. For example, the meaning of the terms "human being" and "death" presents a legal issue for resolution by the judge. When the California Supreme Court decided that the phrase "human being" means a person who is either born alive or in the birth process, the court was actually defining an element of the crime of murder despite the fact that this was also a "clarifying" interpretation of the scope of the offense.\(^\text{94}\)

In response to that "clarifying" ruling, the Legislature amended the actus reus of murder by including a fetus within its terms: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."\(^\text{95}\) But the legislation did not include a definition of what was meant by the word "fetus." That question was also a legal issue to be resolved by the courts. In \textit{Smith}, the court held that a "fetus" for the purpose of the actus reus of murder means a viable fetus—a fetus capable of independent human life.\(^\text{96}\) This, too, is a "clarifying" ruling concerning the scope of a crime, but this definition is undeniably an element of both first degree murder and all of the special circumstances. This clarifying ruling in \textit{Smith} produces a new component of the subject matter element of the actus reus of...
murder and of the special circumstance. After Smith, the subject matter of both murder and the special circumstances is a human being (as defined in Keeler)\(^{297}\) or a viable fetus (as defined in Smith). Furthermore, since Smith concerns the definition of what the law of murder seeks to deter and punish, its "clarifying" ruling, its definition of "fetus," is undeniably an element of the actus reus of murder and the special circumstances.

Finally, there is nothing mystical about this process. It does not unexplainably happen. It is not a "novel" occurrence. There should be nothing mystifying about it. It is the typical product of the application of the legal process to the actus reus of the crime or special circumstance by "clarifying" the terms used in the legislation. It is the ordinary course of the law. Although further examples abound, such as the "clarification" of the term "death" for the purpose of all of the homicide offense and the special circumstance,\(^{298}\) little would be gained by prolonging this discussion with further examples of this type.

Once the particular element is "clarified," the question of whether the victim of an alleged murder or special circumstance was a "viable fetus" is a factual question for resolution by the jury under appropriate instructions.\(^{299}\) Although an element of an offense or special circumstance nearly always produces a factual issue which must be proved by the prosecution beyond a reasonable doubt,\(^{300}\) that is not necessarily an inherent quality of an element.

Infrequently, and despite the fact that there are constitutional constraints on the use of this technique, an element of an offense tenders only a question of law for resolution by the court.\(^{301}\) This is

\(^{297}\) See supra note 294.


\(^{299}\) E.g., People v. Apodaca, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978).


\(^{301}\) See, e.g., People v. Figueroa, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986) (and cases cited therein) (instruction that promissory notes involved in the transactions were "securities" under the Corporate Securities Law was tantamount to a directed verdict on the "security" element of the offense and usurped the defendant's right to a jury trial).

Although a discussion of the constitutional constraints on the defining of an element of an offense in purely legal terms is beyond the scope of this article, a distinction should be drawn between the partial directed verdict in Figueroa and the rule presently under consideration. In Figueroa the court quite properly held that though the definition of a "security" is a question of law, for the court, the application of the definition to the facts in the case was a factual issue for the jury. Id. A different, and perhaps unique, situation is presented by the inherently-dangerous-felony rule. Undoubtedly we would all agree that the definition of an "inherently
true with respect to the second degree felony-murder rule in California. A homicide committed in the perpetration or attempt to perpetrate a felony which is "inherently dangerous to human life," but not enumerated in the first degree felony-murder rule, is murder in the second degree under the second degree felony-murder rule. Although the commission of an inherently dangerous felony is part of the actus reus and the mens rea of felony-murder, the definition of an "inherently dangerous felony" raises only a legal issue because of the way it is defined.

A felony is "dangerous" only if it is life-threatening, and it is "inherently" dangerous only if the elements of the offense, as they are written in the statutes, necessarily create a life-threatening risk. In other words, the determination is made by examining "the elements of the felony in the abstract, not by the 'facts' of the case." Since this determination is made from the abstract elements of the underlying felony, both the definition of an inherently dangerous felony and the application of the definition to the elements of the underlying felony are questions of law for the court. It raises no factual issue to be resolved by the jury. It is also clear that this "clarification" of an inherently dangerous felony is an element of second degree felony-murder for it implements one of the basic purposes of

dangerous felony" presents a question of law for the court. But the application of the rule also presents only a question of law for the rule is applied by analyzing the contents of a statute on its face. It has nothing to do with the evidence produced in the case; and everything to do with the law as it is written in the books. The inherently-dangerous-felony rule is thus quite distinguishable from a partial directed verdict of guilt at issue in Figueroa for there are no "facts" upon which to direct the partial verdict only "law." And though I realize that the "fact-law" distinction is, in many respects illusory, I do believe that it has reality in this context. Given the expertise of judges on interpreting statutes, the question of the whether the elements of the underlying felony pose the necessary risk to human life should be made by the judge. Therefore believe that the rule withstands analysis under Figueroa. It is in this sense that I use the phrase "not factually based."


304. Both the actus reus and mens rea of the underlying felony, or of the attempt to commit the felony, quite obviously become part of the actus reus and the mens rea of the felony-murder for one must be guilty of either an attempt to commit the underlying felony, or the commission of the underlying felony for guilt under the felony-murder rule.

305. See supra note 303.

306. Burroughs, 35 Cal. 3d at 829-30, 678 P.2d at 897, 201 Cal. Rptr. at 322 (quoting from Phillips, Henderson, Satchell, and Lopez).

307. See supra note 301.
the crime itself: the deterrence of killings during the commission or attempt to commit a qualifying felony.\textsuperscript{308}

2. Role of Jury Instructions on Elements of a Crime of Special Circumstance

In view of Chief Justice Lucas' concern expressed in \textit{Kimble} over the giving of a jury instruction "regardless of whether the evidence supports such an instruction,"\textsuperscript{309} a brief discussion of the role of jury instructions on the elements of a crime or special circumstance is in order. Since most of the elements of a crime or special circumstance raise factual issues which must be proved by the prosecution beyond a reasonable doubt, an instruction must be given to the jury on these elements regardless of the evidence in the case. If there is no evidentiary support for the instruction, then the defendant should be acquitted. Conversely, even if the prosecution's evidence establishes the elements of the crime under every standard of proof, the issue must still be submitted to the jury under proper instructions.\textsuperscript{310} In other words, an instruction on all of the factually based elements of the crime or special circumstance is required by the charge made against the defendant regardless of whether the evidence actually supports such an instruction.\textsuperscript{311}

\textsuperscript{308} The supreme court "formulated this standard because '[i]f the felony is not inherently dangerous, it is highly improbable that the potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony.' \textit{Burroughs}, 35 Cal. 3d at 829, 678 P.2d at 897, 201 Cal. Rptr. at 322 (quoting from \textit{People v. Williams}, 63 Cal. 2d 452, 458 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965)).


\textsuperscript{310} In \textit{Figueroa}, the California Supreme Court expressed the rule as follows:

\begin{quote}
In many criminal cases, the prosecution's evidence will establish an element of the charged offense 'as a matter of law.' Similarly, in many instances, the accused will not seriously dispute a particular element of the offense. . . . However, neither of these sometime realities of trial practice justifies the giving of an instruction which takes an element from the jury and decides it adversely to the accused. Such an instruction confuses the roles of judge and jury.
\end{quote}


\textsuperscript{311} As a practical matter, if the prosecution does not produce sufficient evidence to make out a \textit{prima facie} case, the trial court would probably grant a motion for judgment of acquittal either \textit{sua sponte} or on motion of the defendant. See \textit{CAL. PENAL CODE} §§ 1118-1118.1 (West 1988). In that case the unsupported charge would never be submitted to the jury. Nevertheless, there is a sufficient number of cases in which reviewing courts find that a verdict is unsupported by sufficient evidence for one to conclude that the jury was properly instructed on an element of a crime or special circumstance and yet there was insufficient evidentiary support for the instruction. In that situation, we cannot say that it was error to give the
There is one apparent exception to this rule. If there are alternate elements either of which will suffice for a finding of guilt of the crime or the "truth" of the special circumstance, the trial court need only instruct on the alternate element which is supported by the evidence. For example, in California the mens rea of murder is either malice aforethought or the mens rea of the underlying felony for a felony-murder conviction. On a charge of murder, the trial court should only instruct on the alternate mens rea requirement which is supported by the evidence. But this is not truly an exception to the rule for the court must instruct on all of the elements of the crime or special circumstance even though the judge need not instruct on all variants of the crime; rather only those variants which are raised by the charge or supported by the evidence.

In a murder prosecution, if there is no felony-murder theory urged by the prosecution (and supported by the evidence) then no felony-murder instruction should be given. However, an instruction on malice aforethought would then be required regardless of the evidence in the case if the murder charge is submitted to the jury. The "alternate element" instruction rule is, of course, equally applicable to all alternate elements. It is not limited to alternate mens rea elements. There are alternate subject matter requirements in the actus reus of the crime of murder. The subject matter must either be a human being or a viable fetus. Here, too, the trial court should only instruct the jury on the alternate subject matter supported by the evidence, and for precisely the same reason delineated above.

Furthermore, exactly the same analysis applies to alternate the-

313. E.g., CALJIC No. 8.11 (1983 Revision), Use Note (West Supp. 1987); CALJIC No. 8.21 (West 1979) & Use Note to CALJIC No. 8.21 (West Supp. 1987).
314. E.g., CALJIC No. 8.11 (1983 Revision), Use Note (West Supp. 1987); CALJIC No. 8.21 (West 1979) & Use Note to CALJIC No. 8.21 (West Supp. 1987).
315. But, of course, the case should not be submitted to the jury if the mens rea of malice aforethought is not supported by sufficient evidence to support the verdict. See supra note 311.
316. See supra text accompanying notes 294-97.
317. When the victim has been "born alive" so that it qualifies as a "human being" under Keeler, with respect to the subject matter of the crime of murder, the typical instruction will simply tell the jury that "the crime of murder is the unlawful killing of a human being..." In order to prove the commission of the crime of murder, each of the following elements must be proved: 1. That a human being was killed..." See CALJIC No. 8.10 (1983 Revision) (West pamph. 1988). No further definition of a "human being" need be given for the term has no technical meaning in this context. It is thus within the common knowledge of the jurors. See infra note 640 and accompanying text.
ories of an element of a crime or special circumstance. For example, there are two theories of malice aforethought in California: an intent-to-kill without justification, excuse or mitigation (express malice), and implied malice on the theory of a “wanton disregard” for human life without justification, excuse or mitigation. 318 Although the trial court must instruct the jury on the mens rea requirement of malice aforethought if the case is submitted to the jury (and assuming that the felony-murder rule is not involved), the court should only instruct on the theory supported by sufficient evidence. 319

Of course, in the rare circumstance when an element is not factually based, when it is purely a question of law, then no instruction is called for regardless of the charge and regardless of the evidence in the case. The “inherently dangerous felony” element of the second-degree felony-murder rule again provides a ready example. 320

Before this analysis is applied to the Daniels-aggravated-kidnapping rule, a brief summary should be helpful. A “clarifying” ruling recognizes or creates a new element of an offense or special circumstance if (1) it affects either the physical part (the actus reus) or the mental part (the mens rea), 321 and (2) it defines what is to be deterred by the law, and announces the circumstances under which punishment will be exacted, or rehabilitation undertaken (in the case of non-capital crimes), when nothing more is shown. 322 Finally, since virtually all of the elements of a crime or special circumstance are, and perhaps must be, 323 factually based, a jury instruction is

318. E.g., People v. Watson, 30 Cal. 3d 290, 296-97, 637 P.2d 279, 283, 167 Cal. Rptr. 22, 25-26 (1981). This latter theory is frequently referred to as “extreme recklessness” (as in Model Penal Code, supra note 246, § 210.2(b)) or as “depraved-heart” murder (see Lafave & Scott, supra note 188, at 617-21).

319. See, e.g., CALJIC No. 8.11 (1979 Revision), Use Note (West 1979).

320. Thus, quite correctly, the standard jury instruction on second degree murder informs the jury that “[t]he unlawful killing of a human being . . . which occurs as a direct causal result of the commission of or attempt to commit a felony inherently dangerous to human life, namely, the crime of ______. . . . is murder of the second degree.” CALJIC No. 8.32 (West 1979). See People v. Lilliock, 265 Cal. App. 2d 419, 71 Cal. Rptr. 434 (1968). If this element required a factual determination by the jury, then this instruction would be constitutionally impermissible as a partial directed verdict of guilt. See, e.g., People v. Figueroa, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986) (instruction that promissory notes involved in the transactions were “securities” under the Corporate Securities Law was tantamount to a directed verdict on the “security” element of the offense). The federal and state constitutions undoubtedly restrain the power of a court or a legislative body to define an element of a crime or special circumstance in purely legal terms so that it does not call for a factual determination by the jury. See Figueroa, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719. A discussion of this issue is beyond the scope of this article.

321. See supra note 291 and accompanying text.

322. See supra note 292 and accompanying text.

323. Perhaps the right to a jury trial requires virtually all of the elements of a crime or
required on each element of the crime or special circumstance regardless of the evidence in the case, if the question is submitted to the jury.\textsuperscript{824}

As we have already seen, Daniels held that movements of a victim constitute kidnapping for robbery only if the movements are more than merely incidental to the commission of the robbery and if they substantially increase the risk of harm beyond that inherent in the robbery.\textsuperscript{825} This rule modifies the "asportation" element of the actus reus of kidnapping, and thus it would pass the first prong of our "element" test.\textsuperscript{826} But it falters on the second prong. The purpose of the Daniels rule is to avoid overlap between the two crimes of robbery and kidnapping, and the resulting serious injustice when a ordinary robbery is prosecuted as an aggravated kidnapping.\textsuperscript{827}

The rule was conceived to prevent most, if not all, robberies from also being aggravated kidnappings unless the purpose of the aggravated kidnapping law is also met. Hence, the twin requirements of more asportation than necessary for robbery and a substantial increase in the risk of significant physical injury to the victim. These two requirements prevent the application of the more severe penalties for aggravated kidnapping than is provided for robbery when the crime is essentially a robbery.\textsuperscript{828} But the Daniels rule does not address the purpose for the crime of aggravated kidnapping. It does not define the offense in terms of the law's goal of deterring the defendant's conduct or fixing the conditions warranting punishment, or the nearly forgotten goal of rehabilitation. In short, the rule has nothing to do with the defendant's culpability or the deterrence of the defendant's conduct.

Because the Daniels rule does not further the purpose of defining the crime of aggravated kidnapping, it is not an element of that crime. Chief Justice Lucas is correct in his conclusion that the Daniels rule has never been treated by the California Supreme Court as an element of the offense, and under the analysis presented it should...
not be characterized as an element of aggravated kidnapping. Nevertheless, in agreement with the lower California courts, the Committee on Standard [Criminal] Jury Instructions, and the prevailing California practice, the Daniels rule should be decided by the jury under appropriate instructions in every case in which the defendant is charged with aggravated kidnapping whether the theory is kidnapping for robbery, or for ransom, reward, or extortion.

Daniels creates a rule which, though external to the elements of the crime of aggravated kidnapping, is factually based. The right to trial by jury clearly extends to factual determinations which are not elements of a crime or special circumstance but nevertheless speak to the guilt-innocence determination by the jury. Further discussion of the Daniels rule is beyond the scope of this article.

Since Daniels did not create or recognize an element of the crime of aggravated kidnapping, does that case support Chief Justice Lucas' argument that Green did not create an element of the felony-murder special circumstance? The answer is obvious by now: it is "no."

Unlike Daniels, the Green intent rule satisfies both prongs of the element test. The rule relates to the mens rea of the felony-murder special circumstance, and it interprets the felony-murder special circumstance so as to fulfill its fundamental purpose by creating or recognizing a new mens rea requirement. As Chief Justice Lucas observed in Kimble, the goal of the felony-murder special circumstance is to "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not . . . ." Since one's just desert principally depends upon the moral culpability or the mens rea with which a prohibited act is committed,

329. Quite clearly, the instruction should be given in any case in which both aggravated kidnapping and the aggravating crime (see infra note 331) are submitted to the jury. The instruction should also be given when the charge is only aggravated kidnapping (and the aggravating crime is not charged) for it is only by giving the Daniels instruction that the danger of "abusive prosecution[s] for kidnapping" (Daniels, 71 Cal. 2d at 1138, 459 P.2d at 237, 80 Cal. Rptr. at 909) can be eliminated. See People v. Martinez, 150 Cal. App. 3d 579, 198 Cal. Rptr. 565 (1984).

330. And this is so whether the charge is kidnapping for robbery (CAL. PENAL CODE § 209(b) (West 1988)) or kidnapping for ransom, reward or extortion (Id. § 209(a)). See People v. Martinez, 150 Cal. App. 3d 579, 198 Cal. Rptr. 565 (1984).

331. See supra text accompanying notes 271-84, 301.


333. In Eumund, a felony-murder death penalty case, Justice White wrote for the majority:
Green implements this goal by distinguishing between death eligible and non-death eligible first degree murderers on the basis of the intent of the defendant (his mens rea) in committing the murder. If the defendant commits the first degree murder for independent felonious gain, then he deserves to be considered for the death penalty for that is the required degree of moral culpability provided by the statute. The Green intent rule thus provides the vital link between the purpose for the provision and definition of the felony-murder special circumstance. That is precisely the function performed by the elements of any crime or special circumstance.

Upon analysis, the Green intent rule is an element of the felony-murder special circumstance. Daniels is clearly distinguishable. And the court's conclusion in Kimble that Green did not recognize an element of the felony-murder special circumstance is simply

We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation . . . for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.'

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his criminal culpability], . . . and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.' Enmund v. Florida, 458 U.S. 782, 798-800 (1982) (citations omitted). And in Tison, Justice O'Connor wrote for the Court:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.


334. Kimble, 44 Cal. 3d at 500-501, 749 P.2d at 815-16, 244 Cal. Rptr. at 160-61 (quoting from Green and Thompson).

335. The Green intent rule is based upon an interpretation of the statutory phrase "[t]he murder . . . was committed during the commission or attempted commission of any of the following crimes: . . . . " See infra notes 423-26 and accompanying text.

unfounded. The trial court was thus required to instruct on Green's intent requirement. The failure to do so was error. But the error would not require a reversal of the death judgment on the narrow ground of special circumstance error because the court found another special circumstance (multiple-murder) valid.

We now turn from the theory of the special circumstances and the general principles that govern them to the court's decisions artic-

337. Chief Justice Lucas' opinion in Kimble did not purport to analyze the nature of the elements of a crime or special circumstance and apply that analysis to the Green intent rule in reaching the court's conclusion. Instead, without analysis, the opinion belittles the idea (the court called it a "novel suggestion") that a "clarifying" instruction can "somehow become an 'element' of such special circumstances" and relies upon authority that either supports a finding that Green recognizes an element of the felony-murder special circumstance (see supra text accompanying notes 251-69) or is clearly distinguishable (see supra text accompanying notes 270-337). Kimble, 44 Cal. 3d at 501, 749 P.2d at 816, 244 Cal. Rptr. at 161. Chief Justice Lucas could have cited People v. Sanders, 145 Cal. App. 3d 218, 193 Cal. Rptr. 331 (1983), which similarly rejected an argument that an instruction on the Green intent rule should have been given sua sponte. The court noted that there had been no request for the instruction and that even if it had been requested, it would have been properly refused because there was no evidentiary support for the instruction. Id. at 223, 193 Cal. Rptr. at 333. Although the court's conclusion in Sanders lends some support to the Chief Justice's argument, there is no indication in Sanders that the appellant was arguing that the Green rule recognizes an element of the felony-murder special circumstance. Accordingly, Sanders neither analyzes the Green rule to determine whether it creates an element of the special circumstance nor cites any authority for its conclusion. The issue is decided by a simple ipse dixit. Since a court's holding is no better than the reasoning and the authority on which it is based, Sanders needs no further discussion. Sanders is wrong for the same reasons that Kimble is wrong.

