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A NEW APPROACH TO DOUBLE JEOPARDY

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Introduction

You are counsel for a defendant whom you feel was unjustly convicted of second degree murder on an indictment for first degree murder. The defendant maintains his innocence and now turns to you for advice regarding a possible new trial. If an appeal were successful and a new trial granted, would your client have the plea of former jeopardy in respect to the first degree murder charge of which he was not convicted; or would the reversal of the second degree conviction subject him to trial of all the issues as if there never had been a trial? Diverse solutions are available with respect to your problem influenced by the mere imaginary lines separating jurisdictions.

The concept of former jeopardy can be traced to the common law where the pleas of *autrefois acquit* and *autrefois convicti* were used in criminal law.[1] Blackstone commenting on these pleas stated:[2]

> Such a plea is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.

The same ideals are found embodied in the fifth amendment of the United States Constitution:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The California Constitution[3] and constitutions of many states contain similar provisions.[4] Different phrases are used in the various state constitutions to describe the prohibition against double jeopardy,[5] but they all are in substance identical to the double jeopardy clause of the United States Constitution. As will be pointed out later, though the language is substantially identical and the principle well understood, the practical application of the double jeopardy doctrine in identical fact situations varies as night and day in diverse jurisdictions.

Nature of the Former Jeopardy Doctrine

The bases underlying the theory of the double jeopardy doctrine are fair play and expediency.[6] Generally, the defendant is "in jeopardy" when

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1 Vaux's Case, 4 Co. Rep. 44a, 45a (1785).

2 4 BLACKSTONE, COMMENTARIES § 336.

3 CAL. CONST. art. I, § 13.

4 Florida, Georgia, Kentucky, Maine, Minnesota, New York, Ohio, Oklahoma, Tennessee, Texas, Washington.

5 Former jeopardy, double jeopardy, twice in jeopardy, jeopardy of life or limb, jeopardy for the same offense. See Bizzell v. State, 71 So. 2d 735 (Fla. 1954); State v. Findling, 123 Minn. 413, 144 N.W. 142 (1913); Stout v. State *ex rel.* Caldwell, 360 Okla. 144, 130 Pac. 553 (1913).

6 Green v. United States, 355 U.S. 184 (1957).

a valid information or indictment has been brought in a court of competent jurisdiction, and a jury impaneled and sworn to try the case and to give a verdict.[7] At this point the state can no longer arbitrarily withdraw the case from consideration by the jury over the defendant's objection.[8] Otherwise, the state could withdraw when it felt the jury would acquit him, hoping for better luck with a new jury. Withdrawal of the case from the jury or from before a court without a jury has the legal effect of an acquittal.[9] The same issues between the same parties could be tried time and again unless some technique was used to bring about a final determination of the case.

Under certain circumstances, however, notable procedural exceptions exist with respect to the rule of prohibiting a new trial of the same issues once the defendant has been in jeopardy and the jury dismissed without rendering a verdict. "Evident necessity" justified in the interest of public justice permits the discharge of the jury in cases where illness or death of the defendant[10] or juror,[11] impossibility of jurors agreeing on a verdict,[12] or consent of the defendant[13] renders a verdict impossible.[14] If the above exceptions were not recognized and the double jeopardy prohibition were followed blindly, the administration of justice would become exceedingly difficult. For example, if in the course of a trial several of the jurors become too ill to continue, the defendant would still be subject to a new trial. To hold that a discharge of the jury without rendering a verdict has the legal effect of acquitting the defendant under *all* circumstances would have more evil consequences than those which the double jeopardy prohibition is designed to prevent.

