FILED

LUIS RENTERIA
NAME
CALFORNIA STATE PRISON-LOS ANGELES
PRISON IDENTIFICATION/BOOKING NO.
4610 P.O. BOX 4610
ADDRESS OR PLACE OF CONFINEMENT
LANCASTER, CA 93539-4610

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

fee due

2016 SEP 13 PM 4:45
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUIS RENTERIA
FULL NAME (*Include name under which you were convicted*)
Petitioner,

v.

DEBBIE ASUNCION, WARDEN OF CSP-LAC
NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER
Respondent.

CASE NUMBER:
CV 16-6874-R (FFM)
To be supplied by the Clerk of the United States District Court

☐ _____ AMENDED

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION LOS ANGELES
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)
CV _____
CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum. the grounds for relief from the conviction and/or sentence that you challenge.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

LODGED
CLERK, U.S. DISTRICT COURT
SEP 12 2016
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:

1. [x] a conviction and/or sentence.
2. [ ] prison discipline.
3. [ ] a parole problem.
4. [ ] other.

PETITION

1. Venue

   a. Place of detention CALFORNIA STATE PRISON-LOS ANGELES COUNTY

   b. Place of conviction and sentence COUNTY OF LOS ANGELES, CITY OF LONG BEACH

2. Conviction on which the petition is based (*a separate petition must be filed for each conviction being attacked*).

   a. Nature of offenses involved (*include all counts*): SECOND DEGREE FELONY MURDER, CONSPIRACY TO COMIT MURDER UNDER THE THEORY OF AIDING AND ABETING Cal. Pen. Code §§ 187(a); et al.

   b. Penal or other code section or sections:

   c. Case number: A041259

   d. Date of conviction: SEE THE ATTACHMENT TO THE PETITION.

   e. Date of sentence: SEE THE ATTACHMENT HERETO.

   f. Length of sentence on each count: 15 years to life, plus consecutively 1 yr. TOTTAL OF 16 YEARS TO LIFE.

   g. Plea (*check one*):

   [X] Not guilty

   [ ] Guilty

   [ ] Nolo contendere

   h. Kind of trial (*check one*):

   [X] Jury

   [ ] Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? [X] Yes [ ] No

   If so, give the following information for your appeal (*and attach a copy of the Court of Appeal decision if available*):

   a. Case number: B056051

   b. Grounds raised (*list each*):

   (1) SEE THE ATTACHMENT HERETO.

   (2)

(3) SEE THE ATTACHMENT TO THIS PETITION.

(4) //

(5) //

(6) //

c. Date of decision: SEE THE ATTACHMENT.

d. Result DENIED.

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☐ Yes ☒ No

If so give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: SEE THE ATTACHMENT.

b. Grounds raised *(list each)*:

(1) SEE THE ATTACHMENT HERETO.

(2) SEE THE ATTACHMENT HERETO.

(3) SEE THE ATTACHMENT HERETO.

(4) ***

(5) ***

(6) ***

c. Date of decision: SEE THE ATTACHMENT HERETO.

d. Result DENIED.

5. If you did not appeal:

a. State your reasons n/a

b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: SEE THE ATTACHMENT HERETO.

(2) Case number: ***

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 8-31-2016

(4) Grounds raised *(list each)*:

(a) SEE THE ATTACHMENT.

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: ***

(6) Result DENIED

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: SEE THE ATTACHMENT.

(2) Case number: ***

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: ***

(4) Grounds raised *(list each)*:

(a) SEE THE ATTACHMENT HERETO.

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: ***

(6) Result ***

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

c. (1) Name of court: SEE THE ATTACHMENT.

(2) Case number: ***

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: ***

(4) Grounds raised *(list each)*:

(a) SEE THE ATTACHMENT.

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: SEE THE ATTACHMENT.

(6) Result: DENIED.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): ***

(2) Result: SEE THE ATTACHMENT.

****

(3) Date of result (if you know): ///

(4) Citation to the case (if you know): ///

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: SEE THE ATTACHMENT TO THIS PETITION.

(1) Supporting FACTS: SEE ATTACHMENT HERETO.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

b. Ground two: //

(1) Supporting FACTS: //

//

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

c. Ground three: SEE THE ATTACHMENT HERETO.

(1) Supporting FACTS:

///

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

d. Ground four:

(1) Supporting FACTS:

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☐ No

e. Ground five:

(1) Supporting FACTS:

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

9. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: SEE THE ATTACHMENT HERETO.

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: SEE THE ATTACHMENT.

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a) //

(b) //

(c) //

(d)

(e)

(f)

(5) Date of decision:

(6) Result

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court:

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(5) Result: DENIED.

//

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

11. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☒ Yes ☐ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: SEE THE ATTACHMENT.

(2) Case number: //

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: n/a

(4) Grounds raised *(list each)*:

(a) SEE THE ATTACHMENT HERETO.

(b)

(c)

(d)

(e)

(f)

12. Are you presently represented by counsel? ☐ Yes ☐ No

If so, provide name, address and telephone number:

//

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

August 31, 2016

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 08/31/2016
Date

Signature of Petitioner

LUIS RENTERIA
Petitioner

DEBBIE ASUNCION, WARDEN
Respondent(s)

DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, LUIS RENTERIA, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? ☐ Yes ☒ No

   a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. n/a

   n/a

   b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. n/a

2. Have you received, within the past twelve months, any money from any of the following sources?

   a. Business, profession or form of self-employment? ☐ Yes ☒ No
   b. Rent payments, interest or dividends? ☐ Yes ☒ No
   c. Pensions, annuities or life insurance payments? ☐ Yes ☒ No
   d. Gifts or inheritances? ☐ Yes ☒ No
   e. Any other sources? ☐ Yes ☒ No

   If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: NONE.

3. Do you own any cash, or do you have money in a checking or savings account? *(Include any funds in prison accounts.)*
   ☒ Yes ☐ No

If the answer is yes, state the total value of the items owned: n/a

n/a

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? *(Excluding ordinary household furnishings and clothing)* [ ] Yes [X] No

If the answer is yes, describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: none

I, declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on August 31, 2016
Date

Signature of Petitioner

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $ _____ on account to his credit at the _____ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: _____

August 31, 2016
Date

Authorized Officer of Institution/Title of Officer

CENTRAL
~~EASTERN~~ DISTRICT OF CALIFORNIA

LUIS RENTERIA

v.

Case Number:

DEBBIE ASUNCION

PROOF OF SERVICE

/

I hereby certify that on August 31, 2016, I served a copy of the attached WRIT OF HABEAS CORPUS: EXHIBITS :"A, B, & C."

by placing a copy in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the United States Mail at

LOS ANGELES COUNTY, CALIFORNIA STATE PRISON, INSTITUTIONAL MAIL.

(List Name and Address of Each Defendant or Attorney Served)

I declare under penalty of perjury that the foregoing is true and correct.

August 31, 2016

(Signature of Person Completing Service)

E X H I B I T "A"

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In re, LUIS RENTERIA Petitioner, On Habeas Corpus	Case No.: A041259 ORDER SUMMARILY DENYING PETITION FOR WRIT OF HABEAS CORPUS (CRC 4.551(g))

The Court has read and considered the Petition for Writ of Habeas Corpus filed on APRIL 19, 2016, and all related materials provided by Petitioner LUIS RENTERIA.

In response thereto, the Court makes the following findings:

1. Petitioner's Writ of Habeas Corpus is timely filed;

2. Second degree felony murder charge as alleged in the information and for which the Petitioner was convicted is not "void for vagueness" nor does it violate the Fifth or Fourteenth Amendments to the United States Constitution ; and

DEPT. S23

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: April 26, 2016

Honorable Gary J. Ferrari , Judge Presiding

Tyra Baham, Deputy Clerk

CASE NO. A041259

IN THE MATTER OF

v.

RENTERIA, LUIS (NP)

NATURE OF PROCEEDINGS: HABEAS CORPUS

The Court has read and considered the Petition for Writ of Habeas Corpus filed on April 19, 2016, and all related materials related materials provided by Petitioner LUIS RENTERIA.

In response thereto, the Court makes the following findings:

1. Petitioner's Writ of Habeas Corpus is timely filed;
2. Second degree felony murder charge as alleged in the information and for which the Petitioner was convicted is not "void for vagueness" nor does it violate the Fifth or Fourteenth Amendments to the United States Constitution; and
3. Petitioner's claim vis a vis insufficiency of the evidence to support the theory that Petitioner was a "major participant" in said crime (People v. Banks (2015) 161 Cal. 4th 788) is likewise without merit; therefore,
4. THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

A The Clerk to give notice

DEPT. S23

MINUTE ORDER

3. Petitioner's claim vis a vis insufficiency of the evidence to support the theory that Petitioner was a "major participant" in said crime (People v. Banks (2015) 161 Cal. 4th 788) is likewise without merit; therefore,

4. THE PETITION FOR WRIT OF HABEAS CORPUS is DENIED.

April 26, 2016

GARY J FERRARI
Judge of the Superior Court

The clerk is to give notice.

E X H I B I T "B"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re

LUIS RENTERIA

on Habeas Corpus.

B275169

(Super. Ct. No. A041259)

(William H. Winston, Jr., Judge)

ORDER

THE COURT:

The petition for writ of habeas corpus filed on May 31, 2016 has been read and considered. The petition is denied.

PERLUSS, P. J., ZELON, J., SEGAL, J.

E X H I B I T "C"

S235326

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re LUIS RENTERIA on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

Luis Renteria
CDCR #E-75707
P.O. Box 4610
Lancaster, CA 93539-4610

In Propria Persona

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LUIS RENTERIA,
Petitioner,

vs.

DEBBIE ASSUNCION, WARDEN OF THE CALIFORNIA STATE PRISON-LOS ANGELES COUNTY
Respondent.
_____/

Case No._____

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY; PURSUANT TO 28 U.S.C. § 2254

INTRODUCTION

Petitioner files the instant petition to challenge the validity of his 1992 conviction for second degree felony murder in Los Angeles County Superior Court in light of the United States Supreme Court's decision in Johnson v. United States, (2015) 135 S. Ct. 2251. Johnson struck down as unconstitutional the so-called "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2006). The Court's holding in Johnson mandates that California's second degree felony

murder rule, which contains language that is materially indistinguishable from the ACCA's residual clause, also be stricken as unconstitutional.

Date: August 31, 2016.

Respectfully submitted,

LUIS RENTERIA
PETITIONER

/s/ Luis Renteria

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES (CONT.)

TABLE AUTHORITIES (CONT.)

PAGE

TABLE OF AUTHORITIES (CONT.)

PAGE

TABLE OF AUTHORITIES (CONT.)

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES (CONT.)

STATEMENT OF THE CASE

On December 13, 1988, the District Attorney for the County of Los Angeles filed an Information, charging Luis Renteria, the Petitioner, of second-degree felony murder (Cal. Penal Code § 187(a)): specifically for the murder of Andy Velasquez. It further charged Petitioner with one count of conspiracy-to-commit murder (Cal. Penal Code §§ 182(1); 187(a)) with an allegation later found to be true; that is, during his participation, he was with the principal who was armed with a firearm (Cal. Penal Code § 12022(a)(1)). (C.T.[1] pp. 77-81.)

The jury found Petitioner Renteria guilty of second-degree felony murder, during which he committed the unlawful killing of Andy Velasquez while in the commission of shooting at an occupied motor vehicle. (Cal. Penal Code §§ 187(a); 246.) It found true that (1) Petitioner engaged in a conspiracy-to-commit murder and (2) being with the principal armed with a firearm (Cal. Penal Code §§ 182.1; 12022(a)(1)). (C.T. pp. 254-256.)

The sentencing court - Judge William H. Winston - sentenced Petitioner to the following: for the underlying offense, that is, second-degree felony murder 15-years to life with an additional consecutive 1-year term for being with the principal armed with the firearm (Cal.

1. The "Clerk Transcripts" will be herein referred to as "C.T."

Penal Code § 120220(a)(1)). (C.T. pp. 261-262.) The sentence imposed on Petitioner resulted to a net total of 16-years to life with the possibility of parole.

STATEMENT OF FACTS

THE PROSECUTION'S CASE

Andy Velasquez was talking to several people, including some members of the "Pee Wee" gang in a driveway near the corner of 254th and Petroleum in Whitter, when a small red Hyundai and a white Toyota pick--up truck drove up and began shooting. (R.T.[2/] pp. 154-170.) Petitioner was the one who drove the red Hyundai. (R.T. p. 375.) Velasquez was killed from a gunshot to the chest. (R.T. pp. 138-141.) And someone in the car and/or truck shouted "Wilmas" around the time of shooting. (R.T. 158-161.)

On September 1, 1988, Leonel Lopez had gone to "Abel's Body Shop," where Petitioner worked, and had a conversation with Petitioner and his friend: "No-Neck." (R.T. pp. 352-353.) During that conseravtion, Lopez was told that Petitioner, "No-Neck," and others had driven to Harbor City in Petitioner's red Hyundai, followed by a white truck, to do a "pay-back" and that they shot someone in a parking lot. (R.T. p. 353.)

Petitioner's cousin, Edward Delgadillo (also known as "Dedo") was killed in a gang shooting on the day of Velasquez's death. (R.T. pp. 374-382.) Petitioner stopped

2. The "Reporter Transcripts" will be herein referred to as "R.T."

his former girlfriend, Dolores Irvine, on her way home from work - he was very upset about his cousin's death and said that he had heard that the Harbor City gang may have done the killing. (R.T. pp. 372-375.) Petitioner also told her that he and his friends were going to Harbor City to shoot up the "Harbor City"[3] (R.T. pp. 375-378.)

Petitioner was interviewed by Detective Joseph after his arrest. During that interview, Petitioner denied shooting Velasquez and denied being present when he was killed. Petitioner told Joseph that he had driven to Harbor City with "No-Neck,"[4] but that he had changed his mind after he got there and left. He further stated that "No-Neck" had driven him in his car and had not been involved in the shooting of Velasquez.

THE DEFENSE'S CASE

A witness to events surrounding the shooting, Freddie Soto, told police that he had seen a white Toyota pickup carrying three "Mexicans" at the scene of the shooting: that he had chased the truck in his car and that those in the truck took several shots at Soto. (R.T. pp. 563-570.) Soto also told them that when he first

3. It should be known that "Andy Velasquez," the man who was shot and killed, was part of rivary gang "Harbor City."

4. Agustine Rosas' moniker is "No-Neck."

saw the truck, it was following a red Hyundai with four men in it and that the Hyundai had made a U-turn to follow the truck. (R.T. pp. 563-570.) Tony Velasquez, the victim's girlfriend who was also a witness to the shooting, told the police that the victim had been hit by shots from a white truck. (R.T. 572.)

Augustine Rosas, "No-Neck," testified that, after the murder of appellant's cousin and another man reputedly by a Harbor City gang, he called a number of his friends and went to Petitioner's business for the purpose of organizing a "pay-back." (R.T. pp. 644-649.) Petitioner did not want to go, but "No-Neck" convinced him to do so. (R.T. pp. 650-655.)

"No-Neck" drove over to Harbor City in a white Toyota mini truck with two other guys in the truck, each carrying a gun. (R.T. pp. 655-656.) "No-Neck" told Petitioner to lead the drive to Harbor City in his red Hyundai because he was afraid that Petitioner would "back out" if Petitioner followed. (R.T. pp. 658-659.)

After searching the Harbor City area in order to locate the van that was reportedly involved in the previous murders, Petitioner turned his car around and told "No-Neck" that he was afraid because so many people were around and that he was going to go back home. (R.T. pp. 659-665.)

Petitioner then turned North on Petroleum and left area. (R.T. p. 667-668.)

"No-Neck" was going to follow Petitioner out of the area when he spotted what he believed to be the van involved in the earlier murders and turned South on Petrolum to follow the van. (R.T. p. 669.) When "No-Neck" was in the middle of the block on Petroleum near 254th Street, someone shot at the truck and all of those in "No-Neck's" truck shot at the people in the street and in a parking lot there, hitting one man - Velasquez. (R.T. pp. 669-672.)

* * * *

STATEMENT OF APPEALABILITY

After tried and convicted, and filing a timely notice of appeal (C.T. p. 240), court appointed appellate counsel filed an Appellant Opening Brief ("A.O.B.") to the Court of Appeal, Second Appellate District, Division Seven. (Case no. B056051.) The brief was submitted on October 21, 1991.

On direct appeal, appellate counsel raised four claims: (1) an erroneous jury instruction, CALJIC 2.04; (2) another jury instruction pertaining to CALJIC. 2.90; (3) a trial court's abuse of discretion; and (4) inadmissible evidence.

However, the Court of Appeal affirmed the Petitioner's conviction with a reasoned opinion.

On a last round of direct appeal, retained attorney at law, Denis Fisher,prepared and filed a petition for review to the California Supreme Court.

But the high court rendered a "post-card" denial for that matter: the petition was defaulted.