Indeed, there appears to be a subtle conflict between the opinion of the Court of Appeal, Second District, Division Two in Sanders and the opinion of the Court of Appeal, First District, Division Three in Ario v. Superior Court, 124 Cal. App. 3d 285, 177 Cal. Rptr. 265 (1981). Like Sanders, Ario was not cited in Kimble. In Ario, a prosecution under the felony-murder special circumstance in the 1978 Initiative, the petitioner challenged the trial court's denial of his motion to dismiss the felony-murder (kidnapping) special circumstance allegation on the ground that the evidence presented at the preliminary examination did not support the allegation. Holding that "the kidnaping special circumstance allegations here may be sustained only if the evidence will support a reasonable inference that the kidnaping was for some purpose other than merely to facilitate the primary crime of murder," and after traversing the evidence produced at the preliminary examination and finding that the only reasonable inference that could be drawn was that the kidnaping was incidental to the murders, the court restrained the trial court from proceeding on those allegations. Ario, 124 Cal. App. 3d at 289-90, 177 Cal. Rptr. at 267-68. Ario thus appears to treat the Green intent rule as any other element of the felony-murder special circumstance, though the opinion does not analyze the question in terms of an "element" analysis.

338. Since a single valid special circumstance supports death eligibility, the fact that other special circumstances are reversed does not compel a reversal of the death judgment. E.g. People v. Montiel, 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985); People v. Williams, 44 Cal. 3d 883, 973-74, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397-98 (1988) (Mosk, J., concurring in the judgment). However, a reversal of the death judgment might be required on the ground that the jury's consideration of the invalid special circumstance may have so infected the death determination process that the death verdict must be vacated. Williams, 44 Cal. 3d at 973-74, 751 P.2d at 456, 245 Cal. Rptr. at 397-98.
ulating the specific law of the special circumstances.

IV. The Law Of The Special Circumstances

In eleven of the automatic appeals decided this year the Lucas court resolved special circumstance issues raised under both the 1977 Legislation and the 1978 Initiative. None of these decisions were written on an entirely clean slate. Nearly a decade of death penalty litigation under both of these statutes produced a number of automatic appeals which were decided by the Bird court. These cases provided a decisional environment and precedent for the court’s work on the law of the special circumstances this year.

The issues resolved this year arose in connection with six special circumstances: (1) heinous-atrocious-or-cruel murder, (2) torture-murder, (3) felony-murder, (4) multiple-murder, (5) prior-murder-conviction, and (6) financial-gain. The law of each of these special circumstances will be discussed in the order in which they are listed. A brief historical sketch of each special circumstance will be presented, along with an elaboration and analysis of the law expressed by both the Bird and Lucas courts. A comparison of the law articulated by each of the two courts will be presented where it is appropriate.

The goal of this section is to state the law of these special circumstances as it stood on March 25, 1988, the last day of the Lucas court’s first year of deciding automatic appeals; to critically evaluate that law; and, when it appears to aid understanding of the Bird and Lucas courts, to compare the way in which each has handled special circumstance issues.

A. The Heinous-Atrocious-Or-Cruel Special Circumstance

The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

This special circumstance first appeared in the 1978 Initiative. The first phrase is worded identically with the heinous-atrocious or cruel special circumstance.
cious-or-cruel "aggravating circumstance" contained in the Model Penal Code's capital sentencing procedure. The Commentaries to the Code indicate that it was included as an aggravating circumstance, though "virtually every murder is heinous," because it "addresses the special case of a style of killing so indicative of utter depravity that imposition of the ultimate sanction should be considered."

In *People v. Superior Court (Engert)*, the Bird court held that this special circumstance was so vague that it violated both the due process clause of the Fourteenth Amendment of the United States Constitution and article I, sections 7, subdivision (a) and 15 of the California Constitution. *Engert* was followed by the Lucas court in *Wade*.

Later in the same year, in *Maynard v. Cartwright*, the Supreme Court of the United States held that a similar provision in the Oklahoma death penalty statute was unconstitutionally vague under the Eighth Amendment. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails to adequately inform juries of what they must find to impose the death penalty. As a result it leaves both juries and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).

After distinguishing a void-for-vagueness attack under the Due Process Clause of the Fourteenth Amendment, the High Court agreed with the court of appeals that the Oklahoma provision violated the Eighth Amendment.

---

342. *Model Penal Code*, supra note 246, § 210.6(3)(h): "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

343. *Model Penal Code*, supra note 246, § 210.6, Comment 6, at 137. Since the Official Draft of the Model Penal Code was adopted at the 1962 Annual Meeting of the American Law Institute, it was obviously not drafted with the strictures of the eighth amendment in mind.

344. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).


347. *Id.* at 4502 (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)).

348. The state argued that in some cases there are factual circumstances that so plainly characterize the killing as "especially heinous, atrocious, or cruel" that affirmation of the death penalty is proper. Construing this argument to mean "that if there are circumstances that any reasonable person would recognize as covered by the statute, it is not unconstitutionally vague
In view of Cartwright, Wade, and Engert, this special circumstance may no longer be validly used. It thus has no continuing significance in the jurisprudence of death in California.

B. **The Torture-Murder Special Circumstance**

This special circumstance involves a murder which was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.\(^4\)

This provision replaced the torture-murder special circumstance in the 1977 Legislation. The 1977 provision reads as follows: “The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.”\(^3\)

Two important changes were made by the Initiative in this special circumstance. First, the mens rea requirement was changed from a “willful, deliberate and premeditated” murder to an intentional murder. Second, the Legislation’s requirement of an “intent to inflict extreme and prolonged pain” was also eliminated. Under the wording of the Initiative, the only criterion is “extreme physical pain, no matter how long its duration.”\(^3\)

The Initiative’s provision thus appears to abolish the 1977 Legislation’s mens rea requirement that the defendant must also intend to torture the victim with prolonged pain.

Despite these omissions, and the implication that the legislative
body intended to abolish the requirement that the defendant intend to inflict pain which was "prolonged" in duration, the Bird court held that the 1978 Initiative should be interpreted with a mens rea requirement with respect to the torture.

The very use of the term torture, to describe the class of murders to which the subdivision applies necessarily imports into the statute a requirement that the perpetrator have the sadistic intent to cause the victim to suffer pain in addition to the pain of death. . . .

As interpreted by the Bird court, the torture-murder special circumstance thus requires an intent to cause the victim extreme (or cruel) pain. The Lucas court followed this interpretation in Wade.

At the close of the first year of the Lucas court, the actus reus of the torture-murder special circumstance requires both a homicide (as does first degree murder), and the infliction of torture. Torture is defined as acts designed to inflict extreme physical pain on the living victim, no matter how long its duration. Despite the contrary im-
lication in the statutory language,\(^\text{358}\) proof that the victim actually suffered extreme physical pain is not required.\(^\text{360}\)

There are two mens rea elements, two culpable mental states, for the torture-murder special circumstance. The first degree murder must be (1) intentional, and the defendant must (2) intend to cause the victim extreme physical pain by the infliction of torture.\(^\text{360}\) The torture-murder special circumstance is thus a "specific intent" special circumstance.\(^\text{361}\)

How then does the torture-murder special circumstance differ from first degree torture-murder rule? It differs in two important respects. First, the actus reus of the first degree rule requires that homicide by torture—the torture must cause the victim's death.\(^\text{362}\) This causation requirement flows from the statutory language that the murder must be "perpetrated by means of torture."\(^\text{363}\) But the single case that has considered whether there is a similar causal requirement for the special circumstance has held that the torture need not cause the victim's death for the torture-murder special circumstance.\(^\text{364}\) The different interpretation appears to be required by the different wording of the special circumstance. For the special circumstance, the murder need not be perpetrated by means of torture. It is sufficient if the murder "involved the infliction of torture."\(^\text{365}\) The case seems correct on principle.

In sum, the actus reus of the first degree torture-murder rule requires a homicide be caused by torture inflicted by the defendant. The actus reus of the torture-murder special circumstance requires that the defendant torture and kill the victim, but there is no re-

---

\(^{358}\) The statute may be reasonably be read as implying that there must be proof that the victim suffered pain for it provides that "[f]or the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration." \text{CAL. PENAL CODE} § 190.2(a)(18) (West 1988) (emphasis added).

\(^{359}\) \text{Davenport, 41 Cal. 3d at 268, 710 P.2d at 873, 221 Cal. Rptr. at 806.}

\(^{360}\) \text{See supra notes 353-55 and accompanying text.}

\(^{361}\) \text{People v. Wade, 44 Cal. 3d 975, 994, 750 P.2d 794, 805, 244 Cal. Rptr. 905, 916 (1988), modified, 45 Cal. 3d 648a, cert. denied, U.S. ---, 109 S. Ct. 248 (1988).}

\(^{362}\) \text{E.g., People v. Talamantez, 169 Cal. App. 3d 443, 215 Cal. Rptr. 542 (1985).}

\(^{363}\) \text{Id. See \text{CAL. PENAL CODE} § 189 (West 1988).}

\(^{364}\) \text{People v. Hoban, 176 Cal. App. 3d 255, 221 Cal. Rptr. 626 (1985).}

\(^{365}\) \text{Id. See \text{CAL. PENAL CODE} § 190.2(a)(18) (West 1988).}
quirement that the torture cause the death.\textsuperscript{366} If, however, the torture does cause the death of the victim, then the defendant has committed the actus reus of both the first degree torture-murder rule and the torture-murder special circumstance.

The second difference between the first degree rule and the special circumstance is with respect to the mens rea requirements. For first degree murder by means of torture the killing need not be intentional. Implied malice will suffice.\textsuperscript{367} But there must be an intent to torture, an intent to cause cruel suffering, for the first degree rule to be satisfied.\textsuperscript{368} On the other hand, the two mens rea requirements for the special circumstance are (a) an intentional murderer, and (b) the intent to torture.\textsuperscript{369} Though the intent to torture required for both the first degree torture-murder rule and the torture-murder special circumstance is precisely the same,\textsuperscript{370} the special circumstance's requirement that the murder be intentional thus narrows the class of first degree torture-murderers who qualify for the special circumstance.\textsuperscript{371} Hence, not all first degree torture-murderers are guilty of the torture-murder special circumstance.

However, because the special circumstance does not require that the torture cause the homicide,\textsuperscript{372} the torture-murder special circumstance may attach to any first degree murder, provided, of course, the elements of the torture-murder special circumstance have been met. The first degree murder must have been intentionally committed,\textsuperscript{373} the murderer must intend to inflict extreme or cruel pain on the victim, and the defendant must actually torture the victim with that

\begin{itemize}
\item 366. See supra notes 362-64 and accompanying text.
\item 367. See supra notes 187-91 and accompanying text.
\item 368. See supra notes 192-93 and accompanying text.
\item 370. Wade, 44 Cal. 3d at 994, 750 P.2d at 805, 244 Cal. Rptr. at 916. In Wade, Chief Justice Lucas wrote, "the torture-murder special circumstance embodies the same intent-to-cause-cruel-pain element as in torture-murder ...." Id.
\item 371. Davenport, 41 Cal. 3d at 271, 710 P.2d at 875, 221 Cal. Rptr. at 808. See People v. Ross, 92 Cal. App. 3d 391, 154 Cal. Rptr. 783 (1979) (construing the torture-murder special circumstance in the 1977 Legislation).
\item 372. See supra note 364 and accompanying text.
\item 373. Since the word "willful" in the definition of first degree murder, on the theory that it was a "willful, deliberate and premeditated" murder, means "intentional," this element of the torture-murder special circumstance is met by any first degree murder on this theory. Cal. PENAL CODE § 189 (West 1988).
\end{itemize}
specific intent. Before turning to the felony-murder special circumstances, it
should be noted that there is no torture-murder provision in the
Model Penal Code; and the 1973 mandatory death penalty legis-
lation did not mention torture-murder.

C. The Felony-Murder Special Circumstance

The murder was committed while the defendant was engaged in
or was an accomplice in the commission of, attempted commis-
sion of, or the immediate flight after committing or attempting
to commit the following felonies. . .

1. Introduction

The felony-murder rule has figured prominently in California
death penalty law since 1856 when murder was divided into degrees
according to the Pennsylvania formula. Any person who commits
a felony-murder while perpetrating or attempting to perpetrate one
of the felonies enumerated in the first degree statute is guilty of first
degree murder. Until 1874, a conviction of first degree murder
carried a mandatory sentence of death. That year the sentencing au-
thority was given untethered discretion to select between death and
the lesser punishment of life imprisonment.

The Model Penal Code's capital sentencing procedure, which
was approved in 1962, ten years before Anderson and Furman were
decided, contains a felony-murder "aggravating" circumstance: "The
murder was committed while the defendant was engaged or was an
accomplice in the commission of, or an attempt to commit, or flight
after committing or attempting to commit robbery, rape or deviate
sexual intercourse by force or threat of force, arson, burglary or kid-

374. See supra notes 356-61 and accompanying text.
375. See Model Penal Code, supra note 246, § 210.6.
376. See 1973 Cal. Stats. § 5, at 1299-1300 (codified as former Cal. Penal Code §
190.2 (West 1979)).
377. Cal. Penal Code § 190.2(a)(17) (West 1988). Because of the length of this pro-
vision, the nine felonies enumerated in the subsections to this provision are not quoted either in
the body of the article or in this note. The nine felonies are (1) robbery, (2) kidnapping (3)
rape, (4) sodomy, (5) a violation of § 288a (the performance of a "lewd or lascivious" act upon
the person of a child under the age of 14), (6) oral copulation, (7) burglary in the first or
second degree, (8) arson, and (9) train wrecking. Id.
378. See supra notes 7-10 and accompanying text.
379. See supra notes 7-10 and accompanying text.
380. See supra notes 11-13 and accompanying text.
napping.\textsuperscript{381} The commentary on this provision simply notes that a murder committed “in connection with designated felonies, each of which involves the prospect of violence to the person” is a circumstance in which the death penalty should be considered.\textsuperscript{382}

After \textit{Anderson} and \textit{Furman} invalidated the use of wholly discretionary capital sentencing, a felony-murder provision was included in the special circumstances enumerated in the 1973 mandatory death penalty legislation. This special circumstance was defined as murder which “was willful, deliberate and premeditated and was committed during the commission or attempted commission” of robbery, kidnapping, rape, the performance of lewd or lascivious acts upon a child under the age of 14, and burglary.\textsuperscript{383} The 1977 Legislation contained exactly the same provision found in the 1973 statute.\textsuperscript{384}

The current provision replaced the 1977 felony-murder special circumstance. It changes the 1977 provision in four ways. First, the list of qualifying felonies was augmented by adding four felonies: sodomy, oral copulation, arson and train wrecking.\textsuperscript{385} Second, the limitations on the qualifying felonies of kidnapping, rape, and burglary were removed.\textsuperscript{386} Third, in addition to applying while the defendant is engaged in the commission or attempted commission of one of the enumerated felonies, the felony-murder rule is expressly made applicable to murders committed in “the immediate flight” after committing or attempting one of the qualifying felonies.\textsuperscript{387} On its face, the 1977 provision applies only during the commission or attempted commission of one of the listed felonies.\textsuperscript{388} Finally, the requirement that the murder be “willful, deliberate and premeditated” to qualify as a felony-murder special circumstance under the 1977 felony-murder provision was eliminated.

Whether the elimination of the mens rea requirement made the felony-murder special circumstance ambiguous when read in conjunction with the Initiative’s other provision, and how that ambigu-

\begin{itemize}
\item \textsuperscript{381} See \textit{Model Penal Code}, \textit{ supra } note 246, § 210.6(3)(e).
\item \textsuperscript{382} See \textit{Model Penal Code}, \textit{ supra } note 246, Comment 6(a), at 137.
\item \textsuperscript{383} See \textit{Former Cal. Penal Code} § 190.2(b)(3) (West 1979). The complete text of this provision is quoted \textit{ supra } note 72.
\item \textsuperscript{384} See \textit{Former Cal. Penal Code} § 190.2(c)(3) (West 1979). The complete text of this provision is quoted \textit{ supra } note 72.
\item \textsuperscript{385} See \textit{supra} note 115 and accompanying text.
\item \textsuperscript{386} See \textit{supra} notes 116-18 and accompanying text.
\item \textsuperscript{387} See \textit{supra} note 119 and accompanying text.
\item \textsuperscript{388} The text of this provision is quoted \textit{supra} note 72. It is not clear whether the 1978 provision expanded liability from what it was under the 1977 provision.
\end{itemize}
ity is to be resolved was first addressed by the Bird court in the now notorious Carlos case.

2. The Carlos Intent-to-kill Rule

a. The Bird Court

The most well-known problem with the 1978 Initiative was in its felony-murder special circumstance provisions. After finding these provisions ambiguous and thus in need of interpretation, the Bird court construed the word "intentionally" in subdivision (b) of section 190.2 to apply to all defendants, actual killers and accomplices alike. Accordingly, the court found that proof of an intent-to-kill must be established before a defendant is subject to a felony-murder special circumstance finding. That ruling came in Carlos v. Superior Court.\(^{389}\) Carlos was decided by a nearly unanimous court. The opinion was written by Justice Broussard and joined by Chief Justice Bird, and Justices Mosk, Kaus, Reynoso and Karesh.\(^{390}\) Justice Richardson dissented alone.\(^{391}\) Despite the fact that Justice Richardson was the lone dissenter, the Carlos rule immediately became controversial.\(^{392}\)

Although the Carlos intent-to-kill rule was reaffirmed and applied in nineteen subsequent cases by the Bird court, the court's adherence to Carlos and the rule of stare decisis supporting its application did not resolve the controversy surrounding this issue.\(^{393}\) Indeed,
the repeated application of Carlos had precisely the opposite effect. Carlos and the reversal of fifteen death cases under the Carlos rule formed part of the mounting criticism of the Bird court to the point that it became an issue in the November 1986 judicial retention election.

Under the Carlos rule, an intent-to-kill was one of the mens rea elements of the felony-murder special circumstance in the 1978 Initiative. The prosecution was required to prove beyond a reasonable doubt that the defendant intended to kill his victim when the homicide was committed during the qualifying felony. Additionally, as with all elements of a crime, since the jury was required to make a factual finding on the existence of that intent element, the jury needed to receive an appropriate instruction. Thus, regardless of the evidence and regardless of the defendant’s omission in requesting an intent-to-kill instruction, the failure to so instruct the jury was error. Furthermore, in People v. Garcia, the Bird court held that unless one of four exceptions were applicable, the failure to instruct the jury on the intent-to-kill element invoked the per se rule of reversible error.

Although by its repeated application the Carlos rule was firmly denied, 469 U.S. 1229 (1985); Ramos v. Superior Court (Ramos II), 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982).

The Carlos rule was applied in three additional cases, but the opinion was pending on remand from the Supreme Court of the United States in one of these cases and petitions for hearing were granted in the remaining two: People v. Hamilton (Bernard), 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (vacated and remanded for further consideration in light of Rose v. Clark, 478 U.S. 570 (1986)) (opinion on remand pending at the close of the first year of the Lucas court), cert. granted, 478 U.S. 1017 (1986); People v. Hamilton (Billy), 41 Cal. 3d 211, 710 P.2d 937, 221 Cal. Rptr. 858 (1985) (petition for rehearing granted, opinion on rehearing pending at the close of the first year of the Lucas court); and People v. Walker, 41 Cal. 3d 116, 711 P.2d 465, 222 Cal. Rptr. 169 (1985) (petition for rehearing granted, opinion on rehearing pending at the close of the first year of the Lucas court).

394. These fifteen cases were Raliff, Balderas, Hamilton (Bernard), Hamilton (Billy), Silbertson, Fuentes, Guerra, Chavez, Boyd, Hayes (John), Anderson (Stephen), Armendariz, Ramos, Whitt, and Garcia.

395. See Poulos, supra note 1 at 263-65.

396. See supra notes 177, 389-93 and accompanying text.

397. See supra notes 177, 389-93 and accompanying text.

398. See supra notes 310-11 and accompanying text.

399. See supra notes 312-20.

400. See supra notes 312-20.

401. 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), cert. denied, 469 U.S. 1229 (1985). The Bird court cases invoking this per se reversibility rule are listed supra note 393. This per se test of reversibility should also govern the failure to instruct the jury on the Green intent rule. See People v. Kimble, 44 Cal. 3d 480, 517-26, 749 P.2d 803, 826-33, 244 Cal. Rptr. 148, 172-79 (1988) (Mosk, J., dissenting); People v. Williams (Keith), 44 Cal. 3d 883, 973, 751 P.2d 395, 456, 245 Cal. Rptr. 336, 397-98 (1988) (Mosk, J., dissenting).
entrenched in the law of California, not all of the justices were willing to adhere to the doctrine of stare decisis and continue to reverse the large number of cases in which Garcia mandated a reversal for Carlos error. In People v. Hamilton (Bernard Hamilton), the Bird court reversed three felony-murder special circumstances, based on the felonies of burglary, robbery and kidnapping, for Carlos error.\textsuperscript{402} Justice Lucas, now Chief Justice Lucas, filed a dissent from the court's use of the Carlos rule:

The majority relies upon People v. Garcia . . . and Carlos v. Superior Court . . . in concluding that the failure to instruct the jury regarding intent to kill was prejudicial error requiring us to set aside the special circumstances finding and the penalty judgment. For reasons I have previously explained, I strongly disagree with the holdings in those cases (see People v. Whitt . . .), and I can no longer concur in judgments which reverse special circumstances findings under their compulsion (see People v. Guerra . . .).

