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O.J. Simpson Case Commentaries

***1 THE LAW OF HOMICIDE AND THE O.J. SIMPSON TRIAL**

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The trial of O.J. Simpson is moving into the final stages of the prosecution's case-in-chief, the focus now turning to the evidence from the medical experts. In this phase of the trial the prosecution seeks to introduce evidence to sustain a conviction for murder, particularly murder in the first degree. In this article I will review California's homicide law to explain the various crimes for which O.J. Simpson could be convicted. In particular I shall relate the evidence of motive, planning, and the physical evidence of manner and cause of death to the issues the jury faces in deciding whether or not to find O.J. guilty of murder.

First, the jury must believe that O.J. was the perpetrator of one or both of the killings before turning to the question of which degree of murder or form of homicide [FN1] to convict him of. Moreover, they must also conclude that O.J. did not kill with excuse (because he was mentally ill, for example) or justification (because he was defending himself against a life-threatening attack, for example). Judge Ito has instructed the jury [FN2] that, under California law, homicide is "the killing of one human being by another, either lawfully or unlawfully. Homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful." [FN3] In California unlawful homicide is either murder or manslaughter and murder is divided into degrees that are based upon the accused's culpability. Assuming the jury believes O.J. attacked and killed Nicole Brown and/or Ron Goldman and was not excused, justified, or acting under heat of passion, they will have to decide whether he is guilty of murder and to what degree. A killer can be guilty of murder by perpetrating the act without the intent to kill, [FN4] either in the second or first degree, under California law. Nonetheless, I will focus on the issues in the Simpson trial related to intentional killing, since it is most likely that the jury, if they believe O.J. guilty of anything, is more likely to believe he is guilty of intentionally killing Nicole and Ron.

Although the prosecution has not sought the death penalty, the State has

charged O.J. Simpson with murder in the first degree. If convicted of first degree murder rather than murder in the second degree, O J would be eligible for a sentence of life imprisonment without the possibility of parole. Thus, the State is very interested in presenting a case which would sustain verdicts of first degree murder.

The critical issues distinguishing first and second degree murder in the Simpson trial turn upon either the presence of "premeditation and deliberation" or the method of killing. [FN5] If the jury finds that O J had the intent to kill when he killed either victim, but also finds that he did so without premeditation and deliberation, then the jury would find him guilty of second degree murder rather than murder in the first degree. Likewise, unless the jury finds that O.J. killed either victim by certain means, for example while lying in wait or by torture, then the jury would likely find him guilty of second degree murder rather than first degree.

*2 Simply put, O.J. could be found guilty of second degree murder if the jury finds he killed either victim intentionally--i.e., with malice aforethought, but without premeditation and deliberation and not while lying in wait or by torture.

The malice aforethought required by second degree murder must be distinguished from "wilful, deliberate and premeditated." *People v. Conley*, 49 Cal. Rptr. 815, 822 (Cal. 1966). For example, a second degree murder with express malice aforethought is shown by a clear intent to kill, but will not be aggravated to first degree murder when there is no proof of premeditation and deliberation. The *Conley* Court held that the mental state required to satisfy first degree murder involves a careful weighing of considerations for and against killing while the mental state for second degree murder requires that the defendant do "[a]n intentional act that is highly dangerous to human life, . . . in disregard of the actor's awareness that society requires him to conform his conduct to the law" *Id.* In *Conley*, the California Supreme Court reversed the defendant's first degree murder conviction because the trial judge failed to give an instruction defining "malice aforethought." *Id.* at 825. The defendant testified that he did not intend to kill the victims when he shot them with his hunting rifle. *Id.* at 818. The defense was based in part on the notion that the element of intent was negated due to voluntary intoxication. *Id.* However, if premeditation and deliberation cannot be shown, the use of a deadly weapon, such as a hunting rifle, will be sufficient to infer the malice aforethought required by a second degree murder. *Id.* at 822. Thus, malice must be shown before a defendant can be convicted of either first or second degree murder. *Id.* at 821.

The most serious form of murder, which carries the greatest punishment, is first degree murder with special circumstances. Depending upon whether a jury believes that special circumstances have been shown, first degree murder is punishable by "death, life without the possibility of parole, or confinement in the state prison for a term of 25 years to life." Cal. Penal Code s 190 (a) (West 1995). It is a matter of prosecutorial discretion whether or not to ask for the death penalty in a given case. As previously noted, the prosecution in the Simpson case has not asked for the death penalty.

