POINTS AND AUTHORITIES

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Week Of	Topic	Guests	
Sept. 26 2016	LYING IN WAIT –Special Circumstance and First Degree Murder	Butch Ford	30 min General

LYING IN WAIT

Lying in wait arises in two contexts: First, as a special circumstance under Penal Code section 190.2(a)(15); second, as a theory of first degree murder (Pen. Code, § 189). This outline addresses requirements applicable to each.

I. Lying in Wait Special Circumstance

A. Background

1. Penal Code section 190.2(a)(15): The penalty for murder in the first degree is death or imprisonment without the possibility of parole if "[t]he defendant intentionally killed the victim by means of lying in wait."

2. Special circumstances lying in wait requires an *intentional* killing. The first degree theory of murder requires only a wanton and reckless intent to inflict injury likely to cause death. This difference is presently the only distinction between lying in wait special circumstances and lying in wait murder.

3. In March 2000, the language of Penal Code section 190.2(a)(15) was changed. It formerly stated that that the special circumstance applied when the defendant intentionally killed the victim "*while* lying in wait." Thus, if there was any interruption that separated the lying in wait from the killing, the special circumstance could not apply.

In 2000, however, the phrase "by means of lying in wait" was substituted for "while lying in wait" so that both the murder and the special circumstance use the phrase "by means of lying in wait." Note that recent Supreme Court cases continue to apply the older definition to death penalty appeals in which the special circumstance finding pre-dates the 2000 change. Otherwise, the phrase "while lying in wait" is an incorrect statement of current law.

4. "The [current] lying-in-wait special circumstance allegation. like its predecessor, is limited to intentional murders that involve a concealment of purpose and a meaningful

period of watching and waiting for an opportune time to attack, followed by a surprise lethal attack on an unsuspecting victim from a position of advantage.'" (*People v. Johnson* (2016) 62 Cal.4th 600, 682, quoting *People v. Carsai* (2008) 44 Cal.4th 1263, 1310.)

5. As to its constitutionality, the Supreme Court recently stated: "[T]he murderer who kills by lying in wait acts surreptitiously, concealing himself or his purpose and making a surprise attack on his victim from a position of advantage, thereby denying the victim any chance of escape, aid, or self-defense. It is no surprise that a murder committed by lying in wait historically has been viewed as ' "a particularly heinous and repugnant crime." ' (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) That a crime historically has been considered more reprehensible than other murders provides 'a rational basis for distinguishing those murderers who deserve to be considered for the death penalty from those who do not.' (*People v. Davenport* (1985) 41 Cal.3d 247, 270, 221.)" (*People v. Johnson* (2016) 62 Cal.4th 600, 636-637.)

B. Elements

1. CALCRIM No. 728 [March 2016 Update]

To prove that this special circumstance is true, the People must prove that

(1) The defendant intentionally killed the victim AND

(2) The defendant committed the murder by means of lying in wait

A person commits a murder by means of lying in wait if:

(1) He or she concealed his purpose from the person killed;

(2) He or she waited and watched for an opportunity to act;

(3) Then he or she made a surprise attack on the person killed from a position of advantage

AND

(4) He or she intended to kill the person by taking the person by surprise

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation and premeditation.

[A person can conceal his purpose even if the person killed is aware of the other person's physical presence]

[The concealment can be accomplished by ambush or some other secret plan.]

II. Lying in Wait as First Degree Murder

A. Background

1. "All murder which is perpetrated by means of . . . lying in wait . . . is murder of the first degree." (Pen. Code, § 189.)

2. Where the evidence supports the special circumstance, it necessarily supports the theory of first degree murder. (*People v. Moon* (2005) 37 Cal.4th 1, 22,

3. Case law provides that while the lying in wait special circumstance requires intent to kill, a lying in wait murder can be based on "a wanton and reckless intent to inflict injury likely to cause death." (*People v. Streeter* (2012) 54 Cal.4th 205, 246; *People v. Moon, supra,* 37 Cal.4th 1, 24, fn.1.)