. . . My principal quarrel is with Carlos itself, wherein my colleagues rewrote Penal Code section 190.2, subdivision (a)(17), and introduced an "intent to kill" requirement which was mandated by neither state nor federal law. As we proceed to reverse one death penalty judgment after another on Carlos grounds, let us not assign the blame to some other court—the fault is ours. I continue to urge reconsideration and disapproval of that unfortunate decision. . . .\textsuperscript{408}

Justice Mosk also filed a separate dissent in Hamilton:

I cannot join in Justice Lucas' criticism of Carlos v. Superior Court . . . Even if one be disillusioned by the number of penalty reversals required by that decision and by People v. Garcia

\textsuperscript{402} People v. Hamilton (Bernard), 41 Cal. 3d 408, 710 P.2d 981, 221 Cal. Rptr. 902 (vacated and remanded for further consideration in light of Rose v. Clark, 478 U.S. 570 (1986)) (opinion on remand pending at the close of the first year of the Lucas court), cert. granted, 478 U.S. 1017 (1986).

\textsuperscript{403} Id. at 437-38, 710 P.2d at 999-1000, 221 Cal. Rptr. at 920-21 (citations omitted).

Justice Lucas began dissenting from the reversal of felony-murder special circumstance findings under the Carlos rule in People v. Guerra, 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985). During his dissent in that case, he wrote,

Although I have in the past concurred in reversals of some capital cases under the compulsion of Carlos/Garcia . . ., I can no longer characterize myself as 'concurs' in these reversals. The Carlos and Garcia rulings are responsible for an increasing number of unnecessary reversals and retrials. I would join three of my colleagues in reexamining, and ultimately overruling, those decisions. Accordingly, I cannot join in the judgment of reversal.

Guerra, 40 Cal. 3d at 390, 708 P.2d at 1259, 220 Cal. Rptr. at 381.
... stare decisis and respect for the judicial process require adherence to decisions rendered so recently by a substantial majority of this court. A petition for certiorari in the United States Supreme Court was sought by the Attorney General in Garcia, and review in the high court was denied. ... Thus Carlos-Garcia remains the law in California.

I agree with Justice Lucas, however, that even under Carlos, we need not set aside the special circumstance finding in this case. Intent to kill was manifest from the facts and no evidence was introduced by defendant that might raise a reasonable doubt on that issue.404

These opinions were filed on December 31st, the last day of 1985. Before the following year was over three vacancies had been created on the court. Chief Justice Bird and Justices Reynoso and Grodin had been denied a further term in office in the November, 1986 judicial retention election.405 The Bird court’s handling of automatic appeals had become the major issue in the retention election campaign.406 The criticism focused on the number of death judgments reversed during the Bird court’s tenure.407 When the votes were counted, it was relatively clear that a majority of the voters wanted a change in the way the California Supreme Court was handling death penalty appeals.408 Arguably, they wanted affirmances, not reversals.409 The continued vitality of the Carlos rule thus depended upon the views of the new appointees.

b. The Lucas Court

When the new California Supreme Court was finally organized in March of 1987, a large backlog of death penalty cases greeted the new justices. The lack of an intent-to-kill instruction for the felony-murder special circumstance infected a large number of felony-murder special circumstance findings. According to one critic, the Carlos intent-to-kill rule may have been applicable to as many as fifty cases already tried under the pre-Carlos instructions.410

404. Hamilton (Bernard), 41 Cal. 3d at 439, 710 P.2d at 1000, 221 Cal. Rptr. at 921 (citations omitted).
405. See Poulos, supra note 1, at 208-20 for a discussion of the retention election campaign, the retention election, and its aftermath.
406. Poulos, supra note 1, at 208-09.
407. Poulos, supra note 1, at 209.
408. Poulos, supra note 1, at 217-18.
409. Poulos, supra note 1, at 218.
410. Soberanis, A California Journal Survey: How biased is the Court?, 17 CAL. J. 435, 437 (1986). It was estimated by Ed Jagels, Kern County District Attorney and a spokes-
Furthermore, the *Carlos* rule was applicable to at least one of the special circumstance findings in nearly one-half of the sixteen automatic appeals decided this year.\(^{411}\) Given the prevalence of *Carlos* error and the anticipated reversal of a large number of death judgments under its compulsion, the *Carlos* rule presented a major impediment to changing the way automatic appeals had been handled under the Bird court.\(^{412}\)

California Governor Deukmejian’s support for capital punishment and his practice of appointing pro-capital punishment judges to the bench\(^ {413}\) is well-known. As indicated above, Chief Justice Lucas made clear his opposition to *Carlos* while still Justice. Additionally, he urged the court to reconsider and disapprove of “that unfortunate decision”\(^ {414}\) and professed his willingness to “join three of [his] col-

\(^{411}\) Sixteen death cases were decided during the first year of the Lucas court’s tenure. See *supra* note 5. There was a felony-murder special circumstance finding in each of the following cases decided under the 1978 Initiative: *Hendricks I, Gates, Anderson (James), Miranda, Hale, Hendricks II*, and *Melton*. Ultimately the Lucas court reversed *Hendricks I* and *Snow* on non-death penalty law grounds. See *supra* note 5. Since there was another valid special circumstance finding in *Anderson (James)* (multiple-murder) and since the death judgment was reversed in that case for *Ramos* error, a reversal would not have been compelled in *Anderson*. In *Hendricks II*, there was also a multiple-murder special circumstance which was upheld. Invalidating the felony-murder special circumstance finding under *Carlos* would not have affected the defendant’s death eligibility, though it may have necessitated a new penalty trial (though the Lucas court rejected a similar argument in *Wade*). In *Miranda* the jury made a special finding that the defendant was guilty of first degree murder and that the killing was willful, deliberate, and premeditated. Arguably this holding would have brought the case under one of the exceptions to the *Carlos* rule. A reversal of the special circumstance findings and the death judgment would have apparently been required in *Gates*; though, because the court relied upon *Anderson’s* overruling of *Carlos*, one cannot tell from the face of the opinion whether one of the exceptions to the *Carlos* rule might have been applicable.

Six of the sixteen cases decided this year were prosecutions under the 1977 Legislation. These were *Ghent, Bell, Kimble, Hovey, Ruiz, and Williams*. See *supra* note 5. The felony-murder special circumstance in the 1977 Legislation was involved in five of these cases: *Ghent* (felony-murder (rape)), *Bell* (felony-murder (robbery)), *Kimble* (felony-murder (burglary, robbery, and rape) and multiple-murder), *Hovey* (felony-murder (kidnapping)), and *Williams* (felony-murder (robbery, and kidnapping), and multiple-murder).

Since the felony-murder special circumstance defined in the 1977 Legislation required a finding that the killing that was committed during the felony was done willfully and with deliberation and premeditation (see *supra* note 72), it did not suffer from the same defect found in the 1978 Initiative’s felony-murder provision.

\(^{412}\) See *Poulos*, *supra* note 1, at 267-76 for a discussion of these issues.

\(^{413}\) See *Poulos*, *supra* note 1, at 209.

leagues in reexamining, and ultimately overruling" Carlos. Subsequently, it was widely anticipated that the Carlos rule would be abandoned shortly after the new Deukmejian appointees took the bench. This prediction proved to be accurate.

On October 13, 1987, in People v. Anderson (James) the Lucas court overruled Carlos. Anderson was the third automatic appeal decided by the Lucas court, and the first case to review a felony-murder special circumstance finding in a prosecution under the 1978 Initiative. In view of Justice Mosk's recent statement in Bernard Hamilton that "stare decisis and respect for the judicial process require adherence" to Carlos, it was surprising that the Anderson opinion was written by Justice Mosk. All of the Deukmejian appointees, new and bygone alike, signed the Mosk opinion. Only Justice Broussard, the author of Carlos, dissented to the reversal.

With the demise of the Carlos intent-to-kill rule, the felony-murder special circumstance no longer has a culpable mental state beyond that necessary for the conviction of murder in the first degree. The analysis of Anderson and a critique of the Lucas court's overruling of the Carlos intent-to-kill rule is far too long and complex to be included here. That task is reserved for another day.

3. The Green Intent Rule

   a. The Bird Court

   In People v. Green the Bird court interpreted the felony-murder special circumstance in the 1977 Legislation as requiring proof beyond a reasonable doubt that the defendant intended to advance an
independent felonious purpose by killing his victim. In an opinion decided several weeks after Green, the court explained the rule as follows:

Since 'the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not,' the determination as to whether or not a murder was committed during the commission of robbery or other specified felony is not 'a matter of semantics or simple chronology.' . . . Rather, this determination involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed . . . in order to advance an independent felonious purpose.' . . . A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder . . . because its sole object is to facilitate or conceal the primary crime.'

This rule thus requires proof of the intent with which the defendant killed his victim, and it defines the intent with which the killing must be done: The killing must have been committed to advance the "commission or attempted commission" of the felony on which the felony-murder charge is based.

The Green intent rule was subsequently applied to the felony-murder special circumstance provision in the 1978 Initiative.

---


424. People v. Thompson, 27 Cal. 3d 303, 322, 611 P.2d 883, 893, 165 Cal. Rptr. 289, 299 (1980). Justice Richardson, joined by Justices Clark and Manuel dissented to the reversal of the felony-murder-robbery special circumstance on the ground that there was sufficient evidence from which the jury could have found that the defendant killed his victim with the intent to further an independent felonious purpose. In other words, the dissenting Justices in Thompson accepted the law as articulated in the majority opinion, but they disagreed with the majority's conclusion that the evidence was insufficient as a matter of law to permit the jury to find that the requisite intent existed in the mind of the defendant when he killed the victim. Id. at 334, 611 P.2d at 901, 165 Cal. Rptr. at 307.

Green was decided on April 24, 1980, and Thompson on June 9, 1980. See Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1; Thompson, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289.

425. The felony-murder special circumstance in the 1977 Legislation applies when the felony is committed or attempted. See supra note 72.

426. The meaning of the word "independent" in the formulation of the rule means that the defendant must intend to advance the commission or attempted commission of the felony which supports the felony-murder special circumstance charge. See supra notes 424-25 and accompanying text.

427. People v. Weidert, 39 Cal. 3d 836, 842, 705 P.2d 380, 383, 218 Cal. Rptr. 57, 60
Though the rule most frequently appears in prosecutions under the felony-murder-robbery special circumstance, it applies with equal force to all of those felonies enumerated in the felony-murder special circumstance provisions of the 1977 Legislation or the 1978 Initiative.

On principle, the Green intent rule is an element of the felony-murder special circumstance. Accordingly, the prosecution has the burden of proving that the defendant killed his victim with the intent of advancing the commission or attempted commission of the felony upon which the felony-murder special circumstance is based beyond a reasonable doubt. In addition, since the rule is an element of the culpable mental state required by the felony-murder special circumstance, the trial court must include an instruction on the intent rule in the court’s charge to the jury. This instruction must be given without regard to whether it is requested by the defendant, and regardless of whether it is supported by the evidence.

Finally, despite Chief Justice Lucas’ assertion in Kimble to the contrary, and the fact that the court never had occasion to so label the rule, the Bird court treated the Green intent rule as an element
of the felony-murder special circumstance in every case in which the rule was invoked, except for Robertson. But Robertson does not contradict the classification of this rule as an element, for that case was argued and decided on an entirely different theory.

b. The Lucas Court

An instruction on the Green intent rule was incorporated into the special circumstances instructions in the book of approved jury instructions. The Green instruction is apparently routinely given in every felony-murder special circumstance case. Indeed, the first two cases in which the Green intent rule was considered by the Lucas court involved the use of the approved form of the Green instruction.

In Gates, the trial court erroneously stated the felony-murder special circumstance's requirements in the disjunctive. Literally read, the jury was told that to find the felony-murder-robbery special circumstance "true" it must find that the murder was committed while the defendant was engaged in the commission or attempted commission of a robbery or that the murder was committed in order to carry our or advance the commission of the robbery. The instruction should have been given in the conjunctive. "And" should have been used instead of "or." Although the Gates court acknowledges that an instruction worded in this fashion is erroneous, it nevertheless found that the error had been cured by a further instruction and illustrations given by the trial judge on this issue. Since the standard jury

434. See supra notes 423-29 and accompanying text.
435. The Green instructions fashioned by the Committee On Approved Jury Instructions and included in the book of approved jury instructions [CALJIC] treats the Green intent rule as an element of the felony-murder special circumstance. See infra notes 437-38 and accompanying text.
436. See supra notes 261-69 and accompanying text.
438. Gates, 43 Cal. 3d at 1193, 743 P.2d at 317, 24 Cal. Rptr. at 682. The instruction read as follows:

Now, to find that the special circumstance, which is murder in the commission of a robbery, is true, it must be proved beyond a reasonable doubt: (1) That the murder was committed while the defendant was engaged in the commission or attempted commission of a robbery, or that the murder was committed during the immediate flight after the commission of a robbery, or that the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection .

Id.
439. Id.
instructions are properly worded in the conjunctive, the trial court apparently misspoke in *Gates*.440

In *Miranda*, the instruction on the *Green* intent rule read, in pertinent part, as follows: "That the murder was committed in order to carry out or advance the commission of the crime of robbery, or to facilitate the escape therefrom or to avoid detection."441

Although the *Miranda* opinion never identified the defendant's specific objections to this instruction, the court found no error in the giving of this instruction because the defendant "did not request any additional instruction on this point" and the instruction "effectively informed the jury that in order to find the special circumstance to be true it had to find the murder was committed in furtherance of the robbery."442

The instructions in *Gates*443 and *Miranda*444 tell the jury that the killing must have been committed "in order to carry out or advance" the felony. However, the fact that this determination must be made by inquiring into the defendant's subjective mental state at the time of the killing, and by finding that the defendant killed the victim with the intent (or for the purpose) of advancing the felony is left for the jury to infer from the italicized phrase.445 While, it would be preferable for the jury to be instructed that it must find "... that the murder was committed for the purpose (or with the intent) of carrying out or advancing the commission of the crime of robbery . . .", the more general phrase was found to suffice in both cases. Since instructions were given on the *Green* intent rule in both cases which treat the rule in the same manner as an element of the felony-murder special circumstances would be treated, both of these cases support the element theory of the rule. It should also be noted that *Gates* and *Miranda* were prosecutions under the 1978 Initiative.446

---

440. *Id.*
441. People v. Miranda, 44 Cal. 3d 57, 90, 744 P.2d 1127, 1147, 241 Cal. Rptr. 594, 614 (1987), cert. denied, 486 U.S. 1038, reh'g denied 487 U.S. 1246 (1988). Though the opinion does not identify this as the standard jury instruction from the book of approved jury instructions, it is apparently CALJIC No. 8.81.17. See *Kinable*, 44 Cal. 3d at 517, 749 P.2d at 827, 244 Cal. Rptr. at 172 (Mosk, J., dissenting).
442. *Miranda*, 44 Cal. 3d at 90, 744 P.2d at 1147, 241 Cal. Rptr. at 614.
443. See supra note 437.
444. See supra note 441 and accompanying text.
445. This instruction is apparently based on the following sentence from the *Thompson* opinion: "A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed in cold blood in order to advance an independent felonious purpose . . .'." People v. *Thompson*, 27 Cal. 3d 303, 322, 611 P.2d 883, 893, 165 Cal. Rptr. 289, 299 (1980) (emphasis in original).
The Green intent rule was also a major issue in Kimble. But in that case a majority of the Lucas court concluded that the intent rule is not an element of the felony-murder special circumstance, and thus the trial court need not always include the Green intent instruction in its charge to the jury on that ground. The court then held that the Green instruction need not be given unless it is either requested by the defendant or the evidence raises a factual issue as to whether the killing was committed for a purpose other than to advance the felony which forms the basis of the felony-murder special circumstance.

Kimble's holding that the Green intent rule is not an element of the felony-murder special circumstance drew a dissent from Justice Mosk. Relying on Green and the standard jury instruction on the Green intent rule, Justice Mosk concluded that the rule "is plainly an element of the felony-murder special circumstance and, as such, should have been instructed on in connection with each of the felony-murder special circumstances alleged in this case." The major portion of his dissent is devoted to the question of the reversibility of the error which is committed when the instruction is not included in the jury charge.

Chief Justice Lucas' opinion in Kimble has already been discussed in connection with the current court's conception of the special circumstances. For the reasons appearing in that discussion, Kimble is wrong on principle and should be disapproved by the court.

The final case to consider the Green intent rule during the first year of the Lucas court is People v. Williams. Since the Williams trial took place before the court decided Green, the Green instruction was not read to the jury. Defendant's argument that this omission was error and that the error invoked a per se standard of reversibility was rejected. But the court did not address the question of

448. Id. at 502-03, 749 P.2d at 816-17, 244 Cal. Rptr. at 162-63.
449. Id. at 517, 749 P.2d at 826, 244 Cal. Rptr. at 172.
450. Id.
451. Id. at 517-26, 749 P.2d at 826-33, 244 Cal. Rptr. 172-79.
452. See supra notes 237-338 and accompanying text.
453. See supra notes 237-338 and accompanying text.
455. Id. at 928, 751 P.2d at 424, 245 Cal. Rptr. at 366.
whether the failure to instruct on the intent rule was error. "Assuming that such an instruction would have been required in this case," wrote Justice Eagleson for the majority, "the omission could not have prejudiced defendant." Without ever identifying the standard governing the reversibility issue for this type of error, the court used an undisclosed form of harmless error analysis to conclude that the error did not compel a reversal of the felony-murder special circumstance finding.

Again, Justice Mosk dissented.

I cannot, however, join in the opinion of the court: I disagree with the majority's conclusion that the felony-murder special-circumstance findings are valid.

To begin with, I believe that advancement of an independent felonious purpose is an element of the felony-murder special circumstance and as such should have been instructed on in connection with each of the felony-murder special circumstances alleged in this case. We held as much in People v. Green . . . The majority choose not to dispute this point and, in my view, simply cannot do so.

Further, contrary to the majority's conclusion, I believe that failure to instruct on the independent-felonious-purpose element is not subject to general harmless-error analysis, and that on this record the error cannot be held nonprejudicial. . . .

Regardless of the validity of the felony-murder special circumstance, Williams remained death eligible. A valid multiple-murder special circumstance finding had also been made in the case. For that reason Justice Mosk ultimately concurred in the affirmance of the death judgment.

At the close of the first year of the Lucas court the status of the Green intent rule as an element of the offense remains clouded by Chief Justice Lucas' opinion in Kimble. There is nothing in Gates or Miranda supporting the rejection of the rule as an element of the special circumstance. The fact that the issue was completely avoided in Williams suggests that Kimble will not be followed. It would have been far too easy for the Williams court to rely on Kimble for the proposition that the rule is not an element of the offense. Thus the

456. Id.
457. Id.
458. Id. at 973, 751 P.2d at 456, 245 Cal. Rptr. at 397 (Mosk, J., concurring in the judgment and dissenting).
459. Id. at 973-74, 751 P.2d at 457, 245 Cal. Rptr. at 398.
460. See supra notes 237-338 and accompanying text.
question of the error turned on whether the trial court had a sua sponte duty to instruct on the rule because of the evidence in the case. Whether the Lucas court will ultimately conclude that the Green intent rule is an element of the felony-murder special circumstance is far from clear at this point.

So far, the Green intent rule has survived the emergence of the Lucas court. The Carlos intent-to-kill rule has not. Justice Mosk wrote the opinion in Anderson overruling Carlos and he is the principal champion of the Green intent rule on the current court. Accordingly, perhaps he will be able to convince his brethren to disavow Kimble and clearly affirm that the Green rule is an element of the felony-murder special circumstance in the 1978 Initiative.