First degree murder can be shown in various ways. According to Cal. Penal Code

s 189 (West 1995), "murder which is perpetrated by means of . . . lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, . . . is murder of the first degree."

A wilful, deliberate, and premeditated killing with express malice aforethought can be shown by using a three part test derived from *People v. Anderson*, 73 Cal. Rptr. 550 (Cal. 1968). The Anderson Court found that evidence adequate to show premeditation and deliberation fell into three categories: (1) planning; (2) motive (derived from the accused's prior relationship or conduct toward the victim); and (3) manner of killing. [FN6]

*3 No mention of the Anderson test is made to the jury, however this test is the standard that the prosecution must meet in order to satisfy their burden of proof with respect to a first degree murder instruction. The test is designed to assist the trial judge in determining whether or not the prosecution has offered sufficient evidence to justify a jury instruction on first degree murder. The California Supreme Court, in discussing the Anderson test has stated that an "[a]nalysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *Id.*

In *Anderson*, the defendant lived with the 10- year old victim, the victim's mother and the victim's 17-year old brother. *Id.* at 552. The defendant killed the victim by cutting and stabbing her some sixty times on various parts of her body, including a postmortem cut through the victim's rectum and vagina, and a partial severance of the victim's tongue. *Id.* at 553. The defendant attempted to conceal the victim's body under blankets and boxes in the victim's room. *Id.* The defendant further tried to conceal the crime by cleaning up blood and fabricating explanations for the bloodstains, and the victim's whereabouts. *Id.*

The California Supreme Court modified the first degree murder conviction reducing it to second degree murder. *Id.* at 563. The court reasoned that among other things, the amount of wounds found on the victim showed a somewhat rash, panicked type of attack rather than a pre-planned killing that would support a first degree murder conviction based on premeditation and deliberation. *Id.* at 556. In determining whether the manner of killing suggests a premeditated murder, the court will look to whether the wounds appear to be calculated to kill or are perhaps the result of haphazard blows. *Id.* For example, the court suggests that "directly plunging a lethal weapon into the chest evidences a deliberate intention to kill as opposed to the type of 'indiscriminate' multiple attack of both severe and superficial wounds" *Id.*

Evidence relating to planning to support murder in the first degree.

In the *Simpson* case, the prosecution has introduced evidence from which the jury could infer planning activities, motive, and that the manner of killing supports the inference of a premeditated and deliberate killing. A case decided before *Anderson*, *People v. Robillard*, 10 Cal. Rptr. 167, 171 (Cal. 1960), supports the prosecution's position in the *Simpson* case with respect to planning.

In *Robillard*, the California Supreme Court rejected the defendant's argument that the first degree murder conviction should be reduced to second degree murder. 10 Cal. Rptr. at 171. The defendant shot and killed a police officer

when defendant was pulled over in a stolen car. Id. at 170. The defendant argued that he did not kill the officer after premeditation and deliberation, and that defendant's actions after the killing were evidence that he continued to act irrationally. Id. The defense further argued that the inconsistent behavior of trying to dispose of all incriminating evidence, yet keeping the murder weapon so the defendant could have the barrel rebored, showed that the defendant was still in an irrational state of mind as a result of the uncalculated killing. Id. However, the Supreme Court held that defendant's actions led to a contrary inference. Id. at 171. The court reasoned that since the defendant thought out his course of action both before and after the killing, the jury could properly infer that the defendant committed the murder with premeditation. Id.

*4 Similarly, in the Simpson case the prosecution will argue that the absence of weapon, clothing, and other evidence supports the inference that O J disposed of such evidence, which further supports the inference that the killings were premeditated and deliberate. If the jury infers that O J in fact disposed of the clothing and other evidence, the jury could also infer that such disposal was in furtherance of O.J.'s planned killings.

On the other hand the jury may choose to convict, not of first degree premeditated murder based on evidence of a planned killing, but of second degree murder with express malice aforethought. A second degree murder conviction in the Simpson case could result if the jury does not believe O.J. disposed of clothing and the weapon and thus rejecting the prosecution's planning theory.

Evidence relating to motive to support murder in the first degree.