PROCEEDINGS OF STATE WRIT OF HABEAS CORPUS

On April 20, 1997, retained attorney at law, James Lynch, filed a state writ of habeas on behalf of Petitioner to the Superior Court for the County of Los Angeles. The writ was a "first collateral attack," based on a legal constitutional claim of ineffective assistance of trial counsel. The court processed, reviewed, and considered the writ but denied it. (Case no. A041259.)

The matter was then appealed in the Court of Appeal, Second Appellate District, Division Seven. Once again, it summarily denied it on August 21, 1997. (Case no. B114779.)

On a last attempt, Attorney James Lynch filed another state writ except with the same legal claim to the California Supreme Court: it too summarily denied it.

Almost a year later, Petitioner filed (pro per) another writ of habeas corpus, addressing an ineffective assistance of both trial and appellate counsel relevant to his conviction, to the Superior Court for the County of Los Angeles. The court summarily denied it, though.

Petitioner then appealed that matter (for-the-second-time) to the Court of Appeal, Second Appellate District, Division Seven. (Case no B126994.) On November 13, 1998, it summarily denied it.

For the second time, Petitioner appealed the lower court's decision (case no. B126994) to the California Supreme Court: the petition was denied on February 17, 1999.

On October 22, 2012, Petitioner filed a writ of habeas corpus to the Superior Court for the County of Los Angeles. He challenged an issue relative to a Board of Parole Hearing (BPH): due process was violated. However, Judge William C. Ryan denied the writ in its entirety. (Case no. BH008896.)

Petitioner, next, appealed the matter in the Court of Appeal, Second Appellate District, Division Seven. (Case no. B247197.) The petition was summarily denied on March 03, 2013.

Petitioner submitted another petition relevant to the Board of Parole Hearing (B.P.H.), alleging a "due process violation," on November 03, 2013. (Case no. BH008828.) Again, Judge William C. Ryan denied the writ.

So Petitioner appealed the issue in the Court of Appeal, Second Appellate District, Division Seven. It denied the petition on January 2, 2014. (Case no. no. B253445.)

A writ of habeas corpus was then filed to the California Supreme Court: Denied it without a doubt on February of 2015. (Case no. S222918.)

Finally, on July 23, 2015, Petitioner sent another writ of habeas corpus, raising a mental incompetency claim under the umbrella of ineffective assistance of both trial and appellate counsel. The petition was ultimately denied.

Petitioner afterwards sent another writ of habeas corpus - appealing the superior court's denial - to the Court of Appeal, Second Appellate Court, Division Seven. (Case no. B266640.) The writ, no less, was denied on September 16, 2015.

Thereafter, Petitioner sent the same writ to the highest court: that is, the California Supreme Court and

denied it. November 18,2016,Case#S229920.

PETITION

Petitioner LUIS RENTERIA is so unlawfully incarcerated and confined within the control, and the absolute command, of Warden Debbie Asuncion: the sole principal of the California State Prison-Los Angeles County ("CSP-LAC"). His confinement is, no less, based to pronounced judgement of Judge William H. Winston from the Los Angeles County Superior Court, the "Long Beach Court," in Department no. SO. D, Long Beach, California. (Case no. A041259.)

This petition (in which is being prepared and submitted) is predicated from the final judgement following a trial by jury, finding Petitioner Renteria guilty of second-degree felony murder (Cal. Penal Code § 187(a)), conspiracy to commit murder (Cal. Penal Code § 182.1), and an allegation found to be true: being with the principal armed with a firearm. (C.T. pp. 254-256.) It challenges (unequivocally) Petitioner's conviction of second degree murder. This state writ of habeas corpus is authorized pursuant to California Penal Code section 1473.

JURISDICTION

This petition (In re Renteria) is being filed to this Court pursuant to its original habeas corpus jurisdiction (Cal. Const., art. VI, § 10, Cal. Penal Code §§ 1473, 1475.)

Petitioner Renteria fundamentally contends that

his conviction and sentence (all-together) must be set-aside, so because the statute of second-degree felony murder is invalid—moreover, the statute in and of itself stands to be "void-for-vagueness." (See Johnson v. United States, (2015 576 U.S.__; Kolender v. Lawson, (1983) 461 U.S. 352, 357-358.) It is "under . . . criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, . . . so standardless that it invites arbitrary enforcement." (Id.) The language, inherently dangerous to human-life, of second-degree felony murder falls within the sole rubric of "vagueness."

On another matter, in light of People v. Banks, (2015) 61 Cal. 4th 788, Petitioner's conviction cannot stand if there was no evidence indicating as a "major participant." Or, in the alternative, and for a better clarity, if the evidence shows naught that the ". . . person, not the actual killer, who, . . . as a major participant," aids and abets, the accused cannot be convicted of such crime. (Id., at p. 798.) Therefore, Petitioner's sentence is nonetheless "unauthorized," as his underlying offense is invalid.

It follows, California Penal Code section 1473 allows this Court to act as required in the interest of justice in particular cases. The California Code of Civil Procedure, § 187, provides: ". . . [W]hen jurisdiction is, by Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means

necessary to carry it into effect are" "given": "[I]n the exercise," for instance, "of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or . . . statute, any suitable process or mode of proceeding may be adopted" - "which [ever] may appear most confortable to the spirit of this Code." (Cal. Code of Civil Procedure, § 187.)

PETITIONER'S CONTENTION(S)

1) Petitioner's conviction, together with his sentence, must be set-aside; for his convicted charge of second-degree felony murder is vague, it ought to be void for vagueness.

2) Petitioner's sentence, in light of People v. Banks, is "authorized": There was no evidence indicating that Petitioner was a "major participant."

PRAYER FOR RELIEF

WHEREFORE, Petitioner LUIS RENTERIA prays to this Court as follows:

(1) That this Court "order to show cause" to the Attorney General as to why Petitioner should not obtain relief;

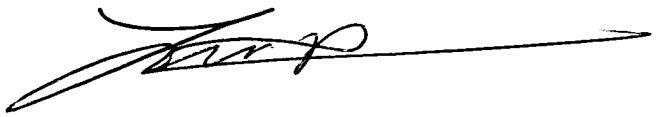
(2) That this Court set-aside Petitioner's (a) conviction and (b) his sentence of 16-years to life in the course of an evidentiary hearing;

(3) That this Court reduces Petitioner's conviction to a "lessor-included-offense," that is to "involuntary manslaughter"; AND

(4) That this Court order Petitioner's release

immediately as he has seved 26-years of incareration in the California Department of Correction and Rehabilitation ("CDCR).

Dated this 8 of 31 ,2016



JURY INSTRUCTION(S)

Petitioner writes, for the most part, herein the jury instruction(s) as verbatim.

CALJIC 8.10

[Petitioner] is accused in Count 2 of the information of having committed the crime of murder, a violation of Penal Code Section 187.

Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Section 187 of the Penal Code.

In order to prove such crime, each of the following elements must be proved:

1. A human being was killed.

2. The killing was unlawful, and

3. The killing was done with malice aforethought. (C.T. p. 211.)

A killing is unlawful, if it was neither justifiable nor excusable. (C.T. p. 212.)

CALJIC 8.11

"Malice" may be either expree or implied.

Malice is express when there is manifested an intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,

2. The natural consequences of the act are dangerous to human life, and

3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard

for human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act. (C.T. p. 213.)

CALJIC 8.20

All murder which is perpetrated by any kind of willfull, deliberate and premedited killing with express malice aforethought is murder of the first degree.

The word "willfull," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not

under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individual and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgement and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as well fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

CALJIC 8.30

Murder of the second degree is also the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

CALJIC 8.55

To constitute murder there must be, in addition to the death of a human being, an unlawful act which was a proximate cause of that death.

A proximate cause of a death is a cause which, in natural and continuous sequences, produces the death, and without which the death would not have occurred.

CALJIC 8.65

Where one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intented to be killed, had been killed. (C.T. p. 219.)

CALJIC 8.70

Murder is classified into two degrees, and if you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree. (C.T. p. 219.)

CALJIC 8.71

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree. (C. T. p. 220.)

contemplated crime. (C.T. pp.189-190.)

CALJIC 3.03

One who had aided and abetted the commission of a crime may end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission. (C.T. p. 191.)

CALJIC 3.31

In each of the crimes charged in Counts 1 and 2 of the information, namely, first-degree murder, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless such specific intent exists the crime to which it relates is not committed.

The specific intent required is included in the definitions of the crimes or allegation charged.

The crime of first degree murder requires the specific intent to kill.

And the crime of conspiracy requires the specific intent to agree and to commit murder. (C.T. p. 193.)

CALJIC 2.02

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of the offenses charged in Counts 1 and 2, unless the proved cricumstances

CALJIC 3.01

A person aids and abets the commission of a crime when he or she,

(1) with knowledge of the unlawful purpose of the perpetrator and

(2) with the intent of purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.

A person who aids and abets the commission of a crime need not be personally present at the scene of the crime.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

CALJIC 3.02

One who aids and abets is not only guilty of the particular crime that to his knowledge his conferates are comtemplating committing, but he is also liable for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crime charged in Count 2 was a natural and probable consequence of such originally

are not only (1) consistent with the thoery that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt the interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (.C.T. p. 194.)

CALJIC 6.10

A conspiracy is an agreement entered into between tow or more persons with the specific intent to agree to commit the public offense of murder and with the further specific intent to commit such offense, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.

In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and

specific intent, there must be proof of the commission of a least one of the overt acts alleged in the information. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when such an act was committed.

The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.

To be an "overt act," the step taken or act committed need not, in and itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that such step or act, in and of itself, be a criminal or an unlawful act. (C.T. pp. 196-197.)

CALJIC 6.12

The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence. It is not necessary to show a meeting of the alleged conspirators or the making of an express or formal agreement. (C.T. p. 198.)

CALJIC 6.13

Evidence that a person was in the company of or associated with one or more other persons alleged or proved to have been memebers of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy. (C.T. p. 199.)

CALJIC 6.14

It is not a defense to the crime of conspiracy that an alleged conspirator did not know all the other conspirators. The adoption by a person of the criminal design and criminal intent entertained in common by others and of its object and purposes is all that is necessary to make that person a co-conspirator when the required elements of a conspiracy are present.

MEMORANDUM OF POINTS AND AUTHORITIES

I. A PETITION FOR WRIT OF HABEAS CORPUS IS THE APPROPRIATE VEHICLE TO PURSUE AND OBTAIN JUDICIAL RELIEF FOR THE PETITIONER

A. PETITIONER'S CONVICTION

Even though the writ of prohibition is used frequently before or after trial to challenge the constitutionality of statute(s) and ordinace and to test whether the accusatory pleading on its face has stated a public offense, a writ of habeas corpus is also the appropriate avenue - let alone, the appropriate remedy - to fulfill either objective. (See In re Berry, (1968) 68 Cal. 2d 137, 145; see also In re Cox, (1970) 3 Cal. 3d 205; In re Allen, (1962) 59 Cal. 2d 5.)

But an "objective" is not the only excuse: When changes in case law expanding a defendant's rights are given retroactive effect, a person previously convicted may use a writ of habeas corpus to obtain overall relief. (See In re Cortez, (1971) 6 Cal. 3d 78; In re Johnson, (1970) 3 Cal. 3d 404 [retroactivity of Leary v. United States, (1969) 395 U.S. 6, 89 S. Ct. 1532, __ L. Ed. 2d __]; In re Montgomery, (1970) 2 Cal. 3d 863 [relief under Barber v. Page, (1968) 390 U.S. 719]; In re Caffey, (1968) 68 Cal. 2d 762 [applying California cases in interpreting decision in Gideon v. Wainwright, (1963) 372 U.S. 335]; In re Walker, (2007) 147 Cal. 4th 533, 538 [in light of developments in law, reasonable probability exists that results of trial would have been different had expert testimony regarding

intimate partner "battering" had been presented]; In re Gross, (1967) 248 Cal. 2d 315, 320 [multiple prosecution barred]; Kellet v. Superior Court, (1966) 63 Cal. 2d 822.) Moreover, the high court, In re Morse, (1969) 70 Cal. 2d 702, held that a petitioner was entitled to habeas corpus relief when a post-conviction decision by the California Supreme Court - which had been made before the petitioner's conviction but which did not initially affect him. There, the Court granted relief because the petitioner could not reasonably have anticipated the California Supreme Court's decision. (Id., at 70 Cal. 2d 704; People v. Stanworth, (1974) 11 Cal. 3d 588.)

Here, Petitioner Renteria could not have expected two high court's decision. One from the California Supreme Court, in which the court in People v. Banks held if there is no evidence as a "major participant" for an accomplice, the accused cannot be convicted. And from the second one is that the United States Supreme Court, in Johnson v. United States, held "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Better said, the "Goverment violates" due process of law "by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, ... so standardless that it invites arbitrary enforcement." (Id.) Petitioner's convicted charge of

second-degree felony murder interrelates with Johnson; thus, Petitioner meets and exceeds the threshold of habeas corpus proceedings.

B. PETITIONER'S SENTENCE

A habeas corpus will order a court to review the validity of a sentence when the face of the record shows that it was imposed in excess of the court's jurisdiction. (In re Estrada, (1965) 63 Cal. 2d 740, 750; In re May, (1976) 62 Cal. 3d 552; In re Huffman, (1986) 42 Cal. 3d 552.) Even more, an unauthorized sentence can be brought before a court by an means (People v. Cooks, (1997) 55 Cal. 4th 797, 811) and at any time (In re Harris, (1993) 5 Cal. 4th 813, 842; People v. Sarrato, (1973) 9 Cal. 3d 753, 763; People v. Chagolla, (1983) 144 Cal. 3d 422, 434.)

So the general rule that habeas corpus relief is not available for claims that were or could have been raised on appeal does not apply here, especially when the petitioner contends that the trial court imposed an unauthorized sentence. (In re Preston, (2009) 176 Cal. 4th 1109, 1114.) And the rule that unexplained delay in seeking relief may bar habeas corpus relief also does not apply here. (In re Birdwell, (1996) 50 Cal. 4th 926, 930; In re Harris, supra, 5 Cal. 4th 813, 842.) Given that Petitioner's unauthorized sentence centers on a 16-years to life for his underlying offense, in light of People v. Banks,(2015) 61 Cal. 4th 788, this writ of habeas corpus stands ready for adjudication.

II. THE PETITIONER'S WRIT OF HABEAS CORPUS IS NOT FILED AS UNTIMELY

The California Supreme Court has formulated "a three-level analysis" to determine whether or not a writ of habeas corpus has been filed timely: "First, a claim must be presented without 'substantial delay.' Second, if a petitioner raises a claim after a substantial delay," the court "will nevertheless consider it on the merits" only "if the petitioner can demonstrate good cause for the delay." And "[t]hird," it "... will consider the merits of the claim" "if it falls under one of [the] four exceptions" -- that is, (i) an error of constitutional magnitude occurred; (ii) the petitioner is actually innocent; (iii) a death penalty was imposed "by a sentencing authority with such a grossly misleading profile"; or (iv) the petitioner was convicted and/or sentenced under an "invalid statute." (See In re Reno, (2012) 55 Cal. 4th 425, 460.)

Because Petitioner's conviction of second-degree felony murder, in ad hoc to the language of "inherently dangerous to human life," is vague - the statute is "invalid." (Id., at 55 Cal. 4th 460.)

In Reno, the Court explained that substantial delay is measured from the time a petitioner (pro per) knew, or reasonably should have known, of the information (Johnson v. United States) offered in support of the claim and the legal basis. (Id., at

It goes without saying, "[i]t has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief." (In re Reno, supra, at 55 Cal. 4th 459; In re Clark, (1993) 5 Cal. 4th 750, 765.) Petitioner believes that there is no "'substantial delay'" in his filing (much less a needed explanation to be given); but out of respect for the law, he shall do so.

On June 26, 2015, the United States Supreme Court handed down Johnson v. United States, (2015) 135 S. Ct. 2551, 2557. It made the so-called "residual clause" of the "violent felony" provision of the Armed Career Criminal Act ("ACCA") "void for vagueness." The Johnson Court held that the constitutinal problem with the residual clause was that the analysis of risk was not based on actual facts, but on hypothetical facts. (Id., at 135 S. Ct. 2557-2560.) Still, Petitioner knew nothing of such existing case law.

Along came an analysis (or judicial thesis) entitled: "Why California's Second-Degree Felony-Murder Rule Is Now Void for Vagueness." The thesis was executed by Professor (of Law) Evans Tsen Lee from UC Hasting, School of Law, on October 15, 2015. (See HASTINGS CONSTITUTIONAL LAW QUARTERLY, Vol. 43:1 [10/15/2015 11:44 a.m.].)

Some thirty-days or so, Professor Lee's thesis of "second-degree felony murder" arrived at the penal

institution of the California State Prison-Los Angeles County ("CSP-LAC"). It narrowly landed at Facility "C" Law Library. It was only then that Petitioner Renteria had awareness of the complexity of Professor Lee's contributing, legal thesis.