4. The Harris Overlapping-felony Rule

The principal problem associated with multiple special circumstance findings is that they inflate the number of aggravating circumstances that may be taken into account during the penalty assessment process at the penalty phase of the capital trial. This occurs because the sentencing authority may consider each special circumstance found true during the preceding phase of the trial as a separate aggravating factor (or circumstance) in the penalty assessment process at the penalty phase under both the 1977 Legislation and the 1978 Initiative. Because the two Harris anti-inflation rules identified below seek to prevent the inflation of the aggravating factors at the penalty phase, one would expect to find the following discussion in an article focusing on the penalty phase of the capital trial, rather than in an article on the law of the special circumstance. For purposes of clarity, the Harris single-charge rule is identified below, but the discussion of that rule is reserved for another day. The second Harris rule, the overlapping-felony rule, tends an issue of the substantive law of the felony-murder special circumstance. For that reason, a discussion of that rule is included below.

461. See supra notes 437-46 and accompanying text.
462. See supra note 417 and accompanying text.
463. See supra notes 449-51, 458-59 and accompanying text.
464. See infra notes 469-71 and accompanying text.
465. See supra notes 86-87 and accompanying text.
466. See supra notes 98-99 and accompanying text.
468. See Poulos, supra note 142.
The first of the two *Harris* anti-inflation rules, the single-charge rule, prevents the use of the same conduct more than once for the same purpose. A violation of this rule typically occurs when the defendant has committed two or more murders. Since the multiple-murder special circumstance requires that the defendant commit more than one murder, the second murder qualifies the defendant for the multiple-murder special circumstance. But in this situation, this is only one multiple-murder special circumstance, not two.  

The same analysis is equally applicable, of course, to the situation in which the defendant has committed more than two murders. There is still only one multiple-murder special circumstance regardless of the number of murders committed. If more than one multiple-murder special circumstance is found to be true, the improper inflation occurs when these multiple findings are considered as more than one aggravating factor by the sentencing jury. Since the *Harris* single-charge rule tenders only a penalty phase issue, that rule is discussed in a separate article on the penalty phase of the capital trial.

The second *Harris* anti-inflation rule embargoes the use of multiple separate special circumstances findings as aggravating factors at the penalty phase of the trial when those findings are based upon the segmentation of a single indivisible course of conduct. This type of inflation typically occurs when the defendant breaks into the victim’s home for the purpose of robbing the victim, and a homicide is then committed during the course of the felonies. Since the defendant has committed two felonies which are enumerated in the felony-murder special circumstance statute (robbery and burglary), the defendant may be prosecuted for two separate felony-murder special circumstances. But since these two felonies were committed as a result of a single indivisible course of conduct, the *Harris* plurality held that the multiple felony-murder special circumstance findings could be considered as only one aggravating fac-

---

469. *Harris*, 36 Cal. 3d at 67, 679 P.2d at 452, 201 Cal. Rptr. at 801 (plurality opinion).


474. *Id.* at 66-67, 679 P.2d at 451-52, 201 Cal. Rptr. at 800-01.
tor at the penalty phase.\textsuperscript{476}

This branch of the \textit{Harris} anti-inflation rule, is known as the overlapping-felony-murder rule. This rule, like its sibling the \textit{Harris} single-charge rule, has been assumed to tender only a penalty phase issue. According to the analysis presented here, it is in fact an issue which should be resolved as a question of the interpretation of the special circumstances themselves. For that reason, the \textit{Harris} overlapping-felony-murder rule is considered in this article.

\begin{itemize}
  \item \textit{The Bird Court}
\end{itemize}

This issue was first encountered by the Bird court in \textit{People v. Harris} (Lee).\textsuperscript{478} Harris was convicted of two counts of first degree murder. Three special circumstances were alleged and found to be true in connection with each murder: felony-murder (robbery), felony-murder (burglary), and multiple-murder. These multiple special circumstance findings, six in total, presented the court with the two different types of inflation of the aggravating factors identified above:\textsuperscript{477} (1) the single-charge rule because of the two multiple-murder special circumstance findings; and (2) the overlapping-felony-murder rule because of two felony-murder special circumstance findings with respect to each murder.\textsuperscript{478} It is only the two felony-murder special circumstances, for robbery and burglary, for each murder that concern us here.

The multiple felony-murder special circumstance findings were based upon the following facts. Lee Harris and his companions travelled to Long Beach, California, for the purpose of robbing a couple who managed an apartment house in which one of the culprits had

\begin{itemize}
  \item \textsuperscript{475} Id.
  \item \textsuperscript{476} 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984).
  \item \textsuperscript{477} There are other ways of inflating the aggravating factors at the penalty phase of the trial. One of the most obvious of these additional ways of achieving inflation is to allow the jury to consider the first degree murder which qualified the defendant for special circumstance consideration under both factor (a) (the circumstances of the crime of which defendant was convicted in the present proceeding) and factor (b) (the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence). This too is improper. \textit{People v. Melton}, 44 Cal. 3d 713, 764, 750 P.2d 741, 771-72, 244 Cal. Rptr. 867, 898 (1988). \textit{See People v. Rodriguez}, 42 Cal. 3d 730, 787, 726 P.2d 113, 150, 230 Cal. Rptr. 667, 704 (1986). On the other hand, the \textit{Melton} court rejected a contention that it was an improper inflation for the jury to consider prior felony convictions for violent felonies under both factor (b) and factor (c) (the presence or absence of any prior felony conviction) on the ground that the fact that the single conviction establishes two concerns: the commission of a felony, and violent behavior. \textit{Melton}, 44 Cal. 3d at 764, 750 P.2d at 771-72, 244 Cal. Rptr. at 898. \textit{See Poulos, supra note 142}.
  \item \textsuperscript{478} \textit{See supra} notes 490-501 and accompanying text.
\end{itemize}
lived. In the course of carrying out their plan they broke into the managers' apartment, robbing and killing both victims.\textsuperscript{479} Relevant to the analysis here is the fact that the instructions charged two felony-murder special circumstances for each murder: felony-murder (robbery) and felony-murder (burglary). Both allegations were found to be true with respect to both murders.\textsuperscript{480}

Harris claimed that the robbery and burglary formed part of a single course of action, and that the separate charging of the burglary and robbery special circumstances wrongfully inflated the number of aggravating factors before the jury at the penalty phase of the trial. Finding that "the federal Constitution and California statutory laws prohibit the cumulative use of special circumstance allegations" as aggravating factors at the penalty phase, the \textit{Harris} plurality agreed.\textsuperscript{481}

The robbery and burglary special circumstances are necessarily overlapping because they both describe virtually the same conduct. The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.'\textsuperscript{482}

In addition, the "principles underlying California's prohibition of double punishment" also support limiting the use of overlapping special circumstances as aggravating factors at the penalty phase.\textsuperscript{483} The plurality then fashioned a remedy for handling overlapping special circumstances.\textsuperscript{484} But the \textit{Harris} plurality's overlapping-felony-murder.

\textsuperscript{479} \textit{Harris}, 36 Cal. 3d at 43-44, 679 P.2d at 435-36, 201 Cal. Rptr. at 784-85.
\textsuperscript{480} \textit{Id.} at 62, 679 P.2d at 449, 201 Cal. Rptr. at 798.
\textsuperscript{481} \textit{Id.}
\textsuperscript{482} \textit{Id.} at 63, 679 P.2d at 449, 201 Cal. Rptr. at 798 (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)).
\textsuperscript{483} \textit{Id.} at 64-65, 679 P.2d at 450, 201 Cal. Rptr. at 799.
\textsuperscript{484} The procedure outlined by the \textit{Harris} plurality was as follows:

We conclude that the appropriate procedure would be to allow the prosecution to charge those special circumstances supported by the evidence, and for the jury to determine in the guilt phase which special circumstances may have been committed.

Assuming that overlapping special circumstances charged are found to be true, the doctrine of "merger" and the prohibition against multiple punishment should then operate in the penalty phase to prevent the improper cumulation of special circumstances to avoid the risk that a jury may give undue weight to the mere number of special circumstances found to be true. To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found
murder rule was never again confronted during the Bird court's tenure. This meant that the rule never acted with the binding force of precedent, nor was it entitled to respect under the doctrine of stare decisis for a majority of the Bird court never employed that rule in a subsequent case.

Nevertheless, in *Allen* a plurality of the Bird court addressed a related form of inflation—the use of alternate theories of a special circumstance to support two special circumstance findings. The witness-killing special circumstance can be committed in two ways: by the intentional killing of a victim (1) to prevent his testimony in any criminal proceeding; and, (2) in retaliation for the victim’s testimony as a witness in any criminal proceeding. The *Allen* court held that even though the evidence supports both theories of the witness-killing special circumstance, only one special circumstance may be found true. The holding was grounded in the “probable intent” of the legislative body in enacting this special circumstance.

Although *Allen* was a case of first impression, the multiple-theory analysis appears to be correct on principle. It follows the analogy of a finding of first degree murder on one of several alternative theories. The prosecution is entitled, for example, to pursue separate theories of first degree murder, and to argue those separate theories to the jury. But only one verdict of guilt of first degree murder is permissible for each victim, even though the jury may find that all of theories of first degree murder have been proven beyond a reasonable doubt.

---

488. For example, the prosecution could produce evidence that a particular murder was (1) willful, deliberate, and premeditated, (2) committed by means of an explosive, and (3) committed during the perpetration of both robbery (4) and burglary. If the trier of fact were to find that each of these theories were proven beyond a reasonable doubt, only one verdict of first degree murder would be proper. See, e.g., People v. Decaillet, 41 Cal. 2d 708, 263 P.2d 441 (1953); People v. Sutic, 41 Cal. 2d 483, 261 P.2d 241 (1953); People v. Gilliam, 39 Cal. 2d 235, 246 P.2d 32 (1952).
489. See, e.g., Decaillet, 41 Cal. 2d 708, 263 P.2d 441 (1953); Sutic, 41 Cal. 2d 483,
b. The Lucas Court

The *Harris* overlapping felony-murder rule appeared for the first time before the Lucas court in *Melton*. James Melton, like Lee Harris, was convicted of murder in the first degree, burglary and robbery. With respect to the murder, the jury found "true" both a felony-murder (robbery) and a felony-murder (burglary) special circumstance. The instructions permitted the sentencing jury to consider each of these special circumstances as a separate aggravating factor. Invoking the overlapping branch of the *Harris* rule, the defendant claimed that the multiple use of his intent to steal, which formed a critical element in both robbery and burglary, impermissibly inflated the aggravating factors in the penalty assessment process. Furthermore, the People conceded that defendant's claim fell squarely within the rule announced by the *Harris* plurality because "the robbery and burglary special circumstances are necessarily overlapping because they describe virtually the same conduct." Despite the Attorney General's concession, the Lucas court rejected the *Harris* plurality's overlapping-felony-murder rule. Writing for the majority in *Melton*, Justice Eagleson took an entirely different view. Instead of focusing on the common element of the burglary and robbery, the defendant's intent-to-steal, Justice Eagleson focused on the difference between the defendant's conduct in the felonies of robbery and burglary. He wrote,

Insofar as the *Harris* plurality was suggesting that the penalty jury may not consider, in any form, the existence of more than one felony leading to the capital murder, we find its reasoning unpersuasive. Section 190.3, subdivision (a), directs the jury to consider generally "the circumstances" of the capital crime. Even if the additional phrase "and the existence of any special circumstances [previously] found to be true" was missing, the sentencing jury would be statutorily entitled to evaluate all the conduct which led to the capital conviction.

In our view, it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, bur-

---

491. Id.
492. Id.
493. Id.
glary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime. 494

Having rejected the constitutional concerns raised by the Harris plurality, Justice Eagleson then turned to the argument that statutory law supported the Harris overlapping special circumstance rule. He concluded that section 190.3 cannot be read in harmony with section 654, and that in the context of a death penalty case, section 190.3 prevailed. 495 In a critical passage in the opinion, Justice Eagleson explained the Melton court’s view of the role of special circumstances at the penalty phase:

On the other hand, the death penalty statutes provide an integrated scheme of ‘special circumstances’ in which the single appropriate punishment for the most serious offense—a first degree murder—is expressly influenced by just such ‘indivisible’ acts and offenses. These ‘special circumstances’ render a first degree murderer eligible for death or life without parole, and their ‘existence,’ as well as all the ‘circumstances’ of the capital crime, must be taken into account under section 190.3, subdivision (a), when the actual penalty is chosen. 496

With this passage the focus of the opinion subtly changed. The court began with the importance of allowing the jury to consider all of the defendant’s conduct, including conduct that involves the actus reus of the crimes of robbery and burglary under the “circumstances” provision of 190.3(a). The court then shifted to the characterization of that conduct as a special circumstance, and the propriety of allowing the jury to take those characterizations into account. With this analysis, the Harris plurality’s overlapping-felony-murder rule was completely cast aside. It no longer searches for a fourth vote. 497

However, the interests the Harris rule sought to vindicate (eliminating unfair inflation of the aggravating factors at the penalty

494. Id. at 766-67, 750 P.2d at 773-74, 244 Cal. Rptr. at 899-900 (emphasis in original).
495. Id. at 768, 750 P.2d at 774, 244 Cal. Rptr. at 900.
496. Id. (emphasis added).
497. Since no other member of the court joined Justice Broussard’s opinion concurring in the judgment in Melton, perhaps it would be more accurate to state that this aspect of the Harris rule was looking for three more votes. The plurality opinion in Harris was authored by Justice Broussard and joined by Chief Justice Bird and Justice Reynoso.
trial) survived, and they continued to plague the Melton court even after the Harris overlapping felony rule has been put to rest. A few sentences further on in the opinion, Justice Eagleson wrote,

Of course the robbery and the burglary may not each be weighed in the penalty determination more than once for exactly the same purpose. The literal language of subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the “circumstances” of the capital crime and any attendant statutory “special circumstances.” Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any “circumstances” which were also “special circumstances.” On defendant’s request, the trial court should admonish the jury not to do so.\footnote{498}

In other words, no error was committed when the jury was allowed to consider both the felony-murder (robbery) and the felony-murder (burglary) special circumstances, but it was error for the jury to also consider those two “specials” again as, using Justice Eagleson’s phraseology, “circumstances of the capital crime.” Thus, under the Melton rule, the concern for inflation is not with the double counting of the two felony-murder special circumstances as aggravating factors, but with the multiplication of the two “specials” by considering them once as “special circumstances” and again as “circumstances of the crime.”

The Harris overlapping-felony-murder rule and the Melton anti-inflation rule produce different results. Under Harris, the jury is permitted to consider only one special circumstance—a single felony-murder special circumstance under the facts of that case—but the conduct committed by the defendant which is classified as a burglary and as a robbery can be considered by the jury under the “circumstances” provision of 190.3(a).\footnote{499} An instruction was required telling the jury that only one special circumstance could be considered as an aggravating factor, and the prosecutor was barred from referring to the multiple special circumstance findings that were merged into a single aggravating factor.\footnote{500}

Under Melton, the two overlapping special circumstances may be considered as separate aggravating factors, but, upon the request of the defendant, the jury should be instructed that it cannot double count the special circumstances found true as both a special circum-

\footnote{498. Melton, 44 Cal. 3d at 768, 750 P.2d at 774, 244 Cal. Rptr. at 901.} 
\footnote{499. Harris, 36 Cal. 3d at 61, 679 P.2d at 448, 201 Cal. Rptr. at 797.} 
\footnote{500. See supra note 484 and accompanying text.}
stance aggravating factor and as a "circumstance of the capital crime" aggravating factor. 501

5. The Burden Of Requesting The Melton Anti-inflation Instruction

The first quarrel with Melton concerns the allocation of the burden of instructing the jury not to double count the special circumstances found true under the two clauses of 190.3(a). Justice Eagleson simply states that "[o]n defendant's request, the trial court should admonish the jury not to do so." 502 He gives no rationale for allocating the burden to the defendant to request this instruction, and none is easily formulated. There are, of course, valid reasons for placing the burden on the defendant to request an instruction. This will generally occur when the instruction is dependent upon a particular set of facts and, under the adversary system, there are tactical judgments which should be left to the defense. But this instruction is not fact specific. The risk of double counting exists at every penalty trial, for it is a condition precedent of every penalty trial that at least one special circumstance be found true. Nor could there possibly be a tactical consideration for not requesting the instruction.

Furthermore, allocating the burden of requesting the instruction to the defense is inconsistent with the instructional requirements for reducing the risk of inflating the aggravating factors in other comparable situations. Elsewhere in Melton, Justice Eagleson recognized that the language of section 190.3, subsections (a) and (b) 503 "literally construed . . . allows the jury to count the violent circumstances of the current crime as aggravating factors under both subdivisions (a) and (b). . . . Instructions in future cases should explain that the violent crimes described in subdivision (b) do not include the circumstances of the capital offense itself." 504 Since the bare language of the

501. See supra notes 498 and accompanying text.
502. Melton, 44 Cal. 3d at 768, 750 P.2d at 774, 244 Cal. Rptr. at 901.
503. The pertinent provisions read as follows:
   In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
   (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1:
   (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
CAL. PENAL CODE § 190.3(a),(b) (West 1988).
504. Melton, 44 Cal. 3d at 763, 750 P.2d at 771, 244 Cal. Rptr. at 897.
two clauses of section 190.3 (a) allows the jury to double count the special circumstances in precisely the same way, the court should have likewise held that the jury instructions in future cases should explain that double counting is also prohibited under subsection (a). There is no reason to treat the prohibited double counting under subsection (a) and (b) any differently from the prohibited double counting under the two clauses of subsection (a) with respect to the duty of the trial judge to accurately inform the jury of the law guiding their decision in the penalty phase of the capital trial.

Justice Eagleson's statement indicating that the burden is on the defense to request the instruction on the prohibited double counting under subsection (a) is also inconsistent with his opinion for the court in *Williams*. *Williams* presented the question of the multiple use of the multiple-murder special circumstance.\(^{506}\) After condemning the use of more than one multiple-murder special circumstance, Justice Eagleson continued for the majority, “Therefore, failure to instruct the jury at the penalty phase to consider only one multiple-murder special circumstance was also error.”\(^{506}\)

Since the purpose served by avoiding the multiple use of the multiple-murder special circumstance is the same in both cases—the avoidance of inflating the aggravating circumstances at the penalty phase—the judge should consistently be required to include the instruction against double counting under subsection (a) in every case.\(^{507}\)

Unless some convincing rationale is offered for *Melton*’s rule that the trial judge need read the anti-inflation instruction to the jury only on the defendant's request, it should be disapproved.\(^{508}\) Absent the anti-inflation instruction, the charge permits the jury to count the felony which qualifies the defendant for the felony-murder special circumstances and to take that same felony into account again as one of the circumstances of the crime. This double counting, of course,

---

506. *Id.* at 950, 751 P.2d at 440, 245 Cal. Rptr. at 382.
507. Indeed, there is more reason for requiring that the “no double counting under subsection (a) instruction” be included as part of the standard jury instructions in every case than there is for the multiple-murder special circumstance discussed in *Williams*. The *Williams* instruction is required only when more than one multiple-murder special circumstance is erroneously submitted to the jury whereas the *Melton* instruction is relevant in every case (for in every case at least one special circumstance will be found true and thus there is the risk that the special circumstance will be double counted in every case).
508. One benefit of the *Melton* approach is that it would eliminate one potential source of error that undoubtedly appears in a number of the automatic appeals now pending in the court. That this would be an illegitimate reason for shifting the burden to the defense should need no discussion.
violates the Melton anti-inflation rule. Without this instruction, the trial court's charge to the jury errs by omission. It is beyond dispute that the court's instructions must accurately state all of the law necessary for a correct resolution of the issues submitted to the jury.

6. The Unitary Theory Of The Felony-murder Special Circumstance

The second quarrel presented here is with the assumption upon which both Melton and Harris are founded. It is commonly assumed that the felony-murder special circumstance provisions in both the 1977 Legislation and the 1978 Initiative define a group of separate special circumstances. For example, it is assumed that there is a burglary special circumstance, a robbery special circumstance, and a rape special circumstance. These are only a few of the felonies which will support a felony-murder special circumstance finding under these statutes. There is nothing in either the language of the felony-murder provisions or the structure of the statutes which warrants this assumption. Furthermore, since it is an assumption, no case has addressed the question of whether this conception of the felony-murder special circumstance accurately reflects the legislative intent with respect to the felony-murder special circumstance provisions.