California Jury Instructions - Criminal No. 8.20 offers further interpretation of a wilful, deliberate and premeditated killing. The instruction defines "wilful" as intentional, "deliberate" as "formed or arrived at or determined upon as a proposed course of action," and "premeditated" as merely "considered beforehand." The instruction further states that if a killing was committed intentionally after clear reflection on the defendant's part, then the killing is first degree murder. Id. In addition, the law does not set a specific standard length of time in which deliberation and premeditation may be formed, thus, this time will vary case to case. Id. However, the California Courts have determined that the Legislature by joining "wilful, deliberate and premeditated," in the definition of first degree murder must have intended to require more reflection than merely the "specific intent to kill." People v. Caldwell, 279 P.2d 539, 542 (Cal. 1955). Therefore, "[t]o 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) (she) decides to and does kill." CALJIC No. 8.20 (West 5th ed.).

The California Supreme Court upheld the first degree murder conviction in Caldwell, holding that the evidence was adequate to show that defendant's acts were premeditated and deliberate. 279 P.2d at 543. In Caldwell the defendant had made verbal threats to his wife in and out of her presence before killing her. Id. at 541. The court held that those previous threats were sufficient to justify the inference that the defendant contemplated killing his wife so as to justify a first degree murder conviction based on premeditation and

deliberation. Id. at 543.

The Simpson case is similar to Caldwell in that the Simpson prosecution has produced evidence of prior beatings and threats made by O.J. to Nicole Brown during their marriage and after their divorce. Assuming the Simpson Jury believes that O.J. was the killer, analogous to Caldwell, the Simpson jury could reasonably infer through the evidence of prior beatings and threats, that the killing was premeditated and deliberate.

***5** Evidence relating to manner of killing to support murder in the first degree.

Although the number of wounds found on Nicole Brown and Ronald Goldman were numerous like that found on the victim in Anderson, the Simpson jury could also infer that Brown and possibly Goldman were killed according to a preconceived design due to the particularly severe neck wounds on both victims and the fatal chest wounds found on Goldman.

Judge Ito's ruling allowing the autopsy photos to be shown to the jury was undoubtedly influenced by the Anderson test. Aside from the fact that the photos will assist the jury in interpreting and corroborating the expert's testimony, the photos will allow the prosecution to offer evidence depicting the manner of the killings. The photos obviously depict the severity and brutality of the killings and as such are evidence of the third factor in the Anderson test. Judge Ito, in his ruling admitting into evidence the crime scene and autopsy photos, repeatedly stated that the photos were "relevant to the nature of the attack" and "the nature of the struggle." Clearly the reason for such relevance is to support the inference of intent to kill from the manner in which the wounds were inflicted. Thus, the prosecution will argue, and the jury will be permitted to conclude if it wishes from the manner of killing, that the perpetrator killed with premeditation and deliberation.

First degree murder on a "lying in wait" theory.

The prosecution in the Simpson case will ask for a first degree murder instruction based on the theory of "lying in wait." [FN7] So far the prosecution has offered evidence from which the jury could infer that O.J. waited and watched Nicole and her male friends in general and that, therefore, on the night of June 12, 1994, O.J. Simpson waited and watched for Nicole Brown and Ronald Goldman in order to kill them. From this evidence, the jury may or may not choose to infer that Brown and Goldman were killed "by means of lying in wait."

To constitute first degree murder by means of lying in wait, the killing must have been immediately preceded by defendant's "waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise." CALJIC No. 8.25 (approved of in *People v. Benjamin*, 124 Cal. Rptr. 799 (Cal. Ct. App. 1975)). The Benjamin Court held that lying in wait is shown sufficiently by evidence of "concealment and watchful waiting." Id. at 811 (citing *People v. Harrison*, 30 Cal. Rptr. 841, 845-846 (Cal. 1963)).

In Benjamin, the defendant's first degree murder conviction based on "lying in wait" was upheld. Id. at 815. Defendant was found to be "lying in wait" based on evidence that defendant and an accomplice were seen driving around the parking lot of a bar waiting for the victim, whom they had argued with earlier in the

morning. Id. at 803. When the victim appeared in the parking lot, the defendant shot and killed the victim. Id. at 804. Thus, the court reasoned that the evidence was sufficient to justify the jury in finding that the defendant waited for the victim with the intention of killing him, (shown by four gun shot wounds) "'and that the killing was accomplished by the means of his watching and waiting in concealment.'" Id. at 811-812 (quoting Harrison, 30 Cal. Rptr. at 846).

*6 First degree murder achieved by means of lying in wait is similar to deliberate and premeditated murder. To satisfy the requirements of lying in wait there is no particular amount of time needed, only that the period of time be adequate to show a state of mind equal to that required by "premeditation or deliberation." CALJIC No. 8.25 (West 5th ed.). Thus, the criteria for "lying in wait" subsumes the criteria for "premeditation or deliberation."