Waiver by Appeal

Does a defendant waive his constitutional right not to be placed in double jeopardy for the higher offense of which he was not convicted by procuring reversal of a conviction of a lower offense? When the jury brings

[7] People v. Tibbits, 60 Cal. App. 2d 335, 140 P.2d 126 (1943); State v. Yokum, 155 La. 846, 99 So. 621 (1924); *Ex Parte* Kirk, 96 Okla. Cr. 272, 252 P.2d 1032 (1943); Holt v. State, 24 S.W.2d 886 (Tenn. 1930); State v. White, 243 Wis. 423, 10 N.W.2d 117 (1943).

[8] Jackson v. Superior Court, 10 Cal. 2d 350, 74 P.2d 243 (1937); People v. Brown, 273 Ill. 169, 112 N.E. 462 (1916); State v. Madden, 119 Kan. 263, 237 Pac. 663 (1925); Wilson v. Commonwealth, 212 Ky. 584, 279 S.W. 988 (1926); State v. Mason, 326 Mo. 973, 33 S.W.2d 895 (1930).

[9] People v. Garcia, 120 Cal. App. Supp. 767, 7 P.2d 401 (1931); Hall v. State, 134 A. 692, 3 W.W. Harr. 233 (Del. 1926); State v. Pittsburg Paving Brick Co., 117 Kan. 192, 23 Pac. 1035 (1924).

[10] People *ex rel.* Jimerson v. Freiberg, 137 Misc. 314, 243 N.Y.S. 590 (1930).

[11] State v. Kappen, 191 Iowa 19, 180 N.W. 307 (1920).

[12] Alford v. State, 243 Ala. 404, 10 So.2d 373 (1942); People v. Sullivan, 101 Cal. App. 2d 322, 225 P.2d 645 (1950); State *ex rel.* Williams v. Grayson, 90 So.2d 710 (Fla. 1956); People v. De Frates, 395 Ill. 439, 70 N.E.2d 591 (1946).

[13] United States v. Harriman, 130 F. Supp. 198 (D.C.N.Y. 1955); Lee v. State, 31 Ala. App. 91, 13 So.2d 583 (1943); People v. Mills, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957); People v. Dodson, 107 N.Y.S.2d 7 (1951).

[14] *In re* Scrafford, 21 Kan. 735 (1879); State v. Malouf, 199 Tenn. 496, 287 S.W.2d 79 (1956).

in a verdict of guilty to the lower offense what can be said about their finding as to the higher offense? To say that the jury's verdict was silent as to the higher offense and thus there is no finding as to the higher offense, or that there was an implied acquittal, or that it was in fact an acquittal, is to make a distinction without significance as far as the original trial is concerned. The defendant simply *cannot be punished for the higher offense because he has not been convicted of it.* From this conclusion it follows that the conviction of the lower offense on an indictment for the higher has the legal consequence of an acquittal of the higher.[15]

The problem now is whether the defendant waives his constitutional right against being placed in double jeopardy on the higher crime of which he was not convicted when he seeks reversal of the lower offense. If there has been no appeal or the appeal was unsuccessful, a plea of former jeopardy is an absolute bar to a new trial.

In an early case, the Supreme Court of Nevada held:[16]

> . . . that when the defendant is convicted, and he asks for a second trial to relieve himself of the jeopardy in which he finds himself by reason of his conviction and judgment, and his prayer is granted, he is estopped from asserting a formal acquittal on his second trial, and waives his constitutional right of pleading once in jeopardy, or that his right has been in any way infringed, because by his own voluntary consent, act, and petition he has been relieved of the bar which prevents him interposing this plea.

On the other hand, Justice Holmes, in an excellent analysis of the double jeopardy controversy points out in his dissenting opinion in *Kepner v. United States*:[17]

> Usually no waiver is expressed or thought of. Moreover it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights.

If waiver is to be defined as *voluntary* relinquishment of a right, clearly a defendant only intends to waive his right as to the lower offense. The defendant's request for correction of error extends only to the conviction of the lower offense.

Several states[18] have statutes defining the extent and effect of granting a new trial similar to the California Penal Code, which provides:[19]

> The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or pleaded in bar of any conviction which might have been under the accusatory pleading.