Putting the felony-murder provisions aside for a moment, and focusing on the 1978 Initiative, all of the other special circumstance provisions in the Initiative apparently define a single special circumstance. This issue came before the court for the first time in Allen. The prosecution alleged two witness-murder special circumstances. One was grounded on the theory that the witness was murdered to prevent his testimony, and the other alleged that the witness was murdered in retaliation for his prior testimony. The prosecution produced evidence supporting both witness-murder special circumstances and the jury found both true. On automatic appeal the court held that witness-murder is a single special circumstance, though it may be committed in two different ways. Speaking for a plurality, Justice Grodin wrote:

Nothing suggests that evidence supporting findings on both theories permits the People to charge and the jury to find two separa-

---

509. See supra notes 498-501 and accompanying text.
511. Id. at 1244, 729 P.2d at 125, 232 Cal. Rptr. at 859.
rate special circumstances. Indeed, the opposite seems to better reflect the drafters’ probable intent: a defendant who is shown to have violated a particular special circumstance in more than one way is “guilty” of no more than one special circumstance violation. Of course, evidence supporting the alternative theories of violation would be properly before the jury in any event; we therefore reject the People’s suggestion that our construction of the statute forces the People to promote one societal interest over the other simply because both are established by a single course of conduct. The presence of evidence supporting both theories of violation can properly be emphasized by the prosecutor in order to stress to the jury the extent to which societal interests that underlie the witness-killing special circumstance have been violated.\(^{511}\)

There is additional evidence supporting Justice Grodin’s opinion that the legislative body most likely intended for each subsection of section 190.2(a) to be a single, unitary special circumstance with alternative theories for its commission. The 1977 Legislation listed both the multiple-murder and the prior-murder-conviction special circumstances in a single provision.\(^{511}\) The 1978 Initiative separated these two special circumstances into separate subsections of section 190.2.\(^{514}\) This action supports the inference that the legislative body intended that each subsection define only a single special circumstance for there is no other apparent reason for this change.

As with the other special circumstances in both the 1977 Legislation\(^{517}\) and the 1978 Initiative,\(^{518}\) the felony-murder special circumstances are set forth in a single subsection of the statute. As demonstrated in Allen, the inference is compelling that the drafters of both statutes intended each of the subsections to define a single special circumstance. The further subdivisions within the subsection simply indicate alternate methods or theories by which the special circumstance can be committed. In essence, this was the plurality’s holding with respect to the witness-murder special circumstance in Allen. The Allen interpretation of the witness-murder special cir-

---

512. Id. at 1273-74, 729 P.2d at 146-47, 232 Cal. Rptr. 880-81. The witness-killing special circumstance can be committed in two ways: by the intentional killing of a victim (1) to prevent his testimony in any criminal proceeding; and, (2) in retaliation for the victim’s testimony as a witness in any criminal proceeding. CAL. PENAL CODE § 190.2(a)(10) (West 1988) (footnote added by the author).
514. CAL. PENAL CODE § 190.2(a)(2) & (3) (West 1988).
515. See supra notes 69-84 and accompanying text.
516. See supra notes 100-34 and accompanying text.
cumstance is equally applicable to the felony-murder special circumstance. *Allen* should be followed and the court should hold that there is only one felony-murder special circumstance which can be committed by the commission of the requisite first degree murder during one of the felonies enumerated in the various subdivisions of the felony-murder special circumstance.

Furthermore, this interpretation of the felony-murder special circumstance follows the same pattern that has been used in California for over a century to divide the crime of murder into a capital and a non-capital offense.\(^5\)

There is only one crime of murder in the first degree in California although the statute defines a number of ways in which that crime can be committed.\(^6\) One of those ways is, of course, the first degree felony-murder rule.\(^7\) Despite the fact that the statute enumerates a series of different felonies that qualify a killing during its commission as murder in the first degree, these are not different first degree felony-murder rules but rather different ways (among others) to commit the crime of first degree murder. In other words, there is no first degree felony-murder-robbery rule, no first degree felony-murder-burglary rule, and no first degree felony-murder-rape rule, to name only a few of the felonies enumerated in the first degree felony-murder provision. There is a single first degree felony-murder rule with alternate theories for its commission.

In addition to the first degree felony-murder rule, first degree murder can be committed in California by such other means as, for example, murder by torture\(^8\) and a willful, deliberate, and premeditated murder.\(^9\) But, again, these are not separate first degree murder offenses. They are alternate theories for the single crime of first degree murder. Furthermore, in a given case the different theories of first degree murder may overlap without prejudice to the defendant. For example, the evidence may support a finding that the defendant intentionally (willfully), and with deliberation and premeditation, tortured her victim to death. In that case there would be two theories of first degree murder, but only one crime of first degree murder.

There is virtue in this interpretation of the various special circumstance provisions. The law is simplified, which is a worthy goal in itself. Additionally, the problem of overlapping felony-murder

---

517. See *supra* text accompanying notes 8-16.
518. See *supra* notes 9-10, 312-19 and accompanying text.
520. See *supra* notes 362-71 and accompanying text.
521. See *supra* notes 9-10 and accompanying text.
special circumstances, which troubled the court in both *Harris* and *Melton*, and which will trouble the court in the future, simply disappears.

I see no problems in this interpretation. Multiple special circumstance allegations are still permitted, as is obviously contemplated by the statute, provided they allege special circumstance defined in the separate subsections of the statute and not the various subdivisions within the separate special circumstances. For example, in *Melton*, there should have been a single felony-murder special circumstance allegation, and in *Harris* there should have been a single multiple-murder allegation and two felony-murder special circumstances allegations, one for each victim. Under a given special circumstance allegation, the prosecution is entitled to pursue the separate theories of the special circumstance enumerated in each subsection, and to argue those separate theories to the jury. But the jury should return a single finding with respect to each alleged special circumstance.

The felony-murder special circumstance presents no unique problems for this interpretation of the statute. The statute already requires that the felony supporting the special circumstance "be charged and proved pursuant to the general law applying to the trial and conviction of the crime." There is, thus, the same ability to meaningfully review the finding of truth of the felony-murder special circumstance that exists with the first degree felony-murder rule. At the penalty phase of the trial, the jury would then be permitted to consider each special circumstance as a separate aggravating factor. Furthermore, the conduct supporting the various theories of the single felony-murder special circumstance would still be properly reviewed.

---


523. For example, if the defendant intentionally killed an undercover narcotics officer to prevent that officer from testifying against him in a separate pending drug prosecution, and if the defendant new that the victim was a peace officer at the time of the murder, then the defendant would have committed two special circumstances: peace-officer-murder and witness-murder. CAL. PENAL CODE § 190.2(a)(7), (10). There is no problem with overlapping special circumstances.


527. The jury should still be instructed, pursuant to the *Melton* anti-inflation rule, that the sentencing jury cannot consider the underlying felonious conduct as both an aggravating factor under the special circumstance provision and again under the circumstances-of-the-crime provision.
considered as a "circumstance of the capital crime" under Melton. In short, this interpretation would simplify the law, eliminate the problem of overlapping felony-murder special circumstances, fulfill the interest in having the various theories of the special circumstances fully litigated, and further the inferred intent of the legislative body.

7. The Underlying Felony

a. Litigating The Underlying Felony

1) The Bird Court

Both the 1977 Legislation and the 1978 Initiative provide that whenever a special circumstance "requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime." Since the felony-murder special circumstance is always dependent upon the commission of one of the felonies enumerated in the special-circumstance provision (the underlying felony), this section always applies to the felony-murder special circumstance. Accordingly, the underlying felony must be charged and proved as in any other prosecution for that crime. This would normally mean that the accusatory pleading must charge the underlying felony, the felony must be proved by the prosecution beyond a reasonable doubt, the jury must be instructed on all of the elements of the crime, the reasonable doubt requirement, and any applicable defenses, and the jury must find the defendant guilty of the crime in its verdict.

In several of the cases the first and last requirements have been omitted. The underlying felony has not been charged in the accusatory pleading, and the jury has not returned a verdict on the underlying felony. With reference to the failure to charge the underlying felony in the accusatory pleading, the Bird court consistently held that though this was error under the statute, the error was harmless. The notice function of the charging requirement was fulfilled

528. See supra text accompanying notes 498-501.
530. See People v. Williams (Keith), 44 Cal. 3d 883, 926, 751 P.2d 395, 423, 245 Cal. Rptr. 336, 364-65 (1988)
by the special circumstance allegation.\textsuperscript{532} The additional claim that
the jury also did not return a verdict on the underlying felony was
not presented to the court, though it was evident that the jury did not
do so in each case.\textsuperscript{533}

2) The Lucas Court

Both claims, that the underlying felony was not charged in the
accusatory pleading and the jury did not return a verdict on the un-
derlying felony, were presented to the Lucas court this term.\textsuperscript{534} The
absence of the charge of the underlying felony, which presents a no-
tice issue, was resolved by applying the Bird court "notice" prece-
dent.\textsuperscript{535} But the failure of the jury to return a verdict raises a differ-
ent issue: Did the jury understand that the defendant must be found
"guilty" of the underlying felony beyond a reasonable doubt, and did
the jury do so?

The jury must be properly instructed on the prosecution's bur-
den of proof, the elements of the underlying felony and any applica-
ble defenses. In addition, the jury need also be told that it must find
that the defendant committed the underlying felony beyond a reason-
able doubt. If both of the above are done, then the instructions sat-
ify the requirement that the jury understand that the defendant
must be found guilty of the underlying felony, and the finding of the
truth of the felony-murder suffices to establish that the jury did so.\textsuperscript{536}

"In those circumstances," wrote Justice Eagleson, "the jury's
attention is focused directly on the crime and it is proven according
to the general law. The return of only a special circumstances verdict
confirming the jury's finding that the defendant was guilty of the
crime is a defect in form not substance. The instructions on these
matters given the jury in this case were adequate in all respects."\textsuperscript{537}

\textsuperscript{532} Robertson, 33 Cal. 3d at 47-48, 655 P.2d at 293, 188 Cal. Rptr. at 91; Velasquez,
26 Cal. 3d at 434, 606 P.2d at 346, 162 Cal. Rptr. at 311.
\textsuperscript{533} See Robertson, 33 Cal. 3d at 47-48, 655 P.2d at 293, 188 Cal. Rptr. at 91; Velas-
quez, 26 Cal. 3d at 434, 606 P.2d at 346, 162 Cal. Rptr. at 311.
\textsuperscript{534} Williams (Keith), 44 Cal. 3d at 925-27, 751 P.2d at 422-23, 245 Cal. Rptr. at
364-65; Miranda, 44 Cal. 3d at 91-92, 744 P.2d at 1147-48, 241 Cal. Rptr. at 614-15.
\textsuperscript{535} Williams (Keith), 44 Cal. 3d at 925-27, 751 P.2d at 422-23, 245 Cal. Rptr. at
364-65; Miranda, 44 Cal. 3d at 91-92, 744 P.2d at 1147-48, 241 Cal. Rptr. at 614-15.
\textsuperscript{536} Williams (Keith), 44 Cal. 3d at 926-27, 751 P.2d at 422-23, 245 Cal. Rptr. at
\textsuperscript{537} Williams (Keith), 44 Cal. 3d at 926-27, 751 P.2d at 422-23, 245 Cal. Rptr. at 365.
In Miranda the jury returned a finding of the truth of a felony-murder special circumstance
with attempted robbery as the underlying felony. Attempted robbery was not charged and the
In other words, as long as the defendant's guilt of the underlying felony is litigated as though he were charged with the underlying felony, and as long as all of the requirements for a valid conviction of the underlying felony have been fulfilled, then the absence of a verdict finding the defendant guilty of the underlying felony is said to be "a defect in form not substance," provided the special circumstance is found true. But this conclusion that the defect is one in form, not substance, under these circumstances is true only if it is also recognized that a finding of the truth of the special circumstance is not a "conviction" of the underlying felony. If the murder verdict is set aside, the defendant may not be held or punished for the underlying felony. Since Williams acknowledges that this is so, it is difficult to see how the failure to charge and return a verdict on the underlying felony under these circumstances prejudices the defendant.

b. Lesser Included Offenses

It is the settled law of the state that the trial court must instruct the jury on a lesser included offense, even if not requested to do so, when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of the lesser offense. This principle, of course, applies with equal force to the felony supporting the felony-murder special circumstance.

In Melton, the defendant was charged with, and convicted of, one count of murder (which was found to be in the first degree), one count of burglary and one count of robbery. The jury also found true two felony-murder special circumstances: felony-murder-burglary, and felony-murder robbery. With respect to the robbery,
Melton claimed that the trial court should have instructed the jury sua sponte on the lesser included offense of theft. Finding that there was evidentiary support for the lesser included offense instruction, the Lucas court held that it was error not to instruct on the lesser included theft offense. But the error was found to be harmless "even under the most stringent standard of prejudice which may apply.”

D. The Multiple-Murder Special Circumstance

"The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree."

The multiple-murder special circumstance first appeared in California death penalty law in the 1973 mandatory death penalty statute. In that statute, it was joined with the prior-murder-conviction special circumstance, to form a single special circumstance. With respect to multiple murders, the pertinent wording in the 1973 statute was identical with the current provision, “[t]he defendant has in this . . . proceeding been convicted of more than one offense of murder in the first or second degree.” This special circumstance was adopted into the 1977 Legislation with no substantive change in its wording, though the structure of the sentence defining multiple-murder and prior-murder-conviction was altered. In the 1978

---

544. Melton, 44 Cal. 3d at 745, 750 P.2d at 759, 244 Cal. Rptr. at 885.
545. Id. at 746, 750 P.2d at 759, 244 Cal. Rptr. at 886. Under both the 1977 Legislation and the 1978 Initiative, any special circumstance found true may be taken into account by the sentencing authority as an aggravating factor in the penalty assessment process. See supra notes 86-87, 98-99 and accompanying text. Since the failure to instruct on a lesser included offense of a felony supporting a felony-murder special circumstance thus affects the capital sentencing process, an issue is presented under Beck v. Alabama, 447 U.S. 625 (1980), and its progeny. But since this is primarily a penalty phase issue, it is beyond the scope of the current article. But it should be noted here that since the Court overruled the Carlos intent-to-kill rule, the only culpability supporting the capital crime in a prosecution under the 1978 Initiative (as was Melton) is the culpability required by the qualifying conviction of first degree murder. If the only theory of first degree murder is the first degree felony-murder rule, then the only culpability supporting the death judgment is the culpability requisite for the felony supporting both the first degree felony-murder rule and the felony-murder special circumstance. Since the absence of the lesser included offense instruction affects this culpability, the Beck issue is even more important than it was when Carlos was the law of the land.

547. The prior-murder-conviction special circumstance is discussed infra text accompanying notes 589-608.
548. The text of the provision is quoted supra note 74.
549. 1973 mandatory death penalty statute, supra note 36, at 5 (codified as former CAL. PENAL CODE 190.2(b)(4) (West 1979)).
550. See supra notes 73-74 and accompanying text.
551. Compare the text quoted supra note 74 with the provisions in the 1978 Initiative.
Initiative, the multiple-murder and the prior-murder-conviction special circumstances are separated into two distinct special circumstances.552 The capital sentencing procedures of the Model Penal Code define a related provision as an "aggravating" circumstance: "At the time the murder was committed the defendant also committed another murder."553 According to the commentary on this aggravating circumstance, this "contemporaneous conduct of the defendant is especially indicative of depravity and dangerousness."554 Despite the fact that the 1978 Initiative separated the multiple-murder and the prior-murder-conviction special circumstances into separate provisions, the court has said that "[r]ead together, these two provisions are plainly complementary, and were evidently intended to define a single basic special circumstance—multiple murder—which can be satisfied by convictions in a single proceeding or in more than one proceeding."555 A few months before, the court described the purpose of the prior-murder-conviction special circumstance as being "directed neither to deterring misconduct nor to fostering rehabilitation."556 Given the court's opinion that these two provisions "define a single basic special circumstance," the court would undoubtedly also hold that the goal of the multiple-murder special circumstance is neither deterrence nor rehabilitation. This implies that the purpose of both of the "multiple murder" provisions is to authorize the punishment of death as a "just desert" for the defendant's crimes.557

1. The Turner Intent-to-kill Rule

a. The Bird Court

In People v. Turner, the defendant was convicted of two counts of first degree murder under the first degree felony-murder rule with

See infra note 552.
552. CAL. PENAL CODE §§ 190.2(a)(2) (prior-murder-conviction), 190.2(a)(3) (multiple-murder) (West 1988). The relevant text of section 190.2(a)(3) is quoted supra text accompanying note 546. The pertinent text of section 190.2(a)(2) is quoted infra text accompanying note 589.
553. MODEL PENAL CODE, supra note 246, § 210.6(3)(c).
554. Id. § 210.6(3)(c), Comment 6 (a), at 136.
557. See supra notes 555-56 and accompanying text.
burglary as the underlying felony.\textsuperscript{558} Two felony-murder-burglary and one multiple-murder special circumstance allegations were found to be true, and the defendant was sentenced to death. The \textit{Carlos} Intent-to-kill instruction had not been given to the jury. Finding that the \textit{Carlos} error fell within \textit{Garcia}'s per se reversal rule,\textsuperscript{560} the two felony-murder special circumstances were set aside.\textsuperscript{560}

The remaining question, according to Justice Kaus, was "whether two first degree felony-murder convictions, neither of which alone can justify imposition of the death penalty absent a finding of intent to kill, can together open the door to a death penalty hearing."\textsuperscript{561} Relying entirely on \textit{Carlos}, the court held that the multiple-murder special circumstance required proof that the two murders had been committed with an intent-to-kill.\textsuperscript{562}

The \textit{Turner} rule was nearly a mirror image of the \textit{Carlos} rule. An intent-to-kill was one of the elements of the multiple-murder special circumstance. The prosecution was required to prove beyond a reasonable doubt that the defendant intended to kill the victim in each murder before it would qualify as a murder sufficient for the multiple-murder special circumstance.\textsuperscript{563} Since an intent-to-kill was an element of the special circumstance, an instruction on this issue was required in the charge to the jury regardless of the evidence and even without a request for the instruction by the defendant.\textsuperscript{564} Finally, the failure to instruct on the intent-to-kill rule was subject to the per se reversal rule unless one of the four exceptions articulated in \textit{Garcia} were satisfied.\textsuperscript{565}

\begin{thebibliography}{9}
\bibitem{558} People v. Turner (Richard), 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984).
\bibitem{559} See supra notes 399-401 and accompanying text for a discussion of \textit{People v. Garcia}.
\bibitem{560} \textit{Turner (Richard)}, 37 Cal. 3d at 328, 690 P.2d at 685, 208 Cal. Rptr. at 212.
\bibitem{561} Id.
\bibitem{562} Id. at 328-30, 690 P.2d at 685-86, 208 Cal. Rptr. at 212-13. Although Justice Kaus wrote only for a plurality consisting of himself and Justices Broussard and Grodin, Chief Justice Bird separately concurred in the reversal of the special circumstance findings and the judgment of death. \textit{Id.} at 330, 690 P.2d at 686, 208 Cal. Rptr. at 213. Justice Reynoso joined the Chief Justice's concurring and dissenting opinion. \textit{Id.} Justice Mosk also wrote separately. He concurred only in the "plurality's disposition of this appeal insofar as it affirms the judgment as to guilt, sets aside the special circumstance findings, and reverses the judgment as to penalty." \textit{Id.} at 350, 690 P.2d at 700, 208 Cal. Rptr. at 227. Justice Lucas did not participate in \textit{Turner}. Thus the \textit{Turner} intent-to-kill rule was supported by a five justice majority of the California Supreme Court.
\bibitem{563} See, \textit{Id.} at 329-30, 690 P.2d at 685-86, 208 Cal. Rptr. at 212-13.
\bibitem{564} \textit{Id.} at 328, 690 P.2d at 685, 208 Cal. Rptr. at 212.
\bibitem{565} \textit{Id.}
\end{thebibliography}
However, there was one potentially important difference in the Carlos and Turner rules. The Carlos rule applied only to the felony-murder special circumstance in the 1978 Initiative. Since the felony-murder special circumstance in the 1977 Legislation required the murder to be willful, deliberate and premeditated, by force of its own explicit terms, the 1977 provision required an intent-to-kill which was also deliberate and premeditated. But neither the 1977 nor the 1978 multiple-murder provisions articulated a mens rea requirement. Since it is possible to commit both first degree and second degree murder without an intent-to-kill, the Turner rule would eliminate these non-intentional murders, in the first or second degree, as qualifying murders for the multiple-murder special circumstance, though they were not felony-murders. On the other hand, the Carlos rule was limited to the felony-murder special circumstance in the 1978 Initiative. But this was only a potential difference between the Carlos and Turner rules because the court was never faced with the question of whether the Turner rule applied to non-felony based murders under either the 1977 Legislation or the 1978 Initiative. In each instance in which the Bird court applied the Turner rule, it was in the context of multiple felony-murders which were used as the basis for the multiple-murder special circumstance.