In order to show "lying in wait" as a special circumstance, the killing must have been committed "while" lying in wait which is more demanding than "by means of lying in wait." CALJIC No. 8.81.15 (1989 Revision)(West 5th ed.). The definition, "while lying in wait" requires that "both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends." Id. In other words, to prove special circumstances there must not be an interruption between the lying in wait and the killing. If there is an interruption, special circumstances are not proved. Id.

The California Court of Appeal interpreted this condition as requiring more than merely taking the victim "unawares." Richards v. Marin County Superior Court, 194 Cal. Rptr. 120, 125 (Cal. Ct. App. 1983). In Richards the court held for the Petitioner who argued that the "lying in wait" charge was not justified because there was no evidence in the record indicating the precise manner in which the killing took place. Id. at 124. The court reasoned that the instruction was improper because it was based merely on the prosecution's argument that an inference could be made that the killing took place while defendant was "lying in wait." Id. at 126.

The Simpson case may be indistinguishable from Richards in that the prosecution has offered little evidence of the manner of killing that indicates the killings occurred "while lying in wait." There is no specific evidence in the record to show that the perpetrator was lying in wait that evening; the only evidence pertains to O J having looked through Nicole's window on one or more occasions.

First degree murder on a torture theory.

First degree murder achieved by torture requires: an unlawful homicide, that the killer "committed the murder with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose," and that the torturous acts were the cause of death. CALJIC No. 8.24 (1992 Revision)(West 5th ed.). In addition, murder by torture does not require proof that the killer possessed the intent to kill, nor that the victim was conscious of the pain. Id.

Although no intent to kill need be shown, an intent to torture must be shown to sustain a conviction of first degree murder. People v. Proctor, 15 Cal. Rptr. 2d

340, 356 (Cal. 1992). Furthermore, "murder- by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death." Id. (citations omitted). In Proctor, the defendant was convicted of first degree murder by torture, for tying up, beating, cutting and strangling the victim. Id. The defendant argued on appeal that the acts of torture were not the cause of the victim's death, and as such the element of causation was lacking for a murder by torture conviction. Id. However, the court rejected defendant's argument, holding that the individual acts may not be separated to determine the cause of death, rather "it is the continuum of sadistic violence that constitutes the torture." Id. (citing People v. Talamantez, 215 Cal. Rptr. 542 (Cal. Ct. App. 1985)).

*7 Moreover, the trier of fact must concentrate upon the state of mind of the perpetrator and not on the amount of pain suffered by the victim, since amount of pain actually felt is not an element of the crime. People v. Wiley, 133 Cal. Rptr. 135, 141 (Cal. 1976). The trier of fact, when determining whether the defendant possessed the intent to torture, may consider all of the surrounding circumstances including the "severity of the victim's wounds." People v. Steger, 128 Cal. Rptr. 161, 165 (Cal. 1976).

In Wiley the defendant was convicted of first degree murder by torture after evidence was presented that indicated the defendant hit the victim antemortem with a baseball bat with the intention of causing the victim to suffer. 133 Cal. Rptr. at 137. Evidence was presented that indicated that the victim may have been unaware of the blows as they were delivered, however the court held this to be immaterial because the relevant inquiry was whether the defendant intended to cause suffering. Id. at 138.

Although the Steger court held that the character of the victim's wounds could be taken into account when determining whether there was murder by torture, the character of the wounds is not dispositive. 128 Cal. Rptr. at 165. The defendant in Steger beat her three-year-old stepchild to death after weeks of continued abuse. Id. at 163. However, defendant's testimony that she continually beat the child to administer discipline rather than to inflict severe pain was cited by the California Supreme Court in justifying the reduction of her first degree murder by torture conviction to second degree murder. Id. at 165.

The autopsy photographs recently allowed in by Judge Ito could, while showing the manner of killing, assist the prosecution in proving murder by torture. Although the autopsy reports on both Nicole Brown and Ronald Goldman make no mention of whether the wounds were inflicted to cause suffering, the many non-fatal or superficial wounds found could be inferred as being indicative of acts of torture. The wounds suffered by Ronald Goldman could easily be inferred as torturous acts. Goldman's wounds both fatal and superficial extend from his upper thigh area to his scalp. 1995 WL 313985 (Cal. Super. Doc.). However, the defense would likely argue, besides the notion that O J was not even at the scene, that the wounds were designed to cause immediate death and that any superficial wounds were the result of either a struggle or mad rage, and as such a murder by torture instruction is improper.