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[15] Palko v. Connecticut, 302 U.S. 319 (1938).
[16] *In re* Somers, 31 Nev. 531, 536, 103 Pac. 1073, 1075 (1909).
[17] 195 U.S. 100 (1904) (dissenting opinion).
[18] Indiana, Kansas, Kentucky, Nevada, New York, Ohio, Oklahoma and Utah.
[19] CAL. PEN. CODE § 1180.

California cases have interpreted this section to apply only to the unsettled issues,[20] that is, the lesser crime which a defendant is appealing. To hold that a defendant voluntarily waives his rights by proceeding with an appeal when the procedural consequences are known is clearly a forced construction of voluntary waiver. This would be relinquishment by operation of law and not by voluntary act of the defendant. When presented with the waiver argument the Supreme Court of the United States in the recent case of *Green v. United States* stated:[21]

> Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal .... As the Court of Appeals said in its first opinion in this case, a defendant faced with such a "choice" takes a "desperate chance" in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.

Admittedly all the states have the sovereign power to prescribe conditions on criminal appeals. But this right might not justify the imposition of such extreme conditions as forfeiture of the plea of once in jeopardy on a defendant who must be presumed innocent until proven guilty beyond a reasonable doubt in a fair trial. The position that a defendant voluntarily waives this right is a conclusion which is difficult to support.

Effect of Reversal of Lesser Crime

In *Jones v. State*[22] the defendant was indicted for murder and convicted of manslaughter. The conviction was reversed on appeal. In the second trial the defendant was convicted of murder. The defendant claimed the decision was in violation of his constitutional right not to be placed in double jeopardy. The Mississippi Supreme Court held:[23]

> If a verdict of manslaughter impliedly acquits the defendant of murder, it also impliedly adjudges that he is not innocent. One implication flows as necessarily and readily from the conviction of manslaughter as the other. To hold that an appellant can appeal and set aside a judgment of conviction upon which it is entered, and upon which no other judgment could be entered, is to leave the shadow without the substance; to leave the implied and remove the actual thing upon which the implication is based. If the verdict convicting of manslaughter is destroyed, it is difficult for the reasoning mind to see how any implied verdict of judgment can exist.

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[20] People v. Gordon, 99 Cal. 227, 33 Pac. 901 (1893); People v. Krupa, 64 Cal. App. 2d 592, 149 P.2d 416 (1944).

[21] 355 U.S. at 193.

[22] 144 Miss. 52, 109 So. 265 (1926).

[23] *Id.* at 72, 109 So. at 269.

The same view was reflected in a decision by the Supreme Court of South Carolina[24] in which a defendant was indicted for murder and convicted of manslaughter. The verdict was reversed on appeal. The defendant was retried and convicted of murder. The second trial was held not in violation of the state's constitutional safeguard against double jeopardy. In the course of the opinion the court said:[25]

> It is undoubtedly true that the legal effect of the verdict of manslaughter on an indictment of murder is to acquit of the greater offense. This implication or inference, however, rests upon the existence of the verdict of manslaughter as the result of a trial upon the indictment for murder. Remove the fact upon which the inference is based and necessarily the inference goes with it.

It is difficult to yield to the force of this sophisticated reasoning. The conclusions are not consistent with the facts. The conviction of manslaughter was unjustly obtained since it was reversed; thus if there be *any* implication it must be a presumption of innocence in every respect. The defendant was not convicted of murder and the conviction of manslaughter was reversed.

The only question to be resolved, as far as the defendant is concerned, is the erroneous conviction of manslaughter. The state, however, may contend that the defendant should have been convicted of murder, the higher offense.