So on December of 2015, Petitioner Renteria began on with his journey of legal research relevant to the matter: "second-degree felony matter." He began attending Facility "C" Law Library as a general legal user ("GLU"). (See Cal. Code of Reg. tit. 15, § 3123 (b).)

Not procrasinating too much, its duration of crafting, preparing, and filing his writ of habeas corpus was (give or take) two (2) months. Therefore, Petitioner's filing of writ, or if this Court would like to "measure[] from the time" Johnson v. United States was ruled, was reasonable in time, unsubstantial in delay. (In re Lucero, (2011) 200 Cal. 4th 38, 44 (a ten-month delay was not unreasonable in filing a writ of habeas corpus when petitioner was a layman - had limited access to the prison law library, and did not receive newly published case law).) Such was the case here with Petitioner. (Id.)

///

///

///

III. "SECOND-DEGREE FELONY MURDER" - COMMON LAW OR NOT - IS "VAGUE"; THE STATUTE VIOLATES STATE AND FEDERAL CONSTITUTION (U.S. CONST. V AMENDT.; CAL. ART. I, § 7)

A. THE JUDICIAL HISTORY OF "ABSTRACTNESS" WHICH IS THE NATURAL EQUIVALENT TO "VAGUENESS"

(1) ON A LEVEL OF FEDERALISM

The United States Supreme Court began with—what appeared to be the beginning, or the absolute inception, of the vagueness doctrine—United State v. Reese, (1875) 92 U.S. 214. There, the Court struck down a criminal statute because it vested punishment for more than just racial discrimination. The case centered (factually) on federal, criminal charges against Kentucky officials: allegedly discriminating toward a black voter. (Id., at 221-222.) Its criminal statute (one deriving from not "appropriate legislation") was unenforceable under the Fifteenth Amendment. (Id.) It held that the statute failed to provide fair notice.

In so holding, the High Court explained that "[l]aws which prohibit the doing of things, and provide a punishment for their violation, should not have a double meaning." (Id., at 220.) It went on to say: "If the legislature undertakes to define by statute a new offense, and provides for its punishment, it should express its will in language that" must "... not deceive the common mind." At the minimum, "[e]very man should be able to know with certainty when he [and/or she] is committing a crime." (Id.)

Reese insomuch confirms the law of vagueness as a restriction on the enforcement of criminal statutes - which became the result of malum prohibitum offense.

A malum prohibitum offense later arose in a criminal antitrust statute. (International Harvester Co. of America v. Kentucky, (1914) 229 U.S. 373.) In International Harvester Co. of America v. Kentucky, a corporate company was prosecuted and penalized for a conspiracy of price-fixing. (Id., at 229 U.S. 377.) It was, to be sure, Justice Holmes who while reversing the conviction, opined:

> For it shows how impossible it is to think away the principal facts of the case as it exists, and say what would have been the price in an imaginary world. ... The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.

(Id., at 223.)

But more than that, Justice Holmes continued with his explanation:

> We regard this decision as consistent with Nash v. United States [(1913) 229 U.S. 373 .. .] in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree - what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. ... To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to devine prophetical (ly) what the reaction of only partially determinate facts would be upon the -

> imaginations and decisions of purchasers, is to [demand] gifts that mankind does not possess

(Id.)

International Harvester Co. does not fully interrelate with Johnson v. United States, given that it involves the difficult predictability of imaginary purchasers - and not imgaining judges. International Harvester Co. generates, however, an intellectual guide for Johnson: it finds blameworthy constitutionally relevant to a criminal statute, no less forcing citizens to assess the criminality of their ponderable acts on hypothetical facts -- rather than on a factual predicate. (Id.)

The Court's "vagueness" analysis - ultimately - climbed up the ladder with another unflux, or fixed, price-rate statute: one that impelled its based on "hypothetical facts," that was very much open-ended in its liability-standard. (United States v. L. Cohen Grocery, (1920) 225 U.S. 81, 89.) There, a grocery company -- to be more precise, L. Cohen Grocery Co. -- was punished under a price-fixing statute which "made unlawful for any person willfully ... to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries ..." (Id.)

In its opinion, Chief Justice White professed,

> Observe that the section forbids no specific or definite act. It confirms the subject-matter of the investigation which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that [-] to attempt to enforce [-] the section would be the exact equivalent of an effect to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust ... in the estimation of the court and jury

(Id.)

Though it did not end there, a construction-company had been prosecuted for violating a state minimum-wage law-decree — "[N]ot less the current rate of per diem wages in the locality where the work is performed shall be paid ..." (See Connally v. General Construction Co., (1926) 269 U.S. 385, 388.) The Court in Connally struck the state's minimum-wage statute as unconstitutionally vague:

> We are of the opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum. ... The "current rate of wages" is not simple, but progressive - from so much (the minimum) to so musch (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incable of any definite answer.
>
> . . .

> In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say , with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? ... It is said that this question is settled for us by the decision of the state Supreme Court on rehearing in State v. Tibbett. But all the court did there was ... define the word "locality" as meaning "place," "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, but is not to remove the obscurity, rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic ... , dependent upon circumstances, [they] may be equally satisfied by areas measured by rods or by miles.

(Id., at 393-395.)

Agreeable or not, Connally reassured (soundingly) that criminal prohibitions would be amounted to the condition of unenforceability if they were uncertain in various aspects. Meaning, its dynamic of uncertainty, fully combined within uncertainty, precluded criminal statutes (or laws) of sufficient notice to suffice the due process.

Connally, if any thing, in some form or shape foretold the "vagueness doctrine's" eventual direction toward a consentration on the precariousness of "arbitrary enforcement." To say the least, Connally is rested on the unarticulated, but fundamental, premise that a statute (revolving in vagueness) violates due process even if the defendant - at bar - had a chance to avoid prosecution: so long as the statute gave effectively law enforcement full descretion in deciding whom to go

after. The fact is that the General Construction Co. had actual notice; but, as relevant as it was, it did not (in the Court's mind) overcome the reality that the commissioner was overall free to go after any wage-paying employer in the jurisdiction so because the measure of liability on the statute could be manipulated infinitely.

Afterwards, the "vagueness doctrine" in its evolution focused on the arbitrary enforcement in Papachristou v. City of Jacksonville, (1969) 405 U.S. 156. The Court, there, held a "loitering-ordinance" statute "void for vagueness." Such statute resulted as "both ... that it fail[ed] to give a person of ordinary intelligence fair notice" of his "contemplated conduct" - "... forbidden by the statute" - "and because it encourage[d] arbitrary ... arrests and convictions." (Id., at 405 U.S.162.)

In rejecting a challenge of vagueness, however, to a minicipal court anti-noise, the Court in Graved v. City of Rockford, (1972) 408 U.S. 104, acknowledged that the statute "contain[ed] no broad invitation to subjective or discriminatory enforcement." So much, "enforcement requires the exercise of some degree of police judgement, but, as confined, that degree of judgement here is permissible." (Id., at 408 U.S. 114.)

But the ic-ing on the cake was in Kolender v. Lawson, (1983) 461 U.S. 352. By then, a prong of "fair notice" and "arbitrary enforcement" was born. The High Court

struck California's loitering statute—more importantly, it made the statute "void-for-vagueness" because it required the ordinary individual to produce a "credible and reliable" identification to law enforcement. (Id., at 357.)

"[T]he void-for-vagueness doctrine," Justice O'Conner explained, "requires ... a penal statute" to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." In addition to that, the clause of "credible and reliable" of the California's loitering statute failed the second prong: it invited "arbitrary enforcement" - violated (nonetheless) the maxim of the "vagueness doctrine." Its "... statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." (Id., at 358.)

Except "probable cause to arrest" was not the only issue: "An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public street 'only at the whim of any police officer' who happens to stop that individual under" the ordinance. (Id., at 461 U.S. 358.)

The prong of "fair notice" and "arbitrary enforcement" was later tested in City of Chicago v. Morales, (1999) 527 U.S. 41. In invalidating Chicago's "Gang Congregation Ordinance," utilizing the anti-arbitrary rationale, the Court expressed the equivocal - and not the obvious - four-element "ordinance" required in order for the violation to be found:

> First, the police officer must reasonably believe that at least one of the two or more persons present in a public place is a criminal street gang membe[r]. Second, the persons must be loitering, which the ordinance defines as remain[ing] in any one place with no apparent purpose. Third, the officer must then order all of the persons to disperse and remove themselves from the area. Fourth, a person must disobey the officer's order.

(Id., at 47.)

Since it equally applied to both non-gang members and suspicious gang members - it left with broad discretion for law enforcement officer(s) to choose who to arrest and who not to. Justice Stevens repeated the words of the Illinois Supreme Court: The definition "provides absoulte discretion to police officers to decide what activities constitute loitering." (Id., at 61.) Not suprisingly, the detected violation of "fair notice" and "arbitrary enforcement" led the Court to find the statute unconstitutionally vague.

So far so good, this analysis — the "vagueness doctrine" — began with the exclusive focus on whether or not the law in question provided adequate notice to the ordinary citizen of what was prohibited and what

was not. It expanded, eventually, to include a prong focusing on whether the language of the statute or ordinance invited arbitrary or selective enforcement. It is fair to say that later decisions paid more attention to the "arbitrary enforcement" prong, notwithstanding the fact that the Court never abandoned the "notice" prong of the "vagueness doctrine."

(2) STATE OF CALIFORNIA

For the majority part, the California Supreme Court has the right to construe individual rights in accordance to the state constitution more broadly than the United State Supreme Court does under the federal Constitution. Thus, the California Supreme Court could interpret article I, section 7 of the California Constitution so to provide a more vigorous safeguard against vague criminal statutes.

In William v. Garcetti, (1993) 5 Cal. 4th 561, one of the leading cases in vagueness, the Court rejected the supposed, ambiguous California statute authorizing misdemeanor punishment to anyone to whom: "commits any act or omits any duty causing, encouraging, or contributing to the dependency or delinquency of a minor." (See Cal. Penal Code § 272 (2015).) An amendment to the statute provided that - for the purposes of the quoted section - parents and/or guardians "shall have the duty to excercise reasonable care, super-vision, protection, and control" over their children. (Id., at 5 Cal. 4th 565.)

Before the California Supreme Court was the issue whether the amendment made the statute unconstitutionally vague. It said,

> The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law," as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the Cali-fornia Constitution (Cal. Const., art. I, § 7) . Under both constitutions, due process of law in this context requires two elements: a criminal statute must "'be definite enough to provide (1) a standard of conduct for those whose activities are proscibed and (2) a standard for police enforcement and . . . ascertainment of guilt . . .'"

(Id., at 567; citing Walker v. Superior Court, (1988) 47 Cal. 3d 112, 114; Kolender v. Lawson, supra, (1983) 461 U.S. 352, 357.)

This statement of law resounded in the ultimate assertion in Kolender and subsequent cases. (E.g., Kolender v. Lawson, supra, 461 U.S. at 357; City of Chicago v. Morales, (Ill. 1997) 687 N.E. 2d 53, 63.) Take this for example, the first prong focuses on "notice" to the ordinary citizen - that is to say, the statute's language, overall, must set forth some ascertainable standard to which the citizen can conform his and/or her behavior. Moreover, "[v]ague laws," it has been said, "... trap the innocent by not providing fair warning." (Garcetti, 5 Cal. 4th at 567.) And the second prong focuses on the avoiding "arbitrary enforcement." On that, "[a] vague law" that "impermissibly delegates basic policy matters to": "policemen, judges, and juries for resolution on an

ad hoc and subjective basis, with the attendent dangers of arbitrary and discriminatory application." Because the statute only authorized punishment upon proof of criminal negligence--which required a gross deviation from the normal care--the statute's standard of "reasonable" care and supervision was not unconstitutionally vague. (Id., at 574.)

Turning on to another case regarding "vagueness" was in People v. Superior Court ("Caswell"), (1988) 46 Cal. 3d 1361. The high court, there, discussed the "vagueness" in which involved a state loitering statute. Saying the least, any person "who loiters in or about any toilet open to the public for the purpose of engaging in or solicitating any lewd or lascivious or any unlawful act" would be "guilty of a misdemeanor." (See Cal. Penal Code § 647 (2015).)

Testing for "vagueness," conveyed the Court, involved the "notice" aspect as well as the "arbitrary enforcement": "... [A] statute," first, "must be sufficiently definite to provide adequate notice of the conduct proscribed." And "[s]econd, a statute must provide" with enough "definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement." (Id., at 390.)

The Court went on to stress - with respect to the "notice" factor - that such loitering statute contains a specific intent requirement. If the lack of the requiste "purpose of engaging in or soliciting" a lewd,

lascivious, or unlawful act, there could be no liability. That being the case, the word "loiter" might be suscetible to multiple interpretions. But nevertheless, the requirement of specific intent prevents real innocent people from doubting to their responsibilities. Even so, "[p]ersons of ordinary intelligence need not linger for the proscribed purpose" (the Court sustained), for "they have not violated the statute." (Caswell, at 391.)

Factoring in the "arbitrary enforcement," the Court made a comparison to Kolender. The necessity to produce "reliable and credible" evidence upon police demand, made the "loitering ordinance" in Kolender subject to the "personal standards of each individual law enforcement officer." (Id., at 394.) Contrary to that, the "loitering ordinance" involved in Caswell vested "no such discretion with law enforcement." In addition, "[a] person is subject to arrest under the provision only if his [and/]or her conduct ... [a]rise to probable cause to believe that he [and/]or she is loitering in or about a public restroom with the proscribed illicit intent." (Id.)

For the most part, all of these California Supreme Court cases revolving into "vagueness," such as the "notice" and "arbitrary enforcement" factors, adhere closely to the United States Supreme Court precedents — the discussed, earlier "vagueness" analysis. The time has arrived to examine California second-degree felony murder rule, for it stands in the center of "vagueness."

(3) JOHNSON v. UNITED STATES

Johnson initiated with its more hardcore, elemental and crucial analysis in Kolender v. Lawson: "... [T]he Goverment violates the guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice to the conduct it punishes, or so standardless that it invites arbitrary enforcement." (Id., at 135 S. Ct. 2551, 2556; citing Kolender v. Lawson, (1983) 461 U.S. 352, 357-358.) "[N]ot only" does the law of vagueness apply "... to statutes defining elements of crimes, but also to statutes fixing sentences." (Id., at 2557; citing United States v. Butchelder, (1979) 442 U.S. 144, 123.)

The infamous, "categorical approach" ignited in the landmark decision in Taylor v. United States, (1990) 495 U.S. 575, 578.) In Taylor, the issue was if the defendant's alleged burglary constituted as a "third strike" in the State of Missouri. (Id.) The Court explained that the analysis was not a "simple one." The courts could not accept a nominal approach to burglary on the justification that Missouri called it "burglary." (Taylor v. United States, supra, 495 U.S. at 592 ("We think that 'burglary' in 924(e) must have some uniform definition independent of the labels employed by the various states' criminal codes").) After all, every state has its own burglary statute - with major variations regarding which places can be burglarized.

Except Congress could not have wanted all sorts of different statutes counted as burglary simply because the state legislatures choose to use that label. (Id., at 590-591.)

Therefore, the Taylor Court adopted the superfluous, generic form of "burglary" for the Armed Career Criminal Act ("ACCA") analysis. With the presumption that a state version of burglary contained all the elements of the burglary, then it would stand. However, the adoption of a generic federal form of burglary immediately provoked another issue: that is, how to determine whether a given conviction meets the elements in the generic form. Taylor's generic form of burglary, for instance, required that the place of the burglary be a fixed structure — and not a car, boat, or airplane. (Id., at 599.) On the other hand, people can be - in some states - convicted of "burglary" for illegally entering: cars, boats, or airplanes with the intent to commit crimes, (Would those convictions count?)

There are two main methods of making that determination. One would be to look at the real conduct (the actual facts approach) underpinning the burglary conviction. For example, if the defendant's lawyer admitted at the plea-hearing that the place of the burglary occurred at a house or a store, then the conviction would stand. Or, in the alternative, if something else in the record divulged that the place of the burglary was a fixed structure - then the conviction would also stand.

But in the real-world, the record does not always contain competent, sound evidence: the precise nature and place of the burglary. Meaning, the "actual facts approach" would often require sub-trials pertaining to old-convictions to determine the applicability of the ACCA. (Id., at 601; Descamps v. United States, (2013) 133 S. Ct. 2276, 2287.)

Circumventing this method as impractical, Taylor instead adopted a "categorical approach": Courts were - relevant to burglaries - to examine the state statute of conviction. If the statutes permitted convictions for burglaries of places other than fixed structures — then all convictions under such statute would be categorically disqualified [even if it was to be clear that the particular burglary took place in a fixed structure]. That way, a federal sentencing court was not required to re-try a case, many of which were committed long ago.

Yet the exact Taylor approach was not available to courts in "residual clause" cases since the "clause" itself enumerated no felonies, such as burglary or extortion. (It is not possible for courts to develop a "generic" version of a residual clause felony, because such felony could (in fact) be any felony presenting a "serious potential risk of physical injury" to another. [18 U.S.C. § 924(e)(2)(B)(ii)(2006).] Therefore, a "minimum conduct" approach as used in Taylor was not

possible.)

