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The Prostitution of Lying in Wait

H. MITCHELL CALDWELL*

Kurt Michaels planned and executed the murder of JoAnn Clemmons.¹ He and an accomplice waited at a construction site adjacent to some apartments where they could view the victim's third-story window.² After several hours, the light in the victim's apartment went out and the two set off across the parking lot, walked up the stairwell and, using a key supplied by the victim's daughter, entered the apartment.³ The victim called out, "Who is it?" Michaels and his cohort entered her bedroom, struggled with the victim and killed her.⁴

The San Diego District Attorney capitally charged Michaels,⁵ alleging as one of the death qualifying circumstances that Michaels murdered while "lying in wait."⁶ Specifically, the District Attorney would have had to allege that Michaels's actions involved (1) a "concealment of purpose, [(2)] a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage"⁷

Murder by lying in wait is a particularly vile manner of murder.⁸ Concealing oneself in the backseat of a car and then attacking the driver when he enters is lying in wait. Hiding behind an embankment and

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1. See *People v. Michaels*, 49 P.3d 1032, 1040-42 (Cal. 2002).

2. See *id.* at 1041.

3. *Id.*

4. See Brief for Respondent at 13-16, *People v. Michaels*, 49 P.3d 1032 (Cal. 2002) (No. 16924).

5. See *Michaels*, 49 P.3d at 1040.

6. *Id.* Three other special circumstances were charged in conjunction with Count I: that the murder was carried out for financial gain (in violation of section 190.2(a)(11) of the California Penal Code), that the murder was committed during the commission or attempted commission of a robbery (in violation of section 190.2 (a)(17)(i) of the California Penal Code), and that the murder was committed in the commission of a burglary (in violation of section 190.2 (a)(17)(viii) of the California Penal Code). *Id.* In addition to Count I, Michaels was also charged with robbery and burglary. *Id.* The jury convicted Michaels on all three counts, and found all allegations and special circumstances to be true. *Id.*

7. *People v. Morales*, 770 P.2d 244, 260-61 (Cal. 1989) (defining the necessary elements of California's lying in wait special circumstance as codified in section 190.2 (a)(15) of the California Penal Code).

8. See *infra* text accompanying notes 35-39.

shooting the victim as he walks by is lying in wait. Calling for a pizza delivery and then shooting the driver as he steps to the door is lying in wait.⁹ Each act is the culmination not only of planning and premeditation,¹⁰ but also of preying on an unsuspecting victim from a position of overwhelming advantage.¹¹ Did Kurt Michaels lie in wait? Did he spring forth from concealment and immediately ambush an unsuspecting victim? Was his conduct when he left his place of concealment, walked across a parking lot, climbed some stairs, entered the apartment and then the bedroom, lying in wait? Can it be that he was lying in wait when he entered through the victim's front door?

9. See *People v. Sims*, 853 P.2d 992, 997-99 (Cal. 1993).

10. See, e.g., *People v. Sanchez*, 24 Cal. 17, 28-29 (1864):

In order to constitute murder in the first degree there must be something more than malicious or intentional killing. . . . There must be killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait or torture, which is wilful, deliberate, and premeditated; or a killing which is committed in the perpetration or the attempt to perpetrate any arson, rape, robbery, or burglary.

See also *State v. Baldwin*, 12 P. 318, 328 (Kan. 1886) ("The act described, and, in fact, any murder committed by means of poison, as well as by lying in wait, involves and presupposes the elements of malice, premeditation, and deliberation; and hence it was needless for the court to state that they were prerequisites to a conviction."); *State v. Daniels*, 46 S.E. 991, 993 (N.C. 1904):

It will be observed that the statute classifies murder in the first degree: (1) By poisoning, lying in wait, etc. Herein the state is not required to prove premeditation, because the manner of doing the act necessarily involves premeditation. The presumption is made, by the statute, irrebuttable. When committed in either of the methods mentioned, it is per se murder in the first degree. A person who lays poison for or waylays or tortures another unto death will not be heard to say that he did not premeditate.

See also *State v. Morgan*, 61 P. 527, 530 (Utah 1887) ("So the act of homicide by poison or lying in wait carries with it conclusive evidence of premeditation; and a jury ha[s] no option but to find the prisoner guilty in the first degree, upon proof of the crime."). In California, jury instructions stating that lying in wait necessarily implies premeditation or deliberation were found erroneous in *People v. Valentine*, 169 P.2d 1 (Cal. 1946). Instead, the *Valentine* court stated that these killings are murders of the first degree because "of the substantive statutory definition of the crime." *Id.* at 10. Therefore, California has now conclusively established that murder by lying in wait is the equivalent of premeditation or deliberation, and the prosecutor need not prove both. See *People v. Byrd*, 266 P.2d 505, 509 (Cal. 1954) ("If the killing was committed by lying-in-wait, it was murder of the first degree by force of the statute and the question of premeditation was not further involved.") (citations omitted); see also Garth A. Osterman & Colleen Wilcox Heidenreich, *Lying in Wait: A General Circumstance*, 30 U.S.F. L. REV. 1249, 1258 n.74 (explaining that the special circumstance of lying in wait may be flawed because it possibly encompasses more types of murder than ordinary premeditated and deliberated first degree murder). Despite this new development in *Byrd*, and the fact that California now sees a murder committed by lying in wait to be first degree murder as a matter of law, and not because it shows evidence of premeditation, other sources in this footnote have found overwhelming evidence of the presence of deliberation or premeditation in a murder by lying in wait, thereby qualifying it as a legitimate form of first degree murder.

11. See *infra* notes 88-89.

The prosecutor's filing of a lying in wait special circumstance,¹² the jury's finding that Michaels did in fact lie in wait,¹³ and the California Supreme Court's blessing of that finding¹⁴ raise troubling questions. Has the lying in wait death qualifying circumstance come to be so broadly defined that it has lost its distinctiveness as a legitimate narrowing mechanism for singling out those deserving of capital punishment?¹⁵ Has this particular "aggravating" or "special" circumstance been expanded beyond the United States Supreme Court's mandate as set forth in *Furman v. Georgia*, that any death penalty law must necessarily narrow that class of individuals deserving execution?¹⁶

The United States Supreme Court has instructed that the purpose of a death penalty scheme is to ferret out those who deserve to die from those who do not.¹⁷ God knows there is an abundance of murderers such as Kurt Michaels in this country,¹⁸ but which of these are to be singled out and executed, and which are to be spared? Surely factors such as race, ethnicity, economic status, religion, and sex must be eliminated from consideration,¹⁹ and yet as a nation we have woefully failed to weed out those very factors in determining who is to be executed.²⁰ In fact, the one constant of the American death penalty is its very arbitrariness.²¹ The death penalty schemes of the thirty-seven capital punishment states, as well as the federal death statute, are so fraught with generalities that arbitrariness thrives among their many nuances.²²

How else are we to explain that the Los Angeles District Attorney

12. See *People v. Michaels*, 49 P.3d 1032, 1040 (Cal. 2002).

13. *Id.*

14. See *id.* at 1049-50.

15. See *Furman v. Georgia*, 408 U.S. 238, 249-51 (1972).

16. *Id.*; see also *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (noting that the primary holding of *Furman* was the unconstitutionality of arbitrary and capricious administration of the death penalty).

17. See *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

The high service rendered by the "cruel and unusual punishment" clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id.

18. Although the Department of Justice has noted a steady decline in homicides since 1991, there were still 15,533 homicides nationwide in 1999. With an average of 5.7 homicides per 100,000 people, this percentage applied to the current population of 287,889,982 would provide for an estimate of 16,409 homicides this year. Department of Justice website, at <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm>.

19. See *Furman*, 408 U.S. at 364-66 (Marshall, J., concurring).

20. See *id.* at 293 (Brennan, J., concurring) ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.").

21. See *id.*

22. See *supra* note 20.

did not charge O.J. Simpson with capital murder when at the very time of his trial another African-American man who killed but one person was charged with capital murder and eventually so sentenced.²³ That other man was poor.²⁴ He was represented by a public defender,²⁵ and nobody had ever heard of him.²⁶ Both men were alleged to have engaged in acts that allowed for the District Attorney to file death penalty charges.²⁷ Simpson allegedly killed two people, a qualifying event.²⁸ He was alleged to have lied in wait, a qualifying event.²⁹ The other man allegedly robbed and raped, both qualifying events.³⁰ To be sure, there are other distinctions to be drawn between Simpson and the other man and, of course, anecdotal references can be self-serving. Nonetheless, these two men, charged by the same prosecutor at the same time, in the same county, illustrate a system fraught with arbitrariness. Death penalty laws that allow vast discretion in who is capitally charged and sentenced fail to fulfill the Eighth Amendment's "narrowing" requirement.³¹

Murder by itself will not necessarily qualify the murderer for capital punishment.³² There must exist circumstances beyond murder that will single out a particular murderer for capital punishment from the vast majority of murderers who will not be so charged.³³ Those circumstances must be rational, nonselective, and nonarbitrary so that only those very few select murderers will stand trial for their lives.³⁴ Lying

23. See Appellant's Opening Brief at 4, *People v. Jones* (June 5, 2001) (Cal. 2001) (Crim. No. S046117) [hereinafter Appellant's Opening Brief]; *Brown v. Simpson*, No. SC036876 (Cal. Super. Ct. 1996); *Goldman v. Simpson*, No. SC036340 (Cal. Super. Ct. 1996).

24. See Appellant's Opening Brief, *supra* note 23, at 23-24.

25. See *id.* at 4-9.

26. See *id.* at 23-24.

27. Compare Appellant's Opening Brief, *supra* note 23, at 4-9 with the events leading up to the murders of Nicole Brown Simpson and Ronald Goldman in the cases before the Superior Court of Los Angeles County, *supra* note 23; additional information can also be found at <http://www.courtTV.com/casefiles/simpson/>.

28. See *supra* note 27.

29. *Id.*

30. See Appellant's Opening Brief, *supra* note 23, at 4-9.

31. See *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring):

When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.

32. See, e.g., CAL. PENAL CODE § 189 (West 2001).

33. See, e.g., *id.* § 190.2 (West 2001).

34. See *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are

in wait has been rightly perceived “as a particularly cowardly form of murder,”³⁵ and thus a qualifying circumstance in some jurisdictions.³⁶ Hence, the opprobrium heaped on the villain who kills from ambush.³⁷ And indeed, lying in wait necessarily involves planning and reflection on taking the life of another.³⁸ Launching a lethal and surprise attack from a concealed position on an unsuspecting victim can rightly be labeled such an “aggravating” or “special” circumstance, and such a murderer could rationally be singled out from the horde of his vile brethren, without regard for race, economic status, or any other factors.³⁹

Nevertheless, should any death qualifying circumstances come to be so broadly defined as to include scenarios not contemplated at the time of its inclusion as a death qualifying event? If so, it has then lost its legitimacy as a death qualifying act.⁴⁰ If any of these “special” circumstances, these filters through which those deserving death will be sifted, become nothing more than a thin veil of constitutionality to cover the specter of killing autonomy possessed by the state, they must be exposed and extinguished. Their distinctiveness in setting forth who shall be executed is lost, and they then lapse into meaninglessness while their use

evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id.

35. *Richards v. Superior Court*, 194 Cal. Rptr. 120, 125 n.5 (Ct. App. 1983).

36. See CAL. PENAL CODE § 190.2(a)(15) (West 2001), enacted in 1978; COLO. REV. STAT. § 16-11-103(5)(f) (2001), enacted in 1974; IND. CODE ANN. § 35-50-2-9(A)(3) (Burns 2001), enacted in 1977; MONT. CODE ANN. § 46-18-303(4) (2001), enacted in 1977. These are the only four states which currently have a “lying in wait” special circumstance in their death penalty schemes.

37. *Richards*, 194 Cal. Rptr. at 125 n.5.

38. See *Thacker v. State*, 556 N.E.2d 1315, 1324-25 (Ind. 1990) (“In such a crime, there is considerable time expended in planning, stealth and anticipation of the appearance of the victim while poised and ready to commit an act of killing.”).

39. See *Richards*, 194 Cal. Rptr. at 125 n.5 (“[Throughout western civilization,] special scorn [has been] reserved for those who murdered victims in a fashion intended to deprive them of the opportunity for reflection and contrition.”).

40. See *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (“Judicial enforcement of the [Eighth Amendment] cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.”); see also Merrill K. Albert, *Murder by Lying in Wait*, 42 CAL. L. REV. 337, 341 (1954) (offering an enlightening syllogism):

1. If, before a lying in wait murder can be found, the jury is required to find beyond a reasonable doubt that the defendant *watched* and *waited* for his victim before murdering him, then any further finding as to premeditation and deliberation would be superfluous because the *modus operandi* itself demonstrates that the murder was a deliberate and premeditated act.
2. But were the concept of lying in wait unduly relaxed so that substantial evidence of prior watching and waiting are not required, then the act of lying in wait would no longer be the equivalent of an act of deliberation and premeditation.
3. Thus, were a defendant convicted under such an inadequate showing of lying in wait, he would have been found guilty of first degree murder without a showing of deliberation or premeditation or its statutory equivalent.

becomes an easy weapon of the arbitrary and capricious. Has the lying in wait special circumstance reached that point?

The focus point of this article examines the special circumstance of lying in wait and determines if, by virtue of its judicially broadened scope, it has lost its legitimacy as a death qualifying event. First, however, we must review the constitutional mandate of the United States Supreme Court in *Furman v. Georgia* that any death penalty law must narrow that class of individuals deserving execution.⁴¹ Secondly, we will examine the historical underpinnings of lying in wait as a special circumstance and fathom its essence as a kind of signature event meriting the most extreme punishment. Next, we will examine the specific parameters of lying in wait as an aggravating circumstance in the four states that utilize lying in wait as a death qualifying circumstance. Finally, we will ascertain if the lying in wait circumstance constitutionally narrows and thus properly defines those individuals who will face the ultimate punishment.

I. THE NARROWING REQUIREMENT OF *FURMAN V. GEORGIA*

The *Furman* decision consolidated three cases: Furman, who killed a man after entering the man's home⁴²; Jackson, who raped a woman⁴³; and Branch, who also committed rape.⁴⁴ All three men were black, and all three were sentenced to death. The question before the United States Supreme Court was why these men were condemned to die while dozens, hundreds, even thousands of other murderers or rapists were not sentenced to die for *their* acts.⁴⁵ Were the death penalty laws of Georgia and Texas, the states from which *Furman* arose, as written and carried out, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment?⁴⁶ Even more specifically, the Court was concerned

41. *Furman*, 408 U.S. at 276-77 (Brennan, J., concurring) ("If . . . the infliction of a severe punishment is 'something different from that which is generally done' in such cases, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the [Cruel and Unusual Punishment] Clause, is inflicting the punishment arbitrarily.") (citation omitted). The leading dissent opinion also makes clear that the crux of the argument in *Furman* is that "the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern." *Id.* at 398-99 (Burger, J., dissenting).

42. *Id.* at 315 (Marshall, J., concurring).

43. *Id.*

44. *Id.*

45. *Id.* at 240-45 (Douglas, J., concurring) ("[The appellants] are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute 'cruel and unusual punishment' within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.").

46. *Id.* at 309-10 (Stewart, J., concurring).

with whether the death sentences of Furman, Jackson, and Branch were the product of the arbitrary and prejudicial application of the death penalty.⁴⁷ Were these men singled out and sentenced to die because they were black?

In the four decades preceding the 1972 *Furman* decision there were 3,859 executions in the United States; 1,721 of those executed were white and 2,066 were black.⁴⁸ Of the 455 individuals executed for rape without murder, 48 were white and 405 were black.⁴⁹ Keeping in mind that African-Americans comprised roughly ten to eleven percent of the American population during this period, the disproportionate percentage of African-Americans executed is staggering.⁵⁰ While the *Furman* Court noted that such numbers alone may not be conclusive that the death penalty was meted out arbitrarily, the numbers were significant enough to at least raise the question of whether the death penalty was imposed in some manner other than in an identifiable, objective, and rational manner.⁵¹

In overturning the death sentences of the three men, *Furman* established that the constitutional guidelines for the various death penalty schemes serve to protect against the arbitrary imposition of the death penalty.⁵² Four of the five concurring Justices in *Furman* made it abun-

47. See *id.* at 242 (Douglas, J., concurring).

48. *Id.* at 364 (Marshall, J., concurring). Justice Douglas also cites one study in Texas which found that:

Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.

Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

Id. at 250-51 (Douglas, J., concurring) (citing Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELIN. 132, 141 (1969)).

49. *Id.*

50. The percentage of African-Americans among the total population in 1930 was 9.6%; in 1940 it was 9.7%; in 1950 it was 9.8%; in 1960 it was 10.3%. All statistical data taken from <http://www.fisher.lib.virginia.edu/census>.

51. *Furman*, 408 U.S. at 250 n.15 (Douglas, J., concurring) (noting that "something more than chance has operated over the years to produce this racial difference. . . . Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided") (citation omitted).

52. See *id.* at 256 (Douglas, J., concurring).

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dantly clear that:

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The *Furman* Court's most pressing concerns were not that the death penalty was unconstitutional (addressed and discarded in *Gregg v. Georgia*⁵⁴) or violated equal protection (addressed and discarded in *McCleskey v. Kemp*⁵⁵), but rather the dire need for legislative restraints on how the

evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id.

53. *Id.* (Douglas, J., concurring).

54. 428 U.S. 153 (1976). *Gregg* involved a defendant who was charged with armed robbery and murder. *Id.* at 158. In accordance with Georgia procedure in capital cases, the trial was in two stages: a guilt stage and a sentencing stage. *Id.* The judge charged the jury that, in determining what sentence was appropriate, the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation. *Id.* at 161. Finally, the judge instructed the jury that it would not be authorized to consider imposing the penalty of death unless it first found beyond a reasonable doubt one of these aggravating circumstances:

One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].

Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.

Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant.

Id. at 161 (Stewart, J., concurring) (alterations in original). "Finding the first and second of these circumstances, the jury returned verdicts of death on each count." *Id.* Answering the defendant's contention that the death penalty is unconstitutional per se, the Court held:

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Id. at 186-87.

55. 481 U.S. 279 (1987). *McCleskey* involved a black man who was convicted of two counts of armed robbery and one count of murder in the Superior Court of Fulton County, Georgia, on October 12, 1978. *Id.* at 283. *McCleskey*'s convictions arose out of the robbery of a furniture store and the killing of a white police officer during the robbery. The jury found that two aggravating circumstances existed beyond a reasonable doubt: the murder was committed during the course of an armed robbery, and the murder was committed upon a peace officer engaged in the performance of his duties. *McCleskey* was sentenced to death. The court stated:

Because *McCleskey*'s sentence was imposed under Georgia sentencing procedures that focus discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," we lawfully may presume that *McCleskey*'s death sentence was not "wantonly and freakishly" imposed, and

death penalty may be administered and the insistence that "this 'restraint upon legislatures' possesses an 'expansive and vital character' that is 'essential . . . to the rule of law and the maintenance of individual freedom.'"⁵⁶

Justices Douglas, Brennan, Stewart, White, and Marshall found that the death penalty laws of Georgia and Texas failed to ensure that the death penalty was administered in a rational, evenhanded, and nondiscriminatory manner.⁵⁷ Given that the Georgia and Texas death penalty schemes were typical of the schemes of the other death penalty states, the *Furman* decision essentially invalidated all death penalty schemes in the United States, reasoning that those laws failed to extinguish arbitrariness in the imposition of death.⁵⁸

The death penalty, if it is not to run afoul of the Cruel and Unusual Punishment Clause, must in an evenhanded, nondiscriminatory manner narrowly distinguish those individuals designated for execution from the broader class of murderers.⁵⁹ Indeed, there must be an identifiable and rational means of distinguishing who is to be capitally charged from those who might be capitally eligible.⁶⁰ The fear is not just that a black man will be capitally charged, convicted, and sentenced when a similarly situated white man would not, but also that the various death schemes do not sufficiently narrow the type and manner of crime befitting capital punishment.⁶¹ While *Furman* specifically dealt with race

thus that the sentence is not disproportionate within any recognized meaning under the Eighth Amendment.