It is the opinion of this writer that if an error occurred in the trial court as to the higher offense it must be presumed in favor of the state. If this were not so, on what other theory could the one-sided appeal generally practiced in the United States be justified? The South Carolina court is really offering a defendant a package deal. In order to obtain a review of an unjust conviction the defendant must give up a just acquittal of the higher offense. This would seem to be a narrow and grudging administration of precious rights. When safeguards which are susceptible of two interpretations are enacted for the protection of man, the interpretation more in consonance with the humane spirit of the day as well as our Anglo-American jurisprudence should be adopted.

Former Jeopardy in California: The Gomez Case

In California, the rule on former jeopardy has been recently clarified. Prior to the case of *Gomez v. Superior Court*,[26] California occupied a unique position in its solution of this problem by drawing a distinction between a conviction of a *lesser offense necessarily included* in the charge of a greater offense and conviction of a *crime of a lower degree* than that charged. In the former situation, the conviction of the lesser included offense had the legal

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[24] State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906).
[25] *Id.* at 323, 53 S.E. 489.
[26] 50 Cal. 2d....., 328 P.2d 976 (1957).

effect of an acquittal of the greater.[27] In the latter, a conviction of a lower degree of the crime did not operate as an acquittal of the higher degree.[28] Thus, if the defendant were indicted for murder and convicted of manslaughter, which is a lesser included offense, and the conviction was reversed on appeal, the defendant could only stand trial for manslaughter. If the conviction was second degree murder, the defendant could stand trial for first degree murder on the grounds that his prior conviction was of murder; the degree relating only to the fixing of punishment.

The distinction between the two cases seems to be that in crimes involving degrees the conviction is of the offense, the degree being only significant in that it fixes the punishment. Thus, a reversal of the lower degree operates to set aside the entire verdict. While in the case of a reversal of an offense which is included in an indictment for a greater offense, such as a conviction of assault on an indictment of battery, the conviction of the lesser included offense of assault is an acquittal of the greater offense of battery. Reversal of the included offense does not disturb the acquittal of the higher offense.

When an offense cannot be committed without necessarily committing another offense, the latter is an included offense.[29] Larceny is an included offense of robbery because it is impossible to commit robbery without committing larceny. The necessity for making the above distinctions has been eliminated by the *Gomez* case.

In the *Gomez* case, the defendants were accused of grand theft of a loading shovel of the value of $3000.[30] They appealed from the jury's verdict of petty theft[31] and obtained a reversal in the California District Court of Appeals.[32] The court then ordered them to proceed to trial on a charge of grand theft in the superior court. The defendants alleged that the superior court had no jurisdiction[33] over the sole remaining charge of petty theft since they had been once in jeopardy for grand theft and had been acquitted of the charge. The California Supreme Court stated that since the California courts in prior cases[34] had made no distinction between lesser in-

[27] "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict though general in terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the defendant is found guilty." People v. Gilmore, 4 Cal. 376 (1854).

[28] People v. Keefer, 65 Cal. 232, 3 Pac. 818 (1884) (conviction of second degree murder at former trial held not to be bar for subsequent trial of murder in first degree); *In re* Moore, 29 Cal. App. 2d 56, 84 P.2d 57 (1938); People v. McNeer, 14 Cal. App. 2d 22, 57 P.2d 1018 (1936).

[29] See Note, 9 HASTINGS L.J. 92 (1957).

[30] See CAL. PEN. CODE §§ 484, 487, 487a, 488.

[31] See CAL. PEN. CODE § 488.

[32] People v. Cardinal, 154 Cal. App. 2d 835, 316 P.2d 1001 (1957).

[33] See CAL. PEN. CODE § 1425.

[34] People v. Daniel, 65 Cal. App. 2d 622, 151 P.2d 846 (1944); People v. Slater, 60 Cal. App. 2d 358, 140 P.2d 846 (1943); People v. Lynch, 60 Cal. App. 2d 133, 140 P.2d 418 (1943); People v. Cowan, 38 Cal. App. 2d 231, 101 P.2d 125 (1940); People v. Castro, 37 Cal. App. 2d 311, 99 P.2d 374 (1940).

cluded and crimes of a different degree when applying section 1181 of the Penal Code,[35] there was no reason to draw a distinction insofar as the question of double jeopardy is concerned.[36] Under this code section it is not a matter of material importance whether the crime was of a lesser degree or a lesser included crime. In either case the trial court could modify the judgment. However, the court quite correctly holds:[37]

> . . . that no sound reason exists for the distinction drawn by the California cases, and our constitutional provision and statutes certainly do not require one to be drawn.