If the "residual clause" were to be treated on a categorical basis, as for the rest of the ACCA, then it would have to be on an "ordinary commission approach." This is, courts would have to determine what the ordinary commission of the felony in question looks like. What facts underlie the ordinary commission of driving under the influence? What facts underlie the ordinary commission of using a motor vehcile to evade a police officer? What facts underlie the ordinary commission of the attempted burglary. Once these hypothetical facts were determined, they could be tested to determine whether they presented the "serious potential risk" of injury.

There is, however, a normal - or an inherent - arbitrariness to imagining the ordinary commissions of felonies. In James v. United States, (2007) 550 U.S. 192, 204, overruled by Johnson v. United States, (2015) 135 S. Ct. 2551, the question was whether attempted burglary in Florida posed a serious potential risk of injury. The Court said yes: reasoning that the ordinary attempted burglary may be more dangerous than the ordinary completed burglary because the typical attempted burglary that is being prosecuted has ended in "... confrontation with a property owner or law enforcement." (Id.)

But in Chambers v. United States, (2009) 555 U.S. 122, 127, the felony, there, at issue was failure to report to a penal, institutional prison under Illinois law. To meet the balance, the majority concluded that such felony did not fall within the "residual clause," in great part because "an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional . . . unlawful conduct." (Id., at 128 (emphasis added).)

In furtherance, and in Sykes v. United States, (2011) 131 S. Ct. 2267, overruled by Johnson v. United States, (2015) 135 S. Ct. 2551, the felony in question was the following: Vehicle flight from law enforcement officers in accordance to Indiana law. There, the Court envisioned the following, inevitable senario as the ordinariness: "It is well known that when offenders use motor vehicles as their means of escape they create serious potential risk of physical injury to others. Flight from a law enforcement officer invites" - "even demands" - "pursuit. As that pursuit continues, the risk of an accident accumulates. And having choosen to flee, and thereby committ[ed] a crime, the perpetrator has all the more reason to . . . avoid capture." (Chambers v. United States, supra, 555 U.S. at 128-130; Sykes v. United States, supra, 131 S. Ct. at 2274-2276.)

A statistical analysis could have - perhaps - made the "ordinary commission" approach less arbitrary. In

fact, the Court did used it when available. Though, availability proved to be the issue. The Court's data was deriving from many different sources, different methodological gatherings. As Justice Scalia reminded the Court: "The Court does not reveal why it chose one dataset over another. ... [O]ur statistical analysis in ACCA cases is untested judicial factfinding masquerading as statutory interpretation." (Sykes, 131 S. Ct. at 2286.) Availability of dataset was not comprehensively close enough to take the arbitrariness out of the analysis - a cloudy reality in which the majority of the justices ultimately came in Johnson v. United States.

In Johnson v. United States, Justice Scalia was very much careful to explain that the "residual clause" was not vague simply because the "serious potential risk" feels too subjective (or too open-ended). Rather, the "residual clause" was vague because - contributing to the "categorical approach" - it attached the concept of "risk" based on hypothetical facts. Moreover, it was vague because the "residual clause" (viewed through the lens of the "ordinary commission") required judges to imagine a set of facts and after determine whether that imaginative set of facts proposed a "serious risk of injury." And so Justice Scalia pointed out:

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicial-(ly) imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime invovles? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct? " United States v. Mayer, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seem-(ingly) requires the judge imagine how the-idealized ordinary case of the crime subsequently plays out.

. . .

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one-thing to apply an impre-cise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction . By asking whether the crime "otherwise involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the-four enumerated crimes - burglary, arson, extortion , and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." Does the ordinary burglar invade an occupied home by night or an unoccpuied home by day? Does the typical extortion-ist threaten his victim by mail with revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as violent-felony, the residual clause produces more unpredicability and arbitrariness than the Due-Process Clause tolerates

. . .

This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard - can provide evidence of vagueness. Here, this Court 's repeated attempts and repeated failure to craft-

> a principled and objective standard out of the residual clause confirm its hopeless indeterminacy.
>
> . . .
>
> It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convince us that we have embarked upon a failed enterprise.

(Id., at 135 S. Ct. 2557-2558, 2560.)

Thus, Johnson's vagueness analysis turns on one main factor and two factors of lessor importance. The main factor is the intersection of risk and hypothetical facts. The less important facotrs are (1) juxtaposition to en-umerated felonies, inviting comparison; and (2) repeated judicial failures to craft a principled and objective standard. It is not clear how much less important these secondary factors are, but for purposes of the California second-degree felony murder rule it does not matter. All three factors are in abundance present in the California's "inherently dangerous felony" rule as it currently exists.

With regards to the juxtaposition to the enumerated felonies, the Johnson Court said the following:

> What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confrims that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into soemone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence after making his demand or because the extortionist might engage in violence before or because the burglar might confront a resident in-the home after breaking and entering.

(Id., at 2557 (emphasis deleted).)

To provide clarity, the unpredictability of the "residual clause" is compounded by the inclusion of enumerated felonies as comparitors because it requires a court to guage the risk of those comparitors as well: something that cannot be done without comprehensive statistics.

B. ITS ORIGINS OF CALIFORNIA'S SECOND-DEGREE FELONY MURDER RULE

(1) THE FRAMEWORK OF CALIFORNIA PENAL CODE SECTION 187-189

The California's murder statute covers several provisions. Both, the first-degree and second-degree felony murder doctrines involve some kind of inference from the structure of the statute: neither is established in so many words. (See People v. Dillon, (1983) 34 Cal. 3d 441, 472 (describing the California Supreme Court first-degree felony murder rule as the product of "piling inference" over "inference").) In short, California Penal Code section 187 states: "Murder is the unlawful killing of another human being, or fetus, with malice aforethought." (See Cal. Penal Code § 187 (2015).) The "malice afroethought" language defined in California Penal Code section 188 is as follows: "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." (See Cal. Penal Code § 188 (2015).)

Then, "felony-murder" is a form of "implied malice."

Section 189 of the California penal code provides as following: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poision, lying in wait, torture, or by any other kind of willful, deliberate, and premediated killing, or which is committed in the perpet-ration of, or attempt to penetrate, arson, rape, carjacking, robbery, burglary, mayhaem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree." (See Cal. Penal Code § 189 (2015).)

California Penal Code section 189 appears purely as a classifying provision. It is, however, section 187 which holds the ultimate (and actual) proscription of the primary conduct — making killings with "malice" punishable as murder. Section 189 contains a laundry-of-list of "murder[s]" that are to be punished as first degree: with a residual clause stating that "[a]ll other kinds of murders" are to be punished as second-degree. If section 189 stated that "all killing which is perpetrated by" various means "is murder of the first

degree," then the first-degree felony murder rule would be explicit. By the same token, if it said that "all other kinds of killings" are second degree murders, there would be no need to infer anything. But section 189 does not say that: it limits its scope to whatever it already made "murder" by section 187.

The construction of section 189 has, however, long ceased to be a matter of first impression. As far back as 1983, in People v. Dillon, the California Supreme Court established that the first-degree felony murder rule is a creation of statute — and that the second-degree felony murder rule is the product of "common law." (Dillon, 34 Cal. 3d at 472.)

At the same time, the California Supreme Court characterized the second-degree felony murder rule as a "judge-made doctrine without any express basis in the Penal Code." (Id.) Before that, the high court (in 1966) had tacitly conceded that the second-degree felony murder was a creature of "common law": "Despite [the] defendant's contention that the Penal Code does not expressly set-forth any provision for second-degree felony murder and that, therefore, we should not follow . . . such doctrine here, the concept lies imbeded in our law." (See People v. Phillips, (1966) 64 Cal. 2d 574, 582, overruled by People v. Flood, (1998) 18 Cal. 4th 470.)

The common law statutes of the second-degree felony-murder rule has been confirmed more recently: In 2005,

the California Supreme Court handed down People v. Howard - in which it held that driving in "willful" or "wanton" disregard of the safety of others while fleeing a police officer is not "inherently dangerous to human life" for purposes of the second-degree felony murder rule. (See People v. Howard, (2005) 34 Cal. 4th 1129.) This is "[b]ecause the second degree felony-murder rule is a court-made rule, it has no statutory definition." (Id.) The Court had went on to say as much as a year ago: "The second-degree felony-murder rule is a common law doctrine." (See People v. Robertson, (2004) 34 Cal. 4th 156, overruled by People v. Chun, (2009) 45 Cal. 4th 472.)

Although, in 2009 the California Supreme Court had changed course. In People v. Chun, the high court offered a historical explanation for the conclusion that the second-degree felony murder rule is a statutory creation (after all): "[T]he second degree felony-murder rule, although derived from . . . common law, is based on statute; it is [just] another interpretation of section 188's abandoned and malignant heart language." (Id., at 1135.)

* * * * *

Justice Chin for the Court continued,

> Even consious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's abandoned and malignant heart language. Similarly, second degree felony murder rule is nonstatutory in the sense that no statut spells it out, but it is also statutory as another interpretation of the same "abondaned and malignant heart" language. We have said that "felony-murder rule eliminates the need for proof of malice - in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree felony murder and seond degree felony murder." But analytically , this is not precisely correct. The felony murder rule-renders irrelevant consious-disregard-for-life malice , but it does not render malice itself irrelevant. Instead, the felony-murder rule acts as a substitute" for consious-disregard-for-life malice. It simply describes a different form of malice under section 188 . "The felony-murder rule imputes the requiste malice-for a murder conviction to those who commit a homicide during the perpetration of a felony inherently danger-ous to life."
>
> . . .
>
> . . . The "abandoned and malignant heart" language of of both the original 1850 law and today's section-188 contains within it the commonlaw second degree-felony murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is base on statute and, accordingly, stands on firm constitutional ground.

(Id., at 1187-1188.)

Ever since 2009, the second-degree felony murder rule has been regarded as a creation of statute: or, more correctly, as a statutory codification of common law. But the reasoning of Chun is not all on point: the making of the "abandoned and malignant heart" language does not only apply to the felony-murders explicitly enumerated in section 189. The Chun may well be corrected

that the "abandoned and malignant heart" denotes a form of malice less "express" than intent to kill and, thus, it encompasses some form of felony-murder. Nevertheless, to conclude that it includes second-degree felony murder - with the open-ended possibility of courts finding new statutory predicates undesireably of by the Legislature, rather than only the legislatively prescribed predicates set forth in section 189 — is quite a leap. At most, what Chun demonstrates is that the interpretation of "abandoned and malignant heart" as including felony-murder is a permissive interpretation. It does not show certainly that such an interpretation is a mandatory reading.

Except, this is not the place for a complete reexamination of Chun and its holding that second-degree felony murder has a statutory pedigree. The issue is, of course, second-degree felony murder - in light of Johnson v. United States is "inherently" vague.

(2) THE DOCTRINE OF "INHERENTLY DANGEROUS FELONY"

An unrestricted version of the felony-murder rule would be harsh - for sure. If, for instance, someone suffered a fatal heart attack from the shock of witnessing someone else commit a crime of grand theft, mail or wire fraud, perjury, or even felony tresspass, the felon might be guilty of murder. A death following one of these felonies seems less than foreseeable, and perhaps the prosectuor would exercise discretion not to charge

murder in such a circumstance, or perhaps the jury would decline to convict of murder. But the criminal law should not leave it completely to prosecutors and juries to make sure that defendants undeserving of punishment for murder do not in fact receive that punishment. The dangerous felony requirement lessen the harsh edge off the basic felony-murder rule.

The origin of the dangerous felony requirement in America is sometimes attributed to reception from English common law.[3] The original English rule is said to have held a defendant liable for felony-murder without regard to whether the underlying felony was dangerous.[4] The earliest California Supreme Court cases tended toward silence as to why various felonies qualified as predicates for the felony-murder rule. The 1914 decision in People v. Wright, for example, held that death resulting from an illegal abortion was second-degree felony-murder. (People v. Wright, (1914) 167 Cal. 1.) There was no mention of why abortion qualified as a predicate felony. In 1931, in People v. Melntyre, the Court assumed that driving under the influence qualified as a predicate for second-degree felony-murder. (See People v. Melntyre, (1931) 213 Cal. 50 (1931).) Again, there was no analysis of why driving under the

3. See WAYNE R. LAFAVE CRIMINAL LAW 785-786 § 14.5 (a) (5th ed. 2010)

4. (Id., at 785. But see Guyora Binder, The Origins of American Felony Murder Rules, 57 STAN. L. REV. 59 (2004) (calling the harsh original rule a myth).

influence counted as a predicate.

People v. Poindexter demonstrates that the California Supreme Court's original approach to inherent dangerous was to focus on the actual facts of the case. (See People v. Poindexter, (1958) 51 Cal. 2d 142.) The defendant had furnished heroin to a minor, who died. The Court expressed, "Here there was uncontroverted testimony that [the victim] died from narcotics poisoning, and that taking a shot of heroin was an act of dangerous to human life." (Id., at 149.) It is hard to know how seriously to take this sentence. Taking literally, the Court is saying that it was proper for the trial court to allow testimony on whether a shot of heroin is dangerous to human life: which would mean that the dangerousness question was treated as a question of actual adjudicative fact, not as an "abstract" question of law. On ther other hand, it could have been a "slip of the pen," the deadly quality of narcotics overdoses have long been well known.

Although People v. Williams is sometimes credited with the beginning of the abstract approach to inherent dangerousness in California, the first real explanation of it appears in People v. Phillips. (People v. Williams, (1965) 63 Cal. 2d 452; People v. Patterson, (1989) 49 Cal. 3d 615, 621 (1989) (attributing the abstract test to Williams); People v. Satchell, (1971) 6 Cal. 3d 28, 38-39, overruled by People v. Flood, (1998) 18 Cal. 4th 470; People v. Phillips, (1966) 64 Cal. 2d 574, also

overruled by People v. Flood, supra.) The Phillips Court declared, "We have held that the only such felonies as are themselves 'inherently dangerous to human life' can support the application of the felony-murder rule. We have ruled that in assessing such peril to human life inherent in any given felony 'we look to the elements of the felony in the abstract, not the particular 'facts' of the case.'" (Id., at 582 (emphasis added).)

The Court was not required to explain why the underlying felony at bar, grand theft, was not inherently dangerous to human life - as the prosecution had conceded the point. The prosecution did, however, argue for what would have amounted to an "actual facts" approach, to which the Court replied:

> Admitting that grand theft is not inherently dangerous to life, the prosecution asks us to encompass the entire course of defendant's conduct so that we may incorporate such elements as would make his crime inherently dangerous. In so framing the definition of a given felony for the purpose of assessing its inherent peril to life the prosecution would abandon the statutory definition of the felony as such and substitute the factual elements of defendant's actual conduct. In the present case the Attorney General would characterize that conduct as 'grand theft medical fraud,' and this newly created 'felony,' he argues, clearly involves danger to human life and supports an application of the felony murder rule. [¶] To fragmentize the 'course of conduct' of defendant so that the felony murder rule applies if any segmant of that conduct may be considered dangerous to life would widen the rule beyond calculation. It would then apply not only to the commission of specific felonies, which are themselves-dangerous to life, but to the perpetration of any felony during which defedant may have acted in such a manner as to endanger life.

(Id., at 583-584.)

By the time of Phillips, it was so much clear that

the proper approach for determining dangerousness was "abstract." But which "abstract" approach? There are two possible abstract approaches: a "minimum conduct" (that is, least risky conduct) approach or an "ordinary commission" approach.[5/] The minimum conduct approach takes a theoritical view: "What is the minimum conduct (in terms of dangerousness) that would nonetheless satisfy the essential elements of the offense?" The other approach, by contrast, takes an empirical view: "What does the ordinary commission of this offense look like?"

Such minimum conduct approach carries an "inherent arbitrariness" in its application. What, for example, is the minimum conduct (least risky or least culpable conduct) that nonetheless satifies the essential elements of driving under the influence? Presumably, the minimum "inference" is the mere threshold of the blood alcohol requirement, .08 percent. But what kind of"driving"? Driving while observing all other traffic laws? How fast? Driving 35 miles per hour (mph) in a 35 mph zone? Or, if 32 mph in a 35 mph zone is marginally safer, does that become the "minimum conduct"? Does

---

5. Petitioner uses the term "minimum conduct" because that term is often used in federal sentencing and immigration law to describe the categorical approach toward determining whether prior convictions qualify for either federal sentencing enhancement or removal. See, e.g., Mendez v. Mukasey, (2d Cir. 2008) 547 F. 3d 345, 348 (looking to the "minimum criminal conduct necessary to satisfy the essential elements of the crime"); Amouzadeh v. Winfrey, (5th Cir. 2006) 467 F. 3d 451, 455 (considering "the minimum criminal conduct necessary to sustain [a] conviction under the statute" (citation ommitted)).

the driving take place in heavy traffic, or on desolate back roads? Night or day? Good whether of bad? Skilled driver or unskilled? Practiced at driving under the influence or novice?