Id. at 308 (citations omitted).

56. *Furman*, 408 U.S. at 267 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 376-77 (1910)).

57. *See id.* at 256-57 (Douglas, J., concurring); *id.* at 305-06 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

58. *See supra* note 57.

59. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring).

The high service rendered by the "cruel and unusual punishment" clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

Id.

60. *See id.* at 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

61. *See id.* at 253 (Douglas, J., concurring).

[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Id.

discrimination in meting out death, the holding was a clarion call against any manner of the arbitrary institution of death. The Court demanded that death schemes as set forth and interpreted by judicial review must provide clarity and guidance against any arbitrary abuse of the scheme.⁶²

In outlining just how courts are to put constitutional restraints on the legislature's ability to prescribe punishments for crimes, Justice Brennan in *Furman* set forth two imperatives: the punishment must not be degrading to human dignity, and it must not be arbitrarily imposed.⁶³ These two statements seem somewhat of a tautology. What could be more degrading to human dignity than standing those convicted of wrongdoing against a wall and rolling dice to see whose body and mind will be forever washed from the earth? Even the most liberal legal mind could imagine a scenario in which capital punishment would be appropriate for certain individuals. The fervor of nationalism in most of the world's countries often finds a way to vindicate purposeful killing and other heinous acts during time of war. But to impose any of these cruel actions *arbitrarily* upon another human being seems to be the most inhumane act of all, falling outside all bounds of human dignity. Arbitrary imposition of a penalty that allows no moral leeway for mistake is a practice that "everyone would ineffably find to be repugnant to all civilized standards."⁶⁴ It is this arbitrariness, so foreign to human dignity, that the Court in *Furman* sought to preclude.⁶⁵

It would be fair to reason that no contemporary American legislative body would authorize arbitrary or discriminatory punishment.⁶⁶ Nevertheless, when those laws, through judicial interpretation or actual implementation, cede power to a prosecutor or a judge or a jury to use that law in an arbitrary manner, that action becomes unconstitutional.⁶⁷ Of course, that is precisely the *Furman* scenario. The death penalty laws of Georgia and Texas were race neutral, but in the charging process and

62. *See id.* at 256-57 (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.").

63. *Id.* at 271, 274 (Brennan, J., concurring).

64. *Id.* at 385 (Burger, J., dissenting).

65. *See id.* at 256-57 (Douglas, J., concurring).

66. *See id.* at 255 (Douglas, J., concurring) ("In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement.").

67. *See id.* (Douglas, J., concurring).

[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id.

in the jury process, African-Americans were in fact executed at a vastly disproportionate rate.⁶⁸ In *Furman*, Justice Douglas wrote that a jury's "untrammelled discretion . . . to pronounce life or death in capital cases is offensive," and that jurors must "be given standards by which that discretion should be exercised."⁶⁹ Douglas reasoned, "What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community."⁷⁰

Justice White perhaps best summed up the Court's concern: "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."⁷¹ Can it be said that the "special" circumstance of lying in wait meets the "meaningful basis" *Furman* standard? As legislatively drafted in the few jurisdictions that recognize lying in wait as a "special" or "aggravating" death qualifying circumstance, the act of lying in wait appears to be precisely defined, such that the prohibited conduct is clear.⁷² Yet as courts have come to probe the outer limits of lying in wait, its scope has broadened; its outer edges have become somewhat vague.⁷³ Prosecutors aware of such broadened interpretations now have license to file under these more relaxed standards. At some point the standard for this "special" circumstance may become so all encompassing as to fit an array of actions beyond that originally intended. If that be the case, the lying in wait death qualifying circumstance loses its

68. See *id.* at 249-50 (Douglas, J., concurring) ("The death penalty is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.") (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT: ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

69. *Id.* at 247 (Douglas, J., concurring) (quoting *McGautha v. California*, 402 U.S. 183, 207-08 (1971)).

70. *Id.* at 249 (Douglas, J., concurring).

71. *Id.* at 313 (White, J., concurring).

72. See *supra* note 36.

73. See *infra* sections III., A., B., and C.; see also Osterman & Heidenreich, *supra* note 10, at 1278-79:

The lying in wait special circumstance needs to be reevaluated. Its current application in California violates the Eighth Amendment and the mandates of the Supreme Court because it does not serve to distinguish between the general class of murderers and those deserving death. A California Court of Appeal Justice stated the situation perfectly in a depublished decision. In his concurring opinion, Judge Johnson stated that the lying in wait definition "has been expanded to the point [that] it is in great danger of becoming a 'general circumstance' rather than a 'special circumstance,' one which is present in most premeditated murders not just a narrow category of those killings."

Id. (quoting *Iniguez v. Superior Court*, 19 Cal. Rptr. 2d 66, 71 (Ct. App. 1993) (Johnson, J., concurring), depublished, No. S028650, 1993 Cal. LEXIS 4333, at *1 (Aug. 12, 1993)).

legitimacy as a *Furman* narrowing mechanism, as it may be wielded by prosecutors at their whim to capitally charge in an arbitrary manner.

II. ORIGINS OF LYING IN WAIT AS A DEATH QUALIFYING CIRCUMSTANCE

What of lying in wait? Why has it been singled out as a circumstance or event meriting additional punishment? Throughout western civilization, special scorn has been reserved for those who murdered by surprise or otherwise in a fashion that deprived the victim of the opportunity for reflection and contrition.⁷⁴ Lying in wait for one's enemies was perceived as a gruesome form of attack even in biblical times.⁷⁵ The origins of lying in wait in Anglo-Saxon history has roots at least as far back as the Norman Conquest of England.⁷⁶ "After the Norman Conquest of England, the hatred of the subjected Anglo-Saxons sought release in secret slayings of Normans by lying in wait and assassinating them."⁷⁷ These types of killings were severely punished by the Crown, and to suppress these slayings, the punishment *murdrum* (murder) was created.⁷⁸ "[T]he crime of killing by lying in wait continued to remain a homicide of extreme heinousness because of its cowardly nature and the difficulty of discovering the assassin in such cases."⁷⁹

One author in the twelfth century defined murder itself as: "A homicide which is committed in secret, no one seeing or knowing it."⁸⁰ Interestingly, then, a more accurate synonym for twelfth century "simple" murder was killing while lying in wait or by ambush. "[I]t is significant to note that the term *murder*, now embracing any unlawful killing with malice aforethought, had its genesis in the act of waylaying, *i.e.*, killing by stealth from ambush."⁸¹ Another colloquium on the dangers of a murder by lying in wait are heard from Hamlet's father during his complaint that he was murdered "in the blossoms of my sin/Unhousel'd, disappointed, unanel'd/No reckoning made, but sent to my account/With all my imperfections on my head."⁸² English common law, which has

74. *Richards v. Superior Court*, 194 Cal. Rptr. 120, 125 n.5 (Ct. App. 1983).

75. *See, e.g., Deuteronomy* 19:11; *Joshua* 8:2-19; 2 *Chronicles* 20:22, 13:13; *Jeremiah* 51:12; *Acts* 20:19.

76. ROY MORELAND, *THE LAW OF HOMICIDE* 198 (1952).

77. *Id.* at 198-99.

78. *Id.*

79. *Id.*

80. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 995 (1932).

81. Merrill K. Albert, *Murder Committed by Lying in Wait*, 42 CAL. L. REV. 337, 337-38 (1954). Many earlier cases used the term "ambush" synonymously with "lying in wait." *See, e.g., People v. Brown*, 59 Cal. 345, 350 (1881); *State v. Wiggins*, 89 S.E. 58, 59 (N.C. 1916); *State v. Rose*, 40 S.E. 83 (N.C. 1901).

82. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

never divided murder into various degrees, still regarded a murder committed by lying in wait as a particularly repugnant crime.⁸³ In 1389, the English Parliament passed a statute that denied the Crown the right to pardon any person who killed “while lying in wait” for his victim.⁸⁴

Not veering far from the English tradition, early American law similarly regarded those who killed by lying in wait as deserving of more severe punishment. Many of the states’ original penal codes were modeled after the Pennsylvania statute of 1794, which divided murder into two degrees.⁸⁵ The states that followed the language of this statute held that: “All murder which shall be perpetrated . . . by lying in wait” is to be murder in the first degree.⁸⁶ One early American case discussed this vile form of murder as “the mental poise of a wild beast in quest of prey.”⁸⁷ Justice DeBruler of the Indiana Supreme Court reflected:

In such a crime, there is considerable time expended in planning, stealth and anticipation of the appearance of the victim while poised and ready to commit an act of killing. Then, when the preparatory steps of the plan have been taken and the victim arrives and is presented with a diminished capacity to employ defenses, the final choice in the reality of the moment is made to act and kill. This . . . circumstance serves to identify the mind undeterred by contemplation of an ultimate act of violence against a human being and, of equal importance, the mind capable of choosing to commit that act upon the appearance of the victim.⁸⁸

After the death schemes of the various death penalty jurisdictions were found unconstitutional in *Furman*, many of the states kept the language of the 1794 Pennsylvania statute, which recognized murder by lying in wait as first degree murder, though not necessarily a death qualifying event.⁸⁹ More importantly, in response to the narrowing mandate of *Furman*, many of the death penalty jurisdictions enacted a list of “aggravating” or “special” circumstances that would qualify the defen-

83. Albert, *supra* note 81, at 337.

84. 13 Rich. 2, c.1 (1389).

85. See *infra* note 89.

86. *Id.*

87. *State v. Tyler*, 97 N.W. 983, 985 (Iowa 1904).

88. *Thacker v. State*, 556 N.E.2d 1315, 1324-25 (Ind. 1990).

89. *People v. Dunlap*, 975 P.2d 723, 751 n.26 (Col. 1999). The entire Pennsylvania statute read:

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

Id., quoted in *Schad v. Arizona*, 501 U.S. 624, 641-42 n.8 (1991).

dant for the death penalty or life in prison without parole.⁹⁰ These “circumstances” were designed to narrow the class of death eligible criminals, yet only four states included murder “by lying in wait” as an “aggravating” or “special” death qualifying circumstance.⁹¹ The four states were California, Indiana, Colorado, and Montana.

It is curious that even though many jurisdictions divide their murder schemes by degrees and most include murder while lying in wait as among the most heinous,⁹² only four jurisdictions single out lying in wait as a death qualifying act.⁹³ Of these four states, only California continues to incorporate both a statute defining murder by lying in wait as first degree murder, and an additional statute listing murder by lying in wait as a special circumstance warranting the death penalty.⁹⁴ Indiana had included lying in wait among its “capital felonies” pre-*Furman*, qualifying the murderer for the death penalty.⁹⁵ After *Furman*, however, it re-enacted its death penalty scheme so as to include lying in wait only among its aggravating factors.⁹⁶ This aggravating factor can be used either to enhance a non-capital penalty, or to impose the death penalty.⁹⁷ Colorado did not include lying in wait anywhere in its penal code until it enacted its list of death penalty aggravating circumstances following *Furman*.⁹⁸ Montana previously divided murder into two degrees (including first degree murder by lying in wait), but after *Furman* it unified their murder statute and placed lying in wait on the list of aggravating circumstances.⁹⁹

90. See, e.g., *People v. Green*, 609 P.2d 468, 505 (Cal. 1981) (“[T]he Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.”).

91. See *supra* note 36.

92. See *supra* note 90.

93. See *id.*

94. Compare CAL. PENAL CODE § 189 (West 2001) (classifying murder “by lying in wait” as murder in the first degree) with CAL. PENAL CODE § 190.2(a)(15) (West 2001) (including “lying in wait” as a special circumstance which, if proved, merits use of the death penalty).

95. IND. CODE ANN. § 35-42-1-1 (Burns 2001) (previously reading “[A] person lying in wait or a person hired to kill who intentionally kills another human being commits a capital felony”).

96. See *id.* § 35-50-2-9(b)(3) (Burns 2001).

97. See *Kingery v. State*, 659 N.E.2d 490, 497 (Ind. 1995) (“The trial court has discretion to find that the manner in which a crime was committed is an aggravating circumstance sufficient to increase the sentence beyond the statutory presumptive sentence.”) (citation omitted).

98. See COLO. REV. STAT. § 16-11-103(5)(f) (2001) (“For purposes of this section, aggravating factors shall be the following factors: . . . (f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device.”). Lying in wait was not included under the previous statutory aggravators as listed in COLO. REV. STAT. § 16-11-103(6)(f) prior to 1974.

99. See MONT. CODE ANN. § 45-5-102 (2001). The Annotator’s Note reads:

This section on deliberate homicide encompasses the former offenses of first-degree and second-degree murder. Under former law, murder was defined as the unlawful killing of a human being with malice aforethought. First-degree murder required

For California and Indiana, an auxiliary task arises when trying to distinguish between two types of lying in wait: lying in wait at an enhancer and lying in wait as a death qualifier. One consideration in accounting for two separate consequences to be assessed for lying in wait conduct may be the deliberative or premeditative aspect of lying in wait.¹⁰⁰ Indeed, lying in wait is the essence of premeditation. Watching and waiting for an opportunity to strike or launch a lethal attack necessarily contemplates a careful and thoughtful weighing out of a plan of attack.¹⁰¹ But by taking into account premeditation as a factor in determining the degree of murder, does it then become somewhat redundant to punish essentially the same conduct by also alleging lying in wait as an aggravating circumstance?¹⁰² In essence, unless lying-in-wait murder and lying in wait as a special circumstance are significantly different concepts, are those states that permit the multiple use of essentially the same conduct authorizing multiple punishment for that conduct?¹⁰³

the element of premeditation; while second-degree murder was any other type of murder without premeditation. The new criminal code eliminates all references to malice, employing instead the more precisely defined mental states of "knowingly" and "purposely". "Purposely", as defined in MCA, 45-2-101, is the most culpable mental state and implies an objective or design to engage in certain conduct, although not particularly toward some ultimate result. "Knowingly", (MCA, 45-2-101), refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Together, these terms replace the concepts of malice and intent. Premeditation, the distinguishing factor between first-degree and second-degree murder, has presented a continuing definitional problem for the courts. Many states require that the offender have had some time to think and reflect about the nature of his forthcoming act before premeditation can be said to have occurred. Montana, in *St. v. Palen*, [17 P.2d 862 (Mont. 1947)], held that premeditation and deliberation can be formed in an instant; thus, in effect, eliminating the traditional distinction between first-degree and second-degree murder. Under the new criminal code, premeditation is no longer an element of homicide, nor is there any delineation between degrees of murder.

Id. (citation omitted).

100. See *Thacker v. State*, 556 N.E.2d 1315, 1324-25 (Ind. 1990) ("[I]n such a crime, there is considerable time expended in planning, stealth and anticipation of the appearance of the victim while poised and ready to commit an act of killing.").

101. See *id.*

102. See *Albert*, *supra* note 81, at 340-41.

Thus, in California a murder committed by lying in wait is, *as a matter of law*, first degree murder. For this reason the lying in wait theory is a valuable and convenient prosecution tool, for once it is established (1) that the killing was murder, and (2) that it was committed by lying in wait, the prosecution has made out a case of murder in the first degree without being compelled to allege and prove that the murder was also deliberate and premeditated, or that specific intent to kill was present.

Id.; see also *People v. Carpenter*, 935 P.2d 708 (Cal. 1997).

103. See *People v. Hillhouse*, 40 P.3d 754 (2002) (Moreno, J., concurring and dissenting). Moreno exhibited apprehension about the differences between first degree murder by lying in wait and the lying in wait special circumstance by saying:

III. DISTINCTIONS IN MURDER BY LYING IN WAIT AND LYING IN WAIT AS AN AGGRAVATING FACTOR

In comparing and drawing distinctions between lying in wait murder and lying in wait as an aggravating circumstance, we start with the former, as it has the more significant legislative and judicial history.¹⁰⁴ The most often quoted early American case discussing lying in wait murder offered a simplistic definition: "to constitute lying in wait, three things must concur, to-wit, waiting, watching, and secrecy; and that these facts must be established beyond a reasonable doubt, to authorize the conclusion that there was such lying in wait."¹⁰⁵ It is these three elements: waiting, watching, and secrecy, or concealment, that are the essentials of lying-in-wait murder. It is within these essentials, however, where judicial and legislative interpretations vary. Different courts have held:

The requisites of watching and waiting do not necessarily require that a constant, unrelenting vigil be maintained. It is no defense that defendant fell asleep while lying in wait for his victim, for though the murder occurs after the killer has himself awakened or where the victim awakens his own murderer, the vigil remains unbroken for purposes of satisfying the requirements of a lying in wait.¹⁰⁶

The element of waiting has also not been strictly interpreted to mean that the defendant must always wait for his victim to come to him; it might also contemplate a situation where the murderer sought out the deceased.¹⁰⁷ And what of concealment?¹⁰⁸ There is some common law precedent that physical concealment from the victim is a necessary factor of lying in wait murder,¹⁰⁹ but there is ample authority to the contrary.¹¹⁰ Indeed, some courts conclude that a complete absence of concealment would not necessarily preclude a finding of lying in wait

It is undisputed that defendant concealed his purpose to kill the victim until he felt the circumstances were conducive to committing the crime, but that is not enough to constitute lying in wait. If it were, most premeditated murders would involve lying in wait and this special circumstance would not perform its function of narrowing "the class of persons eligible for the death penalty."

Id. at 784 (citation omitted).

104. *See supra* section II.

105. *Riley v. State*, 28 Tenn. (9 Humph.) 646, 651 (1849).

106. *Albert, supra* note 81, at 338 (citing *People v. Byrd*, 266 P.2d 505 (Cal. 1954); *People v. Tuthill*, 187 P.2d 16 (Cal. 1947)).

107. *People v. Byrd*, 266 P.2d 505 (Cal. 1954).

108. *See Albert, supra* note 81, at 338.

109. *See, e.g., State v. Cross*, 26 N.W. 62 (Iowa 1885); *Riley v. State*, 28 Tenn. (9 Humph.) 438 (1849).

110. *See, e.g., Williams v. State*, 30 So. 484 (Ala. 1901); *People v. Tuthill*, 187 P.2d 16 (Cal. 1947); *State v. Dooley*, 57 N.W. 414 (Iowa 1894); *State v. Henderson*, 85 S.W. 576 (Mo. 1905); *State v. Jackson*, 230 P. 370 (Mont. 1924); *State v. Walker*, 86 S.E. 1055 (N.C. 1915).

murder.¹¹¹ In 1953, Justice Traynor of the California Supreme Court set forth what has become a common definition of lying in wait murder: "The gist of lying in wait is that the person places himself in a position where he is waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person."¹¹² As evidenced by his choice of words, Justice Traynor articulated the belief that the defendant must be physically concealed from the victim in order for him to murder by lying in wait.¹¹³

How then does lying in wait murder differ from lying in wait as a special or aggravating death qualifying circumstance? The most meaningful distinction between the two concepts is their use. Lying-in-wait murder, as suggested earlier, is a factor in determining the degree of murder. If the elements of watching and waiting and concealment are present, the state certainly has a basis for escalating the ensuing murder to the greatest degree.¹¹⁴ And again, as previously suggested, such circumstances contemplate premeditation, which is typically sufficient justification for a first-degree murder prosecution.¹¹⁵

In sharp contrast, the only purpose in alleging lying in wait as an aggravating circumstance is to death qualify the perpetrator.¹¹⁶ In filing such an "aggravator," the state is alleging that the particular circumstance of lying in wait is heinous enough and specific enough to single out this particular perpetrator for execution. It is *Furman*, then, that compels the distinction between lying in wait murder and lying in wait as a death qualifying event. And inexorably it is *Furman* that demands that the latter be much narrower and more focused in order to provide a "meaningful basis" before someone is to be executed.¹¹⁷

111. See *supra* note 110.

112. *People v. Thomas*, 261 P.2d 1, 3 (Cal. 1953) (Traynor, J., concurring).