Special circumstances can be shown in a first degree murder by torture with proof that the defendant in addition to possessing the intent to torture also

possessed the intent to kill. Cal. Penal Code s 190.2 (a)(18) (West 1995). CALJIC 8.81.18 (1991 Revision)(West 5th ed.), states that the duration of painful suffering by the victim is immaterial in satisfying the special circumstances requirement.

The California Supreme Court reasoned that the language of Section 190.2 (a)(18) makes it clear that "pain which is excruciating but which does not extend over a lengthy period of time is sufficient." *People v. Davenport*, 221 Cal. Rptr. 794, 807 (Cal. 1985). In *Davenport*, the defendant used a knife to cut his victim's throat, and thereafter proceeded to impale her on a wooden stake inserted through her rectum. *Id.* at 799. Defendant argued that special circumstances were not shown because the victim either did not feel the stake due to shock or because the victim was already dead from the throat wound. *Id.* at 802. However, the court held that the special circumstances would stand because the jury chose to believe evidence that the victim was possibly still alive when she was impaled. *Id.* at 800. Since a torture victim's subjective experience of pain is immaterial, the defendant was found to possess the requisite intent to kill by torture that is required to prove special circumstances. *Id.* at 822.

*8 The Simpson case is similar to *Davenport* by way of the fatal neck wounds that were inflicted. Consequently, the *Davenport* case offers some ammunition for the prosecution. If O J were found to have inflicted the superficial knife wounds while the victims were still alive and with the intent to cause extreme pain and suffering, regardless of whether Brown and/or Goldman actually felt the wounds, then the jury could reasonably infer that the killings were committed by means of torture with special circumstances. Manslaughter--mitigation from murder based on heat of passion or sudden quarrel.

Manslaughter is distinguishable from murder in that manslaughter does not require malice, where murder does. CALJIC No. 8.50 (West 5th ed.). Murder can be mitigated to manslaughter in one of three ways, only two of which are relevant to the Simpson trial. [FN8] First, when the killing is performed "in the heat of passion," even though unlawful, the law negates the malice even if the defendant had the intent to kill. *Id.* Second, when the "act causing the death, . . . is excited by a sudden quarrel such as amounts to adequate provocation . . ." the killing is manslaughter not murder. *Id.* Manslaughter is a lesser crime than that of murder because the culpability of the wrongdoer has decreased, due to perhaps a partial justification as a result of "heat of passion," "adequate provocation" or an unreasonable use of self-defense. Joshua Dressler, *Understanding Criminal Law* 462 (1987).

To mitigate a killing from murder to manslaughter using grounds of "sudden quarrel or heat of passion" the resulting provocation must be so severe as would naturally bring about the same state of mind in an ordinary person in the same circumstances. CALJIC No. 8.42 (1991 Revision)(West 5th ed.). The defendant is not allowed to mitigate the killing by showing his or her subjective state of mind, unless that state of mind would have also been aroused in an ordinary person in the same circumstances. *Id.* In addition, CALJIC No. 8.44 (West 5th ed.), states that no particular emotion constitutes "heat of passion." Any single emotion or any combination of emotions can be considered by the jury to

constitute "heat of passion." *Id.* Adequate provocation can occur over a short or even a long period of time, the duration will be considered by the jury to determine whether the defendant's acts were reasonable.

If there has been a sufficient "cooling period" between the "sudden quarrel" or "heat of passion" and the act causing death then the killing will not be mitigated to manslaughter. CALJIC No. 8.43 (West 5th ed.). The test to measure whether defendant has had enough time to cool down, is again an objective test, i.e., would a reasonable person have cooled in the same amount of time. *Id.* However, even where the period of time is considerable, the jury may still find that the "heat of passion" smoldered over that period of time causing defendant to kill. *People v. Berry*, 134 Cal. Rptr. 415 (Cal. 1976). In *Berry* the defendant waited for his victim/wife in her apartment for twenty hours before he killed her. *Id.* The jury was given an instruction on manslaughter because the court reasoned that the twenty hours could have served to aggravate the defendant rather than cool him down to a point where his reasoning would return. *Id.*

*9 Incidentally, perhaps one of the only ways that a manslaughter instruction could ever get to the Simpson jury is by circumstances similar to the facts in *Berry*. However, the defense has chosen not to take the route of showing "heat of passion" or "adequate provocation" in their defense of O.J. Simpson. Therefore, a manslaughter instruction in the Simpson case is improbable.