The Turner intent-to-kill rule was followed in People v. Hayes to invalidate three multiple-murder special circumstance findings. The majority opinion in Hayes was written by Justice Mosk and joined by five of the six remaining justices of the court. Chief Justice Lucas, then Justice Lucas, filed a three sentence opinion concurring in a portion of the majority opinion and concurring in the judgment:

I concur with the majority opinion to the extent it affirms the judgment as to defendant’s guilt. I also concur with the remain-

---

566. See supra notes 389-96 and accompanying text.
567. See supra note 72 for the text of the 1977 felony-murder provision.
568. For example, the first degree torture-murder rule does not require an intent-to-kill. Implied malice will suffice under the “depraved heart” (wanton murder) theory. See supra notes 187-91, 367 and accompanying text.
569. Second degree murder can be committed under the “depraved heart” (wanton murder) theory. See supra notes 7-11 and accompanying text.
570. The two cases were Turner (Richard), 37 Cal. 3d at 328, 690 P.2d at 685, 208 Cal. Rptr. at 212, and People v. Hayes (John), 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985).
572. Id.
The Lucas Court & Capital Punishment

...portion of the judgment setting aside the special circumstances finding and reversing the penalty of death, but only under the compulsion of People v. Garcia ... and Carlos v. Superior Court ... For reasons I have previously expressed, I disagree with the holdings in those cases (see People v. Whitt ...), but (as conceded by the Attorney General) they do appear to control the disposition of the present case. 573

The Turner rule commanded the votes of a clear majority of the California Supreme Court and thus was part of the "law of the land." Justice Lucas' opinion in Hayes, along with his opposition to Carlos and his urging the court to reconsider and disapprove of "that unfortunate decision," suggested that the rule might well be abandoned if the composition of the court changed. 574

b. The Lucas Court

The composition of the court did change, and Carlos was overruled by Anderson. 576 Anderson overruled Turner as well:

In construing section 190.2 (a)(3) to the contrary in Turner, we relied on our decision in Carlos. But we have now rejected the reasoning of Carlos. With its support gone, Turner must also fail.

Accordingly, we overrule Turner to the extent it holds that intent to kill is an element of the multiple-murder special circumstance, and adopt the following reading of the relevant statutory provisions: intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved. 576

Since Anderson, the multiple-murder special circumstance has no mens rea requirement of its own. All that is required is that the defendant commit more than one murder and, because a special circumstance can only attach to a first degree murder, 577 that one of the murders be in the first degree.

573. Id. at 788-89, 699 P.2d at 1264, 214 Cal. Rptr. at 657 (citations omitted).
574. See supra notes 403-04 and accompanying text.
575. See supra notes 417-21 and accompanying text.
577. See supra notes 95-97 and accompanying text.
2. Pleading and Proof

a. The Bird Court

There is only one multiple-murder special circumstance regardless of the number of murders that have been committed. The charging papers should allege one multiple-murder special circumstance separate from the individual murder counts. The allegation should use substantially the same wording as is used in the statute: "The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree."

b. The Lucas Court

The Lucas court has reaffirmed these rules in the automatic appeals decided this year. In addition, a new issue was decided. Defendants have been claiming that, because of the wording of the multiple-murder special circumstance, it is impossible to truthfully allege in the charging papers and establish by probable cause at the preliminary hearing that the defendant "has in this proceeding been convicted of more than one offense of murder." This follows, of course, from the fact that at the time the charging papers are filed, and at the time the preliminary hearing is held, the defendant has not been convicted of any murder offense. These arguments were


580. Id. In Bloyd the multiple-murder allegation read as follows: "It is further alleged that the murder of Martha . . . was committed by the defendant . . . and, in addition to such murder, said defendant is now being charged with having murdered . . . North . . . within the meaning of Penal Code section 190.2(a)(3)." Id. at 361, 729 P.2d at 819, 233 Cal. Rptr. at 384. On appeal, the defendant raised two objections to this allegation. First, that no special circumstance allegation apprised defendant of the murder of North with the additional murder of Martha. Second, that the wrong code section was alleged. Although the court found that both of these defects were technical errors, they were also found to be harmless. The court again approved of the use of the statutory language to allege a multiple-murder special circumstance. Id. at 361-62, 729 P.2d at 819-20, 233 Cal. Rptr. at 385.

581. Kimble, 44 Cal. 3d at 504, 749 P.2d at 817-18, 244 Cal. Rptr. at 163; Anderson (James), 43 Cal. 3d at 1150, 742 P.2d at 1333, 240 Cal. Rptr. at 612. See Williams (Keith), 44 Cal. 3d at 927, 751 P.2d at 424, 245 Cal. Rptr. at 365.

582. E.g., Williams (Keith), 44 Cal. 3d at 922-25, 751 P.2d at 420-23, 245 Cal. Rptr. at 362-64; Anderson (James), 43 Cal. 3d at 1148-49, 742 P.2d at 1331-32, 240 Cal. Rptr. at 611-12.
uniformly rejected this year. 883

In Anderson, Justice Mosk wrote,

[W]e do not ignore the actual language of the provision. That language unproblematically defines the special circumstance as proved. We simply decline to read that language as specifying what the prosecution must charge: otherwise, the special circumstance could never be alleged and hence would be rendered nugatory, and thus the intent of the legislative body would be frustrated. 884

In Williams, the court believed that the major problem was not with the allegation in the charging papers, but with the quantum of evidence necessary to establish reasonable or probable cause to believe that a defendant will be convicted of an offense which renders him eligible for the death penalty under this special circumstance. 885

The court then held that the same standard applied to the special circumstances as applied to other crimes. 886

Since many special circumstance allegations overlap the substantive offense or offenses charged, and a finding of probable cause as to the latter necessarily establishes probable cause as to the identical elements of the special circumstance, the magistrate and the reviewing courts need only identify the additional elements of the special circumstances and satisfy themselves that sufficient evidence has been presented to establish the probable existence of those additional elements. 887

These same rules apply whether the prosecution is under the multiple-murder special circumstance provision in the 1977 Legisla-

---

583. E.g., Williams (Keith), 44 Cal. 3d at 922-25, 751 P.2d at 420-23, 245 Cal. Rptr. at 362-64; Anderson (James), 43 Cal. 3d at 1148-49, 742 P.2d at 1331-32, 240 Cal. Rptr. at 611-12.
584. Anderson (James), 43 Cal. 3d at 1149 n.10, 742 P.2d at 1332 n.10, 240 Cal. Rptr. at 612 n.10 (emphasis in original).
585. Williams (Keith), 44 Cal. 3d at 923-24, 751 P.2d at 421, 245 Cal. Rptr. at 363.
586. Williams (Keith), 44 Cal. 3d at 924, 751 P.2d at 422, 245 Cal. Rptr. at 363.
587. Id. at 925, 751 P.2d at 422, 245 Cal. Rptr. at 364.
tion or the 1978 Initiative.\textsuperscript{588}

E. \textit{The Prior-Murder-Conviction Special Circumstance}

"The defendant was previously convicted of murder in the first or second degree."\textsuperscript{589}

Like the multiple-murder special circumstance, the prior-murder-conviction special circumstance first appeared in California death penalty law in the 1973 mandatory death penalty statute. It was combined with what is now the multiple-murder special circumstance\textsuperscript{600} to form a single special circumstance in the 1973 statute.\textsuperscript{601} The wording of the 1973 provision was somewhat ambiguous: "The defendant has in this or any prior proceeding been convicted of more than one offense of murder of the first or second degree."\textsuperscript{602} This special circumstance was adopted into the 1977 Legislation with a change in the wording which was obviously designed to eliminate the ambiguity in the 1973 provision: "The defendant . . . has been convicted in a prior proceeding of the offense of murder of the first or second degree."\textsuperscript{603} The multiple-murder and the prior-murder-conviction special circumstances are separated into two distinct special circumstances in the 1978 Initiative.\textsuperscript{604}

The Model Penal Code's capital sentencing procedures contain a related "aggravating" circumstance: "The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person."\textsuperscript{605} The commentary on this aggravating circumstance explains why it was included in the Code:

}[This provision] deals with the defendant's past behavior as a circumstance of aggravation. Perhaps the strongest popular de-

\textsuperscript{588} Williams (Keith) was a prosecution under the 1977 Legislation, and Anderson was under the 1978 Initiative. \textit{See supra} notes 584-85.

\textsuperscript{589} \textit{CAL. PENAL CODE} § 190.2(a)(2) (West 1988).

\textsuperscript{590} The multiple-murder special circumstance is discussed \textit{supra} text accompanying notes 546-88.

\textsuperscript{591} The text of the provision is quoted \textit{supra} note 74.

\textsuperscript{592} \textit{Former CAL. PENAL CODE} § 190.2(b)(4) (West 1979). The ambiguity arises because the provision can be read to mean that the defendant must have been convicted of more than one offense of murder in the first or second degree before the prior-murder-conviction special circumstance is applicable. The text of the entire provision is quoted \textit{supra} note 74.

\textsuperscript{593} \textit{Former CAL. PENAL CODE} § 190.2(c)(5) (West 1979). The text of the entire provision is quoted \textit{supra} note 74.

\textsuperscript{594} \textit{CAL. PENAL CODE} §§ 190.2(a)(2) (prior-murder-conviction), 190.2(a)(3) (multiple-murder) (West 1988). The pertinent text of section 190.2(a)(2) is quoted \textit{supra} text accompanying note 589. The relevant text of section 190.2(a)(3) is quoted \textit{supra} text accompanying note 546.

\textsuperscript{595} \textit{MODEL PENAL CODE}, \textit{supra} note 246, § 210.6(3)(b).
mand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some future occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.\footnote{596}

As noted above in connection with the discussion of the multiple-murder special circumstance, the 1978 Initiative separated the multiple-murder and the prior-murder-conviction special circumstances into separate provisions, However, the court has said that when these two provisions are read together, they were evidently intended to define a single basic special circumstance—multiplemurder—which can be satisfied by convictions in a single proceeding or in more than one proceeding.\footnote{597} Furthermore, by holding that the purpose of this provision is neither deterrence nor rehabilitation, the court has implied that the purpose of this provision is retribution.\footnote{598} Only a few cases have addressed prior-murder-conviction issues.

1. The Malone Intent-to-kill Rule

a. The Bird Court

In \textit{People v. Turner}\footnote{599} the Bird court relied on the \textit{Carlos} intent-to-kill rule to interpret the multiple-murder special circumstance as requiring an intent-to-kill. Although the court did not address the issue of whether there was a similar intent-to-kill requirement for the prior-murder-conviction special circumstance, the court of appeal did. Relying on \textit{Carlos} and \textit{Turner}, the court of appeal held in \textit{People v. Malone} that the prior-murder-conviction special circumstance also required an intent-to-kill.\footnote{600}

Like the multiple-murder special circumstance, an intent-to-kill was thus an element of the prior-murder-conviction special circumstance.\footnote{601} This intent had to be proved beyond a reasonable doubt by

\footnote{596. \textit{Model Penal Code}, supra note 246, § 210.6(3)(b) Comment 6(a), at 136 (emphasis added).}
\footnote{597. See supra notes 555-57 and accompanying text.}
\footnote{598. \textit{Hendricks I}, 43 Cal. 3d at 595, 737 P.2d at 1357, 238 Cal. Rptr. at 73 (1987).}
\footnote{599. 37 Cal. 3d 302, 690 P.2d 669, 208 Cal. Rptr. 196 (1984).}
\footnote{601. See supra notes 558-76 and accompanying text.}
the prosecution, and the jury had to be instructed on the requirement regardless of the evidence, and without regard as to whether the defendant requested the instruction.

b. The Lucas Court

The first automatic appeal decided by the Lucas court was filed on July 6, 1987, in *Hendricks I*. It was authored by Justice Mosk for a unanimous court. Hendricks argued that the prior-murder-conviction special circumstance should be set aside because there was no finding of an intent-to-kill as required by *Malone*. This argument was rejected in two short paragraphs. *Malone* was overruled, but neither *Carlos* nor *Turner* were mentioned.

*Hendricks I* foreshadowed Justice Mosk's opinion for the Lucas court in *Anderson*, which was filed three months and one week later. *Anderson*, as indicated above, overruled *Carlos*. It overruled *Turner* as well. Despite the fact that the court found that retribution is the sole purpose of the prior-murder-conviction special circumstance, that special circumstance has no mens rea requirement at all under the Lucas court's decision in *Hendricks I*. Of course, the same may now be said of both the multiple-murder and the felony-murder special circumstances under *Anderson*. Since *Anderson* is the key to the court's holding that no intent-to-kill is required for any of these three special circumstances, the mens rea requirement for all three is best considered in connection with a discussion of *Carlos* and *Anderson*. That discussion is deferred to another day.

2. Additional Requirements?

A prior-murder-conviction special circumstance can only attach to a conviction of first degree murder. Does the actus reus of the

---

603. Id.
604. Id.
606. See supra notes 417-21 and accompanying text.
607. See supra note 575 and accompanying text.
608. See supra text accompanying note 89.
609. See supra notes 95-97 and accompanying text. This statutory requirement has been repeated in a number of the cases. For example, in *Williams (Keith)*, 44 Cal. 3d at 925, 751 P.2d at 422-23, 245 Cal. Rptr. at 364, it was acknowledged that the multiple-murder special circumstance can only attach to a conviction in the current proceedings of first degree murder. "For the special circumstance to be found true at trial, the defendant must be found guilty of at least two counts of murder, and the count or counts to which the special circumstance allegations are appended must be of the first degree." Id.
special circumstance consist of committing a first degree murder after committing a prior murder in either the first or second degree, and after being convicted for that prior murder? The Bird court was never presented with this question, but Edgar Hendricks presented this issue to the Lucas court in *Hendricks I* in two related arguments.

Edgar Hendricks committed four murders, two in Los Angeles and two in San Francisco. The two murders in Los Angeles were committed before the murders in San Francisco. Nevertheless, he was tried for the San Francisco murders first. He was convicted in the San Francisco trial of two counts of first degree murder. Felony-murder and multiple-murder special circumstances were found true, and he was sentenced to death. In the subsequent Los Angeles trial the two San Francisco first degree murder convictions were alleged as a prior-murder-conviction special circumstance.

Hendricks argued that the words “previously convicted” mean that the underlying offense must be committed and reduced to a conviction of murder in the first or second degree before the offense to which they attach as a special circumstance has been committed. Since the San Francisco murders were committed after the Los Angeles murders, according to his argument, they could not qualify as “prior-murder-convictions” for this special circumstance even though they were reduced to a conviction first.

First, he argued that the death penalty is appropriate only when a defendant commits murder after he has been put on notice by a previous murder conviction that if he repeats the crime he might suffer the ultimate penalty. This was a mens rea argument. Finding that the prior-murder-conviction special circumstance “is directed neither to deterring misconduct nor to fostering rehabilitation,” and that the “language of the provision is clear: on its face, it refers simply and unequivocally to previous convictions,” the court rejected the argument. “The order of the commission of the homicides,” wrote Justice Mosk, “is immaterial.”

Second, Hendricks argued that unless the words “previously

---

610. *Hendricks I*, 43 Cal. 3d at 588, 595, 737 P.2d at 1350, 1352, 238 Cal. Rptr. at 66, 68.


612. *Hendricks I*, 43 Cal. 3d at 588, 595, 737 P.2d at 1350, 1356-57, 238 Cal. Rptr. at 66, 72-73.

613. *Id.* at 595, 737 P.2d at 1357, 238 Cal. Rptr. at 72-73.

614. *Id.*

615. *Id.* at 596, 737 P.2d at 1357, 238 Cal. Rptr. at 73.
"convicted" are interpreted to mean previously committed and convicted, prosecutors may manipulate the order of trials to maximize the possibility of a death penalty. The court also rejected this argument, saying: "We are not persuaded that the bare possibility of 'manipulation' furnishes sufficient reason to insert into the provision a requirement that neither appears on the face of the statute nor is suggested by any extrinsic aids. Moreover, defendant's concern is purely speculative: there is no indication of manipulation in the present case."\(^{610}\)

As so interpreted, the California provision differs substantially from the related provision in the Model Penal Code. The commentary to the Code clearly implies that the words "previously convicted," which are the same words used in the California provision,\(^{617}\) means that both the offense and the conviction for that offense must have occurred before the current offense is committed.\(^{618}\) Yet the *Hendricks* court treated the defendant's argument that the words "previously convicted" should be given the same interpretation as the Model Penal Code provision as being "strained."\(^{619}\)

Thus, at the close of the first year of the Lucas court, the prior-murder-conviction special circumstance has no mens rea requirement. Like the felony-murder special circumstance as interpreted in *Anderson*, it is an absolute liability "offense." The only mens rea required is the culpable mental state necessary for conviction of the underlying offenses, murder in the first or second degree in the prior-murder-conviction special circumstance, and first degree murder for the felony-murder special circumstance. With respect to the actus reus of the prior-murder-conviction special circumstance, the defendant need only commit two murders and have one of them reduced to a conviction in a separate prior proceeding to qualify for this special circumstance. As Justice Mosk so clearly stated it, "[t]he order of the commission of the homicides is immaterial."\(^{620}\)

3. *Pleading And Proof*

   a. *The Bird Court*

   There is only one prior-murder-conviction special circumstance regardless of the number of times the defendant has been previously

---

616. Id. at 596 n.2, 737 P.2d at 1357 n.2, 238 Cal. Rptr. at 73 n.2.
617. See supra text accompanying note 596.
618. See supra notes 613-16 and accompanying text.
619. *Hendricks I*, at 595, 737 P.2d at 1357, 238 Cal. Rptr. at 73.
620. Id. at 596, 737 P.2d at 1357, 238 Cal. Rptr. at 73.
convicted of murder in the first or second degree.\footnote{121} Like the multiple-murder special circumstance, the charging papers should allege one prior-murder-conviction special circumstance separate from the murder count to which it attaches, regardless of the number of prior murder convictions suffered by the defendant.\footnote{122} Though the allegation should use substantially the same wording as is used in the statute, the prior murder convictions should be specifically identified.\footnote{123}

b. The Lucas Court

Only one automatic appeal presented prior-murder-conviction special circumstance issues this year, and that was Hendricks I. No pleading or proof issues were presented in that case. There is no reason to suspect that the Lucas court will refuse to follow the pleading and proof requirements established by the Bird court precedent.

F. The Financial-Gain Special Circumstance

"The murder was intentional and carried out for financial gain."\footnote{124}

1. The Elements Of The Special Circumstance

The financial-gain special circumstance was introduced into California law by the 1978 Initiative.\footnote{125} It replaced the "contract-killer" special circumstance in the 1977 Legislation.\footnote{126} The 1977 provision was, in turn, patterned upon a substantially similar "contract-killer" special circumstance in the 1973 mandatory death penalty statute.\footnote{127}

The capital sentencing procedures in the Model Penal Code de-

\footnote{121. People v. Allen, 42 Cal. 3d 1222, 1274, 729 P.2d 115, 147, 232 Cal. Rptr. 849, 881 (1986).}
\footnote{122. See id.}
\footnote{123. The court in which the defendant was convicted, the date of the conviction, and the degree of murder should be specified for each prior murder conviction. See id. When the current prosecution is for more than one murder, so that the prior-murder-conviction special circumstance could attach to more than one count, by analogy to the multiple-murder special circumstance, a single allegation should be used. See id. Defects in the special circumstance do not affect the validity of a subsequent finding, unless the allegation is so defective that it does not give the defendant sufficient notice of the charges to adequately prepare and present a defense. See id.}
\footnote{124. CAL. PENAL CODE § 190.2(a)(1) (West 1988) (the 1978 Initiative).}
\footnote{125. See supra notes 111-12 and accompanying text.}
\footnote{126. See supra notes 111-12 and accompanying text; People v. Bigelow, 37 Cal. 3d 731, 750, 691 P.2d 994, 1005, 209 Cal. Rptr. 328, 339 (1984).}
\footnote{127. The text of both the 1973 and the 1977 provisions are quoted supra note 69.}
fine a similar "aggravating" circumstance: "The murder was committed for pecuniary gain." There are, of course, substantial differences between the Model Penal Code provision and the financial-gain special circumstance. The California provision uses the phrase "financial gain" and requires that the murder be "intentional," whereas the Model Penal Code provision describes the necessary gain as "pecuniary," and does not restrict the "aggravating circumstance" to intentional murders.