There is nothing in the law that requires that the "lying in wait" exist for or consume any particular period of time before the firing of a shot or other act which caused the death. It is only necessary that the act causing death be preceded by and the outgrowth of the "lying in wait." Where the killing is by "lying in wait," and the act causing death was intentional, it is murder of the first degree, whether the killing was intentional or unintentional, as in such case it is not necessary that there exist in the mind of the perpetrator an intent to kill.

Id. at 4 (internal quotations omitted).

113. *Id.* at 7.

114. See *supra* note 11.

115. See *id.*

116. See CAL. PENAL CODE § 190.2(a)(15) (West 2001).

117. See *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (White, J., concurring).

In the 12 years since *Furman v. Georgia*, every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

How must the lying in wait aggravating circumstance be defined to allow for a meaningful distinction? "[T]he terms 'lying in wait' and 'ambush' have well-founded roots in common and legal parlance, and thus the aggravator has a 'common sense core of meaning . . . that criminal juries should be capable of understanding.'"¹¹⁸ Unfortunately, such a common sense understanding has proved elusive. Although many decisions purport to apply a readily understandable definition of lying in wait,¹¹⁹ it is debatable whether "[t]he words themselves contain their own restraint, they have not been applied to allow standardless and unchanneled sentencing, and they are not unconstitutionally vague."¹²⁰ Are the parameters of the lying in wait aggravating circumstance sufficient to meaningfully distinguish this murderer from the larger class of murderers who do not merit death? Has this defendant been singled out by a penal code that rationally narrows the list of those who kill to those who are truly death eligible?

There are three fundamental elements related to a depiction of the lying in wait aggravating circumstance¹²¹: concealment, a period of watching and waiting, and immediately thereafter, a surprise lethal attack on the victim.¹²² Each of these elements served as an essential part of the factual matrix that constituted lying in wait at common law.¹²³ Each element has generated its own complexities. Consequently, any careful analysis of the lying in wait aggravating circumstance must involve an element by element approach. For instance, concealment, far from being a straightforward concept, has, at least in one jurisdiction, included concealment of purpose in place of the physical concealment of the killer.¹²⁴ Likewise, a period of watching and

Id. (citation omitted).

118. *People v. Dunlap*, 975 P.2d 723, 751 (Colo. 1999) (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring)).

119. *See, e.g., Dunlap*, 975 P.2d at 751; *Davis v. State*, 477 N.E.2d 889, 896 (Ind. 1985); *Matheney v. State*, 688 N.E.2d 883, 901 (Ind. 1998); *Fitzpatrick v. State*, 638 P.2d 1002, 1016 (Mont. 1981). The California cases that reference this "easily understood" common law definition of lying in wait are omitted here because of their detailed discussion in the next section.

120. *Fitzpatrick*, 638 P.2d at 1016.

121. *See People v. Thomas*, 261 P.2d 1, 3 (Cal. 1953) (Traynor, J., concurring) ("The gist of lying in wait is that the person place himself in a position where he is waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person.").

122. *See supra* note 106.

123. *See id.*

124. California first explicitly rejected the element of physical concealment in *People v. Tuthill*, 187 P.2d 16 (Cal. 1947). This view has spawned some interesting responses. "Indeed it would seem unnecessary, for it is the acts of watching and waiting which demonstrate that the murder was on of plan and design and for this reason a palpable act of deliberation and premeditation. Concealment adds nothing but evidence of cowardice or caution." Albert, *supra* note 81, at 339-40.

waiting has come to mean mental recognition of the victim's location minutes before the murder.¹²⁵ "Immediately thereafter" is most readily understood as the "temporal proximity" requirement.¹²⁶ The lying in wait aggravating circumstance requires an "immediate" attack from the position of lying in wait. Yet how immediate must the attack be? Obviously, an unrelated act of lying in wait two months before the defendant eventually decides to kill the victim would not present a legitimate instance of murder by lying in wait. Is a five minute gap between the lying in wait and the murder immediate enough?

In addition to these traditional three elements, a fourth segment of lying in wait has surfaced in modern case law. This newly developed fourth element is the notion that lying in wait *results* in a position of advantage over the victim.¹²⁷ While this element may have been presumed historically, greater attention to its meaning has now been arrested.¹²⁸ Not only must the lying in wait immediately precede the lethal attack, but the concealment and period of watching and waiting must have a *direct relation* to the advantage gained over the victim. Actions that may seem mysterious or secretive in themselves, but have no bearing on a cruel and heinous murder, do not belong in a consideration of the defendant's penalty.¹²⁹ Much less does a valueless period of lying in wait that does not result in any physical harm, have a place among the highly selective factors that supposedly weed out those truly deserving of the death penalty.

Collectively, these four factors (concealment of some kind, a period of watching and waiting, an immediate lethal attack thereafter, and a

125. See *People v. Edwards*, 819 P.2d 436, 460 (Cal. 1997).

126. See *id.* at 460.

127. This element surfaces in *Davis v. State*, 477 N.E.2d 889, 897 (Ind. 1985).

In this case defendant did watch and wait from a concealed position for the other campers to go to sleep. However, he did not use the concealment as a direct means to attack or gain control of the victim. Rather he went openly into the tent and then forced J.L. to go with him by the use of a deadly weapon. *There was not a sufficient connection between the concealment and the murder* here to support a finding that this murder was committed "by lying in wait."

Id. (emphasis added).

128. See *id.*

129. See *Ingle v. State*, 746 N.E.2d 927, 940 (Ind. 2001).

The concealment must be used "as a direct means to attack or gain control of the victim," creating a nexus between the watching, waiting, and concealment and the ultimate attack.

. . . Defendant did not use his concealment in the tree as a means to attack [the victim]. . . . Because Defendant did not use his concealment as a "direct means to attack or [to] gain control of the victim," and a substantial amount of time passed between his concealment in the tree and the killing, it does not contribute to the charge of lying in wait.

Id.

relation between the lying in wait and the position of advantage over the victim) are the seeds from which sprout the detailed discussions of lying in wait as an aggravating or special circumstance. Of the four states that cling to lying in wait as an aggravating circumstance, California has devoted by far the most time discussing the distinction between lying-in-wait murder and the lying-in-wait special circumstance, and therefore our attention will turn there first.

A. *California's Lying in Wait Special Circumstance*

California is well versed in death penalty jurisprudence, and its prominence among the states' killing fields was noted in the *Furman* decision itself.¹³⁰ Backed by its list of twenty-two "special circumstances,"¹³¹ California has provided for a large class of death-eligible

130. *Furman v. Georgia*, 408 U.S. 238, 411 (1972). *People v. Anderson* was decided during the adjudication of *Furman v. Georgia* and was negatively referenced by Justice Blackmun's dissent. The California Supreme Court was forced to strike down the death penalty in its entirety because, as Justice Blackmun notes: "California's moral problem was a profound one, for more prisoners were on death row there than in any other state." *Id.* at 411. Whether or not California has absolved this moral problem that accompanies their death penalty jurisprudence is yet to be seen.

131. California is alone among the states who include lying in wait as an aggravating circumstance in calling it a "special circumstance." See CAL. PENAL CODE § 190.2(a) (West 2001):

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

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

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant

knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

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

(F) Oral copulation in violation of Section 288a.

defendants.¹³² It is alone among the four states that include lying in wait as a special circumstance in also explicitly holding that murder “by lying in wait” is first-degree murder as a matter of law.¹³³ Under the California scheme, after determining guilt as to murder, the trier of fact must then decide whether any of the additional alleged “aggravating” or “special” circumstances are present. One of these special circumstances is murder “by means of lying in wait.”¹³⁴ Until a statutory change in 2000, the lying in wait special circumstance was a death qualifier if the murder was committed “while lying in wait.”¹³⁵ The legislative alteration of 2000 changed the wording to “by lying in wait.”¹³⁶ Consequently, the vast history of California jurisprudence on this issue utilized the “while lying in wait” language.¹³⁷ The distinction is critical. “*While* lying in

(G) Burglary in the first or second degree in violation of Section 460.

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim’s official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, “motor vehicle” means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

132. *Id.* § 190.2 (West 2001).

133. *Id.* § 189.

134. *Id.* § 190.2(a)(15). This section was amended in 2000 to read “by means of lying in wait” instead of the previous language “while lying in wait.” This very important distinction will be discussed herein.

135. *Id.* The amendment was a result of the passing of California Senate Bill No. 1878.

136. *See id.*

137. The history of the lying in wait special circumstance revolves around the 1978 Briggs Initiative which added ten special circumstances to California’s death penalty statute, one of them being murder committed “while lying in wait.” The other nine special circumstances that were added by the Briggs Initiative were: (1) murder to prevent arrest or to escape from lawful custody; (2) murder of a federal law enforcement officer; (3) murder of a fireman; (4) murder of a

wait” contemplates an immediacy, or substantial contemporary between the lying in wait and the act of killing,¹³⁸ that is not necessarily present in “by means of lying in wait.”

The first California appellate court to address the lying in wait special circumstance involved a kidnapping, followed later by the murder of the kidnapped victim.¹³⁹ The dominant issue was immediacy, or whether the temporal proximity requirement was met. *Domino* found that the interruption or period of time that passed between the lying in wait and the act of killing precluded a finding that the killing was committed “while” lying in wait.¹⁴⁰ The court said that “where the victim . . . was captured during the period of lying in wait and was killed some one to five hours later, the special circumstance clearly does not exist.”¹⁴¹ The court went on to clarify that:

[T]he killing must take place during the period of concealment and watchful waiting[,] or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist.¹⁴²

Any other result would have eliminated any distinction between lying-in-wait murder and lying in wait as an aggravating circumstance, and as such would most likely have run afoul of *Furman* in that *any* lying in wait murder would be a death qualifier.¹⁴³ Such a result would have

prosecutor; (5) murder of a judge; (6) murder of other specified government officials; (7) an “especially heinous, atrocious or cruel” murder; (8) murder because of the victim’s “race, color, religion, nationality or country of origin”; and (9) murder by poison. *Id.* § 190.2(a)(5)-(19) (2001).

138. *Domino v. Superior Court*, 181 Cal. Rptr. 486 (Ct. App. 1982).

To give proper impact to the term “while” we read it as creating a requirement that where first degree murder has been “perpetrated by means of . . . lying in wait,” the death penalty or life without possibility of parole may be imposed only if the appropriate temporal relationship exists between the killing and the lying in wait.

Id. at 493 (alteration in original).

139. *Id.* at 488-89.

140. *Id.* at 493. Specifically, the court noted the difference between the words “by means of,” used for first degree murder lying in wait, and “while,” which was used for the special circumstance. “One must assume that the drafters were aware of the wording of Penal Code section 189 and that they deliberately chose different words. A contrary assumption would suggest that the drafters exercised little or no care in establishing the criteria for deciding between life and death.” *Id.* at 492.

141. *Id.* at 493. Presumably, this would not matter for a charge of first degree murder by lying in wait.

142. *Id.*

143. In addition to the temporal proximity requirement of the special circumstance, the only other distinction between first degree murder by lying in wait and the special circumstance is the requirement of “an intent to kill.” As discussed in note 11, *supra*, California has equated murder by lying in wait with premeditation or deliberation. This means that there must be an additional

created a broad class of persons eligible for execution far beyond that narrow and meaningfully focused basis set forth in *Furman*.

The California Supreme Court first confronted the lying in wait special circumstance in *People v. Edelbacher*.¹⁴⁴ Edelbacher argued that the murder was not committed "while" lying in wait.¹⁴⁵ The court, citing the *Domino* distinction between lying-in-wait murder and the special circumstance of lying in wait, found that they did not need to "decide in this case whether the distinction drawn in *Domino* is correct."¹⁴⁶ The court, without explication of the *Domino* interpretation, found that:

There was no evidence that [the murder] was committed some time after rather than during the lying in wait and thus no rational juror could conclude, under any reasonable construction of the statutory language, that defendant committed the murder "by means of" lying in wait but not "while" lying in wait.¹⁴⁷

Therefore, while acknowledging the *Domino* distinction, the *Edelbacher* court did not further distinguish between "while" and "by means of."¹⁴⁸

The authoritative decision that laid the foundation of the California Supreme Court's jurisprudence regarding the lying in wait special circumstance was its 1989 decision in *People v. Morales*.¹⁴⁹ In that case, the defendant and an accomplice planned to kill a woman by strangling her with a belt.¹⁵⁰ The men lured the victim into a car, and while driving her to another location Morales tried to strangle her with his belt until it broke.¹⁵¹ When he realized that she was still breathing, he beat her on the head until she was either unconscious or dead, dragged her body into a field, and then stabbed her four times to ensure her death.¹⁵²

The *Morales* court dismissed the defendant's assertion that this murder did not occur "while" lying in wait, as required under the language of the special circumstance statute.¹⁵³ The court cited *Domino*'s

mens rea, or "intent to kill" in the special circumstance to differentiate it from first degree murder, but this distinction has almost no realistic chance of application as discussed in section IV *infra*.

144. 766 P.2d 1 (Cal. 1989). The California Supreme Court had discussed the details of murder by lying in wait at length in *People v. Thomas*, 156 P.2d 7 (Cal. 1945); *People v. Tuthill*, 187 P.2d 16 (Cal. 1947); and *People v. Byrd*, 266 P.2d 505 (Cal. 1954).

145. *Edelbacher*, 766 P.2d at 24. Defendant Edelbacher had shot his estranged wife through her kitchen window in the nighttime. *Id.* at 7. The court conjectured that "the victim was obviously taken unawares, and the shooter was not observed either before or after the shooting." *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. 770 P.2d 244 (Cal. 1989).

150. *Id.* at 249.

151. *See id.*

152. *See id.*

153. *Id.* at 261.

rationale that there can be no cognizable-interruption between the period of lying in wait and the killing. Significantly, the court explained, as it did in *Edelbacher*, that it did not need to "consider the validity of *Domino's* restrictive interpretation of the special circumstances provision."¹⁵⁴ That is, it *again* found that "the evidence in this case clearly would support a finding that defendant's lethal acts flowed continuously from the moment he commenced his surprise attack."¹⁵⁵ Although the defendant's initial attempt to strangle the victim failed, the court found that there was no cognizable interruption between the period of watchful waiting and "the commencement of the murderous *and continuous* assault which ultimately caused her death."¹⁵⁶

Additionally, Morales attacked the lying in wait special circumstance, maintaining that he did not physically conceal himself from the victim preceding the murder. Citing a number of cases interpreting lying in wait *as a type of first degree murder*, the court stated that the concealment element "may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares *even though he sees his murderer*."¹⁵⁷ Finding that Morales's concealment of purpose was sufficient, the court held that

the jury . . . was properly instructed on the concealment element of the lying-in-wait special circumstance . . . based on [the] defendant's watchful waiting, from a position of advantage in the back seat, while the car was driven to a more isolated area, and his sudden surprise attack, from behind and without warning.¹⁵⁸

The court distinguished an earlier decision which had "rejected the argument that the element of concealment could be satisfied merely by taking the victim 'unawares' from behind."¹⁵⁹ The court found this element expendable¹⁶⁰ despite language in a previous decision that stated that

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 258-59 (quoting *People v. Ward*, 103 Cal. Rptr. 671, 679 (Ct. App. 1972) (emphasis added)).

158. *Id.* at 259.

159. *Id.* at 260 (distinguishing *Richards v. Superior Court*, 194 Cal. Rptr. 120 (Ct. App. 1983)).

160. *Id.* at 258. The court insisted:

While concealment is an element . . . , it is only a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise.

. . . .

As the *Sassounian* court explained, concealment, in the sense that the defendant uses the term, is not required in order to justify and support a 'lying-in-wait' special circumstance. The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. It is sufficient that a defendant's true intent and purpose were concealed by his actions or

physical concealment suggests "a particularly cowardly form of murder,"¹⁶¹ and thus an essential requirement of lying in wait.

Answering Morales's argument that the victim might have already been aware of the murderous plans, thus precluding *any* finding of concealment, the court found merit in the idea that "her screams for assistance from [the accomplice] would support a finding that she was indeed surprised by, and unprepared for, the attack."¹⁶² This finding convinced the court that an element of surprise was present, thereby satisfying the concealment requirement.

Justice Mosk vehemently dissented as to the expansion of concealment in a lying in wait scenario.¹⁶³ "I cannot agree [that] 'concealment' means anything other than actual *physical* concealment. . . . '[t]he gist of 'lying in wait' is that the person places himself in a position where he is waiting and watching *and concealed from the person killed*'"¹⁶⁴ Justice Mosk went on to say that "the special circumstance finding must be vacated: insofar as it purports to serve as a predicate for the determination of death-eligibility, it is constitutionally invalid."¹⁶⁵ He gave two reasons for his belief that the special circumstance was unconstitutional:

First, this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim Second, the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not. To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly.¹⁶⁶

The *Morales* majority rejected Justice Mosk's argument and held:

[W]e believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim

conduct. It is not required that he be literally concealed from view before he attacks the victim.

Id. at 258-59 (quoting *People v. Sassounian*, 226 Cal. Rptr. 880, 907 (Ct. App. 1986) (internal quotation and citation omitted)).

161. *Richards*, 194 Cal. Rptr. at 125 n.5.

162. *Morales*, 770 P.2d at 261.

163. *Id.* at 271-74 (Mosk, J., concurring).

164. *Id.* at 272 (citation omitted).

165. *Id.*

166. *Id.* at 272-73 (Mosk, J., concurring).

from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.¹⁶⁷

Two years after *Morales*, the California Supreme Court again examined the immediacy element of lying in wait as an aggravating circumstance.¹⁶⁸ In *Webster*, the court reiterated the distinction between

167. *Id.* at 260-61. The Court continued:

The question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances. But contrary to defendant's argument, we conclude that an intentional murder undertaken by lying in wait in the foregoing manner is properly among the kinds of aggravated killing which justify society's most severe penalty.

Id.

168. *People v. Webster*, 814 P.2d 1273 (Cal. 1991). The following is the court's recitation of the factual record:

The principal prosecution witnesses were Bruce Smith and Michelle Cram

Smith and Cram provided the following account, differing only in minor details: In late August 1981, defendant, Joseph Madrigal, Carl Williams, Robert Coville, Smith, and the 17-year-old Cram were living at a riverbank encampment in Sacramento. Defendant was the group leader. On the night of August 29, Smith, Madrigal, and Coville robbed a nearby convenience store. Quick response by the police forced the trio to hide for several hours before returning to camp.