The real significance of the *Gomez* case is not only that the heretofore illogical distinctions between crimes of a lesser degree and included crimes has been obliterated but it applies a liberal interpretation to the double jeopardy provision of the California Constitution.[38] The holding provides that in the new trial the defendant's jeopardy extends only to the crime of which he was previously convicted and a trial of the higher crime is barred.[39]

By comparison a substantial number of the states hold that when the defendant is found guilty of a lower offense than charged, and appeals from the judgment, the legal effect of the reversal sets aside the entire trial of conviction and leaves the defendant in the same position as if he had never been tried.[40] One of these states is New York where the Court of Appeals held that where the defendant was indicted for first degree assault, convicted of third degree, from which he obtained a reversal and new trial:[41]

> .... [T]he effect of the defendant's appeal is merely to continue the indictment in the appellate court, and, if reversal of the judgment of conviction follows, that judgment, as well as the record of the former trial, has been annulled and expunged by the judgment of the appellate court, and they are though they never had been.

The court goes on further to say the defendant waives his constitutional protection to be tried for the higher offense when he asks for a new trial.[42]

The California and New York cases reflect the two schools of thought

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[35] Providing "that if the evidence (in criminal causes) shows the defendant to be not guilty of the degree of the crime of which he was convicted, *but guilty of a lesser degree thereof or of a lesser crime included therein,* the trial court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed." (Emphasis added.)

[36] 50 Cal. 2d at ....., 328 P.2d at 981.

[37] *Id.* at ....., 328 P.2d at 979.

[38] Art. I, § 3.

[39] 50 Cal. 2d at ....., 328 P.2d at 985.

[40] Nineteen are enumerated by Justice Frankfurter in his dissenting opinion in the *Green* case. They are: Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Vermont and Washington. 355 U.S. at 216–17 n.4 and cases there cited.

[41] People v. Palmer, 109 N.Y. 413, 17 N.E. 213 (1888).

[42] *Id.* at 420, 17 N.E. at 215.

on the issue of whether a retrial for the greater offense is a violation of the double jeopardy provisions of the state constitutions.

Position of the Federal Courts

In the recent case of *Green v. United States,* the Supreme Court of the United States adopted the position held by seventeen states.[43] Where a defendant is convicted of a lesser crime than charged, but on appeal that conviction is reversed and a new trial ordered, a trial of the higher charge would place the defendant in jeopardy twice for the same offense. In the *Green* case the defendant was prosecuted for first degree murder and convicted of second degree murder. On appeal the conviction was reversed; the defendant could not be tried again for first degree murder without violating the double jeopardy provisions of the fifth amendment of the United States Constitution. Mr. Justice Clark, discussing the nature of the double jeopardy doctrine, pointed out:[44]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to the embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The position taken by the Supreme Court in the *Green* case reflects both these principles stated above by Justice Clark and the American ideal of liberty that the welfare of the state yields to the interests of the individual.

Due Process and the Federal Construction of Double Jeopardy

Can it be said that the Supreme Court in the *Green* case has established the minimum standard of fairness required by the fourteenth amendment in regard to the states' application of the double jeopardy concept? The importance of the *Green* case lies in the "persuasive" language[45] that the double jeopardy provision of the fifth amendment as interpreted by the Supreme Court may apply to the states as encompassed within the due process clause of the fourteenth amendment:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law.