The "ordinary commission" approach has its own arbitrariness problems. What does the ordnary or typical commission of an offense look like? The inquiry dredges up problems similar to those of the minimum conduct approach, as there is simply no non-arbitrary way of saying what is ordinary or typical. The one escape from that arbitrariness would be comprehensive statistics. If we knew what percentage of driving under the influence crimes resulted in the death of another person, there would be no need to imagine any facts. But once we had a percentage, how would we know whether it was high enough to qualify as "inherently dangerous"?

The subsequent cases bear out these difficulties predicability. In 1971, the California Supreme Court decided three cases involving an issue of inherent dangerousness. In People v. Satchell, supra, the predicate felony was possession of a concealable weapon by an exfelon.6/

6. Id., at 42 n. 19 ("See, for example, Corporation Code, sections 3019-3021, 25540 et seq (fraudulent and deceptive acts relating to corporation); Election Code, sections 12000 et seq., 14403, 15280, 17090 et seq., 29100 et seq., 29130 et seq., 29160, 29180, 29400, 29430, 29431 (election offenses); Financial Code, section 18857.1 (unauthorized sale of investment certificates); Goverment Code, section 9050 et seq. (interference with the legislative process), section 9908 (crimes of legislative representation); Insurance Code, section 556 (false or fraudulent insurance claim), section 883 (crimes in the inssuance of insurance

(. . . cont.)

During a street fight, the defendant retreated to his car, only to produce a sawed-off shutgun. One blast killed the defendant. He was convicted of second-degree murder, after the trial court had instructed the jury on felony-murder. Before convicting, the jury asked the trial judge multiple questions about the law of second-degree felony murder, suggesting that its verdict may have been based on a felony-murder theory. (Id., at 33.)

The California Supreme Court focused its review on the various offenses for which a felon-in-possession might have been previously convicted. A convicted murder or drug dealer might be more dangerous with a concealable firearm than, say, a "tax cheat." The Court provided many examples of prior convictions that would not suggest enhanced dangerousness in the possessor of a firearm.

Another 1971 decision, People v. Mattison, (1971) 4 Cal. 3d 177, involved poising. The defendant and victim were prison inmates. The victim was an alcoholic and the defendant worked in the prison medical labatory. The defendant procured eight ounces of methyl alcohol and provided it to the victim - who consumed it and died.

(. . . cont.)
securities); Military and Veterans Code, section 421 (conversion of military property); Public Resources Code, section 5190 (interest of park commissoner in park contract); Vehicle Code, section 4463 (false evidence of registration).

After being instructed on first-degree murder by poising, second-degree extreme recklessness murder, second-degree felony-murder, and involuntary manslaughter, the jury convicted defendant of second-degree murder. (Id., at 181-182.)

On appeal, the defendant argued that he had to have been guilty of either first-degree murder or nothing. If he poisoned the defendant on purpose, it had to have been first-degree murder. If the poising was an accident, he had to be acquitted. (Id., at 184.) The California Supreme Court rejected this argument, finding that there was insufficient evidence to prove beyond a reasonable doubt that the defendant had the intent to kill or conscious disregard of a high probability of death. However, the defedant was convicted of violating Penal Code 347, which made it a felony to "willfully mingle[] any poison with food, drink, or medicine, with intent that the same shall be taken by any human being to his injury." (Id.)

Moreover, the California Supreme Court found that the jury was entitled to find him guilty of second-degree murder on a felony murder theory. Although the Court's main focus was on the issue of whether the poisoning was "integral to" and "included in fact" within the homicide, it further noted that the Legislature regarded Penal Code 347 as a dangerous felony. (Id., accord People v. Ireland, (1969) 70 Cal. 2d 522 ("[A] second degree felony murder instruction may not properly be given when it

is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged").) "By making it a felony to administer poison with the intent to cause any injury," the Court said, "the Legislature has evidenced its concern for the danger involved in such conduct, and the invocation of the second-degree felony murder rule in such cases when unforeseen death results serves further to deter such dangerous conduct." (Mattsion, 4 Cal. 3d at 186.)

In a third 1971 decision, People v. Lopez, (1971) 6 Cal. 3d 45, the California Supreme Court held that escape from prison was not inherently dangerous to human life, but again offered no reasoning to support that conclusion. In People v. Nichols, (1970) 3 Cal. 3d 150, the California Supreme Court found arson of a motor vehicle to be inherently dangerous to human life. Its entire analysis of the inherent dangerousness issue consisted of the following sentence: "Certainly the burning of a motor vehicle, which usually contains gasoline and which is usually found in close proimity to people, is inherently dangerous to human life." (Id., 163.) As of 1971, Satchell was, thus, still the only California Supreme Court case discursive in its analysis of the test for an inherently dangerous felony.

The California Supreme Court would not discuss the inherently dangerous felony test again until People v. Burroughs, (1984) 35 Cal. 3d 824. The victim diagnosed with terminal "leukemia," submitted to "treatments" by the defendant - who, allegedly, held himself as a "healer." The treatment included a speical lemonade, exposure to colored lights, and deep abdominal massage. (Id., at 896-898.) The massage caused massive hemorrhaging, excruciating pain, and eventual death. The defendant was convicted of second-degree felony murder on the basis of the predicate felony of practicing medicine without a license "under circumstances or conditions which cause or create a risk of great bodily harm: serious mental or physical illness, or death." (Id., at 830.) The Court - per Justice Grodin - reaffirmed that inherent dangerousness must be viewed in the abstract by analyzing the elements of the predicate felony, not by looking at the defendant's actual. If the jury were to ask whether the felony was inherently dangerous based on the actual facts: "the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous." (Id.)

Accordingly to the Burroughs Court, the abstract test called for a determination of whether the predicate offense "possibily could be committed without creating [danger to human life]." (Id.) This was the minimum conduct approach—what is the minimum conduct, in terms

of danger creation, that nonetheless constitutes a violation of the statute? Here, the Court concluded, there were numerous ways to be guilty of practicing medicine without a license that presented minimal or treatment of the sick or afflicted which has quite innocuous results—the affliction at stake could be a common cold, or a sprained finger - and the form of treatment an admonition to rest in bed and drink fluids or the application of ice to mild swelling," stated the Court. (Id.)

Turning to the phrase "risk of great bodily harm," the Court went on, "a broken arm or leg would constitute serious bodily injury—and by implication, great bodily harm as well. While painful and debilitating, such bone fracture clearly do not, by their nature, jeopardize the life of the victim." (Id.) Finally, referring to the phrase "mental illness," the Court said the following:

> It is not difficult, for example, to envision one who suffers from delusions of grandeur , believing himself to be the President of the United States. An individual who purports without the proper license to be able to treat such a person need not be placing the patient's life in jeopardy, though such treatment, if conducted, for example, without expertise, may lead to the need for - more psychiatric attention.

(Id., at 831.)

Note that the Burroughs Court eschewed any attempt to ascertain the ordinary or typical commission of practicing medicine without a license. Burroughs thus

adopts the "minimum conduct" (least risky conduct) approach to inherently dangerous felonies and is consistent with Satchell — but inconsistent with the "ordinary commission" test employed in Nichols.

People v. Patterson, (1989) 49 Cal. 3d 615, the California Supreme Court swings back toward the ordinary commission approach, albeit somewhat opaquely. The victim, Jenny Licerio, had been using cocaine on a daily basis for about six months before her death. On the night she died, Licerio was partying with defendant Patterson and another friend. Patterson furnished the concaine, which was ingested in multiple forms. Licerio died from acute cocaine-intoxication.

Patterson pleaded guilty to three counts of violating California Heath & Safety Code section 11352(a) - which states:

> [E]very person who transports, imports into this state, sells, furnishes, adminster, or gives away, or offers to transport, import in [to] this state, sell, furnish, administers, or give away, or attempts to import in this state or transport (1) any controlled substance . . . shall be punished by imprisonment . . . for three, four, or five years.

(See HEALTH & SAFETY CODE § 11352(a).)

Upon receiving Patterson's guilty plea to the section 11352(a) charges, the trial court dismissed the murder charge against him. The Court of Appeal affirmed the dismissal. Drawing on the minimum conduct analyses of Satchell and Burroughs, the Court of Appeal reasoned that some of the controlled substance covered

by section 11352(a) are not inherently dangerous to human life.

The California Supreme reversed: Writing for the Court, Justice Kennard explained that whether a violation of section 11352(a) is "inherently dangerous" depends upon precisely which substance is involved. The proper factual field of reference is not just any substance covered by the provision, but instead the precise substance involved in the case. The Court insisted that it was using an "abstract" approach - it expressly rejected the goverment's argument in favor of an actual facts approach. (Patterson, 49 Cal. 3d at 620-621.) The proper quantum or threshold of risk was "high probability" — said Justice Kennard. (Id., at 618.) Does furnishing cocaine pose a high probability of death, viewed in the "abstract"? Answering that question would involve a statistical analysis, which should be performed in the first instance by a trial court on remand.

Ascertaining Patterson's rule requires some parsing. The Court's primary focus was on the establishment of a "high probability" threshold of risk. The Court did not focus on the factual field of reference - except to say that, in the context of section 11352(a), the proper reference was the specific drug involved in the case at bar - and not all drugs convered by the statute. (Id., at 625.) On the surface, that latter holding appears as a limited form of "actual facts" or "real

conduct" anaylsis, but the appearance is misleading. The Court adamantly insisted that it was sticking to an abstract approach, explicitly rejecting the goverment's plea for an actual facts approach. What the Court meant was that section 11352(a) is divisble - in other words - it contains as many different offense as substance it covers. (Cf. Descamps v. United States, supra, (2013) 133 S. Ct. 2276, 2285 (holding that when determining which prior convictions qualify as "violent felonies" under the federal Armed Career Criminal Act, courts may look at the facts only for the limited purpose of ascertaining with portion of a divisible criminal statute the defendant was actually convicted under).)

The correct factual field of reference was an abstract conception of the precise offense with which Patterson was charged--finishing concaine. The Court did not look at the particular way in which Patterson furnished the cocaine, but instead made it clear that statistical analysis should be conducted on remand.

The Patterson Court's endorsement of statistical analysis confirms two things. First, it demonstrates that the anaylsis is abstract, for society-wide statistics about the incidence of death involved in the ingestion of endorsement of statistical analysis shows that the Court impliedly accepted an ordinary commission field of reference rather than a minimum conduct field of reference. A court truly concerned with minimum conduct, such as in Satchell or Burroughs, is not interested in

statistics because they are not probative of the least dangerous manner in which the felony can be committed. A minimum conduct analysis necessarily involves conjuring hypothetical designed to minimize risk, then asking whether that hypothesized minimized risk nonetheless breaks through the thresold for "inherent dangerousness to human life." That is why the Court in Satchell and Burroughs made no mention of statistics. Patterson, by contrast, did remand for trial court consideration of statistics, which can only be probative as to the "average" or "ordinary" commission of the offense in question.

The California Supreme Court stayed with the Patterson "high-probability-in-the-ordinary-commission" approach in People v. Hansen, (1994) 9 Cal. 4th 300, overruled by People v. Chun, (2009) 45 Cal. 4th 1172. Hansen had given $40 to one Echaves, who had promised to procure some methamphetamine for Hansen. When Enchaves never came back, Hansen went to Echaves' apartment and banged on the door serverl times. No one answer. Hours later, when Hansen still had not heard back from Echaves, he drove back to the apartment and shot at it from his car. One of the bullets struck and killed a girl who was sitting in the living room with her brother. (Id., at 305-306.)

Then-Justice George wrote for the Court, holding that shooting into an inhabited dwelling house was inherently dangerous to human life. From consisted of

the opinion, it is very clear that the Court's factual field of reference derived of ordinary commissions of the felony, not the minimum conduct necessary to commit the felony:

> The discharge of a firearm at an inhabbited dwelling house-by definition, a dwelling "currently being used for dwelling purposes, whether occupied or not" (§ 245)-is afelony whose commission inherently involves a danger to human life. An inhabited dwelling house is one in which persons reside and where occupants "are generally in or around the premises." In firing a gun at such a struct - ure, there always will exist a significant - likelihood that an occupant may be present . Although it is true that a defendant may be guilty of this felony even if, at the time of the shooting, the residents of the inhabited dwelling happen to be abstract-as shooting at a structure that currently is used for dwelling purposes-poses a great risk of "high probability" of death within the meaning of Patterson.

(Id., at 310 (emphasis added).)

It is crtical to note that Hansen is not merely based on a commonsense view that shooting at an apartment could kill someone, for if the Court had followed the minimum conduct approach taken in Satchell or Burroughs, the result might well have been different. Is it not possible for a drug dealer to break into an apartment from stem to stern, and, finding no one there, fire a shot back into the apartment out of frustation? If that scenario is possible, can it fairly be said that act of shooting into the apartment is dangerous to human life, given that the house was searched exhaustively and yet no one was found in there? One could not honestly say there is a high probability of killing someone in

that situation. Hansen comes out differently because the Court was not interested in hypothesizing the minimum conduct necessary to violate Penal Code section 246. Rather, the Court was interested in the ordinary or average commission of that offense.7/

By 2004, Justice George had become Chief Justice, but he was still writng for the Court on whether shooting offense are inherently dangerous. In People v. Robertson, (2004) 34 Cal. 4th 156, overruled by People v. Chun, surpa, (2009) 45 Cal. 4th 1172, defendant Quincy Robertson was watching television with his family in his Oakland apartment when he heard a loud noise just outside. He grabbed his gun and emerged to find four intoxicated youths stealing the hubcaps off his park car. When they fled, Roberston fired a shot at them. As they continued to run,Robertson walked into the middle of the street, fired nine more rounds, striking one of them in the back of the head and killing him. According to one eyewitness, Robertson then "swaggered" back into the apartment building. (Id., at 162.) It was the third time someone had broken into or vandalized one of Robertson's parked vehicles.

7. Justice George said nothng about homicide statistics for shooting into buildings, which probably are not gathered.

The jury convicted Robertson of second-degree murder after being instructed that they could base such a verdict on a finding that he had violated Penal Code section 246.3, discharging a firearm in a grossly negligent manner. The California Suprem Court affirmed: agreeing with an earlier Court of Appeal decision holding section 246.3 inherently dangerous to human life. Chief Justice George explained,

> "'The tragic death of innocent and often random victims . . . as the result of the discharging of firearms, has become an alarmingly common occurrence in our society-a phenomenon of enormous concern to thepublic.' " the [Court of Appeal] reasoned that the offense is inherently dangerous because it involves the highly lethal instrumentality of a firearm with gross negligence in a manner that "could result in injury or death to a person" (§246.3). It added that '[i]mminent - deadly consequences [are] inherent in the act ' [citation] even if the bullet fortuitously-falls so as to injure and not kill." By its terms, the statute "presuppose that there are people in harms's way" and that a reasonable person in defendant's situation would have "reasonable grounds to suspect that people will be endangered. . . ."

(Id., at 168-169.)

Robertson does not tell us much about the proper factual field of reference, as either mode of analysis ends up in the same place with this particular offense. Certainly the ordinary or average discharge of a firearm in a grossly negligent manner is dangerous to human life. Yet even the minimum (least risky or least culpable) conduct necessary to violate this statute is dangerous to human life: given that there must be (1) discharge of a firearm; and (2) it must be in a factual context

where a reasonable person should have been aware of an extremely substantial risk that someone could be harmed. Not even a law professor could dream a fact pattern in which someone fires a gun in a grossly negligent manner where it is extremely unlikely that an innocent person will be killed, for if it is extremely unlikely that the shot will harm anyone: it is not grossly negligence. Therefore, with respect to section 246.3, it does not matter which factual field of reference one uses; the result will be that the felony is inherently dangerous. The Robertson Court did not have to choose.

California Supreme Court's next inherently dangerous felony decision was People v. Howard, (2005) 34 Cal. 4th 1129. In the early morning hours of May 23, 2002, defendant Howard was stopped by officer of the California Highway Patrol for not having a rear license plate. As the officers alighted from their vehicle, Howard restarted his engine and sped-off, precipitating a chase that reached ninety mph. During this chase through a rural area, Howard shut off his headlights, ran two stop signs, and crossed over to the wrong side of the road. When Howard got close to downtown Fresno, however, the officers ceased their pursuit, fearing an incident. But it was too late. Shortly after they gave up the chase, the officers saw Howard's Chevrolet Tahoe run a red light and collide with a car driven by Jeanette Rodriguez, who was killed. It turned out that the Tahoe

had been stolen earlier in the day. Howard's blood was tested and showed a high level of methamphetine. Victim Rodriguez's blood was also tested and found to contain both heroin and cocaine. (Id., at 1132-1133.)