The next day, August 30, defendant and Williams made one of several trips to buy beer, which the camp residents were consuming at a steady pace. When the men returned in early afternoon, defendant said they had met two "outlaws" ("street persons" or "survivors") at the Shell station near the convenience store. Defendant reported there was still intense police activity in the area because of the robbery, and he suggested the group needed to leave town. Defendant said he had arranged to use the "outlaws'" car for joint drug purchases or robberies that evening. The opportunity arose, he suggested, to lure one of the "outlaws" back to the camp, kill him, and steal the car.

Madrigal, Coville, and Williams expressed enthusiasm for the plan. According to Cram, defendant said he personally would kill and dismember the victim; according to Smith, Coville said he "hadn't killed somebody in quite a while" and would "take care of it." When Cram expressed skepticism about defendant's boasts, he insisted he was serious. Defendant said this would be Cram's first criminal lesson and would help her become more independent from Williams, with whom she was living.

It was decided that because the "outlaws" knew Williams, he would walk back to the Shell station with defendant to meet them. Madrigal would go along. Once the three returned to camp with the intended victim, either defendant (according to Cram) or Coville (according to Smith) would kill him. Defendant showed Smith where to dig a grave and told Cram to clean up the campsite and pack in preparation for the group's departure. Defendant, Williams, and Madrigal then left for a 7:30 p.m. meeting with the "outlaws." Defendant had drunk beer all day and may have taken amphetamines. As usual, defendant was wearing glasses; Williams wore a cowboy hat.

While the three men were gone, Smith and Cram worked at their assignments; Coville sat and drank beer. After half an hour's absence, defendant called out from the top of a levee that his group had returned. Four men walked single file down the trail to the camp. Williams was in the lead, followed in order by Madrigal, the victim Burke, and defendant. When the four were about halfway down the trail,

first degree murder by lying in wait and the lying in wait special circumstance by stating that the jury instructions properly "expressed the correct temporal relationship between concealment and attack."¹⁶⁹ The charge to the jury confirmed: "For purposes of first degree murder . . . the killing must be 'immediately preceded' by the period of lying in wait."¹⁷⁰ The special circumstance instruction set forth the statutory requirement that the murder was "committed 'while' the defendant was lying in wait,"¹⁷¹ thus validating the *Domino* court "distinction between 'by means of' and 'while.'"¹⁷²

Despite the explicit language in *Webster*, one year later the Court in *People v. Hardy*¹⁷³ began to blur the distinction between "while" and "by means of." In *Hardy*, the defendants drove to the victim's home in the early morning hours, parked on a side street, and used a key they had obtained earlier to silently gain access.¹⁷⁴ They rotated the light bulb in the porch light and "cloaked in darkness, they traversed the hallway to the bedrooms and killed the victims."¹⁷⁵ With respect to first degree murder by lying in wait, the court stated:

[T]he jury could reasonably conclude defendants concealed their murderous intention and struck from a position of surprise and advantage, factors which are the hallmark of a murder by lying in wait. Insisting on a showing that defendants actually watched the victims sleeping and waited a moment before attacking reads the law in too literal a fashion.¹⁷⁶

Although the case primarily discussed only first degree murder by lying in wait, a subtle confusion arises when the court uses the *Morales* elements, which were explicitly used to describe the special circumstance of lying in wait,¹⁷⁷ to define first degree murder by lying in wait.¹⁷⁸ This "confusion" may explain the future tendency of the Cali-

defendant suddenly grabbed Burke and pulled a knife. According to Smith, defendant moved around to the front of Burke and stabbed him; Cram saw defendant reach from behind to stab Burke in the chest. Burke protested, and a struggle ensued. Madrigal turned back to assist defendant. Burke began to make gurgling sounds.

Id. at 1277-78.

169. *Id.* at 1294.

170. *Id.*

171. *Id.*

172. *Id.* The *Webster* Court is also the first to draw attention to the other semantic distinction in the penal code between first degree murder by lying in wait and the lying in wait special circumstance, that the defendant *intentionally* killed while lying in wait. *Id.*

173. 825 P.2d 781 (Cal. 1992).

174. *Id.* at 795-97.

175. *Id.* at 825.

176. *Id.* at 825-26.

177. *Id.* at 825 (quoting *People v. Morales*, 770 P.2d 244, 260-61 (Cal. 1989)).

178. *Id.*

fornia Supreme Court to eradicate any distinguishing factors of the murder by lying in wait and the lying in wait special circumstance.

In *Hardy*, the court specifically rejected the defendant's constitutional challenge that the special circumstance statute "fail[ed] to provide notice, guidance or any principled method to identify a class of murderers that are more deserving of death."¹⁷⁹ Also in *Hardy*, Justice Mosk renewed his concern that physical concealment should be required to find a murder by lying in wait.¹⁸⁰

The elements of the lying in wait special circumstance surfaced again just eleven days later in *People v. Roberts*,¹⁸¹ in which the imprisoned defendant killed a fellow inmate as the other was walking down a corridor.¹⁸² Roberts waited for the victim to pass and then attacked him from behind.¹⁸³ The state presented no evidence that the defendant concealed himself.¹⁸⁴ In distinguishing between first degree lying in wait and the special circumstance, the court held that the lying in wait special circumstance could only be found if: "(1) the defendant intentionally killed the victim, and (2) the murder took place during the period of time that the defendants were lying in wait, or the lethal acts began and flowed continuously from the point in time the lying in wait ended."¹⁸⁵

The issue once again was concealment. The court stated:

Concealment may manifest itself either by ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer. It is only a concealment which puts the defendant in a position of advantage from which it can be inferred that lying in wait was part of the defendant's plan to take his victim by surprise.¹⁸⁶

Roberts argued that "the only difference between his case and one in which a prisoner walked to another inmate's cell and stabbed him to

179. *Id.* at 844.

180. *Id.* at 865 n.1 (Mosk, J., concurring). Mosk stated:

In my concurring and dissenting opinion in *People v. Morales*, I set out my view that lying in wait as a theory of first degree murder and lying in wait as a special circumstance establishing eligibility for the penalty of death[;] each require waiting, watching, and actual *physical* concealment—I did so impliedly as to the theory and expressly as to the special circumstance. Put simply, concealment of purpose as distinguished from concealment of the person is not enough. "I continue to adhere to that view as a matter of personal belief. I have not succeeded, however, in persuading my colleagues of the soundness of my position. After reflection, I have decided not to beat a rataplan."

Id. (citations omitted).

181. 826 P.2d 274 (Cal. 1992).

182. *Id.* at 283-85.

183. *Id.*

184. *Id.* at 302.

185. *Id.*

186. *Id.*

death would be locomotion; yet the hypothetical inmate would not be death eligible on that basis.”¹⁸⁷ The court answered this challenge by quoting their own definition of the lying in wait special circumstance in *Morales* and then concluding that “the [jury] instructions, verdict, and finding met the statutory requirement of section 190.2, subdivision (a)(15) that the murder occurred ‘while lying in wait.’”¹⁸⁸ There was no fact-based analysis applying the definition of the special circumstance to the case, nor was there an explanation of how the special circumstance was to be meaningfully distinguished from other forms of premeditated murder, including first degree murder by lying in wait.

The continued blurring of any meaningful distinction between lying in wait first degree murder and lying in wait as an aggravated circumstance came but a year later in *People v. Ceja*.¹⁸⁹ *Ceja* was a lying in wait first degree murder case; no lying in wait aggravating circumstance was alleged. On the day of the murder, Ceja parked his truck in the victim’s backyard and knocked on the front door.¹⁹⁰ The victim took her baby from its crib and proceeded to walk outside with Ceja. The three of them went into the front yard and sat down.¹⁹¹ Some time later, Ceja shot and killed her.¹⁹²

In answering the contention that the lying in wait first degree murder instructions were unconstitutionally vague, the court set forth the *Morales* definition of the lying in wait special circumstance to interpret lying in wait first degree murder,¹⁹³ and in a footnote purporting to explain the difference between the two types of lying in wait, stated:

Lying in wait as a form of first degree murder under Penal Code section 189 should not be confused with the largely similar, but slightly different, special circumstance in which the “defendant *intentionally* killed the victim *while* lying in wait.” (. . . italics added to indicate language differences between the two statutes . . .) Here, there was no special circumstance allegation, so only lying in wait

187. *Id.*

188. *Id.* at 303.

189. 847 P.2d 55 (Cal. 1993).

190. *Id.*

191. *Id.*

192. *Id.* at 58.

Defendant was arrested a year and a half later in Merced. Although he denied committing the crime, he told the police that he drove his father’s pickup truck to Hermenegildo’s house the morning of the shooting, and saw Diana briefly. He said he left the truck at the house because it would not start. At trial, he presented an alibi defense which the jury rejected.

Id.

193. *Id.* at 59 (“As we said in *People v. Edwards*, 819 P.2d 436, ‘We did not require any particular phraseology in *Morales*, only the substance.’ The instruction contains the substance of all the legal requirements.”).

murder is involved. However, we can and do rely on special circumstance cases to the extent, which is substantial, that the two types of lying in wait overlap.¹⁹⁴

After this dubious assurance, the court, in the context of first degree murder by lying in wait, went on to state that the facts supported a finding of a murder by lying in wait. In response to Ceja's suggestion that he waited too long to kill the victim for his actions to constitute a lying in wait murder, the court proclaimed: "As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise."¹⁹⁵ In fact, another footnote explains that if a defendant and victim "engage in activities before the killing not designed to gain a position of advantage, or the defendant passes up several positions of advantage before killing during an argument, there is no lying in wait."¹⁹⁶ Despite this concession, the court found that the jury could have reasonably concluded that Ceja had not passed up his position of advantage, but rather "sought and obtained a position of advantage before he shot [the victim]."¹⁹⁷ It is apparently permissible in California, then, for a trier of fact to use circumstantial evidence to arrive at the conclusion that the defendant sought and obtained a position of advantage. Moreover, if a significant amount of time passes, the trier of fact can also conclude (with the same evidence) that the defendant simply waited until he maximized this position of advantage.¹⁹⁸

Justice Kennard, although agreeing with the Court that the evidence was sufficient to support the first degree murder perpetrated by lying in wait,¹⁹⁹ expressed concern:

194. *Id.* at 59 n.2 (citations omitted).

195. *Id.* at 63 (explaining that in *People v. Edwards*, an earlier first degree lying in wait case, the court had found that the defendant waited and watched until the victims reached the place of maximum vulnerability before shooting and upheld a finding of murder by lying in wait).

196. *Id.* at 61 n.3.

197. *Id.* at 62.

198. *Id.* The court explained its reasoning:

When defendant met Diana at the door, others were nearby. He tried to get her alone in the backyard, near his truck. When that failed, he lured her to the front yard, a "more isolated area" than the house, although perhaps not as ideal for his purposes as the backyard. It was not, however, until Roque returned to the house after accompanying defendant and Diana to the front yard that defendant was finally alone with his victim. At that point, the jury could reasonably find, defendant seized his advantage, and attacked. That the victim resisted long enough to cry for help, and for others to run out and witness the shooting, does not vitiate the lying in wait.

Id. (citations omitted).

199. *Id.* at 63-64 (Kennard, J., concurring).

Here, the prosecution used the lying-in-wait theory only as the basis for a charge of

[T]he lying-in-wait special circumstance must provide a meaningful basis for distinguishing capital and non capital cases, so that the death penalty will not be imposed in an arbitrary or irrational manner. Recent decisions of this Court have given expansive definitions to the term "lying in wait," while drawing little distinction between "lying in wait" as a form of first degree murder and the lying-in-wait special circumstance, which subjects a defendant to the death penalty.²⁰⁰

Included in the decisions in which she finds this troubling predicament are *Hardy*, *Webster*, and *Morales*.²⁰¹ Justice Kennard continued:

I have a growing concern . . . that these decisions may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death penalty from those defendants who are "merely" guilty of first degree murder. But because the prosecution in this case did not charge defendant with a lying-in-wait special circumstance, I need not further explore the possible differences between murder by lying in wait and the lying-in-wait special circumstance here.²⁰²

In dissent, Justice Mosk echoed the concerns of Justice Kennard: "At trial, there were indeed isolated pieces of evidence that bore on 'waiting,' 'watching,' and 'concealment' as discrete facts. But, viewed in its entirety, the evidence did not establish an underlying, and unifying, fatal plan."²⁰³ Justice Mosk continued to maintain that physical concealment should be required.²⁰⁴

People v. Edwards was another dynamic rendering of California's view of the lying in wait special circumstance.²⁰⁵ In that case, Edwards had entered a campsite around eleven a.m.²⁰⁶ Three hours later, two girls were leaving the campsite to have a picnic lunch in a nearby area,

first degree murder. But lying in wait can also be a special circumstance, rendering a criminal defendant eligible for the death penalty. (See Pen.Code, § 190.2, subd. (a)(15) ["The defendant intentionally killed the victim while lying in wait."].) In this case, however, defendant was not charged with this special circumstance. . . .

Id. (footnote omitted).

200. *Id.* at 63 (Kennard, J., concurring) (citation omitted).

201. *See id.*

202. *Id.* at 64 (Kennard, J., concurring).

203. *Id.* at 65 (Mosk, J., dissenting).

Quite the contrary, it revealed a tragic fortuity. The last encounter between defendant and the victim was similar to many that preceded it during the course of their stormy relationship. It was different in this: Maria Ortega spit a "nasty" remark at defendant. As a consequence, he immediately drew a gun and pointed it at her; she ran behind a tree; and he then turned the weapon against the victim. On such facts, a reasonable jury could not have found lying-in-waiting *beyond a reasonable doubt*.

Id.

204. *Id.* at 64 n.2 (Mosk, J., dissenting).

205. 819 P.2d 436 (Cal. 1991).

206. *Id.* at 446.

but they first stopped to use the restroom at the entrance to the campground.²⁰⁷ They were observed coming out of the campsite by other campers.²⁰⁸ There was testimony that Edwards had driven past the girls as they were leaving, and a few minutes later, he drove his truck out of the campground towards the girls.²⁰⁹ One of the girls heard the vehicle approaching and told the other to “get on the side of the road.”²¹⁰ Edwards drove alongside the girls, stopped, and said, “Girls.”²¹¹ He then fired two shots from a pistol, hitting one of the girls and killing her.²¹² Edwards was charged with the lying in wait special circumstance.²¹³

The court rejected Edward’s plea that he did not kill “while” lying in wait.²¹⁴ The court surmised that “the shooting occurred without any ‘cognizable interruption’ following the lying in wait under any legal standard.”²¹⁵ Edwards claimed that he drove right beside the girls and called out to them; the court interpreted this action as a plan to catch them “completely unsuspecting” and thought that he called to the girls “so they would look his way and become ideal live targets.”²¹⁶ Concluding its rationale, the court found: “The jury could reasonably infer defendant waited and watched until the girls reached the place of maximum vulnerability before shooting . . . Rather than shoot them when he

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* Defendant objected to the charge of the lying in wait special circumstance on numerous grounds. *Id.* at 457. Many of the objections centered on the use of the lying in wait jury instructions. *Id.* at 458-59. One of them was that the instructions did not include the requirement, from *Morales*, that the defendant achieve “a position of advantage.” *Id.* at 458. The court ignored this contention by stating that the instructions implied this element and held that the language included in the instruction, which said that there must be a “‘situation where the victim is taken unawares and by surprise,’ combined with an intent to kill, necessarily places the intended killer in a position of advantage.” *Id.* The defendant next objected to the absence of the word “substantial” in relation to the period of watching and waiting, but the Court found that the inclusion of the admonishment to the jury that the lying in wait “must be of sufficient duration to establish the elements of waiting, watching and concealment or other secret design,” presupposed a substantial temporal element. *Id.* at 458-59.

213. *Id.* at 445.

214. *Id.* at 460.

215. *Id.* at 459-60.

216. *Id.* The Court reasoned:

[The defendant engaged in] watching and waiting from inside the campgrounds out to the road. There was a secret plan to take them by a surprise which was as effective as any ambush that he could have accomplished from hiding, and perhaps even more so because this way he didn’t have to wait behind a tree or a rock hoping that they would come his way. In this way, he was able to move his point of ambush right directly in front of the girls.

Id.

first saw them, he turned around, followed them, and when they had reached the most isolated spot in the area, struck.”²¹⁷

The most innovative part of the opinion with regards to the lying in wait special circumstance was evidence of a “substantial” period of watching and waiting. The court agreed that the jury could infer that the defendant first saw the girls when they were walking towards the restroom before leaving the campsite. This analysis followed:

Since more than a quarter of a mile separated the spot where defendant first saw the girls and where he shot them, and they were on foot, the jury could reasonably infer that a matter of minutes elapsed from the time defendant first saw them until he shot them. This was substantial.²¹⁸

Edwards also argued that the lying in wait did not “result in an opportune moment for attack, provide a position of advantage, or put the decedent in a particular state of vulnerability.”²¹⁹ The court stated that the evidence suggested “the lying in wait might have been crucial to defendant’s murderous design; it certainly furthered it.”²²⁰ They based this on the fact that the first victim was shot between the eyes, while the second victim was able to turn her head and affect the defendant’s aim.²²¹

A year later in *People v. Sims*,²²² the court once again maintained that there is a distinction between first degree murder by lying in wait and the lying in wait special circumstance. Sims and an accomplice ordered a pizza from a hotel room. When the delivery man came to the door, they immediately strangled him and threw him in the bathtub.²²³ The cause of death was either strangulation or drowning.²²⁴ Sims was charged with the lying in wait special circumstance. The court reflected that “the jury instruction [special circumstance allegation] included the requirement that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguish-

217. *Id.* at 460. In the author’s view, this is precisely the type of liberal interpretation of a special circumstance that undermines its critical narrowing requirement as mentioned by Justice Kennard, *supra* note 200. Essentially, the *mens rea* required for any crime could be reasonably inferred from minimal evidence pointing towards such a mental state. When, however, the jury is inferring an overriding plan, or an effective murder by “lying in wait,” it is clear that more than scant circumstantial evidence is needed. One could easily be delayed in committing a murder or accidentally concealed from the victim before the fatal wounds are inflicted by no action of his own, but this delay or accidental concealment should not be factored into the lying in wait special circumstance.

218. *Edwards*, 819 P.2d at 460.

219. *Id.*

220. *Id.*

221. *Id.*

222. 853 P.2d 992 (Cal. 1993).

223. *Id.* at 998-99.

224. *Id.* at 999.

ble from a murder perpetrated by means of lying in wait, or following premeditation and deliberation.”²²⁵ This was the third time the court had explicitly endorsed the temporal requirement outlined in *Domino* and written in the statutory language that the killing must occur “while” the defendant was lying in wait.²²⁶

The *Sims* court plowed new ground in the watching and waiting components of lying in wait.²²⁷ The defendant averred that “mere concealment of purpose, followed by a period of *waiting*, is a characteristic of numerous categories of murders that are not classified as special circumstance offenses.”²²⁸ The court disagreed and explained that after placing the pizza order by telephone, the defendant “was waiting in his motel room and was ‘watchful,’ i.e., alert and vigilant in anticipation of [the victim’s] arrival so that defendant could take him by surprise,”²²⁹ thus concluding that the element of “watchful” waiting was therefore satisfied.²³⁰ Although the term “watchful waiting” had been used previously,²³¹ it had almost always been in the context of physically watching the victim prior to the attack.²³²

Three years later, and after two California appellate court decisions that again addressed the lying in wait special circumstance,²³³ the Cali-

225. *Id.* at 1008 (citing *People v. Edelbacher*, 766 P.2d 1, 25 (Cal. 1989)).

226. *See People v. Roberts*, 826 P.2d 274, 302 (Cal. 1992); *People v. Webster*, 814 P.2d 1273, 1294 (Cal. 1991).