CONCLUSION

The prosecution in the Simpson case has opted to seek a conviction for murder in the first degree. The evidence has been introduced to support such a conviction based on premeditation and deliberation, and some possibility of lying in wait or torture. The premeditation and deliberation theory of first degree murder is supported in the evidence presented so far by the domestic violence conduct, the stormy relationship between O.J. and Nicole, the inferences relating to planning, and by the manner in which the wounds were inflicted. There is little evidence to support the theories of lying in wait or torture, but those theories may be submitted to the jury. Judge Ito will have to decide whether the evidence for all such theories is sufficient.

There is no evidence to support a defense theory that the killings took place either as a result of "heat of passion" or sudden quarrel. Moreover, those theories are inconsistent with the defense's theory that O.J. Simpson is not the perpetrator. Thus, unless the defense changes, which is unlikely, the jury will be given only the choices of acquitting O.J., or finding him guilty of either first or second degree murder.

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FN1 A jury believing O J to be the perpetrator might nonetheless believe that O J was overcome by the heat of passion in committing the murder or murders. In that case such a jury could find O J guilty of voluntary manslaughter under California law, a lesser form of homicide than murder. However, at the trial's beginning Judge Ito did not instruct the jury as to manslaughter as an option. Unless Judge Ito specifically so instructs and gives the jury a manslaughter

verdict option, the jury will either convict of murder in the first degree, the second degree, acquit, or hang.

FN2 Judge Ito gave the jury a full set of instructions prior to the opening statements of counsel. This was unprecedented. However, he will have to instruct them again after closing arguments.

FN3 California Jury Instructions--Criminal, No. 8.00 (West 5th ed.).

FN4 Second degree murder encompasses, among other things (see the next footnote) "the unlawful killing of a human being when . . . the killing resulted from an intentional act" . . . that is "dangerous to human life, and . . . was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." CALJIC No. 8.31 (West 5th ed.).

FN5 All murders that are not wilful, premeditated and deliberate, or achieved by any of the listed methods, or committed during the course of any of the enumerated felonies, are second degree murders. Cal. Penal Code s 189 (West 1995). Second degree murder is "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 No. 8.30 (West 5th ed.). The "malice aforethought" required to make any homicide a murder can be either express or implied. CALJIC No. 8.11 (West 5th ed.). Express malice is shown if facts indicate that the defendant intended unlawfully to kill a human being. Id. Implied malice is satisfied by the identical requirements of second degree murder in CALJIC 8.31, supra. Furthermore, CALJIC No. 8.11 states that once express or implied malice is shown nothing further concerning defendant's mental state need be shown to establish malice aforethought. Id. The definition further clarifies that to achieve malice aforethought, defendant does not need to harbor "any ill will or hatred of the person killed." Id. In addition, CALJIC No. 8.11 states that the word "aforethought" merely means that the malice must precede the killing.

FN6 The Anderson test, as set forth in *People v. Anderson*, 73 Cal. Rptr 550, 557 (1968), is as follows:

(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing, what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' (citation omitted); (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's

life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." Id.

FN7 In California, first degree murders may be aggravated by special circumstances, which if proved make the defendant eligible for the death penalty or life imprisonment without parole. Cal. Penal Code s 190.2. (West 1995).

FN8 The third way that murder can be mitigated to manslaughter is when the killing is the result of an "honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury". Clearly that does not apply to the O.J. Simpson trial.

West's Topic and Key Number References

203 HOMICIDE
203II Murder
203k7 k. Nature and elements in general.

203 HOMICIDE
203II Murder
203k9 k. Intent or design to effect death.

203 HOMICIDE
203II Murder
203k21 Degrees
203k22 First Degree
203k22(1) k. In general.

203 HOMICIDE
203II Murder
203k21 Degrees
203k22 First Degree
203k22(2) k. Deliberation and premeditation.

203 HOMICIDE
203II Murder
203k21 Degrees
203k23 Second Degree
203k23(1) k. In general.

203 HOMICIDE
203II Murder
203k21 Degrees
203k23 Second Degree
203k23(2) k. Deliberation and premeditation.

203 HOMICIDE
203III Manslaughter

203k38 Sudden Passion or Heat of Passion
203k39 k. In general.
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