The jury was instructed that it could convict Howard of second-degree felony-murder if it concluded that Rodriguez was killed during a violation of California Vehicle Code section 2800.2, which makes it a felony to "driv[e] in willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer." The trial court did not instruct on any other theory of malice, which is to say, it did not instruct on malice as conscious disregard of an extreme risk to human life (colloquially referred to as "implied malice murder"). If it were to convict for murder, then the jury would have to convict on a felony-murder theory. During its deliberations, the jury sent the trial judge a note asking, "It appears in the instructions if there is a guilty verdict [in section] 28002.2 then there must be a guilty verdict for [Penal Code section] 187, yes or no?" (Id., at 1134.) The trial judge declined to answer the question and simply repeated the instructions on felony-murder and causation. The jury convicted Howard of second-degree murder and a violation of section 2800.2, which states:

> (a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail . . . . The court may also impose a fine . . . or may impose both that imprisonment or confinement and fine.
>
> (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occurs, or damage to prperty occurs.

(Id., at 1137.)

Zeroing in on the definition of "willful or wanton disregard" as including driving in a manner that involves three traffic violation points, the California Supreme Court concluded that a violation of section 2800.2 is not inherently dangerous to human life:

> Violations that are assigned points . . . [that] can be committed without endangering human life include driving an unregistered vehicle owned by the driver, driving with a suspended license, driving on a highway at slightly more than 55 miles per hour when a higher speed limit has not been posted, failing to come to a complete stop at a stop sign, and making a right turn without signaling for 100 feet before turning.

(Id., at 1137-1138.)

In other words, if a person flees a pursuing police officer by driving an unregistered vehicle fifty-six mph in a fifty-five mph zone and later signals for a right turn only ninety-nine feet before turning, that conduct constitutes "willful disregard for safety of persons or property" as a matter of law. Obviously, driving in such a manner is not inherently dangerous to human life.

It is painfully clear that the California Supreme Court's approach to the inherent dangerousness issue in Howard was abstract, as it completely ignored the wildly reckless abandon of the defendant's actual driving. It is equally clear that the Howard Court abjured "ordinary commission" of section 2800.2 as a field of reference for its dangerousness analysis. Although it is impossible — without comprehensive statistics, to say eactly what the "ordinary" or "average" section 2800.2 violation looks like — it most certainly does not involve driving fifty-six mph and signaling for right turns a tad late. The Howard Court employed a minimum conduct field of reference, which is to say, it imagined the least risky conduct that nonetheless would constitute a section 2800.2 violation, then deemed those hypothetical facts not to be inherently dangerous to human life.

That brings us, finally, to the most recent major California Supreme Court decision on the second-degree felony murder rule, People v. Chun, (2009) 45

Cal. 4th 1172. Chun, a gang member, fired shots from his vehicle into another vehicle he knew was owned by a rival gang memeber. Someone else in Chun's vehicle also fired shots into other vehicle. The other vehicle had darkened windows and, unbeknownst to Chun and his confederate, was actually occupied by the rival gang member's sister and her friend. The sister was killed, and it was not clear who had fied the fatal shot. (Id., at 1179.) Chun was convicted of second-degree murder after the jury had been instructed that it could convict him of second-degree felony murder based on the underlying felony of shooting into an occupied vehicle as either a principal or aider and abettor. (Id.)

As noted earlier, Chun was a path-breaking decision on second-degree felony murder in California because it held, contrary to decades of precedent, that the second-degree felony murder rule is mandated by statute. Chun also broke new ground on another important front, which is the so-called "merger" limitation on second-degree felony murder. Starting with People v. Ireland, supra, (1969) 70 Cal. 2d 522, 539, the California Supreme Court refused to allow the operation of the second-degree felony murder rule where the underlying felony was "integral to" and "included in fact" within the resulting homicide. In Ireland, the jury instructed that it could convict of second-degree felony murder if the killing was the "direct causal result of the

perpetration of . . . assault with a deadly weapon." (Id., at 538.)

The defendant had shot and killed his wife point blank while he was heavily intoxicated. The California Supreme Court found that the instruction was erroneous because the assault was integral to and included in fact within the resulting homicide. (Id., at 539.) It was up to the jury to decide whether the defendant, under the circumstances, really intended to kill his wife or whether it was instead a kind of manslaughter. The prosecution should not have been permitted to "bootstrap" the assault into murder if there was no independent proof of malice aforethought. (Id.)

As chronicled by the Chun opinion, so began a long and tortured trail of decisions regarding the scope of the Ireland rule (also referred to as California's version of the "merger" doctrine. (Id., at 539, see also Id., at n. 15 (collecting authorities on the merger doctrine from other states).) Such utterly perplexing series of decisions is beyond the scope of this analysis. It safe to say that Chun repudiated these confusing decisions and settled on a simple definition of the merger rule namely, that a felony may not serve as a predicate for a second-degree felony murder conviction if the felony is "assualtive in nature." (Chun, supra, Cal. 4th at 1200-1201.)[8/]

---

8. There is still the possibility that certain felonies will be in a gray area between "assaultive" and "non-assaultive," but this rule is considerably less

But if Chun augured a sea change in the merger limitation on second-degree felony murder, it did absolutely nothing to change the law regarding the inherently dangerous felony limitation. "This ristriction is not at issue here," stated flatly Justice Chin's opinion for the Court. (Id., at 1188.) Relying on Hansen's finding that shooting into an inhabited dwelling house was inherently dangerous, Justice Chin concluded that shooting into an occupied motor vehicle is also self-evidently inherently dangerous. (Id.) Chun, then, said nothing new about the inherently dangerous felony doctrine.

As a preliminary matter, it should be noted that the abstract approach to this doctrine breaks down into two parts: (1) the proper factual field of reference (that is, minimum conduct or ordinary commission), and (2) the threshold of risk that qualifies as inherently dangerous. The law on the correct threshold of risk is "high probablity." (People v. Patterson, (1989) 49 Cal. 3d 615, 618.) It is true that the Howard opinion recites the threshold as "substantial risk," People v. Howard, supra, 34 Cal. 4th 1129, 1135, but it makes no acknowledgement of the apparent discrepancy, much less any reasoned explanation for it. In the absence of any such explanation, it is best to assume that the "high probability" standard still governs.

The first part, unfortunately, of the existing abstract approach to inherent dangerousness is not clear at all. Three decisions—Satchell, Burroughs, and Howard—clearly come down on the side of minimum conduct as the proper field of reference. Three others decisions - Patterson, Hansen, and Nichols - clearly come down on the side of ordinary commission case, but it gives no reasoning except to suggest that Hansen was virtually on all fours. None of these cases has ever overruled any of the others on the inherently dangerous felony point. Thus, technically, they are all good law.

The scorecard in terms of which felonies have been determined inherently dangerous and which have not, is decidedly mixed. Felonies that have been held inherently dangerous to human life include shooting at an inhabited dwelling, People v. Hansen, (1994) 9 Cal. 4th 300, overruled by People v. Chun, (2009) 45 Cal. 4th 1172, poisining with intent to injure, People v. Mattison, (1971) 4 Cal. 3d 177, arson of a motor vehicle, People v. Nichols, (1970) 3 Cal. 3d 150, grossly negligent discharging a firearm, People v. Robertson, (2004) 34 Cal. 4th 156, overruled by People v. Chun, supra, manufacturing methamphetamine, People v. James, (1998) 62 Cal. App. 4th 244, 271, kidnapping, People v. Greenberger, (1997) 58 Cal. App. 298, 377; People v. Pearch, (1991) 229 Cal. App. 3d 1282, and reckless or malicious possession of a destructive device. (People v.

v. Morese, (1992) 2 Cal. App. 4th 620, 646.) Felonies that have been not inherently dangerous to life include practicing medicine without a license under conditions creating risk of great bodily harm, serious physical or mental illness, or death, People v. Burroughs, (1984) 35 Cal. 3d 824, false imprisonment by violence, menance, fraud, or decit, People v. Henderson, (1977) 19 Cal. 3d 86, 92-96, overruled by People v. Flood, (1998) 18 Cal. 4th 470, possession of a concealable firearm by a convicted felon, People v. Satchell, (1971) 6 Cal. 3d 28, 38-39, overruled by People v. Flood, supra, possession of a sawed-off shotgun, id., at 41-43, escape, People v. Lopez, (1971) 6 Cal. 3d 45, grand theft, People Phillips, (1966) 64 Cal. 2d 574, overruled by People v. Flood, supra, conspiracy to possess methedrine, People v. Williams, (1965) 63 Cal. 2d 452, extortion, People v. Smith, (1998) 62 Cal. App. 4th 1233, 1236-1238, furnishing phencyclidine, People v. Taylor, (1992) 6 Cal. App. 4th 1084, 1099, and child endangerment of abuse, People v. Lee, (1991) 234 Cal. App. 3d 1214, 1229. If there is a discernable pattern here, it is subtle indeed.

This recitation reminds one of Justice Scalia's in Johnson. From 2007 to 2011, the United States Supreme Court reviewed four cases presenting the question of which state felonies posed a "serious potential risk of physical injury" within the meaning of the ACCA residual clause. First, the Court held that attempted

burglary in Florida does present a serious potential risk of physical injury. (James v. United States, (2007) 550 U.S. 192, 195, overruled by Johnson v. United States, (2015) 135 S. Ct. 2551.) Then, it held that driving under the influence in New Mexico does not present a serious potential risk of injury. (Begay v. United States, (2008) 553 U.S. 137, 147-148.) Next, the Court held that failure to report to a penal institution in Illinois does not present a serious potential risk. (Chambers v. United States, (2009) 555 U.S. 122, 128-130.) In 2011, the Court held that vehicular flight from a law enforcement officer in Indiana does present risk of injury. (Sykes v. United States, (2011) 131 S. Ct. 2267, overruled by Johnson v. United States, supra.) In Johnson, the goverment asked the Court to deem possession of a short-barreled shotgun in Minnesota a serious potential risk of injury. The Court despaired of finding a workable test to determine serious potential risk, asked the parties to brief the question of vagueness, and finally declared the clause vague. The Court declared its residual clause jurisprudence a failed enterprise:

> This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. Here, this Court's repeated attempts and repeated failure to craft a principled and objective standard out of the residual clause confirms its hopeless indeterminacy.

. . .

> [C]ommon sense is a much less useful criterion than it sounds. . . . How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum [of risk] Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated [ACCA] crimes; there is no reason to expect it to thousands of unenumerated crimes.

(Johnson, 135 S. Ct. at 2558-2559.)

The seeming unpredictability of results under the residual clause was not by itself what led the United States Supreme Court to declare the clause vague. It was also the fact that the Court had tried so many different approaches and failed with all of them. Furthermore, the Court had tried comparing felonies not enumerated in the ACCA to felonies that were unumerated. It tried fashioning a test — "purposeful, aggresive, and violent." It tried statistics. It tried statistics plus "common experience." (Sykes, 131 S. Ct. at 2278 (Thomas, J., concurring).)

Every one of these approaches fell short. The felonies enumerated in the ACCA were too disparate, risk-wise, to provide guidance (burglary, extortion, arson, and "use of explosives," the last of which isn't even the name of a felony at all). The "purposeful, aggressive, and violent" test had no basis in the text of the ACCA. The statistical approach failed because there simply was not the kind of comprehensive data-base required to draw meaningful conclusions, and

"common experience" is only persuasive to the degree that everybody experience the world the same way.

By swapping a few choice words, Justice Sacalia could well have been writing an opinion declaring California's inherently dangerous felony doctrine a failed enterprise. Before the 1960s, California ascertained dangerousness by looking at the actual facts. Then it switched to an "abstrct" approach with no rationalization or articulation of any field of reference. Then it articulated "high probability" as a threshold. Finally, in its last two decisions, it used minimum conduct for one and ordinary commission for the other, as well as articulating "substantial risk" as a threshold. "What sets ACCA apart from those statutes - and what confirms its incurable vagueness - is our repeated inability to craft a principled test out of the statutory text," stated Justice Scalia. (Id., at 2287 (Scalia, J., dissenting).)

C. SECOND-DEGREE FELONY MURDER MUST BE STRIKEN DOWN - "VOID FOR VAGUENESS" - IT VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE IT FAILS TO PROVIDE "FAIR NOTICE" TO THE ORDINARY PERSON OF THE PROHIBITED CRIME, AND IT INVITES "ARBITRARY" AND "DISCRIMINATORY " ENFORCEMENT FOR WHICH CRIME IT INTENT TO PUNISH

(1) THE APPLICABILITY OF THE "VAGUENESS " ANALYSIS TO THE "FELONY MURDER RULE"

The rationale of Johnson wholly and precisely encompasses California's current inherently dangerous

felony doctrine. According to Johnson, the residual clause's core infirmity was that it anchored risk to hypothetical facts - that is, that the measurement of risk was based on an idealized version of the felony. From a vagueness standpoint, the problem with such a rule is that neither the concept of risk nor hypothetical facts are attached to anything concrete. To use a mechanical metaphor, it would be to connect one pivioting joint to another pivioting joint, with neither joint attached to anything stationary. Both the residual clause of ACCA and the inherently dangerous felony doctrine in California do extactly that. Furthermore, while Petitioner appreciates the lawyerly intuition dangerous felony rule seem like very different laws, intuitions must not be acted upon in tha face of hard logic.

If we are to treat the two situations differently, we must be able to articulate some meaningful basis for different treatment. When someone serving life in California prison for second-degree felony murder now articulates a precise reason why Johnson applies to the inherently dangerous felony doctrine —— namely, that in both situations the measurement of risk is hinged to a hypothesized version of facts - it is not enough for the system to respond, "Well, it's just not the same thing. They feel different. So you will spend the rest of your life in prison." Petitioner has made what might be called a prima facie showing that the ACCA

residual clause and the inherently dangerous felony doctrine share the same constitutional infirmity. The burden now shifts to the goverment to explain precisely why the comparison is inapt. Intuition, no matter how strong or widely shared, is not an adequate rebuttal. Now let us, then, explore five possible grounds upon which these two doctrines might be distinguished for vagueness purposes.

One possible ground of distinction would be that felony-murder differs from a mandatory minimum sentence because the very notion of felony-murder recognizes that felons give up any standing to complain about their treatment when they commit the underlying felony and thereby kill someone. A second possible argument would be that "inherent dangerousness" (the ACCA). A third possible ground of distinction would be that risk of death (felony-murder) is different from risk of physical injury (ACCA). A fourth possible ground of distinction is that the ACCA is a sentencing enhancement statute, whereas the felony-murder doctrine is a rule of liability. Finally, it could be argued that the residual clause in ACCA was compared to felonies explicitly enumerated elsewhere in ACCA, whereas there are no enumerated felonies that trigger second-degree felony murder. Each one of these asserted distinctions fails.

No doubt the animating force behind the felony-murder rule is an intuition that those who commit felonies

forfeit their right to the niceties of the mens rea doctrine when they kill someone. It is sometimes said that thefelony-murder rule deters killings precisely bacause of its simplicity: "you do the crime and you kill someone, you do the time. If you commit a serious offense, we do not want to hear that you 'didn't mean to kill anyone.'"However reputable or disreputable this intuition may be, it does not distinguish the felony-murder rule from the residual clause of the ACCA. The ACCA is a federal three-strikes statute. It operates on the basis of a highly analogous popular intuition about deterring crime: three strikes and you're out. You commit three felonies, we do not want to hear any arguments about whether they were technically "violent" or not. You have forfeited your right to complain. Yet that did not stop the Supreme Court from holding the residual clause unconstitutionally vague.

And for good reason. Congress may not delete someone's constitutional right to adequate notice of what a criminal statute covers. The ACCA might have more deterrence potential if it were exempt from the constitutional rule against vague statutes, but it does not matter. Similarly, the second-degree felony murder rule might deter more people if it were exempted from the vagueness doctrine: but that move is simply out of bounds. The Legislature may delete the mens rea requirement from a criminal offense, so long as that does not violate the Constitution. The courts have

(rightly or wrongly) decided that the felony-murder rule does not violate the Constitution on the ground that it lacks a requirement of mental culpability with respect to the killing. But the Legislature may not delete the requirement of constitutionally adequate notice for any offense.

The second asserted ground of distinction requires little response because both "dangerous" and "risk" denote probabilistic concepts. The California Supreme Court has always treated dangerousness as the question of likelihood that an actor's commission of a given felony would bring about the death of another human being. The United States Supreme Court has treated residual clause risk as the physical injury to another human being. Neither inquiry involves any normative consideration, as in whether the danger/risk was unjustifiable. In either case, it is assumed that the criminality of the conduct makes it per se unjustifiable. The inquiry with both dangerousness and risk is purely predicative: not qualitive in any way. For vagueness purposes—that is, for the purpose of providing notice to actors—dangerousness and risk are materially indistinguishable.