227. *Sims*, 853 P.2d at 1006-08 (holding that the defendant’s waiting was “watchful,” i.e., alert and vigilant in anticipation of the victim’s arrival so that the defendant could take him by surprise).

228. *Id.* at 1007 (emphasis added).

229. *Id.*

230. *Id.* at 1007-08.

231. *People v. Morales*, 770 P.2d 244, 259 (Cal. 1989).

232. *Sims* joined the long list of defendants who raised a constitutional challenge to the lying in wait special circumstance, but the Court rejects this challenge by stating that:

We previously have rejected the same contention . . . with respect to analogous facts and circumstances and again conclude that the lying-in-wait special circumstance, as interpreted in this and previous decisions, has clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty.

Sims, 853 P.2d at 1008 (citations omitted).

233. *People v. Padayao*, 30 Cal. Rptr. 2d 13 (Ct. App. 1994) is a recent California Court of Appeals decision which refocused on the temporal requirement set forth in *Domino*. *Id.* at 15-17. Padayao and an accomplice laid in wait for the victim near his house. When the victim left, they followed and signaled for him to stop. *Id.* at 14. After abducting him from his car, they brought him to Padayao’s house where he was beaten for a matter of hours, and then eventually suffocated. *Id.* Even though the victim was not immediately killed following the lying in wait, the lethal acts supposedly began at and flowed continuously from the moment the concealment and watchful waiting ended. *Id.* at 15. The court analogized this case to the *Morales* case in which “it made no difference that the initial attacks proved ultimately to be nonlethal.” *Id.* at 16 n.3 (citations omitted). The court emphasized that the focus is not upon when death actually

California Supreme Court once again heard the pleas of a defendant charged with lying in wait murder as well as the lying in wait special circumstance.²³⁴ The court pointed out, as it had in the past:

The requirements of lying in wait for first degree murder under Penal Code section 189 are "slightly different" from the lying-in-wait special circumstance under Penal Code section 190.2 (a) (15). . . . We focus on the special circumstance because it contains the more stringent requirement. If, as we find, the evidence supports the special circumstance, it necessarily supports the theory of first degree murder.²³⁵

The Court quoted the *Morales* mantra²³⁶ and then concluded that the facts of the present case fell under such a standard.²³⁷ While the specific facts were unremarkable, *Carpenter* was yet another insistence that California's lying in wait special circumstance could be meaningfully distinguished from lying in wait murder. This insistence came in the wake of decisions using the same definition to underlie both,²³⁸ the erasure of physical concealment under the special circumstance,²³⁹ the ruling that only a matter of minutes is needed during the lying in wait to show premeditation,²⁴⁰ the new development of "watchful waiting,"²⁴¹ and the soon to arrive elimination of the word "while" in the special circum-

occurs, "but whether there has been a continuum of physically harmful acts from the period of concealment to the commencement of the assault which ultimately causes death." *Id.* As in *Morales* and *Edelbacher*, the *Padayao* court found that there was no cognizable interruption between the period of lying in wait and the period during which the killing takes place. See *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989); *Morales*, 770 P.2d at 261. *People v. Lujan*, 87 Cal. Rptr. 2d 320 (1999), is the second court of appeals case where the facts tend to conclusively establish that the murder was in fact by lying in wait except for one debatable element, a "substantial period of watching and waiting." *Id.* at 324. They proclaimed: "It is clear that no particular time period is required for a lying-in-wait special circumstance. Rather, the period must only be 'substantial.'" *Id.* The court then restated the position of the *Edwards* opinion which had ruled that a matter of minutes was sufficiently substantial. *Id.* Much like the California Supreme Court's reluctance to ever find "a cognizable interruption" between the period of lying in wait and the beginning of a lethal attack, the *Lujan* case affirmed for the time being that no California high court had yet found a period of lying in wait to be so insubstantial as to defeat a finding of the lying in wait special circumstance. *Id.*

234. *People v. Carpenter*, 935 P.2d 708 (Cal. 1997).

235. *Id.* at 751; *People v. Ceja*, 847 P.2d 55, 59 n.2 (Cal. 1993).

236. The lying in wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, . . ." *Morales*, 770 P.2d at 260-61.

237. *Carpenter*, 935 P.2d at 751.

238. See *Ceja*, 847 P.2d at 58; see also *People v. Hardy*, 825 P.2d 781, 825 (Cal. 1992).

239. See *Morales*, 770 P.2d at 260.

240. See *People v. Edwards*, 819 P.2d 436, 460 (Cal. 1991).

241. See *People v. Sims*, 853 P.2d 992, 1007-08 (Cal. 1993).

stance statutory language.²⁴²

Then, in 2002, the California Supreme Court provided decisive guidance when it decided *People v. Hillhouse*.²⁴³ In that case, the defendant expressed to a friend his intent to kill a man they had met in a bar that evening.²⁴⁴ After the victim had voluntarily entered Hillhouse's car, Hillhouse drove the victim, who had passed out, and Hillhouse's friend to a gas station.²⁴⁵ As they continued driving Hillhouse told his friend to "check [the victim's] pockets."²⁴⁶ The friend complied, taking money from the victim's pockets.²⁴⁷ Eventually, the victim came to, asked where they were going, and then asked Hillhouse to turn the truck around and later to stop the car.²⁴⁸ Hillhouse complied.²⁴⁹ The victim got out of the car and began urinating.²⁵⁰ Hillhouse approached the victim, who responded by telling Hillhouse not to mess with him while he was urinating.²⁵¹ Hillhouse said, "I ought to kill you," and then stabbed the victim, threw him to the ground, and stabbed him a couple more times.²⁵²

Hillhouse was convicted of both first degree murder by lying in wait and the special circumstance of lying in wait. The court said it would focus on the special circumstance because it contained the more stringent requirements.²⁵³ The Court quickly passed over the elements of an intent to kill, a substantial period of watching and waiting for an opportune time to act, and attacking from a position of advantage by surprise.²⁵⁴ Hillhouse objected to the finding that he attacked from a position of advantage because "earlier opportunities existed for [him] to

242. See 1998 Cal. Stat. 629, enacted as Prop. 18, approved by voters, Mar. 7, 2000, effective Mar. 8, 2000 (codified as amended at CAL. PENAL CODE § 190.2(a)(15)).

243. 40 P.3d 754 (Cal. 2002).

244. *Id.* at 763.

245. *Id.* at 762.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 775.

254.

We find sufficient evidence of each of these elements. Lonnie testified that defendant told him at an early stage of an intent to kill Schultz. Defendant concealed his purpose from Schultz until he struck. The evidence shows a substantial period of watching and waiting for an opportune time to act—which arose when Schultz asked defendant to stop the truck and got out and urinated. Immediately thereafter, while the victim was still urinating—and hence particularly vulnerable—defendant attacked from a position of advantage. He took Schultz by surprise with no opportunity to resist or defend himself.

Id.

kill an unconscious [victim] in the truck.”²⁵⁵ The Court then quoted from *Ceja* that “as long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise.”²⁵⁶

Nevertheless, in *Ceja*, the court had agreed that if before the killing *Ceja* had engaged in activities not designed to gain a position of advantage, or if he had passed up several positions of advantage before the killing, there would be no lying in wait special circumstance.²⁵⁷ The *Ceja* court was content to rest with this assumption because it felt that the evidence reasonably could lead to the conclusion that the defendant had in fact surprised and killed the victim in his most vulnerable state.²⁵⁸ Note, though, that *Ceja* now presented problems regarding *Hillhouse*. The court either had to pull back from its holding in *Ceja* or hold that a man who is standing, conscious, facing his attacker, and able to run away, is in a more vulnerable position to be stabbed than when he is unconscious and directly within the killer’s grasp. They opted for the latter. “The jury could reasonably conclude that defendant found that the most opportune time to take [the victim] by surprise came when he had stepped outside the truck and started to urinate. Stabbing him under those circumstances avoided having the victim bleed in the truck and facilitated hiding the body.”²⁵⁹

In his concurring and dissenting opinion, Justice Moreno took exception: “[A] mere concealment of purpose’ is not sufficient to establish lying in wait because ‘many routine murders are accomplished by such means’”²⁶⁰ He noted that in addition to this concealment, there must be “immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.”²⁶¹ Justice Moreno felt that “the evidence in the present case does not satisfy the third prong of the *Morales* test.”²⁶² He continued:

255. *Id.*

256. *Id.*

257. *People v. Ceja*, 847 P.2d 55, 61 n.3 (Cal. 1993).

258. *Id.* at 62.

259. *Hillhouse*, 40 P.3d at 775. In a concurring opinion, Justice Kennard expressed the same apprehension she had in the *Ceja* case about the distinction between first degree murder by lying in wait and the lying in wait special circumstance. *Id.* at 783. After citing all of her comments from the *Ceja* case, she found that because she agreed with the majority in *Hillhouse* that substantial evidence supported a finding of lying in wait, she need not explore the differences between Penal Code sections 190.2(a)(15) and 189. *Id.*

260. *Id.* at 784 (Moreno, J., concurring and dissenting).

261. *Id.*

262. *Id.* The Court held:

Defendant’s brother and accomplice, Lonnie Hillhouse, testified that defendant stated he planned to rob and kill the victim, who was passed out on the front seat of

It is undisputed that defendant concealed his purpose to kill the victim until he felt the circumstances were conducive to committing the crime, but that is not enough to constitute lying in wait. If it were, most premeditated murders would involve lying in wait and this special circumstance would not perform its function of narrowing "the class of persons eligible for the death penalty" Moreover, mere advance planning or waiting for an opportune moment to attack the victim, without more, does not constitute lying in wait. The period of watchful waiting must result in the defendant achieving a position of advantage from which he or she can launch a surprise attack upon an unsuspecting victim.²⁶³

Justice Moreno explained that because the defendant approached the victim, spoke to him, and said that he ought to kill him before he stabbed him, the evidence did "not establish the third prong of the *Morales* test, i.e., 'a surprise attack on an unsuspecting victim from a position of advantage.'"²⁶⁴ Despite Justice Moreno's reservations, the California Supreme Court found that a man standing and facing his victim, even following numerous opportunities to attack, killed while lying in wait.²⁶⁵

the victim's truck. With defendant driving and Lonnie seated next to the victim, they drove out of Chico into a less populated area. At defendant's direction, Lonnie removed money from the victim's pockets and gave it to defendant. The victim woke up and, at his request, they turned around and headed back towards Chico. They pulled over at the victim's request, and Lonnie walked to the back of the truck. The victim walked a couple of feet from the truck and began urinating. Defendant approached the victim and said something that Lonnie could not quite hear. The victim responded: "Don't fuck with me while I'm peeing." Defendant, who was standing in front of the victim, said: "I ought to kill you." Lonnie then "heard a thunk" as defendant stabbed the victim in the chest. The victim began "gasping for air." Lonnie turned away, but looked back when he felt something hit the truck and saw the victim leaning against the door with his hands on his chest. Defendant grabbed the victim, threw him to the ground and stabbed him three more times.

It is undisputed that defendant concealed his purpose to kill the victim until he felt the circumstances were conducive to committing the crime, but that is not enough to constitute lying in wait.

Id. at 784.

263. *Id.* 784-85 (citation omitted). This is the first time that the fourth element of lying in wait (that the concealment result in a position of advantage over the victim) is seen in California.

264. *Id.* (citation omitted).

265. The most recent California Supreme Court decision discussing in detail the lying in wait special circumstance is *People v. Gutierrez*, 52 P.3d 572 (Cal. 2002). Armed with a gun, Gutierrez waited in a car outside his estranged wife's house on Halloween night for several hours until she and her boyfriend came home. *Gutierrez*, 52 P.3d at 585-86. When he saw her arrive, he put on a mask "to gain easy entry into the home by ruse." *Id.* Once inside, he stormed the master bathroom where the boyfriend was taking a shower and shot him numerous times. *Id.* Gutierrez was charged both with lying in wait murder and the lying in wait special circumstance. *Id.* at 584-85. The court dismissed Gutierrez's claim that the special circumstance did not meaningfully narrow death eligibility by holding that the "distinguishing factors identified in *Morales* and *Sims* that characterize the lying in wait special circumstance constitute 'clear and specific

Perhaps in reaction to the troublesome nature of distinguishing lying-in-wait murder from lying in wait aggravating circumstance, the California legislature in 2000 amended penal code section 190.2(a)(15) (lying in wait as a special circumstance) changing "while" to "by means of."²⁶⁶ This would not have been so significant had it not been given life as the heart of the distinction between the two types of lying in wait in the California courts since *Domino*.²⁶⁷ The sponsor of the bill noted that: "The proposed changes are modest and do not . . . dramatically expand California's death penalty law."²⁶⁸ In discussing the lying in wait amendment, he stated:

Case law has interpreted this special circumstance to require that the killing must occur during the lying in wait period, which is almost immediately upon confrontation. This means that the lying in wait special circumstance does not apply if the defendant lies in wait, captures the victim and transports him to some other location and then kills him.

I believe these distinctions are arbitrary, inequitable and unfair. They unwisely circumvent the intent of our special circumstances law.

. . . .

This bill changes the language in the "lying in wait" special circumstance to conform with the language in Penal Code section 189 [which outlines first degree murder by lying in wait].²⁶⁹

Apart from the requirement of an intent to kill in the lying in wait special circumstance, the net effect of this legislative change is to equate first degree murder by lying in wait with the lying in wait special circumstance.

Each of the four elements of lying in wait have undergone significant modification over the past twenty years dating back to *Domino* in 1982. Beginning with the temporal requirement, after the *Domino* court initially held that there could be no "cognizable interruption" between

requirements" which are sufficient to separate a murder by lying in wait from other murders so as to justify the use of the death penalty. *Id.* at 613. They subsequently found that "the evidence plainly established that defendant intentionally murdered [the victim] under circumstances that included a concealment of purpose, a substantial period of watching and waiting for an opportune time to act, and, immediately thereafter, a surprise attack on his unsuspecting victims from a position of advantage." *Id.* at 614. The most recent appellate court decision dealing with the issue is *People v. Cox*, No. D037122, 2002 WL 1804021 (Cal. App. 2002).

266. *See supra* note 238.

267. *See supra* note 140; *see also* *Gutierrez*, 52 P.3d 572; *People v. Fecht*, No. B148759, 2002 WL 1806009 (Cal. App. 2002).

268. *Murder: Special Circumstances: Hearing on S.B. 1878 Before the Senate Comm. On Public Safety*, 1997-98 Regular Sess. (Cal. 1998) (statement of Kopp, Member, Senate Comm. on Public Safety).

269. *Id.*

the lying in wait and the lethal attack, the Supreme Court found that this restrictive interpretation may not be necessary.²⁷⁰ Moreover, the Supreme Court of California has never found there to be a “cognizable interruption” between these acts.²⁷¹ Regardless, the legislature rewrote the special circumstance statute to read that the killing need only take place “by means of” lying in wait.²⁷² Because there have been no cases ruling on this new statutory language, one cannot be sure what effect California’s interpretation of “by means of” will have on this temporal proximity requirement. Presumably, it will mirror the standard of first degree murder by lying in wait in which the lying in wait must “immediately precede” the murder. Indeed, this is what the author of the amendment had envisioned by saying that the new language of the special circumstance will “conform with” first degree murder by lying in wait.²⁷³ Because the new wording is a less strict standard than the previous statutory language, one can be sure it will not alter the recent liberal interpretations of what constitutes a “cognizable interruption.” Therefore, California’s stance on the temporal proximity requirement will continue to be, per *Hillhouse*, that multiple hours, a distance of several miles, and a change of mental states does not qualify as a “cognizable interruption” between the lying in wait and the lethal attack.²⁷⁴

270. *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989).

271. *See, e.g., People v. Michaels*, 49 P.3d 1032, 1050 (Cal. 2002); *Edelbacher*, 766 P.2d at 24; *People v. Morales*, 770 P.2d 244, 261 (Cal. 1989).

272. *See supra* note 259.

273. *See supra* note 261.

274. The Ninth Circuit has also found difficulty in outlining California’s temporal requirement for the lying in wait special circumstance. In two unpublished opinions, it has struggled with the same issues on appeal concerning the lying in wait temporal proximity requirement. *See People v. Adame*, No. B144019, 2001 WL 1575160 (Cal. App. 2001) (discussing a defendant who shot his girlfriend through the window after she would not let him hold their child). The court held:

When [the victim] complied by bringing the baby to the window, [the defendant] had obtained the position of advantage. Positioning [the victim] with her child created a position of ultimate vulnerability for her. [The defendant] then waited for [the victim] to turn around to put her baby down, at which time he moved the gun to his pocket. [The defendant] seized this position of advantage to ready himself for an attack.

Id. at *4. Adame was sentenced to life in prison without parole. *Id.* He contended that the failure to distinguish between the lying-in-wait special circumstance and the lying in wait murder charge lowered the prosecution’s burden of proof by making the proof for the charge carrying the lesser sentence (that is the lying-in-wait murder) sufficient for proof of the charge carrying the greater sentence (that is, lying-in-wait-murder with the lying in wait special circumstance).

Id. at *5. In an interesting concession answering the defendant’s constitutional concerns about lying in wait murder and the lying in wait special circumstance, the court states: “[E]ven if the statutes and jury instructions for the two lying-in-wait charges are functionally equivalent, a sentence of LWOP has properly been determined by the California Legislature to be an appropriate sentence for a person convicted of the special circumstance of lying-in-wait; the greater crime.” *Id.* at *8. Therefore, the court does not have to answer the criticism that the two

From the *Morales* decision forward, mere concealment of purpose was sufficient to satisfy the concealment element.²⁷⁵ In addition, it is clear from *Edwards*, *Ceja*, and *Hillhouse* that even if there are words spoken between the defendant and the victim (indeed, a full conversation in *Ceja*), including threatening remarks (“I ought to kill you” in *Hillhouse*), a trier of fact can still find that the defendant concealed his purpose to kill.²⁷⁶

In regards to the period of watching and waiting, there have been two extensions. First, the defendant does not have to actually be watching the victim while waiting. This was the case in *Sims* when the defendant merely waited for the pizza delivery person to arrive.²⁷⁷ Second, a matter of minutes may constitute a substantial period of watching and waiting.²⁷⁸

Finally, there is the requirement that the defendant achieve a “maximum position of advantage” by the use of the lying in wait.²⁷⁹ In both *Ceja* and *Hillhouse* it was permissible to judge the position of advantage gained by the defendant based on circumstantial evidence.²⁸⁰ That is, the trier of fact is allowed to estimate that the particular position achieved by the defendant was indeed what the defendant had desired by

statutes are functionally equivalent (and therefore violate the holding of *Furman*) in the *Adame* case, because the defendant was only sentenced to life in prison without parole and not the death penalty.

In *People v. Weathington*, Nos. B147825, BA182367, 2001 WL 1192283, at *6 (Cal. App. 2001), the court said:

Likewise, in the instant case, there was no cognizable interruption between the watching and waiting activity of appellant and his shooting of Tammy. According to appellant’s statement to police, he sat in the park by a white truck and waited for Tammy to come home. He then ran up to Tammy with the gun in his pocket. He grabbed Tammy and shot her. Tammy did not see him coming. Appellant said he “tried to talk to her.” He said that Tammy replied “Oh, fuck you,” and he “just shot her.” Mary Ephrim testified that Tammy told her she was going outside, and Mary Ephrim heard shots “just seconds” after Tammy left. Mary Ephrim’s evidence revealed that appellant remained concealed while the two women and the children arrived and entered their home. Appellant waited, still concealed, until Tammy came out of the house alone.