Whether the constitutional provisions of the due process clause of the fourteenth amendment of the United States Constitution have been violated requires the application of the slippery standard of minimum fair-

[43] As listed by Justice Frankfurter, they are: Alabama, Arkansas, *California,* Delaware, Florida, Illinois, Iowa, Louisiana, Michigan, New Mexico, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia and Wisconsin. In the other states the question had not been considered up to the *Green* case. 355 U.S. at 217–18 n.4 and cases there cited.

[44] 355 U.S. at 187.

[45] *Id.* at 198.

ness.[46] The court in the *Green* case expressly rejects the position taken in *Trono v. United States,*[47] stating:[48]

> We believe that if either of the rationales offered to support the *Trono* result were adopted here it would unduly impair the constitutional prohibition against double jeopardy. The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

In the recent case of *Hoag v. New Jersey,* Justices Douglas and Black stated in a dissenting opinion:[49]

> We recently stated in *Green v. United States,* that by virtue of the constitution, protection against double jeopardy an accused can be forced "to run the gauntlet" but once on a charge. That case, involving a federal prosecution, *provides for me the standard for every state prosecution as well.* (Emphasis added.)

In construing the double jeopardy provision of the fifth amendment, the Supreme Court of the United States has, in substance, said that it is fundamentally unfair to try a defendant for the higher offense when he procures a reversal of a conviction of a lower offense on an indictment for the higher offense. The Supreme Court of the United States has unequivocally stated that the due process clause of the fourteenth amendment does not encompass all the rights of the Federal Bill of Rights.[50] In other words, a violation of the fifth amendment which applies to the federal courts does not necessarily violate the due process clause of the fourteenth amendment which applies to the state courts. The court did not hold that this decision would be binding on the states, but this was not a question before it.

It is the opinion of this writer that the court was thinking of the fourteenth amendment and did, in essence, say that any other procedure in regard to double jeopardy would be fundamentally unfair. It would be difficult for a reasoning mind to accept a position that what is fundamentally unfair in a federal court by some act of magic becomes fundamentally fair in a state court. The Supreme Court said:[51]

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued.

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[46] *Id.* at 215 (dissenting opinion by Justice Frankfurter).

[47] 199 U.S. 521 (1905). This was a murder prosecution where the defendants were found guilty of assault. On appeal the conviction was reversed. It was held that the defendants could be tried again for murder on the grounds that they waived their plea of former jeopardy with regard to the charge of murder by appealing the conviction of assault.

[48] 355 U.S. at 198.

[49] 356 U.S. 464, 477 (1958) (dissenting opinion).

[50] Adamson v. California, 332 U.S. 46, 53 (1947).

[51] 355 U.S. at 198.

Presumably, "our society" was not meant to be restricted to a federal society or that "this highly valued and dearly won right" was intended to be available only to those who found themselves in federal courts. In other words, it would seem that if a particular procedure is fundamentally unfair with reference to the fifth amendment, the same procedure would be fundamentally unfair in a state court and consequently a violation of the due process clause of the fourteenth amendment.

Conclusion

Your client, in order to secure the reversal of an erroneous conviction of second degree murder must take the chance of conviction of first degree murder which may be punishable by death. Unless he has the spirit of Patrick Henry, who achieved fame by saying, "Give me liberty, or give me death," he may find it wise to be content with the second degree conviction. The difference in punishment between first degree murder and second degree murder can be as different as night and day.[52]

You, as a counselor advising your client, will have to consider the chance of possible conviction for the higher offense where the rule in the *Green* or *Gomez* cases does not prevail. But the chance does not seem as "desperate" with the *Green* case appearing on the horizon.

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[52] CAL. PEN. CODE § 190—Punishment for murder:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same; or upon the plea of guilty, the court shall determine the same; and every person guilty of murder in the second degree is punishable by imprisonment in the State prison from five years to life."

CAL. PEN. CODE § 2920 (minimum confinement, second degree murder, with good time allowances—3 years, 7 months).