Nor does the third asserted ground require much analysis. There is no meaningful difference, vagueness-wise, between risk of death and risk of physical injury. It is true that death is unambiguous (putting aside cessation of brain activity/persisten vegetative state

controversies), while the existence or non-existence of physical injury can be contested in concrete cases. But this argument completely ignors the case law. The United States Supreme Court's residual clause jurisprudence has never had any problem with defining physical injury, in the abstract or in concrete situations. Instead, the United States Supreme Court's problem has been defining "serious potential risk" in the abstract—just as the California Supreme Court's problem has been defining "inherent dangerousness" in the abstract. There is no distinction to be made between risk of death and risk of injury, from a notice standpoint. People in California have no more ability to predict which felonies will be held inherenntly dangerous to human life than people throughout the United States could predict which felonies posed a "serious potential risk" of physical injury - and for the exact same reason. No one can accurately predict how much imagination judges are going to employ in hypothesizing facts. (Cf. Gonzalez v. Duenas-Alvarez, (2007) 549 U.S. 183, 193 ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language").)

The fourth asserted distinction is the easiest to dispatch. Yes, the ACCA residual clause is a rule of sentencing, while the second-degree felony murder rule

(which subsumes within it the inherently dangerous felony limitation) is a substantive rule of criminal law. One governs the degree of punishment while the other governs liability. But if this distinction has any purchase at all, it cuts in favor of finding vagueness here. Surely actors are no less entitled to clear notice about the boundaries of substantive criminal liability rules than they are about sentencing rules. If we were to recognize a distinction between the two, actors would be more entitled to notice about liability rules. (Cf. Chapman v. United States, (1991) 500 U.S. 453, 467-468 (suggesting that vagueness scrutiny for sentencing statutes is less exacting than for primary criminal conduct statutes, and stating, "[t]his is particularly so since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").) In Johnson itself, the Court stated that the due process doctrine of vagueness "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences. (Johnson, 135 S. Ct. at 2557.) In support of that proposition the Court cited United States v. Batchelder, (1979) 442 U.S. 114, 123, which stated that "vague sentencing provisions may pose consequences of violating a given criminal statute."

The fifth asserted ground of distinction is that the ACCA residual clause was made unique by its juxtaposition to specifically enumerated felonies, which

further complicated the risk analysis. Section 924(e)(2)(B) states:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive devise that would be punishable by imprisonment for such term if committed by an adult, that —
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

(See 18 U.S.C. § 924(e)(2)(B) (West 2006)

The focus here is on subsection (ii). It expressly designates burglary, arson, extortion, and felonies involving use of explosives as "violent," thus making them count toward the three strikes that trigger a mandatory minimum sentence. The enumeration of those four felonies is followed by the residual clause or "otherwise" clause, which includes any other felonies that involve conduct presenting a serious potential risk of physical injury to another.

In Johnson, Justice Scalia's opinion for the Court mentioned this juxtaposition of enumerated and unenumerated felonies as a factor contributing to the vagueness of the residual clause:

> By asking whether the crime "otherwise involves conduct that presents a serious potential risk, moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes-burglary, arson, extortion, and crimes involving the use of explosive. These offense are far from clear in respect to the degree of risk each poses. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten by mail with the revelation of embarrssing personal information? By combining-indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause ... tolerates

(Johnson, 135 S. Ct. at 2558 (citation omitted).)

This structural feature of the ACCA - placing enumerated felonies next to a residual clause, and thereby complicating the risk analysis - is nearly identical to California Penal Code section 189. As noted above, the structure of section 189 is to enumerate certain situations, most of them commissions of underlying felonies, in which a murder is first-degree, and then to declare that all other murders are second-degree. In other words, section 189's second-degree murder provision is itself a residual clause:

> All murder which is perpetrated by means of a destructive devise or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or-by any other kind of willful, deliberate, and premeditated killing, or which is commited in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train-

> wrecking, or any act punisable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehcile, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

(Cal. Penal Code § 189 (West 2015) (emphasis added).)

The last sentence of section 189 is a residual clasue, and it creates exactly the same problem that plagued the ACCA resdiual clause in terms of gauging risk. When a court asks whether an unenumerated felony is inherently dangerous, it performs that analysis in the shadow of section 189's many enumerated felonies. But how often do those enumerated felonies end up in a killing? Justice Scalia used burglary as an example of the difficulty of gauging risk in the abstract. Occupied home at night or unoccupied home in the daytime? In the absence of comprehensive statistics, there is simply no non-arbitrary answer to that question. (Johnson, supra, 135 S. Ct. at 2557 (comprchensive statistics do not exist).) Yet section 189 specifically enumerates burglary, just as the ACCA residual clause does. Indeed, the risk analysis for enumerated felonies in section 189 is worse: because it includes attempts to commit all those enumerated felonies as well as successful commissions of the felonies. If it is hard to gauge the risk of injury or death in an abstract burglary, how hard is it to gauge the risk of injury or death in an attempted burglary? The mind reels.

One potential confusion must be avoided. In Johnson, the Court stated that it would not be vague for a statute to measure risk off the real-world facts or "statutory elements." (Id.) One might get the impresion from this statement that California's inherently dangerous felony doctrine is therefore valid because the abstract approach to determining dangerousness is based on an analysis of statutory elements. But that is plainly not what the Johnson Court meant. In order to see this, one must return to the text of the ACCA.

The relevant portion of the statute has three parts. The first part, section 924(e)(2)(B)(i), defines a violent felony as any felony that "has as an element . . . the use of physical force against the person of another." The second part, which is the first clause of section 924(e)(2)(B)(ii), specifically denominates as violent felonies four particular offense--burglary, extortion, arson, and use of explosives. The third part, the residual clause, which is the second clause of section 924(e)(2)(B)(ii), includes any other felony whose conduct involves a serious potential risk of injury. When Justice Scalia refers to "statutory elements" being an acceptable, non-vague mode of analysis, he does not mean the kind of elemental analysis involved in section 924(e)(2)(B)(i) - that is, literally, does the element of force appear in the statute defining the underlying felony?

So, what is the difference? Under section 924(e)(2)(B)(i), the question is whether the text of a statute contains the word "force." Traditional rape statutes contained the term force; some of the modern ones do not. This kind of analysis is as determinative as it gets in the law. Even if section 924(e)(2)(B)(i) extends to case law reading a force requirement into a statute that lacks an explicit mention of the word, the analysis is highly determinatve for constitutional purpose. However unrealistic that is, one is presumed to know the judicial gloss on criminal statutes.

The elemental analysis is California's inherently dangerous felony cases, on the other hand, is not highly determinative. The question there is not whether "inherent dangerousness" is a formal element of the underlying felony; it is whether the formal elements of the underlying felony can be said, at a minimum, to require conduct that can fairly be characterized as inherently dangerous to human life. If the inherently dangerous felony cases pivoted on whether the statute contined the word "danger" or "dangerous," they would have no vagueness problem. If they pivoted on the presence or absence of the word "risk," they would not be vague. Even if the inherently dangerous felony cases pivoted on whether judicial gloss had read "danger" or "risk" into a statute, they would not be sufficiently vague to violate due process.

Under the minimum conduct cases like Satchell, Burroughs, and Howard, the question is whether one could imagine any plausible set of facts which: (1) satisfies the essential elements of the offense, and (2) does not pose a "high probability" of killing someone. This is anything but brigh-line analysis, for it contains two open-ended inquiries. Which hypothetical facts are "plausible" is an inherently subjective inquire, as is the question of what constitutes a "high probability." Both inquiries are subject to significant disagreement among reasonable judges, which is predicability - and, therefore, notice to actors - of which felonies will be found inherently dangerous.

The "ordinary commission" cases like Patterson and Hansen are no less arbitrary. In Patterson, the California Supreme Court remanded to the trial court to consider "medical articles and reports" offered by the goverment to prove that furnishing cocaine is inherently dangerous to human life. (Patterson, supra, (1989) 49 Cal. 3d 615, 625.) Although Petitioner has been unable to find a record of what happened on remand, it is extremely doubtful whether the goverment actually produced conprehensive statistics on what happens when one person furnishes cocaine to another person. Doubtless there are plenty of "medical articles and reports" documenting the frequency of fatal cocaine overdoses, but that would not have been sufficient to

resolve the legal question. The goverment would have had to to have produced comprehensive statistical evidence of how often people have fatal overdoses after ingesting cocaine that has been furnished to them in violation of California Health & Safety Code section 11352. In other words, a report confirming that x number of people died from cocaine overdoses in any given year would not satisfy the goverment's burden. The relevant question would be: In what percentage of cases involving violations of section 11352 do people die? If 100 people died of cocaine overdoses in a year, that seems like a lot; but if 100,000,000 cocaine transactions in violation of section 11352 occurred that year, that amounts to .000001, which is infinitesimal. On the other hand, if 100 fatalities came from 10,000 transaction, that amounts to .01, which is fairly frequent. It is extremely doubtful whether the goverment could have produced statistics at the level of granularity.

It is the double whammy of uncertainty that made the residual clause unconstitutional, and which makes the abstract approach to the inherently dangerous felony doctrine equally unconstitutional. Using an abstract approach to imagine facts that are then gauged for some threshold of risk amounts to an abstraction of abstraction. It is not merely to ask what Hamlet would have looked like if Shakespear had been born to share croppers in Mississipi; it is then

to ask wether contemporary literary critics would have liked it. However fun that might be at a cocktail party, that kind of hyper-imaginative exercise cannot produce the minimal predicability and notice necessary to satisfy due process in the criminal law. As things currently stand, the second-degree felony murder rule in California is unconstitutionally vague.

(2) APPROACHING TO THE "ACTUAL FACTS"

Petitioner has demonstrated the need for action of some kind. In theory, that action could come from the California Legislature. The Legislature could proactvely amend its homicide statute to codify the second-degree felony murder rule with an explicit "actual facts" approach to determining which felonies are dangerous enough to qualify. That would be constitutional. Or it could explicitly abrogate the second-degree felony murder rule.

Political action in the absence of judicial action is, however, extremely unlikely. The responsiblity of remedying the current constitutional infirmity of the second-degree felony murder rule will almost certainly fall on the court - ultimately, the California Supreme Court. The High Court does not have the option of creating an exhaustive list of felonies that qualify as predicates for the operation of the second-degree felony murder rule. That would be to encroach on legislative prerogative. That leaves two remaining options: switching to an "actual facts" approach or

abolishing the second-degree felony murder rule altogether. Candorness requires Petitioner to acknowledge that, unlike his argument about the constitutionality of abstract approach to determining dangerous felonies, he has no claim that logic requires any choice bewteen these two remedial options. Nothing more than logic is required to demonstrate the fatal inconsistency of the abstract approach to dangerous felonies under Johnson, which is legally binding on California. However, logic requires only that something be done about the current rule--it does not dictate what that something is. With that disclaimer, Petitioner now proceeds to offer a few brief thoughts about the "actual facts" or "actual conduct" approach.

Let us begin with critical observation that, although the Legislature is unlikely to do anything until the courts act, the Legislature will always have the last say on whether or not to have a second-degree felony murder - if it wants to have that say. If the California Supreme Court strikes the current rule down as "viod for vagueness" and does not replace it, Legislature could react by adding a section to the homicide statute explicitly codifying the second-degree felony murder rule and listing all the felonies that support it, or, more likely, explicitly requiring an "actual facts" approach to determining which felonies are sufficiently dangerous. Thus, with respect to remedy, the Court need not be concerned

about displacing legislative prerogative. There is no occasion here for deference to the Legislature. No matter which option the California Supreme Court chooses, it will not destroy the Legislature's ability to have the last word. The High Court should therefore exercise its best independent judgment about what remedial course to take.

California stands alone in its exclusively abstract approach to the dangerous felony limitation on felony-murder. Most states have a felony-murder rule, and most of those states have a requirement that the underlying felony be dangerous to human life. Among these states, California alone takes a purely abstract approach. Other states that retain a felony-murder rule hold that the "foreseeable" dangerousness of the underlying felony is to be measured by the circumstances of the case at bar.

To see this, consider some decisions from other state supreme courts. In Commonwealth v. Matchett, (Mass. 1982) 436 N. E. 2d 402, the Massachusetts Supreme Judicial Court reversed a second-degree felony murder conviction based on extortion. "We hold today that when a death results from the perpetration or attempted perpetration of the statutory felony of extortion, there can be no conviction of felony-murder in the second degree unless the jury find that the extortion involved circumstances demonstrating the defendant's concsious disregard of

the risk to human life." (Id., at 410)

In Jenkins v. State, 230 A. 2d at 269, where the predicate felony was fourth-degree burglary, the Delaware Supreme Court held, "It is the opinion of the Court . . . that the felony-second degree murder rule of this State should be limited to homicides proximity caused by the perpetration or attempted perpetration of felonies which are, by nature or circumstances, foreseeably dangerous to human life, whether such felonies be common law or statutory." "Burglary in the fourth degree may, or may not, be foreseeably dangerous to human life, depending upon whether someone may be reasonably expected to be present in the building, and upon other circumstances of the case, held the Court. (Id.)

In State v. Wallace, (Me. 1975) 333 A. 2d 72, the Supreme Judicial Court of Main upheld a felony-murder conviction based on sodomy committed against an eight-year-old boy. The Court held:

> [T]he felony-murder rule in Maine requires in addition to a causal relationship bewteen the felony being committed, or attempted, and the death, proof beyond a reasonable doubt that-the manner or methoed of its commission, or attempted commission, present a serious-threat to human life or is likely to cause serious bodily harm.

(Id., at 81.)

The Court conceded that consensual adult sodomy is not necessarily dangerous to human life, but, "while force and violence are not necessarily dangerous to human

- it may equally well be committed by the use of potentially deadly force." (Id., at 82.)

In State v. Harrison, (N.M. 1977) 564 P. 2d 1321, superseded by Tafoya v. Baca, (N.M. 1985) 702 P. 2d 1001, the Supreme Court of New Mexico held that false imprisonment may qualify as a predicate felony for purposes of the felony-murder rule if the manner of its commission is dangerous. In New Mexico, the legislature has denominated some felonies as first degree, while others are of lesser degree. A killing caused by the commission of a first-degree felony is automatically felony-murder without regard to whether the circumstances were dangerous. (Id., at 1324 ("In felony murder cases where the felony is a first-degree felony such a presumption is appropriate, but not where the felony is of a lesser degree").) In Harrison, however, the Court held that the same rule should not apply to killing caused by the commission of lesser-degree felonies. "[I]n a felony murder charge, involving a collateral lesser-degree felony, that felony must be inherently dangerous," the Court explained. Contrasting its holding with the California rule, the Harrison Court explicated:

> Today the courts apply this test in two differing manners: (1) the felony is examined in the abstract to determine whether it is inherently dangerous to human life [citing Satchell] or (2) both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human-life. We adopt the latter test.

(Id. (citations omitted).)

Further, in State v. Thompson, (N.C. 1972) 185 S.E. 2d 666, the North Carolina Supreme Court considered whether a killing caused by the commission of a felonious breaking and entering could support a verdict of first-degree felony murder. North Carolina's first-degree murder statute states that any murder committed "in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary or other felony shall be deemed to be murder in the first degree." (N.C. GEN. STAT. § 14-17 (West 2015).) In order for an unenumerated felony to serve as a predicate for first-degree murder in North Carolina, that felony must be either dangerous in the abstract or foreseeably dangerous under the circumstances:

> In our view, and we so hold, any unspecified felony is within the purview of G.S. § 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to , felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. § 14-17.

(Thompson, 185 S.E. 2d at 672.)

The Thompson rule is essentially indentical to the rule in Harrison, in the sense that a felony qualifies if it is either inherently ("abstract") dangerous or if it is foreseeably dangerous under the circumstances of the case. This superficially appears to be a "hybrid"

rule, the "best of both worlds," because it includes both the abstract and actual fact approaches. But any hybrid quality is chimerical. The "addition" of the abstract approach to the ordinary commission approach actually adds nothing at all. In any case where, under the circumstances, the underlying felony was not foreseeably dangerous to human life, the felony will not be dangerous in the abstract either. Under the minimum conduct appraoch to abstraction, a felony is only inherently dangerous if every imaginable instance would be dangerous. By definition, if the case at bar presents a "non-dangerous" situation, then the minimum conduct test is not met. Under ordinary commission approach to abstraction, a felony is only inherently dangerous. But if the defendant's conduct in the case at bar is not "foreseeably dangerous to human life," then again, virtually by definition, the ordinary commission of that felony is not dangerous. The term "foreseeable" is largely parastic on the notion of ordinariness or typicality. An act is only foreseeably dangerous to human life if similar acts lead to death on at least a semi-regular basis. Thus, the hybrid approach followed in Harrison and Thompson (and apparently in many other jurisdictions) really amounts to nothing more than the actual facts approach. (See STEPHEN A. SALTZBURG, ET AL., CRIMINAL LAW: CASES AND MATERIALS 342 (3d ed. 2008) (collecting authorities).)

Because the "hybrid" approach turns out to be little more than an actual facts approach, there is no vagueness problem with it. Such an approach is intellectually dishonest: it sounds like the best of both worlds when in fact it represents only one world, but it is not unconstitutional.