Based on the foregoing, “a jury could reasonably infer that [appellant] concealed his purpose, waited and watched for an opportune time to act, and then, when . . . no help could be expected, made a surprise attack from a position of advantage.” Consequently, the requirement that the murder be committed while the defendant is lying in wait was satisfied.

Id. at *6 (citation omitted).

275. See *supra* note 167.

276. See *supra* text accompanying note 167.

277. *People v. Sims*, 853 P.2d 992, 1007-08 (Cal. 1993).

278. *People v. Edwards*, 819 P.2d 436, 460 (Cal. 1992).

279. *Id.*

280. See *People v. Ceja*, 847 P.2d 55, 62 (Cal. 1993); *People v. Hillhouse*, 40 P.3d 754, 775 (Cal. 2002).

use of his lying in wait. In addition, the trier of fact is allowed to interpret the "maximum position of advantage" as it relates to committing the crime and not taking the victim by surprise.²⁸¹ This is important in light of the language in *Ceja* that stated that if a defendant and victim "engage in activities before the killing not designed to gain a position of advantage, or the defendant passes up several positions of advantage before killing during an argument, there is no lying in wait."²⁸² The jury now has vast discretion in deciding which activities are designed to gain a position of advantage.²⁸³

B. *Indiana's Lying in Wait Aggravating Circumstance*

In contrast to California, the other three states that include murder committed by lying in wait as one of their "aggravating" circumstances justifying the death penalty have a very limited number of cases that explore the parameters of lying in wait. None of them provide for murder by lying in wait as a form of first degree murder.²⁸⁴ These three states only include lying in wait as an aggravator, a circumstance of the crime that warrants an enhanced sentence or a death sentence.²⁸⁵ Indiana, though, provides for two different types of lying in wait. One serves as an aggravating factor that merely enhances a *non-capital* sentence; the other is a gateway to the death penalty.

Although there are some Indiana Supreme Court decisions that conclude only that the use of the lying in wait aggravator is appropriate,²⁸⁶ there are a select few that actually devote more than a sentence to the elements of lying in wait.²⁸⁷

*Davis v. State*²⁸⁸ was the first case to offer some assistance in outlining the Indiana Supreme Court's view of the lying in wait aggravating

281. See *supra* note 279. Presumably, lying in wait as it had been traditionally understood was feared because of the position of advantage the murderer gained *over the victim*. Being murdered without a chance to defend yourself is a particular vulgar and undesirable way to die. By altering the nature of this "position of advantage," California has done away with a fundamental feature of lying in wait murder.

282. *Ceja*, 847 P.2d at 61 n.3.

283. The continued number of cases in California state courts discussing the lying in wait circumstance remains staggering. For the most recent interpretation of the special circumstance in the California state appellate court see *People v. Gutierrez*, 52 P.3d 572 (Cal. 2002); *People v. McDermott*, 51 P.3d 874 (Cal. 2002); *People v. Cox*, No. D037122, 2002 WL 1804021 (Cal. App. 2002); *People v. Fecht*, No. B148759, 2002 WL 1806009 (Cal. App. 2002).

284. See COLO. REV. STAT. § 18-3-102 (2001); IND. CODE § 35-42-1-1 (2002); MONT. CODE ANN. § 45-5-102 (2001).

285. See COLO. REV. STAT. ANN. § 16-11-103(5)(f) (2001); IND. CODE ANN. § 35-50-2-9(b)(3) (2002); MONT. CODE § 46-18-303(1)(a)(iv) (2001).

286. See *Kingery v. State*, 659 N.E.2d 490, 497 (Ind. 1995).

287. See *Davis v. State*, 477 N.E.2d 889, 896 (Ind. 1985) (pointing out the elements of lying in wait had not previously been discussed in Indiana case law).

288. 477 N.E.2d 889 (Ind. 1985).

circumstance.²⁸⁹ Davis murdered two young boys and almost killed a third, all under different circumstances.²⁹⁰ In the first murder, Davis stalked a boy in a cornfield, and after sneaking up on him, he grabbed him, took him into the woods, molested him, and beat him unconscious.²⁹¹ The second incident occurred at an acquaintance's house where Davis met another young boy.²⁹² He invited him to take a ride on his motorcycle and drink beers with him later that night.²⁹³ After they finished drinking beers, the boy said he had to go home, and Davis grabbed the youngster, took him to some train tracks, and strangled him.²⁹⁴ The third incident took place at a campsite where Davis was sitting and smoking a marijuana cigarette.²⁹⁵ Two boys walked by, and he asked if they would like to join him.²⁹⁶ They agreed, and sat and talked with Davis for awhile about marijuana.²⁹⁷ Later that evening, he returned to the campsite and began "lurking around, waiting."²⁹⁸ He watched where the boys had set up their tent, and waited until they went to sleep and the people at the next campsite quieted down.²⁹⁹ He then went inside the boys' tent and woke up one of them.³⁰⁰ Davis forced the boy to go near some railroad tracks, sexually assaulted him, and then strangled him.³⁰¹

Davis contended that there was not sufficient evidence to prove that the murders were committed by "lying in wait."³⁰² Beginning their treatment of the subject, the Indiana high court noted that "the elements constituting 'lying in wait' have not previously been discussed by this Court[,] but there is a well defined meaning of that phrase in the common law."³⁰³ The court proceeded to quote the California Supreme Court's definition in *People v. Thomas*,³⁰⁴ and referenced other Califor-

289. *See id.* at 896.

290. *Id.* at 890-91.

291. *Id.* at 891.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 892.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 895.

303. *Id.*

304. "Lying in wait requires the elements of waiting, watching, and concealment for the purpose of taking a victim unawares." *People v. Thomas*, 261 P.2d 1, 7 (Cal. 1953) (Traynor, J., concurring).

nia decisions defining lying in wait.³⁰⁵ It also set forth the Supreme Court of North Carolina's interpretation of concealment:

If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.³⁰⁶

Along the same line, the Indiana high court noted that the Arizona Supreme Court found "that while concealment is an essential element of murder by lying in wait, the victim's discovery of the defendant's presence before the murder does not prevent a finding of murder by lying in wait."³⁰⁷ After consulting with these precedents, the court concluded that although Indiana cases had not discussed the elements of lying in wait, they had in the past held that "'lying in wait with a deadly weapon' is a specific circumstance which can be used to enhance a penalty and can be proof of a defendant's specific intent to commit murder."³⁰⁸ The opinion went on to state:

In these cases, the actions involved in "lying in wait" always included the elements of waiting, watching, concealment, and taking the victim by surprise Therefore, we find that the common law definition does apply in Indiana and the elements necessary to constitute "lying in wait" are watching, waiting, and concealment from the person killed with the intent to kill or inflict bodily injury upon that person.³⁰⁹

Utilizing this common law definition of lying in wait, the court applied it to the circumstances of the two murders.³¹⁰ With regard to the first murder, the court found that the record supported a finding of lying in wait. The findings showed that:

[D]efendant was watching and waiting for [the victim] and was concealed from [the victim] as it was a dark night and defendant was off to the side of the road where he could not be observed Defendant's actions and preparations show that he had the necessary intent to kill [the victim] or inflict bodily injury upon him. . . .

Furthermore, defendant confronted [the victim] by surprise as he called out to him from his concealment beside the road Although defendant then talked to [the victim] in a friendly manner for a few

305. *Davis*, 477 N.E.2d at 895 (citing *Richards v. Marin County Superior Court*, 194 Cal. Rptr. 120 (Ct. App. 1983); *Domino v. Superior Court*, 181 Cal. Rptr. 486 (Ct. App. 1982)).

306. *Id.* (quoting *State v. Allison*, 257 S.E.2d 417, 425 (N.C. 1979)).

307. *Id.* at 895-96 (quoting *State v. Miller*, 520 P.2d 1113, 1114 (Ariz. 1974)).

308. *Id.* at 896; *Vasquez v. State*, 449 N.E.2d 284 (Ind. 1983); *Andrews v. State*, 441 N.E.2d 194 (Ind. 1982); *Petillo v. State* 89 N.E.2d 623 (Ind. 1950).

309. *Davis*, 477 N.E.2d at 896.

310. *Id.* at 896-97.

minutes, as soon as [the victim] said he had to be going, defendant bound him with the wire.³¹¹

Therefore, the court found that this murder presented a factual scenario sufficient to constitute a murder committed by lying in wait.³¹² In the third murder, however, the court concluded otherwise. While recounting the facts of the campsite murder, the Court held:

The evidence here does show defendant concealed himself from [the boys] and waited and watched until the other campers were asleep. However, defendant then openly went into the tent and woke [the victim]. . . . In this case defendant did watch and wait from a concealed position for the other campers to go to sleep. However, he did not use the concealment as a direct means to attack or gain control of the victim. Rather he went openly into the tent and then forced [the victim] to go with him by the use of a deadly weapon. There was not a sufficient connection between the concealment and the murder here to support a finding that this murder was committed "by lying in wait."³¹³

Although the defendant still received the death penalty on account of another aggravating circumstance, the Indiana Supreme Court made two crucial points in the *Davis* case. First, they held that Indiana recognizes the common law definition of lying in wait, including *physical concealment* from the victim.³¹⁴ Secondly, they found that there must be "a sufficient connection between the concealment and the murder" to support a finding that any murder was committed by lying in wait.³¹⁵

These two holdings are important to keep in mind in relation to California's rejection of the need for physical concealment and the ruling in the *Michaels* case. The *Davis* case is strikingly similar to *Michaels* in that both defendants did not use their physical concealment as a direct means to attack or gain control of the victim.³¹⁶ Just as *Davis*

311. *Id.*

312. *Id.* In rejecting the notion that the temporal proximity requirement had not been met, the court held:

Although defendant then talked to D.R. in a friendly manner for a few minutes, as soon as D.R. said he had to be going, defendant bound him with the wire. The sexual act and the killing then followed within a few minutes of each other and in approximately the same location. This was sufficient proximity of time and place to defendant's concealment to support the trial court's finding that the murder was committed by lying in wait.

Id. at 897.

313. *Id.* (emphasis added).

314. *Id.* at 896.

315. *Id.* at 897.

316. *Michaels*'s actions do not fit within the reasoning of past lying in wait special circumstance cases because there was simply no immediate connection between his concealment and the eventual attack. In actuality, no "surprise attack" occurred at all. *Michaels* entered the victim's apartment in as unsurprising a way as possible—through the front door. To hold that

“went openly into the tent” after waiting and watching, so too did Michaels go openly into the house to commit his murder after waiting until it was dark.³¹⁷ This similarity will be touched upon later.

After the *Davis* case, more recent Indiana cases have simply followed the definition of the lying in wait aggravator as provided in *Davis* with little new developments. In *Thacker v. State*,³¹⁸ the court offered a succinct statement on what it means to kill while lying in wait: “This aggravating circumstance serves to identify the mind undeterred by contemplation of an ultimate act of violence against a human being and, of equal importance, the mind capable of choosing to commit that act upon the appearance of the victim.”³¹⁹

The court went on to give a vindication for the presence of this particular aggravator:

We therefore construe this statutory aggravator as intending to identify as deserving consideration for the penalty of death those who engage in conduct constituting watching, waiting and concealment with the intent to kill, and then choosing to participate in the ambush upon the arrival of the intended victim.³²⁰

Thacker had conspired to kill her husband in order to cash in on a life insurance policy. She hired three men to wait in the woods outside her husband’s trailer, watch for her husband to arrive, and then kill him without warning as soon as he arrived.³²¹ The court found that although the men who had waited outside the trailer had lain in wait, Thacker was

Michaels acted “while lying in wait” would extend the special circumstance’s immediacy requirement to the point of meaninglessness. *See* Brief for Appellant at 102-03, *People v. Michaels*, 49 P.3d 1032 (Cal. 2002) (No. CRN 14859). Applying the lying in wait special circumstance to the Michaels case effectively depicts a front door entry into a victim’s home as a surprise attack from a position of advantage. Included under the special circumstance, then, would be every murder in which the perpetrator waited outside the victim’s home for an opportune time to enter and act. The inclusion of such a broad category of cases would expand the special circumstance far beyond the point of providing a “meaningful basis” for distinguishing death penalty from non-death penalty cases. *Id.* at 100.

317. *Id.* at 99 (“The killing did not involve an ‘ambush or some other secret design’ as the special circumstance contemplates. Rather, after [their third accomplice] returned, Michaels and his accomplice emerged from their temporary concealment . . . waited for the area to be clear of people, and crossed to the apartment.”).

318. 556 N.E.2d 1315 (Ind. 1990).

319. *Id.* at 1325.

320. *Id.*

321. *Id.* at 1317-18.

During a period of several weeks, appellant spoke with three young men, Buchanan, Music and Hart, expressing her desire to have her husband, John Thacker, killed and encouraging and challenging each to do so. Her husband had a life insurance policy of which she was beneficiary. There was conflict between husband and wife. She formulated a plan and guided its execution, demanding that he be killed with a shotgun loaded with deer slugs providing some ammunition, picking out for the trio a location along a road near their residence on which her husband drove and where

not at the crime scene, and she did not therefore make "that required choice to participate in the attack upon the arrival of the victim."³²² Therefore, the aggravating circumstance was not applicable to her as an accomplice or accessory, but the nature of the crime was indeed a murder by lying in wait.³²³

The next case to discuss the Indiana lying in wait aggravator is more telling of the court's view of the factual matrix necessary to portray a murder by lying in wait. In *Matheney v. State*,³²⁴ the defendant was given an eight-hour pass from a correctional institute, drove his car to his ex-wife's house, parked his car, and broke in through the back door.³²⁵ The victim fled from her home, and Matheney gave chase.³²⁶ When he caught up with her, he beat and killed her, and then drove away.³²⁷ As part of Matheney's appeal, he argued that his actions did not constitute a murder by lying in wait.³²⁸ Without a lengthy review, the court concluded that:

It would be reasonable for the trier of fact to conclude that appellant had used a circuitous approach toward [the victim's] house in order to conceal himself from her and that testimony regarding the amount of time involved tended to prove that appellant waited and watched until he could take [the victim] by surprise. The evidence regarding his use of a deadly weapon was indicative of his intent to kill. The evidence was sufficient to support the finding that this aggravating factor was proven beyond a reasonable doubt.³²⁹

This finding was supported by evidence that Matheney had parked the car he was driving in an alley two houses away from the victim's house.³³⁰ The victim's backyard was also isolated and secluded by dense bushes along the perimeter.³³¹ *Matheney* was consistent with

he might be stopped and killed without notice, and directing that his wallet be taken following the assault because it contained an important paper.

One night, the three joined appellant at her trailer. She requested that her husband be killed that night, and one of the three said that it would be done. The trio then left her trailer and drove from it a short distance up a hill to the site along the road which had been previously pointed out by appellant, where, armed, they put a log across the road, hid, and waited for John Thacker to come along. He drove up in his truck and stopped to remove the log. He was then shot and killed by Music.

Id. at 1317.

322. *Id.* at 1325.

323. *Id.*

324. 583 N.E.2d 1202 (Ind. 1992).

325. *Id.* at 1204-05.

326. *Id.* at 1203.

327. *Id.*

328. *Id.* at 1208.

329. *Id.* at 1209.

330. *Id.* at 1208.

331. *Id.* at 1209.

other court rulings holding that a defendant does not have to be stationary or refrain from approaching the victim in order to commit a murder by lying in wait.³³² The *Matheney* case was remanded and again appealed to the Indiana Supreme Court.³³³ In the second opinion, the court reiterated its position that the aggravating circumstance of lying in wait was appropriate.³³⁴ More significantly, the court confirmed its position from *Davis*:

Concealment from the victim must be the direct means to attack or gain control of the victim. It is not necessary, however, that the defendant be concealed when the fatal acts are committed as long as the lethal attack begins and flows continuously from the moment the concealment and waiting ends.³³⁵

In the second *Matheney* decision, the court held that "this Court's definition of [the lying in wait aggravator] in *Davis* and subsequent cases gives the phrase sufficient specificity to survive a vagueness challenge."³³⁶ They reasoned that "no reasonable lawyer would think it necessary to challenge the lying in wait aggravator on its face or as applied in this case, given our cases dealing with this issue."³³⁷

There are two cases in which Indiana used the lying in wait aggravator solely to enhance a non-capital sentence.³³⁸ Only one is relevant to this article.³³⁹ In *Taylor v. State*, the defendant waited in a car outside his estranged wife's apartment and watched for her arrival.³⁴⁰

332. See *People v. Byrd*, 266 P.2d 505, 509 (Cal. 1954).

333. 688 N.E.2d 883 (Ind. 1998).

334. *Id.* at 901.

335. *Id.* (quoting *Domino v. Superior Court*, 181 Cal. Rptr. 486, 493 (Ct. App. 1982)).

336. *Id.*

337. *Id.* The next opinion dealing with the lying in wait aggravating circumstance, *Fleenor v. State*, 622 N.E.2d 140, 151 (Ind. 1993), was unremarkable in that it presented facts consistent with all traditional notions of lying in wait. After referencing both the *Davis* and *Thacker* definitions of lying in wait, the court recited the factual record:

Appellant, armed with a pistol, broke and entered the house and concealed himself. The two women, the man, and the three children arrived. As they settled into their routines, appellant appeared and unleashed deadly force against the man, shooting him in the stomach and disabling him. While the others were kept at bay and helpless, appellant shot one of the women, and again shot the man, both in the head, killing them. This was murder by ambush.

Fleenor, 622 N.E.2d at 151.

338. *Kingery v. State*, 659 N.E.2d 490, 497 (Ind. 1995); *Taylor v. State*, 681 N.E.2d 1105, 1111 (Ind. 1997). In *Kingery*, the defendant had staked out a tavern and waited for his victim to arrive in his truck. *Kingery*, 659 N.E.2d at 492. Based on circumstantial evidence, the trial court had concluded that the defendant had stayed out of sight until the victim arrived at the tavern, and then shot him without warning. *Id.* The court found that "the trial court could have properly inferred from facts in evidence that [the defendant's] vehicle was hidden, and that [he] had laid in wait for [the victim]." *Id.* at 497.

339. *Taylor v. State*, 681 N.E.2d 1105 (Ind. 1997).

340. *Id.* at 1108.

When she arrived, he got out of the car and ran towards her yelling "[Y]eah, yeah I got you now." A scuffle ensued, and then Taylor began to drag her by her hair, and as she continued to resist, he shot her in the head.³⁴¹ Taylor argued that the trial court had erroneously found that he laid in wait. Taylor based his argument on *Davis*, where the court found there was not a sufficient connection between Davis's concealment and one of his murders to support lying in wait as a statutory death penalty aggravator.³⁴² Yet, the court distinguished between capital sentencing aggravating circumstances and general felony sentencing aggravating factors.³⁴³ Indeed, the facts in *Davis* did not warrant a finding of the death penalty aggravator of lying in wait, but in the present case the trial court found as a general aggravating circumstance "that the defendant was, in fact, lying in wait for the victim on the night that she was killed," and this was sufficient to enhance Taylor's sentence.³⁴⁴ They mentioned that they "need not resolve whether Taylor's conduct met the requirements of the lying in wait death penalty aggravator."³⁴⁵

This finding implicitly made a distinction between a lying in wait aggravating circumstance that would simply enhance the defendant's sentence, and the seemingly more concerted and heinous lying in wait situation which was an aggravator justifying use of the death penalty. "Unlike the capital sentencing provisions, 'the general felony sentencing statute's aggravating factors do not limit the matters that the court may consider in determining the sentence.'"³⁴⁶ This separation between lying in wait as a general aggravator in order to enhance a non-capital sentence and lying in wait as a death penalty aggravator became a bit muddled when the *Taylor* case appeared again before the court two years later.³⁴⁷ With a more extended discussion of the lying in wait general aggravator, the court first cited to the *Thacker* definition of the lying in wait death penalty aggravator, and then concluded that "the presence of this aggravating circumstance in any murder is significant and warrants the consideration of an enhanced sentence."³⁴⁸ The court further held that, "[a]lthough the non-capital sentencing statute does not specifically cite the lying in wait element of a crime as a separate aggravator, a court may consider the nature and circumstances of a crime to determine what sentence to impose."³⁴⁹

341. *Id.*

342. *Id.* at 1111.