However, no court has addressed the relationship between this state of mind associated with implied malice and "a state of mind equivalent to deliberation or premeditation," as required for lying in wait murder. (See *People v. Sims* (1993) 5 Cal.4th 405, 433-434.)

4. As the Supreme Court explained in *People v. Sandoval*, supra, 62 Cal.4th 392, lying in wait acts as the functional equivalent of proof of premeditation, deliberation, and intent to kill. Proof of lying in wait distinguishes those cases in which a defendant acts "insidiously" from those in which he acts out of rash impulse. The lying in wait need not continue for any particular length of time provided that its duration " 'is such as to show a state of mind equivalent to premeditation or deliberation.' " Once a sufficient period of watching and waiting is established, together with the other elements of lying-in-wait murder, no further evidence of premeditation and deliberation is required in order to convict the defendant of first degree murder. (*Id*. at p. 415.)

5. "If the murder was perpetrated by means of lying in wait, it need not be independently determined to have been 'willful, deliberate and premeditated.'. . . If it was perpetrated by

means of lying in wait, it is, by definition, first degree murder." (*People v. Dickerson* (1972) 23 Cal.App.3d 721, 727

B. Elements

1 A lying-in-wait murder occurs when the defendant conceals his or her purpose, engages in a substantial period of watching and waiting for an opportune time to act, and inflicts a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Gurule* (2002) 28 Cal.4th 557, 630.)

2. CALCRIM No. 521 [March 2016 Update]

The defendant murdered by lying in wait if:

(1) He concealed his purpose from the person killed;

(2) He waited and watched for an opportunity to act

AND

(3) Then, from a position of advantage, he intended to and did make a surprise attack on the victim

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the other person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]

III. Requirements

Apart from the requirement of an intentional killing for lying in wait special circumstances, the elements of lying in wait murder and lying in wait special circumstances are identical, so they are considered together in this section of the outline.`

1. Concealment of purpose

a. Concealment of the killer's presence, as distinct from his or her purpose, is not required. (*People v. Casares* (2016) 62 Cal.4th 808, 849.)

b. The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that the defendant be literally concealed from view before he attacks the victim. (*People v. Combs* (2004) 34 Cal.4th 821, 853.)

c. "The factors of concealing murderous intent and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.' " (*People v. Stevens* (2007) 41 Cal.4th 182, 202.)

2. Waiting and watching for an opportunity to act

a. "The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens, supra,* 41 Cal.4th at p. 202.)

b. This period of time need not continue for any particular length of time provided that its duration is such as to show a state of mind *equivalent* to premeditation or deliberation. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.)

c. A lying in wait *murder* does not require that the premeditation and deliberation be independently proved. (*People v. Ruiz* (1988) 44 Cal.3d 589, 614.) Lying in wait " 'takes the place of direct proof of premeditation and deliberation.' " (*Id*., quoting *People v. Ward* (1972) 27 Cal.App.3d 218, 231.) For this reason, a state of mind is required that is "equivalent to," and not identical to premeditation or deliberation. (*Id*. at p. 615, italics added.)

d. The precise period of time for lying in wait is not critical so long as the period of watchful waiting is "substantial." (*People v. Moon, supra,* 37 Cal.4th at p. 23.) However, "substantial" here is less about clock time than about the defendant's state of mind and actions during the period. The cases discussed at the end of this P&A illustrate this concept. Indeed, a very short period of time can suffice for lying in wait:

(i) *People v. Moon, supra,* 37 Cal.4th at p. 23 ["a few minutes can suffice"]

(ii) *People v. Mendoza*, *supra*, 52 Cal.4th at p. 1074 ["only a few minutes elapsed"]

(iii) *People v. Edwards* (1991) 54 Cal.3d 787, 826 [the wait was "a matter of minutes"]

(iv) *People v. Stevens*, *supra*, 41 Cal.4th at p. 203 ["even a short period of watching and waiting can negate an inference that defendant killed as a result of a rash impulse"]

e. " 'Watchful' does not require actual watching; it can include being 'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise." (*People v. Streeter* (2012) 54 Cal.4th 205, 247.)