(3) THE RESOLUTION TO THE "INHERENTLY DANGEROUS TO HUMAN LIFE" OF SECOND DEGREE FELONY MURDER

If the California Supreme Court were to swap the abstract approach out for an actual facts approach, it would solve the constitutional problem. But we believe that would be a mistake. The actual conduct test is intellectually dishonest and unfaithful to society's basic understanding of murder as the purposeful or extremely reckless taking of human life. It permits individuals to be punished for murder based on nothing more than negligence.

Murder is the most serious condemnation available to the criminal law. California has many grades of manslaughter, including voluntary manslaughter, involuntary manslaughter, and several grades of vehicular manslaughter, depending on just how intoxicated and/or reckless the driver. The word "murder" is reserved for killings brought about by more than carelessness or even recklessness. This is to say nothing of the severity of the punishment for murder in California, which is a mandatory life sentence. The judge has no discretion whatsoever after even a second

degree murder conviction. The formal mandatory sentence of "15 years to life" conceals the reality of this punishment, which would be more aptly explained as "life in prison, with the small possibility that the Board of Prison Terms (all poltical appointees) will grant parole at some point after the minimum term of years has been served." In fact, less than twenty percent of people sentenced to life in California are ever paroled. (See UNIVERSITY OF SOUTHERN CALIFORNIA: CALIFORNIA PAROLE PROCESS, http://uscpcjp.com/legal-overview/.) Moreover, the only other ways for them to be released are to have their convictions overturned or to receive executive clemency.

If the conceptual paradigm of malice, and therefore murder, is an intentional killing, felony-murder is miles from that paradigm. What is colloquially referred to as "implied malice" or conscious disregard" murder already represents a significant attenuation from the paradigm. To be convicted of this form of murder, the goverment must prove that the defendant acted in the face of a conscious disregard for the risk that a human being would be killed. (People v. Knoller, (2007) 41 Cal. 4th 139, 170.) The defendant must have actually considered that risk and acted in spite of it. Note that conscious disregard of some risk of killing is not enough; it must be consciousness of a high risk, which distinguishes this form of murder from mere reckless homicide.

(People v. Coddington, (2000) 23 Cal. 4th 529, 593, overruled by Price v. Superior Court, (2001) 25 Cal. 4th 1046 (although Knoller states the rule for conscious disregard murder without specifying a threshold of risk ("[w]e conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life"), this must have been an inadvent omission. The Court could not possibly have meant that a conscious disregard of the most infinitesimal chance of death could satisfy thc standard. Such a mental state could not possibly qualify as "abandoned and malignant heart." (Cal. Penal Code section 187 (West 2015)).) A killing in the face of a conscious disregard of a less-than-high risk of killing is involuntary manslaughter, which, in California is punishable by two, three, or four years in prison. (See Cal. Penal Code § 193(b) (West 2015).)

The classic case of involuntary manslaughter is a ciminally negligent killing. (Cal. Penal Code section 192(b) (West 2015), which defines non-vehicular manslauhter, states: "Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The California Supreme Court has long held that this definition generally equates to a criminally negligent killing. See People v. Howk, (1961) 56 Cal. 2d 687, 703-

704; People v. Penny, (1955) 44 Cal 2d 861, 879.) In such a prosecution, the goverment need not prove that the defendant actually thought about the risk that his conduct might kill someone, it is enough that a hypothetical "reasonable person" in the defendant's situation would have thought about the risk and desisted from the conduct. When someone kills in this situation, the conduct is highly socially irresponisble, and it deserves both serious condemnation and punishment. As noted above, California law treats this as involuntary manslaughter.

Some second-degree felony murders also meet the requirements for conscious disregard murder. Let them be judged by that standard. (Note: the Massachusetts Supreme Judicial Court has adopted an "actual facts" rule requiring that the defendant "consciously disregard the risk to human life." Depending on the required quantum of risk that the defendant must have perceived, this situates the Massachusetts felony-murder rule somewhere between reckless homicide and extreme recklessness murder. See supra notes 198-199 and accompanying text.) It is wrong to lump criminally negligent killings in with conscious disregard killings, both because of the lack or required awareness in negligence and because of the lower risk threshold in negligence. Some felony-murders are nothing more than criminally negligent killings, so the goverment should not be permitted to get a felony-murder instruction that effectively serves

to water down the "reasonable doubt" standard for the requisite mental element of conscious disregard murder. The goverment should sink or swim based on its ability to prove conscious disregard. Consciousness can be proven by circumstantial evidence beyond a reasonable doubt, the conviction should be for no more than involuntary manslaughter. Such a killing should not be punishable by life in prison.

Even if one has no problem with the notion of negligent murder as a concept, there is a serious problem with the adminstration of the "actual facts" test. In the real world, it strongly invites circular reasoning. Once the jury has been walked through voluminous evidence on how the killing occurred, replete with photos of the corpse and detailed forensic analysis of the fatal wound(s), the instruction will then ask the jury whether the felon's conduct was "foreseeably dangerous" to human life. How likely is it that a jury, having effectively watched this killing take place in super-slow motion several times, will come to the conclusion that it was not foreseeably dangerous? As Justice Grodin stated in Burroughs, under an actual facts approach to dangerousness, "[T]he existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous." (People v. Burroughs, supra, 35 Cal. 3d 824, 830.) Hindsight is 20/20.

A felony-murder rule supposedly limited by a "dangerous felony" requirement based on an "actual facts" approach is arguably worse than a felony-murder rule with no dangerous felony limitation at all. The implicit promise of a dangerous felony limitation is that the system contains a structural safeguard against punishing purely accidental killings as murder. This promise insulates the felony-murder rule against critisim. Yet the promise is illsuory, for the fact of a killing "lead[s] inexorably" to the conclusion that the felony was conducted in a dangerous manner. The actual facts approach would thereby render the second-degree felony-murder rule politicaaly opaque. It would obscrure from the Legislature's view the reality that the felony-murder rule can, and inevitably will, be imposed in some cases involving purely accidental killing. In other words, the judicial adoption of an actual facts approach would hinder the political process from doing its job of evaluating the second-degree felony murder rule for what it really is.

The reluctance to grant facial challenges is in part due to the Court's aversion to resting decisions of constitutional magnitude on hypothetical scenarios. (See Hill v. Colorado, (2000) 530 U.S. 703, 733.) But given the countless very real predicate offenses arising from every county of this state, the Court need not reach out for imagined situations in order to assess the broad vagueness of the second degree felony murder ("inherently

dangerous to human life") provision. Petitioner urges the Court that he has established that "inherently dangerous to human life" is vague in all of its application, including the real application currently before the Court, the real cases that have come before, and the real questions that have yet to be answered. Certainly the Court's power to declare a statute unconstitutionally vague is "strong medicine" to be used sparingly. (See NEA v. Finley, (1998) 524 U.S. 569, 580 (noting that facial invalidation of a statute as unconstitutionally vague is "strong medicine" which should be "employed by the Court sparingly").) This case, however, calls out for that "strong medicine."

Although the jury was not instructed on the language of "inherently dangerous to human life" but rather on the standard language of "natural and probable consequences to human life," the language is the equivalent to one another. The word "natural" is the functional equivalent to "inherently"; thus, CALJIC 8.11 is a jury instruction of the "inherently dangerous to human life." (See Merruan-Webster's School Dictionary ("2004") p. 636.)

* * * *

IV. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THAT PETITIONER WAS A "MAJOR PARTICIPANT" IN LIGHT OF THE "BANKS" ANALYSIS; THAT HE AIDED AND ABETTED IN THE COMMISSION OF SECOND DEGREE FELONY-MURDER

The Hight Court of the State of California sent shock waives with its recent ruling for accomplices — also known as "aider and abetters." The Banks Court essentially held that an accomplice(s) cannot be held liable (or, better said, convicted) of a crime; such as the one before this Court, that is, of course, Petitioner Renteria's conviction of second degree felony murder, if there was no evidence indicating as a "majory participant." (See People v. Banks, (2015) 61 Cal. 4th 788.)

Or, in the alternative, and for a better clarity, if the evidence divulges naught that the ". . . person, not the actual killer, who, . . . as a major participant," aids and abets in the commission of a crime, the accused cannot be convicted of a crime. (Id., at p. 798.)

As a "major participant," there has to be, direct or circumstantial, evidence so compelling that an accomplice had intent to commit a crime. (Id., see also Edmund v. Florida, (1982) 548 U.S. 782; Tison v. Arizona, (1987) 481 U.S. 137.) So if there is no evidence that Petitioner was a "major participant," he is legally innocent. (Jackson v. Virgina, (1979) __ U.S. __.)

Here, Freddie Soto, a witness to events surrounding the shooting, told police that he had seen a white Toyota pickup with three "Mexicans" at the scene of the shooting: that he had followed the truck in his car when he saw several gunshots coming-out from that truck directed to himself: Freddie Soto. (R.T. pp. 563-570.) Mr. Soto also told police that when he first saw the Toyota pickup truck, it was following a red Hyundai, in it, with four men: the red Hyundai had made a "U-turn" to follow the truck itself. (R.T. pp. 563-570.)

On another factual matter, the girlfriend of Victim Andy Velasquez - who was also a witness to the shooting - told police that the victim had been hit by gunshots coming from a white Toyota pickup. (R.T. p. 572.)

Evidence had indicated that "No-Neck" (Augustin Rosas) accompanied by his associates, of whom were armed with guns, coerced Petitioner to "tag along" with them when they arrived at Petitioner's business: "Abel's Body Shop." Although Petitioner had no intention to assist "No-Neck" and the others for the famously known "payback" (R.T. pp. 650-655), "No-Neck" had compelled Petitioner to lead the "drive" to Harbor City in his red Hyndai because "No-Neck" was afriad that Petitioner would "backout" if he, instead, follwed "No-Neck." (R.T. pp. 658-659.)

After a far, long search in the Harbor City area so as to locate the individuals who were involved in the murder of Mr. Delgadillo, Petitioner "turned" his car around, told "No-Neck" that he was "afraid" because there were so many people, and that he was ultimately going back, home. (R.T. pp. 659-665.) Exactly how it was said: Petitioner turned north on Petrolium Avenue and the left the scene. (R.T. pp. 667-668.)

Except "No-Neck" had followed Petitioner when, from a short distance, spotted what "No-Neck" believed to be the van involved in the murder of Mr. Delgadillo: he stopped following Petitioner, and began following the van on south of Petrolium Avenue. (R.T. p. 669.)

When "No-Neck" was in the middle of the block on Petrolium near 254th Street, someone shot at the truck of "No-Neck" and the other with him began shooting back: hitting at the end one individual, Andy Velasquez. (R.T. pp. 669-672.)

As one can see, the evidence at Petitoner's trial were slim: (1) there is evidence that Petitioner had no intent for what would be a "payback," (2) there was evidence that Petitioner was not the shooter, as he was in a saparate car - his red Hyndai, (3) there was evidence that "No-Neck" and his associates threat - or better said, coerced, Petitioner to "lead the drive," and, finally, (4) there was evidence that Petitioner had turned away from the shooting at the scene. Petitioner was not an actual "major participant." Pure and simple. (People v. Banks, supra.)

C O N C L U S I O N

For the foregoing reasons, Petitioner moves this Court to strick, or void for vagueness, his conviction of second degree felony murder, the language of "inherently dangerous to human life"; in the alternative, Petitioner moves this Court to set aside his conviction in light of People v. Banks, supra, as he is factually innocent: no evidence indicated that Petitioner was a "major participant" in the death of Andy Velasquez.

* * * *

9.6.16

CLERK of THE COURT

ENCLOSE IS A FEDERAL DISTRICT PETITION 1 ORGINAL AS UNABLE TO MAKE COPY.

I HAVE ALSO ENCLOSE A COVER COPY of PETITION WITH S.E.S.E IN ORDER FOR YOU TO STAMP FILE DATE PETITION WAS FILED SO TO BE RETURNED

THANK YOU VERY MUCH.

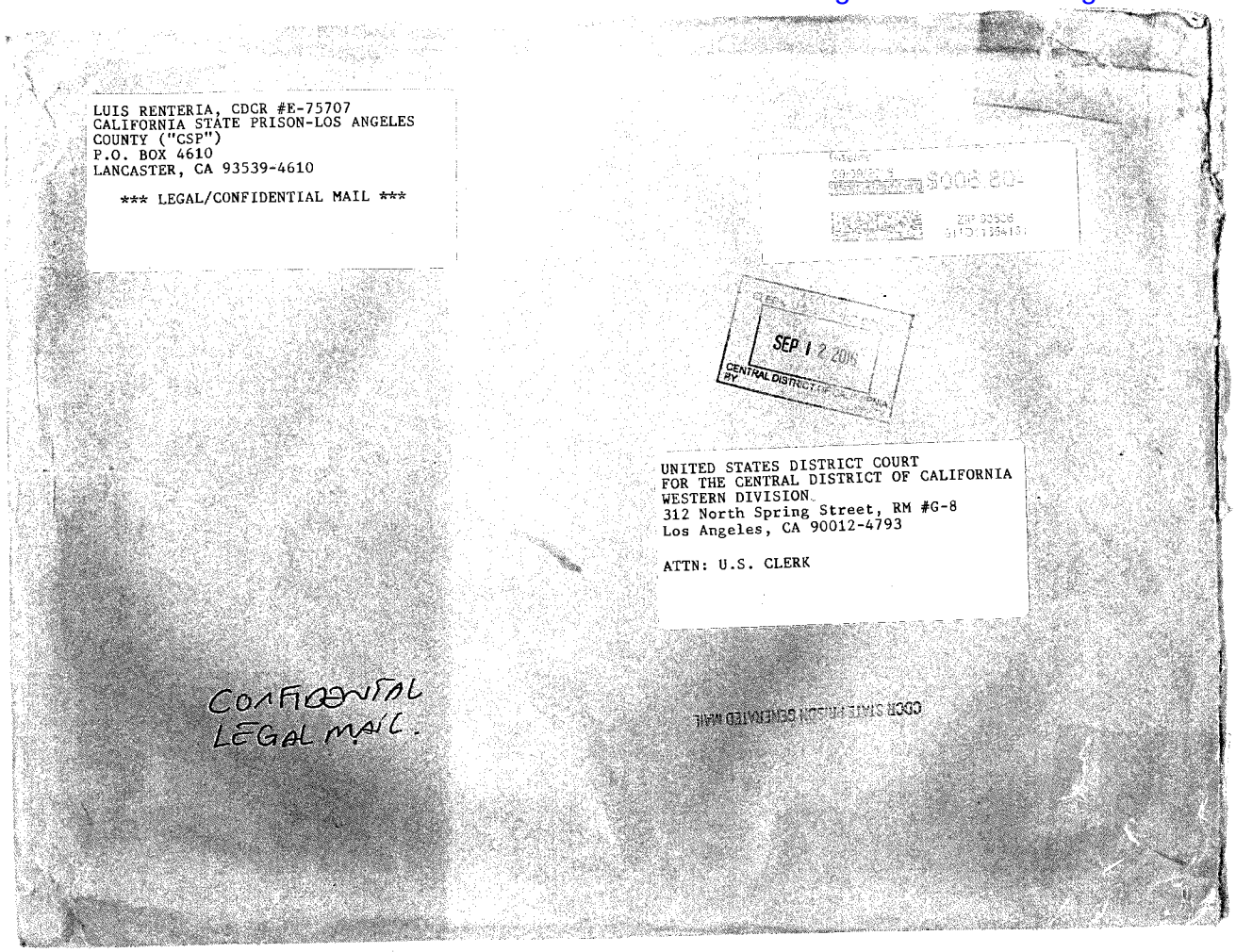
SINCERELY

LUIS RENTERIA E-75707
CSP-LAC. C.3. 143
P.O. Box 4610
LANCASTER CA 93539

DECLARATION OF
LUIS RENTERIA. E-25707

I ENCLOSE DECLARATION of IN FORMA PAUPERIS TO PROCEED. SIGNED BY ME. BUT NOT SIGNED BY TRUST office. AS PETITION IS RUNNING ON TIME TO FILE AND ME COURT DEADLINES. PETITION CAN'T DEPEND ON TRUST OFFICE TO SEND PETITION WITH STATEMENT FORM SHOWING IF I HAVE OR DON'T HAVE FUNDS IN ACCOUNT AS TRUST office LOSES AND OR DELAYS PETITIONS. THERE FOR PETITIONER RESPECT-FULLY SEND PETITION WITH NO FUNDS TO PAY FILE COST

I DECLARE ALL IS TRUE UNDER PENALITY of PERJURY.
EXCUCTED THIS 9.6.2016.



LUIS RENTERIA, CDCR #E-75707
CALIFORNIA STATE PRISON-LOS ANGELES
COUNTY ("CSP")
P.O. BOX 4610
LANCASTER, CA 93539-4610

*** LEGAL/CONFIDENTIAL MAIL ***

$005.80

ZIP 93536

SEP 12 2016

CENTRAL DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
312 North Spring Street, RM #G-8
Los Angeles, CA 90012-4793

ATTN: U.S. CLERK

CONFIDENTIAL
LEGAL MAIL.

CDCR STATE PRISON SEGREGATED MAIL