343. *Id.*

344. *Id.*

345. *Id.* (emphasis added).

346. *Id.* (quoting *Bivins v. State*, 642 N.E.2d 928, 956 (Ind. 1994)).

347. *Taylor v. State*, 695 N.E.2d 117 (Ind. 1998).

348. *Id.* at 120.

349. *Id.*

Given the confusing nature of the California decisions regarding lying in wait, it is easy to see the inherent problem in this last ruling from the Indiana Supreme Court. They found there is a difference between the general non-capital aggravator of lying in wait and the death penalty lying in wait aggravating circumstance without explaining what that difference is. This is identical to California's struggle to separate their two types of lying in wait. Even more problematic, the ruling in *Taylor* used the explicit definitions of lying in wait as previously used for the death penalty aggravator to impose merely an enhanced sentence on a defendant who had simply laid in wait during the night that he killed the victim.³⁵⁰ This may be analogous to California's strategy in utilizing the "more stringent" standard, and then finding that the lesser standard was necessarily included.³⁵¹ It does not, however, clarify how these two standards differ.³⁵²

The last Indiana case to consider is *Ingle v. State*.³⁵³ Ingle threw a brick through the victim's car window while she was at a local pub.³⁵⁴ He then waited behind some trees and watched for her to approach the car. After she did, he continued watching while she spoke to the police about the incident and then went back inside the pub.³⁵⁵ Ingle then went to a nearby campsite to get a ride to Goodwill where he purchased clothing that he could use as a disguise. He later returned and shot the victim inside the pub.³⁵⁶ The court analogized this case to *Davis*, where the defendant did not use concealment "as a direct means to attack or gain control of the victim."³⁵⁷ Specifically, the court noted:

[D]efendant did watch, wait, and conceal himself outside of Tommy Lancaster's, but his concealment at that time did not constitute any part of murder by lying in wait [Because] a substantial amount of time passed between his concealment in the tree and the killing, it does not contribute to the charge of lying in wait.³⁵⁸

The court therefore upheld the view that unless there is a sufficient connection between the concealment and the murder, there cannot be a murder committed by lying in wait.³⁵⁹ It also dismissed the notion that

350. *Id.*

351. *See, e.g.*, *People v. Carpenter*, 935 P.2d 708, 751 (Cal. 1997); *People v. Ceja*, 847 P.2d 55, 59 (Cal. 1993).

352. *See Carpenter*, 935 P.2d at 751 (failing to legitimately distinguish the two types of lying in wait).

353. 746 N.E.2d 927 (Ind. 2001).

354. *Id.* at 940.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.* ("In this respect, this case resembles *Davis*, where we found that the defendant did not commit a murder by lying in wait. The defendant in *Davis* watched and waited from a concealed

when the defendant returned to the pub, he was lying in wait. "Though defendant was disguised, he did not watch for the victim, nor did he wait. Rather, Defendant walked to where he thought [the victim] would be and approached her directly."³⁶⁰ This final thought evinces an important distinction: "Defendant's actions could reasonably lead a jury to presume deliberation and forethought, yet they do not fit our legal definition of lying in wait."³⁶¹ This is crucial. The court made clear that a certain kind of "lying in wait" is appropriate for proving a state of mind, premeditation or deliberation, but there is a narrower and fiercer factual matrix that constitutes the lying in wait suitable for death sentences.

In reviewing Indiana's treatment of its lying in wait aggravating circumstance, three highlights deserve mention. First, in *Davis*, Indiana decided to adhere to the common law definition of lying in wait, including physical concealment from the victim at least until the lethal attack is precipitated.³⁶² Secondly, in *Davis* and then in *Ingle*, Indiana's highest court ruled that this physical concealment must be the *direct means* of attacking or gaining control of the victim.³⁶³ Finally, in *Taylor*, the court distinguished between the type of lying in wait that can be used as a general aggravating circumstance to merely enhance a sentence and the lying in wait aggravator sufficient to impose the death penalty.³⁶⁴ Although the court does not demarcate the precise differences, it is clear that Indiana, like California, attempts to somehow characterize the two different types of lying in wait.

C. Montana's Lying in Wait Aggravating Circumstance

As previously stated, Montana does not distinguish between first and second degree murder.³⁶⁵ It does though include an act of deliberate homicide "by an offender lying in wait or ambush" as an aggravating circumstance which, if proven beyond a reasonable doubt, can be used to impose the death penalty.³⁶⁶ Like Indiana, there are very few cases that discuss the lying in wait aggravator.³⁶⁷ In fact, the only in depth explanation of this aggravator comes by way of two dissenting opinions on two different hearings in the same case by the same justice on the

position, but 'did not use the concealment as a direct means to attack or gain control of the victim.'").

360. *Id.* at 941.

361. *Id.*

362. *Davis v. State*, 477 N.E.2d 889, 896 (Ind. 1985).

363. *Id.* at 897; *Ingle*, 746 N.E.2d at 940.

364. *Taylor v. State*, 681 N.E.2d 1105, 1111 (Ind. 1997).

365. See MONT. CODE ANN. § 45-5-102 (2001) (defining the crime of "deliberate homicide").

366. See *id.* § 46-18-303(1)(iv) (2002).

367. See, e.g., *State v. Dawson*, 761 P.2d 352 (Mont. 1988).

Montana Supreme Court.³⁶⁸

State v. Fitzpatrick was twice heard by the Montana Supreme Court.³⁶⁹ Fitzpatrick and some accomplices had planned on robbing a convenience store.³⁷⁰ They armed themselves with a gun and some rope and waited outside the store in their cars until it closed.³⁷¹ When the assistant store manager came out, they followed him to the bank.³⁷² Fitzpatrick and an accomplice seized the assistant store manager as soon as he arrived to make the nightly deposit.³⁷³ They took \$200 in cash and then Fitzpatrick shot him in the head.³⁷⁴ The trial court found that he had committed "a deliberate homicide by lying in wait or ambush" in conformity with the statutory aggravating circumstance.³⁷⁵ The majority, without further comment, stated: "Discussion of this point is unnecessary, except to state that the evidence in the record clearly proves sufficient aggravating circumstances exist in this case to warrant imposition of the death penalty."³⁷⁶

Although the majority opinion did not challenge this finding, the sole dissenter, Justice Shea, thought that the statutory aggravator was inappropriate.³⁷⁷ He believed the lying in wait at the bank did "not

368. *State v. Fitzpatrick*, 638 P.2d 1002, 1041-42 (Mont. 1981) (Shea, J., dissenting); *State v. Fitzpatrick*, 606 P.2d 1343, 1382 (Mont. 1980) (Shea, J., dissenting).

369. *See supra* note 359.

370. *Fitzpatrick*, 606 P.2d at 1346.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 1347.

375. *Id.* at 1360; *see also* MONT. CODE ANN. § 46-18-303(1)(iv) (2001).

376. *Fitzpatrick*, 606 P.2d at 1360.

377. *Id.* at 1382-83.

The vital question is, of course, whether defendant committed the homicide while "lying in wait or ambush." The sentencing court found that he did; but its own findings belie this conclusion. An analysis of the evidence and of the sentencing court's findings clearly establishes that defendant was not lying in wait or ambush at the time he killed Monte Dyckman. Indeed, the finding that defendant was lying in wait or ambush does not relate at all to the actual homicide. Rather, the finding describes defendant as "lying in wait or ambush" at the bank, waiting for the person to arrive from the Safeway Store with the receipts from the day's business.

Following are the findings set forth in the judgment with regard to the statutory phrase "... lying in wait or ambush":

"That on the 5th day of April, 1975, being only eight days after his release from the Montana State Prison, *the defendant was lying in wait or ambush* at the Big Horn Drive-in Bank of Hardin, Montana, for the arrival of an employee of the Hardin Safeway Store carrying the store receipts for deposit in the bank. The courier on that night was a young man, Monte Dyckman, who occupied the position of assistant manager at Safeway. Upon his arrival at the drive-in bank, Dyckman was robbed by the defendant and then abducted in his own automobile, his hands being bound behind his back and he was taken by the defendant to the Toluca Interchange approximately 12 miles west of Hardin where, in a secluded spot

relate at all to the actual homicide.”³⁷⁸ He proffered: “There is nothing from the factual recitation in the judgment . . . from which one can even conclude that the intent of defendant to kill [the victim] preexisted or arose while he was waiting at the bank.”³⁷⁹ He concluded that “the defendant’s decision to kill [the victim] was a ‘sua sponte’ decision, and that all those involved believed that robbery was the only objective.”³⁸⁰ Justice Shea disagreed with the conclusion of the majority because he thought that the proper intent to kill while lying in wait was not present.³⁸¹ He voiced this concern again when the case was presented for a second time before the Montana Supreme Court.³⁸² Without offering detailed aspects of lying in wait, he boldly stated:

Both the sentencing court and the majority have expanded the meaning of “lying in wait or ambush” far beyond any reasonable interpretation, which illustrates how elastic these aggravating factors can be when a sentencing court is determined to impose the death penalty, and when an appellate court is determined to approve the death sentence imposed.³⁸³

This telling opinion is indicative of the chorus of justices, who, like those on the California Supreme Court, have become dissatisfied with the expanding definition of the lying in wait aggravating circumstance.³⁸⁴ What is even more discouraging is that Montana’s high court

behind a pile of gravel, the defendant shot him twice in the head with a .45 caliber semi-automatic pistol, causing instantaneous death. That such death was the proximate result of robbery plans initiated several days earlier. . . .”

Having thus found that defendant was “lying in wait or ambush” at the bank while waiting for the person to show up with the day’s receipts from the Safeway Store, the court then determined that this fit within the meaning of the aggravating circumstance for deliberate homicide, that is, that the homicide was “committed by a person lying in wait or ambush.” There is nothing from the factual recitation in the judgment however, from which one can even conclude that the intent of defendant to kill Monte Dyckman preexisted or arose while he was waiting at the bank.

Id. (internal citation omitted).

378. *Id.* at 1382.

379. *Id.* at 1383.

380. *Id.*

381. *Id.*

382. *Fitzpatrick v. State*, 638 P.2d 1002, 1041 (Mont. 1981) (Shea, J., dissenting).

383. *Id.*

384. *See, e.g., People v. Hillhouse*, 40 P.3d 754, 784-85 (Cal. 2002) (Moreno, J., concurring and dissenting).

It is undisputed that defendant concealed his purpose to kill the victim until he felt the circumstances were conducive to committing the crime, but that is not enough to constitute lying in wait. If it were, most premeditated murders would involve lying in wait and this special circumstance would not perform its function of narrowing “the class of persons eligible for the death penalty” Moreover, mere advance planning or waiting for an opportune moment to attack the victim, without more, does not constitute lying in wait. The period of watchful waiting must result

has yet to give a succinct definition of lying in wait or any of its elements. Legal scholars are left wondering what fusion of actions constitutes lying in wait as envisioned by the Montana Legislature in drafting this aggravating circumstance.

D. *Colorado's Lying in Wait Aggravating Factor*

Similar to Montana, Colorado's high court has furnished only a single case that gives extensive treatment to the state's lying in wait aggravating circumstance.³⁸⁵ The specific language of the aggravator allows for use of the death penalty if "the defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device."³⁸⁶

In *People v. Dunlap*,³⁸⁷ the defendant objected to the use of the aggravator because, he claimed, "the aggravator utilizes terms with no common sense meaning capable of consistent application, and does not inform the jury of what it must find to impose the death penalty."³⁸⁸ The Colorado Supreme Court said: "[T]he terms 'lying in wait' and 'ambush' have well-founded roots in common and legal parlance . . . The phrase 'lying in wait' has been used throughout the history of criminal law to distinguish a more culpable class of murderers from the set of all murder defendants."³⁸⁹ In the view of the Colorado Supreme Court, that common sense, widely understood meaning is that "the killer conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise."³⁹⁰ They also reference the definition offered in one of the California cases, *People v. Edwards*.³⁹¹ The Colo-

in the defendant achieving a position of advantage from which he or she can launch a surprise attack upon an unsuspecting victim.

Id. (internal quotation marks and citation omitted); *People v. Ceja*, 847 P.2d 55, 63-64 (Cal. 1993) (Kennard, J., concurring).

The lying-in-wait special circumstance must provide a meaningful basis for distinguishing capital and non-capital cases, so that the death penalty will not be imposed in an arbitrary or irrational manner Recent decisions of this Court have given expansive definitions to the term "lying in wait," while drawing little distinction between "lying in wait" as a form of first degree murder and the lying-in-wait special circumstance, which subjects a defendant to the death penalty.

Ceja, 847 P.2d at 63-64; *see also* *People v. Morales*, 770 P.2d 260, 271-74 (Ca. 1989) (Mosk, J., concurring) ("I cannot agree [that] 'concealment' means anything other than actual *physical* concealment. . . . The gist of lying in wait is that the person places himself in a position where he is waiting and watching and *concealed from the person killed*.").

385. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999).

386. COLO. REV. STAT. ANN. § 16-11-103(5)(f) (West 2002).

387. 975 P.2d 723 (Col. 1999).

388. *Id.* at 751.

389. *Id.*

390. *Id.*

391. *Id.* (quoting *People v. Edwards*, 819 P.2d 436, 457 (Cal. 1991) (quoting jury instructions

rado high court does not, however, set forth each element of lying in wait, or even apply its own definition to the facts in the case. It simply holds that "because 'lying in wait' and 'ambush' are terms that an average juror should be capable of understanding, we conclude that the subsection (5)(f) aggravator is not unconstitutionally vague."³⁹²

IV. LYING IN WAIT AS AN AGGRAVATING CIRCUMSTANCE

Colorado's paucity of judicial review contrasts sharply with California's extensive work in the area. Unfortunately, the end product of all four jurisdictions that continue to adhere to lying in wait as a death qualifying event is that the clear guidelines that provide that "meaningful basis" necessary for *Furman* remain elusive. And, as *Furman* made clear, a death penalty scheme that fails to meaningfully distinguish those to be executed from those who are not is flawed.³⁹³ A death penalty scheme that allows prosecutors to file death qualifying charges in an arbitrary manner is every bit as repugnant as the Texas and Georgia schemes struck down in *Furman*.³⁹⁴ When a death scheme is susceptible of varied and changing interpretations such that a judge or a jury could apply general laws "sparsely, selectively, and spottingly" to unpopular perpetrators, that scheme must be struck down.³⁹⁵ An "aggravating" or "special" circumstance that allows for broad interpretation of condemned conduct does not meaningfully narrow those who should be condemned.³⁹⁶

Can it be said that a person who walks in the front door, locates the victim, and kills him has lain in wait? Is it true that a person who wakes another from sleep and then later stabs him while standing face to face

defining "lying in wait" as "a waiting and watching the victim for an opportune time to act, together with the concealment by ambush or some other secret design to take the victim by surprise")) (internal quotation marks omitted).

392. *Id.* at 752.

393. The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily [sic] to unpopular groups.

Furman v. Georgia, 408 U.S. at 238, 256-57 (1972) (Douglas, J., concurring).

394. *See id.* (Douglas, J., concurring); *id.* at 305-06 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

395. *See id.* at 256-57 (Douglas, J., concurring).

396. Here, both the sentencing court and the majority have expanded the meaning of "lying in wait or ambush" far beyond any reasonable interpretation, which illustrates how elastic these aggravating factors can be when a sentencing court is determined to impose the death penalty, and when an appellate court is determined to approve the death sentence imposed.

Fitzpatrick v. State, 638 P.2d 1002, 1041 (Mont. 1981) (Shea, J., dissenting).

with that person has lied in wait? Furthermore, in the California scheme that provides for lying in wait murder as well as lying in wait as a death enhancer, can it be said that the California law as interpreted by its appellate courts has drawn meaningful distinctions between the two? While the California Supreme Court pays lip service to the notion that lying in wait as an aggravator is much more restricted and less inclusive than lying in wait murder, has that court truly crafted its work in this area to render that ideal a reality?

In California, either those who murder by lying in wait must already be death eligible, or the special circumstance must take another step and rationally narrow in some manner those more deserving of death from those who “only” murdered by lying in wait. California seems to have mistaken the lying in wait circumstance with simply having a plan. By definition, all premeditated murders take place within the context of some type of plan (even if the plan is just that the victim will be killed on a certain day). Since at least *Ceja*, California courts have relied on the two types of lying in wait to the extent that they overlap, but the courts have not outlined how they have remained distinct! One of the clear differences between these two types of lying in wait, killing “by means of” or killing “while” lying in wait, has now been dissolved completely due to the statutory amendment.³⁹⁷ Note that it was this difference that was first postulated in *Domino* as the key to the special circumstance fulfilling the mandatory narrowing requirement of a death penalty scheme.³⁹⁸

In California, the jury instructions for first degree murder by lying in wait and the lying in wait special circumstance are now identical except for this temporal requirement, which is now defunct, and the requirement in the special circumstance that the defendant “intentionally killed the victim.” This “intentional murder” element is so seldom used as to be almost meaningless. The only instance in which it might be helpful is where the defendant laid in wait to play a practical joke on the victim or to harm the victim in some non-lethal manner, and the victim unexpectedly died as a result. This scenario was not present in any of the California cases, and only mentioned in the Montana case, *Fitzpat-*

397. This difference in language between “while” and “by means of” was also relied upon by the ninth circuit in keeping the two types of lying in wait distinct. See *Houston v. Roe*, 177 F.3d 901, 906-08 (9th Cir. 1999).

398. See *Domino v. Superior Court*, 181 Cal. Rptr. 486, 493 (Ct. App. 1982). Specifically, the court noted the difference between the words “by means of,” used for first degree murder lying in wait, and “while,” which was used for the special circumstance. *Id.* at 492. “One must assume that the drafters were aware of the wording of Penal Code section 189 and that they deliberately chose different words. A contrary assumption would suggest that the drafters exercised little or no care in establishing the criteria for deciding between life and death.” *Id.*

rick, although even there it was questionable.³⁹⁹ The possibility that a defendant might kill an individual by lying in wait *without intending to* is so rare an occurrence that this element hardly creates a distinction between first degree murder by lying in wait and the special circumstance.

There is a definite distinction between the historical murder by lying in wait, with no chance for reflection and contrition, and the actions in *Padayao*,⁴⁰⁰ where the victim, although suffering through terrible mental torture, was not sure whether he was going to die, and if he did die, whether he would have a chance to reflect on his life.⁴⁰¹ The element of surprise takes on a different form if the victim is suddenly abducted, instead of being given a split second to breathe before he is instantly killed without any opportunity for resistance or forethought of the afterlife. Although the difference may seem slight to victims of a heinous crime, it is one of constitutional magnitude and should at least be addressed before the death penalty is once again imposed in an altogether arbitrary fashion.