Although it may be debatable whether "financial gain" is more inclusive than "pecuniary gain," it is clear that the financial-gain special circumstance is more inclusive than either the 1973 or the 1977 "contract-killer" provisions. On its face, the financial-gain special circumstance covers a wide variety of intentional murders: a contract murder, a murder to financially benefit a third person, to acquire an inheritance, to obtain life insurance, or simply to acquire money or property in a wide assortment of situations, to name but a few.

There is an apparent change in the actus reus, the physical conduct, of the special circumstances in the 1978 Initiative as compared to the 1977 "contract-killer" provision. Both provisions share essential conduct which originates from the fact that the special circumstance applies only to a defendant found guilty of first degree murder: a homicide must have been committed by the defendant (which was found to be murder in the first degree).

However, the 1977 provision also required that the murder be carried out pursuant to "an agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim." Thus, under the 1977
provision, additional conduct was required. The defendant also had to enter into the requisite agreement. There is no similar additional conduct requirement for the 1978 financial-gain special circumstance. All that the defendant must do under the 1978 Initiative's financial-gain special circumstance is commit the homicide (which is later found to be murder in the first degree).

Though the 1977 and the 1978 provisions share the mens rea requirement that the murder be “intentional,” the specific intent required by the two provisions is substantially different. The 1977 provision requires, in addition to an intentional murder, that the murder be committed pursuant to the agreement to receive valuable consideration for the intentional murder. Thus the defendant must make the agreement and commit the murder to obtain the specified valuable consideration. The additional mens rea requirement for the financial-gain special circumstance in the 1978 legislation does not require the making of an agreement and the commission of the intentional murder with the intent of obtaining the valuable consideration specified in the agreement.

In Howard, Chief Justice Lucas explained the additional mens rea requirement as follows:

\[ \ldots \text{The special circumstance focuses on the defendant's intention at the time the murder was committed.} \ldots \text{[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.} \]

In other words, the defendant must not only commit an intentional murder, but she must also kill her victim with the intent, or for the purpose, of obtaining financial gain for herself or another person. Since the critical factor is the culpable mental state with which the defendant committed the murder, it is not necessary that the expected financial gain be actually received. The receipt of the gain is, thus, not an element of either the mens rea or the actus reus of the financial-gain special circumstance.

Chief Justice Lucas' interpretation of the mens rea requirement fairly flows from both the language of the provision, and the application...
plication of the fundamental principles of the criminal law to the financial-gain special circumstance.\textsuperscript{639} The remaining question concerns the definition of “financial gain.” The court has held that the phrase has no technical meaning that is peculiar to the law. Since its meaning is commonly understood by people familiar with the English language, an instruction defining “financial gain” need not be included sua sponte in the court’s charge to the jury.\textsuperscript{640} Yet in affirming the trial court’s refusal to give three jury instructions tendered by the defense, the court has provided a better explanation of its conception of “financial gain.” The instructions offered the following definitions:

1. The murder . . . was carried out pursuant to an agreement by the person committing the murder to accept valuable consideration for the act of the murder from some person other than the victim.\textsuperscript{641}

2. In order to find the special circumstance to be true, you must be convinced beyond a reasonable doubt that the person who committed the murder was the one who did or was to benefit financially.\textsuperscript{642}

3. In order to find the special circumstance to be true, you must be convinced beyond a reasonable doubt . . . (b) the defendant either committed the murder or solicited someone else to do so; (c) that the defendant \textit{either} benefited financially from the act of the killing \textit{or} solicited the murder for the purpose that someone else might benefit financially.\textsuperscript{643}

The first instruction was properly refused on the ground that the special circumstance requires proof of the defendant’s intent at the time of the killing, proof that the defendant not only committed intentional murder, but that he also intended to obtain the desired financial gain.\textsuperscript{644} Thus, although it may be sufficient to prove that the defendant committed a contract killing, it is not a necessary finding. Since the instruction made the contract theory a necessary finding, it was properly refused.\textsuperscript{645} Unlike the 1977 provision, the finan-

\textsuperscript{639} See supra text accompanying notes 181-218.
\textsuperscript{640} Howard, 44 Cal. 3d at 408, 749 P.2d at 297, 243 Cal. Rptr. at 860.
\textsuperscript{641} Id. at 407 n.8, 749 P.2d at 297 n.8, 243 Cal. Rptr. at 860 n.8.
\textsuperscript{642} Id.
\textsuperscript{643} Id (emphasis added).
\textsuperscript{644} Id. at 409-10, 749 P.2d at 298, 243 Cal. Rptr. at 861-62.
\textsuperscript{645} Id. at 409, 749 P.2d at 298, 243 Cal. Rptr. at 861.
cial-gain special circumstance is not limited to contract murders.

The second instruction was properly refused because it requires the jury to find that the murderer intended to personally obtain the financial gain. The special circumstance is not limited to this intention. It is sufficient if the murder is committed with the intention of obtaining financial gain either for the murderer or a third person.646

Finally, the third instruction was properly refused because there is no requirement that the financial gain be received by any person.647 What is critical is the defendant's intent, not the receipt of the financial gain. Since one of the two choices given to the jury was clearly wrong, the entire instruction was wrong.

At the close of the first year of the Lucas court, the elements of the financial-gain special circumstance can be summarized as follows. There is no actus reus requirement beyond the actus reus necessary for the underlying conviction of murder in the first degree. No financial gain need be actually received by any person as a result of the murder, and no contract or agreement is necessary. There are two mens rea requirements. The murder must have been intentionally committed; and the murder must have been committed with the intent, or for the purpose, of obtaining financial gain for herself or another person. The additional intent-to-receive-financial-gain makes the financial-gain special circumstance a specific intent special circumstance much like the torture-murder special circumstance discussed above.648 It is this additional mens rea that justifies imposing liability for the death sentence over all other intentional first degree murders.649

The only point of disagreement between the Bird and Lucas courts at this point is over the proper interpretation of the Bigelow rule.

2. The Bigelow Anti-overlap Rule

The Bird and Lucas courts have consistently followed a policy of interpreting the special circumstances so as to eliminate overlapping special circumstances for the same criminal conduct.650 Since

---

646. Id. at 409 n.9, 749 P.2d at 298 n.9, 243 Cal. Rptr. at 861 n.9.
647. Id.
648. See supra notes 360-61 and accompanying text.
649. See supra notes 192-97, 424 and accompanying text.
650. See supra notes 464-501 and accompanying text. As indicated in that portion of this article, the Lucas court's refusal to follow the Harris overlapping-felony-murder rule is not an exception to this statement. The court concluded that the conduct involved in the Melton case (see People v. Melton, 44 Cal. 3d 713, 765-69, 750 P.2d 741, 772-75, 244 Cal. Rptr.)
most robberies, as well as many burglaries, kidnappings and arsons are committed for financial gain, the financial-gain special circumstance will frequently overlap with the felony-murder special circumstance. How should that overlap be eliminated?

a. The Bird Court

The task of harmonizing the financial-gain and felony-murder special circumstances was first presented to the court in Bigelow.\(^\text{651}\) Jerry Bigelow was convicted of the first degree murder, robbery and kidnapping of John Cherry. Cherry’s automobile was the subject matter of the robbery. Along with two other special circumstances, the jury found “true” both a felony-murder-robbery and a financial-gain special circumstance based solely upon the robbery of Cherry. This finding was possible because the same aspect of Bigelow’s culpability, his murder for the purpose of stealing the automobile, apparently satisfies both the felony-murder-robbery and the financial-gain special circumstances. On his automatic appeal Bigelow claimed that the financial-gain special circumstance should be set aside. The court agreed:

In this context, we believe the court should construe special circumstance provisions to minimize those cases in which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the defendant. Such a limiting construction will not prejudice the prosecution, since there will remain at least one special circumstance—either financial gain or felony murder—applicable in virtually all cases in which the defendant killed to obtain money or other property. We adopt a limiting construction under which the financial gain special circumstance applies only when the victim’s death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant. Since the present case does not fall within the special circumstance as so limited, the trial court erred in submitting that special circumstance to the jury.\(^\text{652}\)

The Bird court never again had occasion to address the question of the overlap between the financial gain special circumstance and the felony-murder special circumstance.

\(^{652}\) Id. at 751, 691 P.2d at 1006, 209 Cal. Rptr. at 340 (emphasis added).
b. The Lucas Court

The financial-gain special circumstance was first presented to the Lucas court in *Howard.*653 Howard argued that the trial court should have instructed the jury *sua sponte* on the *Bigelow* definition of "financial gain."654 The court rejected this argument, saying,

. . . *Bigelow* does not expressly require that instructions utilizing the limited construction adopted in that opinion be given in all cases. Even though such instructions may in some instances be necessary in order to avoid the overlap which that opinion is intended to cure, there is no such necessity here. Our major concern in *Bigelow* was to prevent overlapping special circumstances findings based on the same conduct. Defendant attempts to derive from that decision an interpretation of the financial-gain special circumstance which is more restrictive than is necessary to avoid application of multiple special circumstances to one form of conduct.

*Bigelow's* final articulation of the scope of the provision must be viewed in terms of the problem it sought to correct. In this case, the victim's death was the "consideration" for the financial gain that defendant sought; in other words, defendant killed the victim in order to benefit financially. Use of the word "consideration" arguably conjures up contract law and may improperly, as is inherent in defendant's argument here, shift the focus backwards towards the time that a relevant "agreement" was made. We conclude, therefore, that *Bigelow's* formulation should be applied when it is important to serve the purposes underlying that decision, but that it is not intended to restrict construction of "for financial gain" when overlap is not a concern.655

This holding drew a dissent from Justice Broussard. Under Justice Broussard's analysis, the majority's holding "gives a dual meaning to the phrase 'for financial gain.'"656

. . . When the prosecutor charges both felony murder and murder for financial gain, the phrase would mean a murder in which the victim's death is essential to the gain, but whenever he charges only murder for financial gain, the same words would mean something different, broader, and wholly undefined. While one can argue about what the people intended

654. *Id.* at 408-09, 749 P.2d at 297-98, 243 Cal. Rptr. at 860-61.
655. *Id.* at 410, 749 P.2d at 298, 243 Cal. Rptr. at 861-62.
656. *Id.* at 447, 749 P.2d at 323, 243 Cal. Rptr. at 887.
when they enacted a special circumstance of murder for financial gain, it is quite unlikely that they intended two different things depending on whether the prosecutor chose to join a charge of felony murder.\textsuperscript{657}

The majority's interpretation of \textit{Bigelow} is neither novel nor incorrect. The \textit{Bigelow} rule does not create or recognize an element of the financial-gain special circumstance. Even if one assumes that the rule satisfies the first prong of the test articulated above, it fails the second prong of that test.\textsuperscript{658} The \textit{Bigelow} rule does not address what is to be deterred by the law, or announce the circumstances under which punishment will be exacted when nothing more is shown.\textsuperscript{659} When a robber intentionally kills his victim because it is not otherwise possible to gain possession of the victim’s money, his culpable mental state suffices for the financial-gain special circumstance and that is precisely why prosecutors seek to charge both felony-murder robbery and a financial-gain special circumstances in these situations.

As Chief Justice Lucas correctly points out in \textit{Howard}, \textit{Bigelow} does not interpret the mens rea requirement of the financial-gain special circumstance.\textsuperscript{660} Nor does \textit{Bigelow} affect any other aspect of the defendant's culpability, or the deterability of the defendant's conduct.

\textit{Bigelow} addresses a different concern: the avoidance of the overlap between the felony-murder and the financial-gain special circumstances. The \textit{Bigelow} rule performs the same function for these two special circumstances that the \textit{Daniels} rule performs for robbery and aggravated kidnapping; and for precisely the same reason.\textsuperscript{661} Just as the \textit{Daniels} rule does not create an element of crime of aggravated kidnapping, so the \textit{Bigelow} rule does not create an element of the financial-gain special circumstance.\textsuperscript{662}

There are not two conceptions of the mens rea or the actus reus of the financial-gain special circumstance—one which applies when a felony-murder allegation is joined and one when it stands alone. But to eliminate the overlap between the two special circumstances, when “financial gain” is an integral part of the defendant’s felonious intent, the \textit{Bigelow} rule seeks to provide a basis for selecting between

\begin{small}
\begin{itemize}
  \item 657. \textit{Id.}
  \item 658. \textit{See supra} text accompanying notes 291-322.
  \item 659. \textit{See supra} text accompanying notes 291-322.
  \item 660. \textit{Howard}, 44 Cal. 3d at 409, 749 P.2d at 297-98, 243 Cal. Rptr. at 861.
  \item 661. \textit{See supra} text accompanying notes 325-31.
  \item 662. \textit{See supra} text accompanying notes 325-31.
\end{itemize}
\end{small}
the two competing special circumstances.663

Although the Bigelow rule is factually based and thus should be
given to the jury to resolve under appropriate instructions when it is
an issue in the case, since there was no danger of an overlap in Howard, the court's holding that the instruction was not necessary seems
correct on principle.664 No overlap was presented in Howard because Howard's plan to acquire financial gain through the murder of
his victim did not also entail the commission of one of the felonies
enumerated in the felony-murder special circumstance.

3. A Proposal

The Bird and Lucas courts agree with Bigelow's goal of construing special circumstance provisions to minimize those cases in
which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the defendant. Since the Bird court was never presented with the question of whether Bigelow created an anti-overlap rule, like Daniels, or modified one of the elements of that special
circumstance, one cannot determine whether the two courts disagree
over Bigelow's theory.665 The two members of the Bird court still
remaining on the court, Justices Mosk and Broussard, are appar-
ently divided on this question. Justice Mosk joined Chief Justice Lu-
cas' opinion for the majority in Howard.666 Justice Broussard, the
author of Bigelow, takes the view that the Bigelow rule alters an
element of the special circumstance by modifying the definition of
"financial gain."667 Although, for the reasons discussed above, the
majority's conception of the Bigelow rule is correct on principle, it
appears that the rule should have been abandoned in favor of a dif-
ferent rule.

If one takes its language literally, the Bigelow rule does not
eliminate the overlap which is the rule's goal. The term "considera-
tion," even when it is understood to mean that the financial gain is
"payment" for the intentional murder, is too narrow. Additionally, it
diverts the jury from its central task. It brings to mind the law of

663. In my view this policy is founded in the intent of the legislative body which may be inferred from the structure of the 1978 death penalty initiative. See supra text accompanying notes 476-87.
664. See supra notes 270-331 and accompanying text, discussing the similar Daniels instruction.
665. See supra text accompanying notes 484-85 for a discussion of the Daniels rule.
666. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842.
667. See id. at 446-47, 749 P.2d at 323-24, 243 Cal. Rptr. at 886-87.
contracts and tends to limit the concept of financial gains to the "contract-killer." It also shifts the focus of the inquiry from the essential question of the defendant's intent at the time of the murder to some previous time when a contract was made.\footnote{668}

Furthermore, the idea that the intentional murder must be the "essential prerequisite to" the financial gain fails to draw a distinction between many felony-murders and the financial gain special circumstance unless a great deal more is added to our understanding of that phrase. For example, suppose the defendant wishes to steal a large sum of money from an armed courier. When the courier is accosted by the defendant, the courier draws her weapon and fires at the defendant. The only way the robber can get the money is to kill the courier. He does so. The common understanding of the language used in \textit{Bigelow} (the murder is an essential prerequisite to the financial gain sought by the defendant) would indicate that the financial-gain circumstance applies to this classic example of a felony-murder special circumstance.

Of course, this meaning of the phrase can be altered by further definition. One could say, for example, that the word "essential" means that the defendant's plan should be examined in the abstract, and thus the fact that the courier resisted with lethal force should be disregarded.\footnote{669} The point is that the rule needs further refinement and with further refinement comes further complexity. A far simpler solution to the overlap problem is preferable.

If the defendant's culpable conduct and his culpable mental state qualify for the felony-murder special circumstance, then, as a matter of law, the financial-gain special circumstance should not be applicable. In other words, if the defendant's intent is to acquire financial gain by perpetrating a felony enumerated in the felony-murder special circumstance, then the court should hold, as a matter of law, that the financial-gain special circumstance is not at issue in the case. This construction of the two special circumstances gives them a mutually exclusive interpretation as a matter of law. It simplifies the law and avoids the submission of unnecessary issues to the jury.

The next question is whether the financial-gain and the felony-murder special circumstances should ever both be submitted to the jury under appropriate instructions. Certainly, when the defendant's plan does not involve the acquisition of financial gain by the commis-

\footnote{668. \textit{Id.} at 409-10, 749 P.2d at 298, 243 Cal. Rptr. at 861-62.}
\footnote{669. This would borrow from the law used to determine whether a felony qualifies for the second degree felony-murder rule. \textit{See supra} notes 302-07 and accompanying text.}
sion of a felony listed in the felony-murder special circumstance the answer is clear: No. That, of course, is the essential teaching of Howard. When the evidence shows that the defendant's plan does involve the commission of one of these enumerated felonies, then the overlap should be limited by submitting only the felony-murder special circumstance to the jury under appropriate instructions. These were the facts presented in Bigelow. The Bigelow court reached the correct result by applying the wrong rule.

Could there be a situation in which the facts are sufficiently unclear so that both special circumstances should be submitted to the jury with instructions that it must find only one of the choices to be true—either the felony-murder or the financial-gain special circumstance? An example of where this would be true is difficult, at best, to conceive. Since the felony-murder special circumstance applies to attempts to commit the felony, the failure to prove that the felony was actually committed does not mean that the felony-murder special circumstance is inapplicable. If the evidence is conflicting on whether an attempt has been committed because of the evidence of the defendant's mental state, it is difficult to see how the financial-gain special circumstance would be applicable. Indeed, the financial-gain special circumstance overlaps largely because of the defendant's culpable mental state, his commission of the felony to acquire financial gain, not because of an overlap in his conduct.

Conflicting evidence on his culpable mental state would not provide the jury with a choice between the two competing special circumstances. Instead, it would present the jury with the choice of finding both special circumstances to be untrue. In other words, the overlap between these two special circumstances is always caused by the fact that the defendant's mental state qualifies for both special circumstances. It either qualifies for both or it qualifies for neither. Subsequently, under these circumstances, conflicting evidence does not suggest that both special circumstances should be submitted to the jury.

Under the rule proposed, the court would look at the defendant's conduct and his culpable mental state and decide whether there are sufficient facts to submit the felony-murder special circumstance to the jury. If the felony-murder special circumstance should be submitted to the jury, then the financial-gain special circumstance is not applicable to the case and should not be submitted to the jury under any circumstances. This follows from the fact that the overlap is caused because the defendant's culpable mental state qualifies for both the felony-murder and the financial-gain special circumstances.
In the example of the felony-murder-robbery special circumstance, if the jury refuses to find that the defendant intended to steal, then the jury would also axiomatically reject finding that he killed the victim for the purpose of financial gain. Unless facts are presented which have nothing to do with the felony-murder special circumstance, the financial-gain special circumstance is simply not involved in the case.

A summary of the proposed rule should prove helpful at this point. The court should first look at the defendant’s conduct and his culpable mental state and decide whether there are sufficient facts to submit the felony-murder special circumstance to the jury. If the felony-murder special circumstance is submitted to the jury, then the financial-gain special circumstance should not be submitted to the jury for that murder. This should be decided by the court as a matter of law, even though submitted instructions are designed to force the jury to choose between the two special circumstances.

Given the policy against finding two special circumstances for the same conduct and the same culpable mental state, one of the two competing special circumstances must be selected over the other. This rule resolves that conflict. It selects the felony-murder special circumstance as the more general of the two, and reads the financial-gain special circumstance as applying to situations not covered by the felony-murder special circumstance. This appears to be the probable intent of the legislative body. If this were not true, then the court would be obliged to find that the legislative body either intended the overlap or that the financial-gain special circumstance was intended to displace the felony-murder-robbery special circumstance in the typical robbery situation. Since neither of these arguments appear to be tenable, the intent was probably to make the financial-gain special circumstance apply only in situations in which the felony-murder special circumstance does not.