The departure from a traditional view of lying in wait centers on the four elements of a lying in wait murder.⁴⁰² The first expansion was, of course, the erasure of physical concealment in *Morales*.⁴⁰³ Although California was in line with other states that had done away with this element, it must be noted as one step in the watering down process of this special circumstance.⁴⁰⁴ Is a murder with mere concealment of purpose as cowardly as the lying in wait envisioned two hundred years ago? If there is no physical concealment, is there really a difficulty, as mentioned above, in finding out who the murderer is?⁴⁰⁵ Is a murder with only a concealment of purpose extremely cowardly?⁴⁰⁶

The second departure from the traditional view concerns the temporal requirement between the period of watchful waiting and the killing. While initially spelling out a standard that the lethal acts must continu-

399. See *supra* note 383.

400. See *supra* note 230.

401. Compare *Richards v. Superior Court*, 194 Cal. Rptr. 120, 125 n.5 (Ct. App. 1983) with *People v. Padayao*, 30 Cal. Rptr. 2d 13, 13-14 (Ct. App. 1994).

402. The four elements are concealment, watching and waiting, immediately thereafter a surprise attack on the victim, and obtaining a position of advantage.

403. See *People v. Morales*, 770 P.2d 244, 258-59 (Cal. 1989) (quoting *People v. Ward*, 103 Cal. Rptr. 671, 679 (Ct. App. 1972)).

404. See *id.* at 272 (Mosk, J., concurring) ("I cannot agree [that] 'concealment' means anything other than actual physical concealment. . . . The gist of lying in wait is that the person places himself in a position where he is waiting and watching and concealed from the person killed.").

405. ROY MORELAND, *THE LAW OF HOMICIDE* 199 (1952) ("[T]he crime of killing by lying in wait continued to remain a homicide of extreme heinousness because of its cowardly nature and the difficulty of discovering the assassin in such cases.").

406. See *id.*

ously flow from lying in wait, and that there can be no cognizable interruption between the watching and waiting and the killing, this standard has been pushed to the breaking point.⁴⁰⁷ The California Supreme Court has never found there to be a cognizable interruption between the lying in wait and the killing that would preclude a finding of lying in wait.⁴⁰⁸ This interruption, of course, may be immaterial now that the statutory language has openly done away with the previously needed element of murdering "while" lying in wait.⁴⁰⁹

A third step in the dissolution of this death qualifying circumstance was the decision which purported that a few minutes of lying in wait was "substantial."⁴¹⁰ One might imagine a scenario where the killer conceals his purpose, has the intent to kill, and views his victim a few hundred yards away. Since it would take a few minutes to run towards them, that running time would constitute a substantial period of watching and waiting.⁴¹¹ Any traditional notion of lying in wait would suffer a body blow at such a result.

The final measure, and indeed the most important, in chipping away at the lying in wait special circumstance is the language from the California cases that allows for the defendant to wait and maximize his position of advantage after he is in view of the victim, but before commencing his attack.⁴¹² The reasoning in *Hillhouse* (that the defendant found the most advantageous position of attack to be while the victim was outside the truck urinating because there would be no blood on the seat⁴¹³) differs from the language in *Ceja*, which discusses the position of advantage *as it relates to attacking the victim*.⁴¹⁴ The California Supreme Court shed new light on the lying in wait doctrine by expounding the view that even if the defendant passes up an advantageous opportunity over the victim—that is, one that would most take the victim by surprise—he may wait until he obtains a more advantageous position as it concerns the perpetration of "the perfect crime."⁴¹⁵

This explanation strays far from the heinous and horrific acts of historic lying in wait. Indeed, the latest examples of murder that fall under this special circumstance in California seem to be a "tragic fortu-

407. See, e.g., *People v. Michaels*, 49 P.3d 1032, 1050 (Cal. 2002); *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989); *Morales*, 770 P.2d at 261.

408. See *supra* note 393.

409. See *supra* note 236.

410. See *People v. Edwards*, 819 P.2d 436, 460 (Cal. 1992).

411. See *id.*

412. See *People v. Ceja*, 847 P.2d 55, 62 (Cal. 1993); *People v. Hillhouse*, 40 P.3d 754 (Cal. 2002).

413. See *Hillhouse*, 40 P.3d at 775.

414. See *Ceja*, 847 P.2d at 62 (emphasis added).

415. See *supra* note 398.

ity”⁴¹⁶ rather than a criminal mastermind who leaves absolutely no room for the possibility of escape or self-defense. If this legal construction of lying in wait is to continue, judges will have the final word as to what is the most advantageous position in any crime. Surely these positions must be endless, and prosecutors and triers of fact will have untrammelled discretion in finding that the defendant did not give up his position of advantage.

Two overarching themes of the California Supreme Court’s interpretation of the lying in wait special circumstance manifest themselves: the court’s assurance that the lying in wait special circumstance fulfills the narrowing requirement of *Furman*,⁴¹⁷ and the accompanying dismemberment of the phrase “lying in wait,” which makes that assurance questionable.⁴¹⁸ At least four California Supreme Court Justices have noted both the disparity in California’s varied interpretation of the lying in wait special circumstance⁴¹⁹ as well as its inability to “genuinely narrow the class of [death eligible defendants] in a way that reasonably justified the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”⁴²⁰ That is, the California Supreme Court’s reliance on the consistency of the term and its continual amorphous nature remain equally strong.

As for Indiana, the Indiana Supreme Court provides an enlightening comment on the necessary definition of lying in wait in the *Davis* case; they required that there be “a sufficient connection between the concealment and the murder . . . to support a finding that this murder was com-

416. See *Ceja*, 847 P.2d at 65 (Mosk, J., dissenting):

[V]iewed in its entirety, the evidence did not establish an underlying, and unifying, fatal plan. Quite the contrary, it revealed a tragic fortuity. The last encounter between defendant and the victim was similar to many that preceded it during the course of their stormy relationship. It was different in this: Maria Ortega spit a “nasty” remark at defendant. As a consequence, he immediately drew a gun and pointed it at her; she ran behind a tree; and he then turned the weapon against the victim. On such facts, a reasonable jury could not have found lying-in-waiting beyond a reasonable doubt.”

417. See, e.g., *People v. Sims*, 853 P.2d 992, 1008 (Cal. 1993); *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989).

418. See, e.g., *Hillhouse*, 40 P.3d at 783 (Kennard, J., concurring); *Ceja*, 847 P.2d at 63-64 (Kennard, J., concurring and dissenting); see also D.A. Cox, Annotation, *Homicide: What Constitutes “Lying In Wait”?*, 89 A.L.R.2d 1140 (1963) (“[T]he phrase has today, as applied, a meaning beyond the literal language and common understanding.”).

419. See *Hillhouse*, 40 P.3d at 784-85 (Moreno, J., concurring and dissenting); *Ceja*, 847 P.2d at 63-64 (Kennard, J., concurring); *People v. Webster*, 814 P.2d 1273, 1307 (Cal. 1991) (Broussard, J., concurring and dissenting); *People v. Morales*, 770 P.2d 244, 273 (Cal. 1989) (Mosk, J., concurring and dissenting).

420. See *supra* note 404; see also Osterman & Heidenrich, *supra* note 10, at 1278 (“The lying in wait special circumstance needs to be reevaluated. Its current application in California violates the Eighth Amendment and the mandates of the Supreme Court because it does not serve to distinguish between the general class of murderers and those deserving death.”).

mitted by lying in wait.”⁴²¹ They returned to this thought in *Ingle* when they found that the defendant’s concealment did not constitute any part of such lying in wait or murderous acts.⁴²²

Nevertheless, Indiana still falls prey to the same problem California has when it creates a distinction between a non-capital lying in wait aggravator and a capital lying in wait aggravator without explaining the difference.⁴²³ In the first *Taylor* decision, the court found that the defendant had lain in wait according to the definition outlined in *Thacker* (which was the definition of the lying in wait death penalty aggravating circumstance), but it also said that it did not need to resolve whether or not his actions met that very standard since it was only aggravating his non-capital sentence.⁴²⁴ Clearly, this is a patent distinction without a difference that must be resolved if Indiana is to prove that its lying in wait aggravating circumstance serves to meaningfully distinguish those who are deserving of the death penalty from those who are not.

As evidenced by the paucity of cases dealing specifically with the lying in wait aggravator in Montana and Colorado, these two states have not assaulted or exploited the common law understanding of lying in wait. Neither has there been a long line of constitutionally charged arguments proposing the extinction of their lying in wait death penalty aggravators. Notwithstanding, the presence of Justice Shea’s dissent in *Fitzpatrick* and the reluctance of these high courts to expound upon the “widely understood” meaning of lying in wait remain troubling.⁴²⁵ Without a clear cut rendering of what this aggravating circumstance means, courts may be free to mold the definition to their judicial prerogative, and the narrowing function required by *Furman* will vanish.⁴²⁶

Overall, it is relatively clear that murder by lying in wait as applied by the California Supreme Court has been stretched to the breaking point. A concealment of purpose, or taking the victim by surprise, has become the failure to immediately indicate to the victim that you intend to kill him outright.⁴²⁷ A substantial period of watching and waiting has diminished to a few minutes.⁴²⁸ There appears to be no end to the interpretations of what may constitute “the maximum position of advan-

421. *Davis v. State*, 477 N.E.2d 889, 897 (Ind. 1985).

422. *See Ingle v. State*, 746 N.E.2d 927, 940 (Ind. 2001).

423. *See Taylor v. State*, 695 N.E.2d 117, 120 (Ind. 1998).

424. *See Taylor v. State*, 681 N.E.2d 1105, 1111 (Ind. 1997).

425. *See People v. Dunlap*, 975 P.2d 723, 751 (Colo. 1999); *Fitzpatrick v. State*, 638 P.2d 1002, 1041 (Mont. 1981) (Shea, J., dissenting).

426. *See Fitzpatrick*, 638 P.2d at 1041 (Shea, J., dissenting).

427. *See People v. Michaels*, 49 P.3d 754, 775 (Cal. 2002).

428. *See People v. Edwards*, 819 P.2d 436, 460 (Cal. 1992).

tage.”⁴²⁹ Not only can courts now fabricate the defendant’s unsuspecting plan to find the maximum position of advantage based on circumstantial evidence, but now the advantage can relate to committing the perfect crime instead of taking the victim unaware as it was historically understood.⁴³⁰ A cognizable interruption between the concealment and the killing simply does not exist.⁴³¹ There is an ongoing metaphysical continuum that links all concealment to all lethal attacks. It cannot be broken. Neither physical movement nor the lapse of time can divide the defendant’s watching and waiting from his vicious acts.

V. FINAL ANALYSIS

What has been lost in the lying in wait paradigm is the *completion* of the murder by the lying in wait, or, in the words of the Indiana Court, “the connection between the concealment and the murder.”⁴³² The acts of lying in wait must result in a position of maximum advantage.⁴³³ The Indiana Court is correct in its assumption that the watching, waiting, and concealment must be the means by which the defendant obtains and utilizes that position of advantage.⁴³⁴ Otherwise these elements have no meaning. They would have served no purpose, and they should not be recounted when appraising the killer’s devious behavior. And if, as the California Supreme Court has admitted, it must be the maximum position of advantage, then courts cannot transport that advantage to an infinite number of angles and positions. It must be the intended position of

429. See, e.g., *People v. Hillhouse*, 40 P.3d 754 (Cal. 2002); *People v. Ceja*, 847 P.2d 55, 62 (Cal. 1993).

430. See, e.g., *Hillhouse*, 40 P.3d at 754; *Ceja*, 847 P.2d at 62.

431. See, e.g., *Michaels*, 49 P.3d at 1050; *People v. Edelbacher*, 766 P.2d 1, 24 (Cal. 1989); *People v. Morales*, 770 P.2d 244, 261 (Cal. 1989). At least one California appellate court has found a cognizable interruption between the lying in wait and the lethal attack. In *People v. Fecht*, No. B148759, 2002 WL 1806009 (Cal. App. 2002), the defendant laid in wait, attacked the victim, and decapitated him at some point thereafter. *Id.* at *3. The estimated time of death was at least fifteen hours after the initial attack. *Id.* It may have been as long as twenty-two plus hours. *Id.* From this evidence, the court held:

Because there was no evidence of the nature of wound inflicted during the original attack or the cause of death, it is speculative to conclude that Klein died slowly from the wound inflicted during the original attack. Accordingly, the evidence was insufficient that the act or acts causing Klein’s death occurred during the period of concealment and watchful waiting or that the lethal acts commenced and flowed continuously, without cognizable interruption, from the moment watchful waiting and concealment ended. The special circumstance finding must therefore be stricken and appellant must be re-sentenced.

Id. at *3-*4.

432. See *Davis v. State*, 477 N.E.2d 889, 897 (Ind. 1985); see also *Ingle v. State*, 746 N.E.2d 927, 940 (Ind. 2001).

433. See *supra* note 418.

434. See *id.*

advantage as envisioned by the murderer. The watching, waiting, concealment, and surprise attack must be parts of a coherent whole in which the killer executes a murder *by* lying in wait and not *in spite of* it.

The fundamental idea remains a connection, a factual matrix in which the lying in wait initiates, implements, performs, and accomplishes a heinous murder. It cannot be serendipitous. It cannot be fortuitous. Waiting too long, giving too much notice to the victim, or not utilizing a maximum position of advantage as foreseen by the killer may seem trivial, indeed wretched, details to gawk over in light of the victim's fate, but it is these details that warrant imposition of the death penalty. Without these crucial elements, there is no authority for legislatures and courts to send people to their graves under the banner of *Furman*.⁴³⁵ Can one who waits and watches for a few minutes instead of spontaneously approaching a victim fairly and honestly be *rational*ly narrowed out among the many categories of murderers? Can a defendant who takes an unconscious man in his truck, drives him somewhere, lets him out, and then attacks him while he is urinating be *meaningfully* distinguished from someone who runs mad into a public restroom and kills an unsuspecting victim?

Lastly, we return to *Michaels*.⁴³⁶ Michaels had waited outside the victim's apartment complex for a half-hour or more until the lights went out.⁴³⁷ Michaels and his accomplice had to walk across the parking lot, up to the apartment, open the door, and then prepare themselves while inside the apartment to murder JoAnn Clemons.⁴³⁸

Beginning with the temporal proximity requirement, Michaels focused his appeal on the fact that there must have been a "cognizable interruption" between the lying in wait and the murder.⁴³⁹ The California Supreme Court disagreed: "If the only interruption was the time required for defendant and [his accomplice] to emerge from their hiding place, cross the apartment building's parking lot, and enter the victim's apartment, that interruption would not preclude application of the special circumstance of lying in wait."⁴⁴⁰ The court found, again, that "the victim's death would have followed in a continuous flow from the concealment and watchful waiting."⁴⁴¹ It should be remembered that included in

435. See *Furman v. Georgia*, 408 U.S. 238, 310 (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").

436. 49 P.3d 1032 (Cal. 2002).

437. *Id.* at 1041.

438. *Id.*

439. *Id.* at 1050.

440. *Id.*

441. *Id.*

this "imaginary" temporal requirement is the mandate that there be "a continuum of physically harmful acts from the period of concealment to the commencement of the assault which ultimately causes death."⁴⁴² The court found no interruption in this continuum in *Michaels*.⁴⁴³ Michaels left his place of concealment as soon as he and his accomplice approached the apartment. The logical conclusion is that walking across a parking lot is physically harmful to the victim. Walking up stairs is physically harmful to the victim. Entering an apartment is physically harmful to the victim. Fumbling for a murder weapon must also be part of the continuum and therefore physically harmful to the victim. Can this logic withstand constitutional scrutiny under *Furman*?⁴⁴⁴

A more legitimate reading of the events shows that the period during which Michaels and his accomplice scouted the apartment and waited for their ride to return was interrupted in both time and physical space from the attack. The killing did not involve an "ambush or some other secret design" as the special circumstance contemplates. There was a clear interruption separating the period of lying in wait from the actual attack during which Michaels and his accomplice discussed the getaway with their cohort, waited for the area to be clear of people, and crossed to the apartment. There is simply no transcending the fact that there was a concrete set of actions that vividly separated the period of concealment from the commencement of the lethal acts.

Did Michaels display a concealment of purpose? He and his accomplice walked across the parking lot; this was in plain view of anyone within the observational radius. They walked upstairs; presumably people do not break into houses in the middle of the night for any other reason except to commit burglary or other nefarious acts. If the victim had walked out her bedroom, or seen him at all, Michaels's purpose would have been immediately known. This is a far cry from the historical instances of lying in wait that were extremely cowardly or clandestine. It is likely that the half-hour period spent watching and waiting was a "substantial" amount of time, and therefore this element was probably satisfied.

What of obtaining a maximum position of advantage through the use of lying in wait? Although this case involved hiding, the concealment did not create a position of advantage from which the attack was mounted. Michaels's period of lying in wait did not result in a vantage

442. See *People v. Morales*, 770 P.2d 244, 261 (Cal. 1989).

443. *Michaels*, 49 P.3d at 1050.

444. See *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.").

point from which he could launch an ambush. By the time Michaels entered the victim's bedroom, no part of her surprise could be attributed to his emergence from that initial concealment. Even if the lookout position from across the street could be characterized as a position of advantage, this advantage *was surrendered* as soon as they left their place in the bushes, and it did not consummate the surprise lethal attack.

Lying in wait used to be feared because of "the cowardly nature of the offense and the difficulty in identifying the assassin."⁴⁴⁵ These concerns have long passed in the modern interpretations given to the lying in wait special circumstance. The sparse discussion of lying in wait by other states,⁴⁴⁶ as well as the fact that only four states use it as an aggravating circumstance,⁴⁴⁷ should ring the bell for those analyzing California's widespread use of it in sending defendants to death row. Without caution, California has set itself apart in applying this special circumstance to a vast number of situations, and it is abundantly clear that it has failed to mete out those deserving death in a non-arbitrary and non-discriminatory fashion.⁴⁴⁸ The *Domino* court was the first to try to provide a meaningful distinction between first degree murder and the lying in wait special circumstance in California. It surmised: "A contrary assumption would suggest that the drafters exercised little or no care in establishing the criteria for deciding between life and death."⁴⁴⁹ This suggestion was true, but it is now a reality, and it is a deadly reality to those pleading for their lives before the California Supreme Court. The lying in wait special circumstance has been prostituted on every side and through each element. It no longer fulfills the narrowing requirement of *Furman*, and it is therefore a shameless attempt to circumvent constitutional safeguards against the arbitrary imposition of the death penalty.⁴⁵⁰

Lying in wait, if it is to be used as an element of a crime that warrants execution, must be reexamined, rewritten, and reapplied to faithfully adhere to the fundamental fabric of our death penalty jurisprudence. Should these efforts be ignored, the ghosts of *Furman* will be

445. See MORELAND *supra* note 76, at 199.

446. Illinois state courts have used the phrase "lying in wait" twenty-six times since 1878. New York state courts have used the phrase thirty-two times since 1805. Texas state courts, while mentioning lying in wait in 114 cases going back to 1853, has only discussed the phrase eleven times since 1950. These figures are striking in contrast to California. California state courts have used the phrase "lying in wait" 368 times, and 272 of those are after 1950. Even more disturbing, they have discussed the lying in wait special circumstance ninety-eight times since 1981! Statistics taken from www.lawschool.westlaw.com.

447. See *supra* note 36.

448. See Osterman & Heidenrieck, *supra* note 10, at 1278.

449. *Domino v. Superior Court*, 181 Cal. Rptr. 486, 492 (Ct. App. 1982).

450. See *id.*

lying in wait, preparing to tear down the sanctity of criminal justice, and ready to launch a lethal attack on every defendant's constitutional liberties.