Under this analysis, both Howard and Bigelow were correctly decided on this issue. Since the facts in Howard did not raise the felony-murder special circumstance, the financial-gain special circumstance was properly submitted to the jury. Similarly, since the

---

670. Though the intent to steal, which is one of the mental states required for the crime of robbery, does not require that the culprit intend to acquire personal gain (lucri causa), that is the usual intent with which robberies are committed. See People v. Green, 27 Cal. 3d 1, 57-58, 609 P.2d 468, 503, 164 Cal. Rptr. 1, 36 (1980). Of course, when the defendant’s intent is to permanently deprive another of property by destroying the property, it would be robbery, though the financial-gain special circumstance would not overlap. See id. at 58, 609 P.2d at 503, 164 Cal. Rptr. at 36.
felony-murder-robbery special circumstance was involved in Bigelow, the trial court erred in submitting the financial-gain special circumstance to the jury. The felony-murder-robbery special circumstance finding was thus correctly set aside. The court should abandon the Bigelow anti-overlap rule in favor of the rule proposed above. The virtues of this rule are that it is easily applied in the lower courts, it avoids further development of the vague and misleading concepts used in the Bigelow rule, and it simplifies the issues submitted to the jury, because the issues involved with the overlap are properly resolved, as a matter of law, by the court, not by the jury.

4. A Summary Of The Financial-Gain Special Circumstance

At the close of the first year of the Lucas court, the elements of the financial-gain special circumstance may be summarized as follows. This special circumstance is defined in such a way as to add no new element to the actus reus of first degree murder. In other words, this special circumstance divides first degree murder into a death eligible category and a non-death eligible category purely on the basis of the defendant's mens rea "at the time the murder was committed." There are two mens rea requirements: (1) the murder must be intentional; and (2) the defendant must have committed the murder with the intention of (or for the purpose of) acquiring financial gain.

The first requirement is specifically articulated in the statute. The second is clearly implied from the statutory phrase “murder . . . carried out for financial gain.” One point should be emphasized, however. A defendant may be convicted under the financial-gain special circumstance even though the defendant does not intend to personally acquire financial gain from the murder. Thus a defendant who hires a contract killer to murder the victim is liable under the financial-gain special circumstance.

671. Howard, 44 Cal. 3d at 409, 749 P.2d at 298, 243 Cal. Rptr. at 861 (emphasis in original).
673. Id. (emphasis added). “The special circumstance focuses on the defendant's intent at the time the murder was committed. . . . [T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.” Howard, 44 Cal. 3d at 409, 749 P.2d at 298, 243 Cal. Rptr. at 861 (per Lucas, C.J.) (emphasis and footnote omitted). See supra text accompanying notes 203-18 for an extended discussion of this requirement.
5. Pleading And Proof

a. The Corpus Delicti Rule

In *People v. Mattson* the Bird court held that the corpus delicti of the felony-based special circumstances must be proved independently of an accused's extrajudicial statements. The *Mattson* rule was squarely based on the provision in the 1977 Legislation requiring a crime upon which a special circumstance is based to be proved "pursuant to the general law applying to the trial and conviction of the crime." The court interpreted this provision as creating an exception to the general rule that does not require independent proof of the corpus delicti of an underlying crime used for the purpose of establishing the degree of the murder.

An identical provision is contained in the 1978 Initiative. In *Howard* the defendant argued that the *Mattson* corpus-delicti rule applied to the provision in the 1978 Initiative, and that the corpus delicti of the financial-gain special circumstance had to be proved independently of the defendant's extrajudicial statements. The court properly rejected this argument on the ground that, though the *Mattson* rule applies with equal force to the 1978 provision, since the financial-gain special circumstance does not require proof of an underlying crime, the rule has no application to this special circumstance. Unless the general law on this topic is to be abandoned in favor of a rule requiring the proof of the corpus delicti independently of the defendant's admissions in every case, the *Howard* ruling appears to be completely consistent with the settled law of the state.

It is worth noting here, however, that the *Howard* ruling on the application of the *Mattson* corpus-delicti rule is another example of the interpretation of the special circumstances under the law applicable to the interpretation of crimes in general. The financial-gain special circumstance is being treated in this instance in exactly the same way as the substantive rules dividing murder into the two crimes of first and second degree murder.

---

676. Former *CAL. PENAL CODE* § 190.4(a) (West 1979).
678. *CAL. PENAL CODE* § 190.4(a) (West 1988).
679. *Howard*, 44 Cal. 3d at 414, 749 P.2d at 301, 243 Cal. Rptr. at 864-65.
680. Id. at 414-15, 749 P.2d at 301, 243 Cal. Rptr. at 865.
V. Conclusion

Until legislation was adopted in response to Furman and its progeny, liability for the punishment of death was governed by the elements of the capital crime and by the "elements" of the various forms of justification, excuse, and mitigation. These rules of liability reflected the accumulated wisdom of centuries of common law development. They expressed the circumstances and conditions under which society believed that punishment may be justly imposed to further sound public policy, whether that policy is retribution or deterrence, or some long forgotten goal. But law is a human institution. As the human condition has changed, so the law has been altered. The substantive criminal law is no exception. It too has been subject to the ebb and flow of the forces of human history.

For the most part, these changes have been produced by a process of accretion and evolution over long periods of time. Nevertheless, general principles governing these liability rules have been generated to keep the specific rules, whether new or old, within the bounds of the purposes they are designed to serve, the goals of the criminal law.

The history of the substantive criminal law of California mirrors this process. The rules imposing liability for the punishment of death for the crime of murder were not fashioned out of whole cloth when California's first penal statutes were adopted in 1850. They reflected the mainstream of the criminal law as it then stood. Though there have been changes in these liability rules over the years, these alterations have been ultimately governed by the general principles of the criminal law. An example is in order.

In 1856, when California divided murder into degrees for the purpose of limiting the death penalty to the crime of murder in the first degree, one of the rules defining liability for the death penalty was the torture-murder rule. The statute simply said that "[a]ll murder which shall be perpetrated by . . . torture . . . or by any other kind of willful, deliberate and premeditated killing . . . shall be deemed murder of the first degree."

Although this statute has been altered over the intervening one

681. See supra notes 7-16 and accompanying text.
682. See Poulos, supra note 8, at 146-55.
683. See supra notes 146-48 and accompanying text.
684. See Poulos, supra note 8, at 146-48.
685. See, e.g., infra notes 688-96 and accompanying text.
hundred thirty years as it was carried forward from generation to generation, the current law articulates the torture-murder rule in essentially the same terms. When the California Supreme Court was faced with the task of deciding what culpable mental state was required for death eligibility for murder by torture, the court could not resolve the issue by simply consulting the wording of the statute. The statute does not clearly articulate the precise mental state required for guilt under the torture-murder rule. Invoking a tradition as old as the common law of crimes itself, the court turned to the fundamental principles of the criminal law to define the mental state required by the statute.

There appear to be two major reasons for delineating separate degrees of murder and imposing different punishments. First, some murders can more easily be prevented than others by the deterrent effect of severe penalties: e.g., a hired assassin is more likely to reflect upon the possibility of imprisonment for life than an enraged husband who shoots his wife in a drunken Saturday night quarrel. Second, society draws a moral distinction between murders: as morally wrong as murder per se is, some murders are more deplorable than others. Society instinctively senses a greater revulsion for a calculated, deliberate murder than it does for any other type of killing. Only by appropriately circumscribing the application of first degree murder can society preserve that pervasive moral distinction.

Since the mental state with which the defendant performs the prohibited acts is the linchpin of deterrence, and since it also establishes the moral culpability justifying punishment, it is a fundamental principle of the criminal law that all significantly punished crimes require a culpable mental state. Employing this fundamental principle, the California Supreme Court has held that the first degree torture-murder rule requires, in addition to the mental state

---

necessary for guilt of murder, an intent to torture the victim. Thus, though the statute does not expressly enumerate the intent-to-torture as an element of this theory of first degree murder, it is now the settled law of the state that an intent-to-torture is an element of the torture-murder rule.

Furthermore, as evidenced by this ruling, the fundamental principles of the criminal law apply to statutes as well as to judge made law. And, though, within the limits imposed by constitutional doctrine, a legislative body has the authority to change the elements of any crime in ways that are inconsistent with these fundamental principles, a number of rules have been created to assure that statutory laws which seemingly flaunt them are consciously meant to do so.

While it is not appropriate here and now for a cataloguing of those rules, several examples are in order. The fact that a penal statute does not expressly enumerate a mens rea requirement, a culpable mental state, as an element of the offense does not mean that the legislative body has defined the crime without a mental element. The court must resolve that issue as it did, for example, with the torture-murder rule. It is also presumed that the legislative body does not intend to overthrow long-established rules unless the decision to do so clearly appears either by express declaration or by necessary implication. Finally, the legislative body's use of a term with an established legal meaning, such as the word "torture," incorporates that meaning into the statute unless a contrary intent is plainly shown. Thus, although a legislative body has the power to define crimes inconsistently with the fundamental principles of the criminal law, it must do so with unmistakable clarity.

Indeed, the major task of the enterprise we know as "the process of the substantive criminal law," is devoted to articulating a con-

---

691. E.g., People v. Wiley, 18 Cal. 3d 162, 554 P.2d 881, 133 Cal. Rptr. 135 (1976); see supra notes 183-93 and accompanying text.
692. See supra notes 182-93 and accompanying text.
693. The fact that we have rules to assure that legislative enactments are meant to disregard the fundamental principles of the criminal law demonstrates why these principles are thought of as "fundamental" precepts. They should prevail unless they are consciously subverted.
sistent body of legal rules by interpreting all crimes and all matters in defense. These interpretations must be in accordance with the fundamental principles of the criminal law, insofar as it can be done within the constraints imposed by the constitution and the legislative will.

The change wrought in California by the flurry of legislation designed to restore capital punishment in the wake of Furman and its progeny has been different from the previous history of the legislative development of the substantive criminal law in two respects. First, it has produced more change in the law defining liability for capital punishment in the five year period between 1973, when the mandatory death penalty statute was adopted, and 1978, when the Initiative was adopted, than was produced between statehood, in 1850, and the decisions in Furman and Anderson, in 1972.697 The older changes had been produced by a process of accretion and evolution: Years intervened between most of them, and the number of significant changes were relatively small. But major changes were made in each of the three death penalty statutes adopted in 1973, 1977, and 1978.698 In five years, the law was rewritten three times, with a number of major changes being made on each occasion.

This was not an evolutionary process. The changes forged by these three death penalty statutes were not grounded in evolving notions of morality, justice, fairness, or public policy. They primarily reflected a single goal—the restoration of capital punishment under the federal and state constitutions.699 Particular death penalty legislation was enacted because it was thought to have the "best" chance of "withstanding constitutional attack."700 A related death penalty goal was added with the enactment of the 1978 Death Penalty Initiative—to produce the "toughest" death penalty statute in the nation.701 Thus the first differences in these death penalty statutes, as compared with past amendments to the substantive criminal law in California, were in the speed with which they were adopted, in the number of changes they made within this short period of time, and the purpose for which this legislation was enacted.

The second distinction was in the manner in which the law was changed. The changes made in the rules defining liability for capital punishment between statehood and 1972 employed the familiar

697. See supra notes 7-17, 36-144 and accompanying text.
698. See supra notes 36-144 and accompanying text.
699. See supra notes 22-35 and accompanying text.
701. See supra notes 90-91 and accompanying text.
method of the substantive criminal law. The elements of the crimes and the various forms of justification, excuse and mitigation were legislatively altered with the inevitable indeterminacy which causes the courts to become full partners in articulating the nature of the change.\textsuperscript{702} As we have seen, the courts have discharged these partnership duties by interpreting the legislative acts in accordance with the fundamental principles of the criminal law. But this tradition of defining eligibility for the death penalty by altering the elements of the capital crime was \textit{formally} broken by the 1973 mandatory death penalty legislation. The legislation did not alter the definition of the capital offense as was done when murder was divided into degrees. The legislation did not purport to subdivide murder in the first degree into a capital and non-capital variety of murder in the first degree. Instead, a new, unfamiliar device was employed to define death eligibility: the special circumstance.

The creation of this new device did not reflect a legislative judgment that this was a better way to deliver justice over the way it had been done for centuries in every jurisdiction adhering to the common law. It did not reflect a legislative judgment that this was a better or more just way to deter murder, or to impose retribution. It was, instead, "the alternative considered most preferred as best withstanding constitutional attack."\textsuperscript{703}

As special circumstances were employed in the 1973 mandatory death penalty legislation, they were undeniably substantive rules which determined liability for the death penalty in precisely the same way as the crime of murder in the first degree defined liability for the death penalty before the advent of capital sentencing discretion in California.\textsuperscript{704} But before the California Supreme Court had an opportunity to decide that the special circumstances were capital crimes governed by the fundamental principles of the criminal law, the court invalidated the mandatory capital punishment statute under the High Court's 1976 decisions in \textit{Woodson} and \textit{Roberts}.\textsuperscript{705}

The special circumstance device was adopted into the 1977 Legislation and the 1978 Initiative as the method for defining liability for the death penalty. In the analysis presented in this article, the special circumstances are crimes which are, and should be, governed by the fundamental principles of the substantive criminal law.\textsuperscript{706}

\textsuperscript{702} See, e.g., \textit{supra} notes 182-93 and accompanying text.
\textsuperscript{703} National Association Of Attorneys General, \textit{supra} note 33, at 21.
\textsuperscript{704} See \textit{supra} notes 37-46 and accompanying text.
\textsuperscript{705} See \textit{supra} notes 60-62 and accompanying text.
\textsuperscript{706} See \textit{supra} notes 145-80 and accompanying text.
The Bird court vacillated between characterizing the special circumstances as "categories of first degree murder," on the one hand, and as *sui generis* rules on the other. Nevertheless, the court consistently treated the special circumstances as though they were crimes defining liability for the punishment of death. The fundamental principles of the substantive criminal law guided the court's interpretation and application of the special circumstances.

For example, when the court was confronted with the task of defining the culpable mental element required by the Torture-murder special circumstance in the 1978 Initiative, the court held that the culpable mental state included an intent-to-torture, despite the fact that the statute did not articulate that requirement. In this respect, the Bird court's method of interpreting the torture-murder special circumstance was essentially similar to the method employed by its predecessor court to decide that the first degree torture-murder rule also required an intent-to-torture.

The Lucas court has refrained from characterizing the special circumstances during this first full year of its tenure. It has not resolved the Bird court's ambivalence in labeling the special circumstances as crimes on the one hand and as *sui generis* rules on the other.

Furthermore, unlike the Bird court, the Lucas court has treated the special circumstances with some inconsistency. *Wade* and *Howard* were decided consistently with the theory that the special circumstances are governed by the fundamental principles of the criminal law. Nevertheless, the court neither articulated its understanding of the special circumstances in these two cases, nor did it cite the fundamental principles in resolving the special circumstance issues tendered in these cases. Though these two cases are consistent with the theory that the special circumstances are crimes governed by the fundamental principles of the criminal law, they do not expressly apply the method of the substantive criminal law in reaching their conclusions.

On the other hand, the Lucas court's decision in *Kimble* is not

---


708. See supra notes 173-75 and accompanying text.


710. See supra notes 176-78 and accompanying text.

711. See supra notes 182-92 and accompanying text.
only inconsistent with prior Bird court precedent, it is inconsistent with the conception of the special circumstances as being crimes which are governed by the fundamental principles of the substantive criminal law. The Kimble opinion also suggests that the court has no theory of the special circumstances, no overriding idea of how they fit into the law of capital homicide in California, and how they square with the fundamental principles of the substantive criminal law. Yet Kimble is a single case which, under the analysis presented in this article, is incorrectly decided.

Whether the Lucas court will ever recognize the special circumstances as capital crimes, and whether it will overtly look to the fundamental principles of the substantive criminal law to resolve special circumstance issues remains to be seen. But from the court's record compiled during this first year, it appears that the court has refrained from committing itself to either a conception of the special circumstances, or to a method which should be employed to resolve special circumstance issues. The fact that Wade and Howard were decided consistently with the theory of the special circumstances as crimes does not commit the court to that position. While this preserves the options available to the court in future cases, it does little to guide the lower courts and counsel as they struggle to resolve the special circumstance issues in the lower courts.

After the votes were counted in the November, 1986, retention election, it was widely anticipated that the reconstructed California Supreme Court, as rebuilt by Governor George Deukmejian, would overrule much of the Bird court precedent interpreting the two death penalty statutes. In a series of briefs filed in the California Supreme Court, the Attorney General of California asked the court to reconsider and overrule "not only Carlos . . ., and Turner . . ., but also virtually every other decision construing the 1977 or 1978 death penalty laws." But as we have seen above, except for Carlos and its progeny, the court declined the Attorney General's invitation. Given the views of Governor Deukmejian on capital punishment and his practice of appointing pro-capital punishment judges to the bench, and Chief Justice Lucas' near promise to overrule Carlos if joined by three other justices, it was no surprise that the new court quickly over-

712. See Poulos, supra note 1, at 268-75.
714. See Poulos, supra note 1, at 209.
715. See supra notes 402-04 and accompanying text.
ruled Carlos, Turner, and Malone.718

It was the court's adherence to the remaining precedent that was unanticipated. The court's refusal to follow the Harris overlapping-felony rule represents no break with prior authority, for that rule was adopted by less than a majority of the Bird court. As such it had neither the binding force of precedent nor the respect conferred by the doctrine of stare decisis.717 Furthermore, under the analysis suggested in this article, the rule should be abandoned in favor of a unitary theory of the felony-murder special circumstance.718

Howard's treatment of the Bigelow rule for avoiding overlap between the financial-gain and the felony-murder special circumstances is not accurately classified as an exception to the Lucas court's general adherence to Bird court precedent. Howard accepts the rule, interprets it, and concludes that it is inapplicable to the facts presented in the case.719 Howard's use of the rule is criticized in this article on the ground that the Bigelow rule should be abandoned in favor of a far simpler solution to the problem of the overlap between these two special circumstances: the court should interpret the financial-gain special circumstance as applying only when the felony-murder special circumstance is unsupported by the evidence.720

But this would require the court to "recognize" or "create" a new rule with respect to these two special circumstances. And, with one exception, the opinions of this term indicate a reticence to create new law. The law has been applied, and it has been destroyed, but not created. Whether the Lucas court will ever jettison the Bigelow rule, or the Harris overlapping-felony rule mentioned above, in favor of other rules designed to better further their policy, remains to be seen.

The one exception to the court's apparent reluctance to create new law is Howard's holding that the mental element of the financial-gain special circumstance includes an intent-to-obtain-financial-gain from the murder.721 In the remaining cases, the court recognized no new special circumstance rules. This was true even when the court was asked to rationalize the prior-murder-conviction special circumstance so that the prosecution could not maximize the chance of a finding of eligibility for the death penalty by trying the

716. See supra notes 417-21, 574-77, 599-608 and accompanying text.
717. See supra notes 473-85 and accompanying text.
718. See supra notes 509-28 and accompanying text.
719. See supra notes 636-39, 653-63 and accompanying text.
720. See supra notes 664-70 and accompanying text.
721. See supra notes 203-18, 636-39 and accompanying text.
weaker case first.\textsuperscript{722}

Existing law was destroyed when the intent-to-kill requirement was removed from the felony-murder, the multiple-murder, and the prior-murder-conviction special circumstances by the overruling of Carlos, Turner, and Malone. Though the Green intent rule, which applies to the felony-murder special circumstance, has survived the first year of the Lucas court, its status has been undermined by Kimble's rejection of the rule as an element of the special circumstance,\textsuperscript{723} and by the ambiguous treatment of the rule in the other cases.\textsuperscript{724}

With respect to the other special circumstances, the heinous-atrocious-or-cruel special circumstance\textsuperscript{725} and the torture-murder special circumstance,\textsuperscript{726} precedent was followed in much the same way that it would have been followed by the Bird court.

One further observation needs to be made. In each of the cases, except for Wade's invalidation of the surplus heinous-atrocious-or-cruel special circumstance, the court found no special circumstance error in these cases. And in every case, except for Anderson's reversal for Ramos error, the judgment of death was affirmed.

\begin{footnotesize}\begin{enumerate}
\item[722.] \textit{See supra} notes 609-19 and accompanying text.
\item[723.] \textit{See supra} notes 430-33 and accompanying text.
\item[724.] \textit{See supra} notes 434-36 and accompanying text.
\item[725.] \textit{See supra} notes 340-48 and accompanying text.
\item[726.] \textit{See supra} notes 349-76 and accompanying text.
\end{enumerate}\end{footnotesize}