For example, in *People v. Sims* (1993) 5 Cal.4th 405, the defendant lured a Domino Pizza delivery man to his motel room on the pretext of ordering a pizza. When he arrived, defendant overpowered him, robbed and killed him. "Although the evidence does not suggest that defendant, hidden from view, was watching the delivery man as he left Domino's Pizza and drove to the motel," there was evidence defendant "was waiting in his motel room and 'watchful,' i.e. alert and vigilant in anticipation of the delivery man's arrival so the defendant could take him by surprise." (*Id*. at p. 433.)

3. <u>Surprise attack from a position of advantage</u>

a. "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 the victim by surprise." (*People v. Russell* (2000) 50 Cal4th 1228, 1245.)

b. Lying in wait does not require the killing to occur at the first available opportunity and permits the defendant to maximize his advantage prior to striking. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.)

IV. Case Examples

1. *People v. Nelson* (2016) 1 Cal.5th 513 [insufficient evidence of watching and waiting]

The defendant worked at Target unloading trucks and stocking shelves. The defendant had anticipated a promotion to team leader in his unit, but another employee, Robin Shirley, was promoted instead. The defendant confronted Shirley, angrily telling her that he deserved the promotion, not her. Fellow employee Lee Thompson accused the defendant of harassing Shirley and told the defendant to leave. A few days later the defendant and Thompson again angrily argued and had to be separated by another employee. The defendant told Thompson, "I will get you, I will get you back some day." After the defendant received a warning notice based on his comments to Shirley, he resigned the next day. (*Id*. at pp. 523-524.)

Because their shift began in the early morning hours, it was the custom of the Target employees to gather in the parking lot before work, sit in each other's car and talk or listen to music. About three weeks after the defendant resigned, shortly before 4:00 a.m., the defendant Nelson "rode to the Target parking lot on his bicycle, armed with a loaded gun. Shirley and Thompson were in the front seat of Thompson's car. Nelson parked his bicycle, approached the car on foot from behind and fired several shots into the car through an open rear window, then started to walk away before returning and firing again into the car. After shooting Shirley and Thompson, Nelson fled the scene on his bicycle, which he then abandoned when police chased him. In his closing argument, Nelson's attorney conceded Nelson had killed the victims but argued the shootings had not been deliberate and premeditated." (*Id*. at p. 522.)

The defendant was convicted of the murders of Shirley and Thompson and the jury found true the special circumstance that the murders were committed by lying in wait. The Court (five of seven justices; two dissenters on this issue) concluded there was insufficient evidence to support that special circumstance. The Court agreed with the defendant that the prosecution failed to prove the defendant engaged in a substantial period of watching and waiting for a favorable time to act. The Court concluded: "The evidence showed, directly or by reasonable inference, that [the defendant] rode his bicycle to the area near the Target parking lot, where he had reason to believe the victims would be waiting to go to work. He concealed his bicycle and came up behind his victims on foot to take them by surprise. He shot the two victims in quick succession. After ensuring his victims were dead by shooting a second time, he retrieved his bicycle and left. [¶] There is no evidence, however, that [the defendant] arrived before the victims or waited in ambush for their arrival. In the absence of such evidence, there is no factual basis for an inference that before approaching the victims, he had concealed his bicycle and waited for a time when they would be vulnerable to surprise attack. The jury was presented with no evidence from which it could have chosen, beyond a reasonable doubt, that scenario over one in which defendant arrived after the victims, dismounted from his bicycle, and attacked them from behind without any distinct period of watchful waiting." (*Id*. at p. 551.)

The Court noted: "Although a brief period of watching and waiting may suffice to support the lying-in-wait special circumstance (see *People v. Moon*, *supra,* 37 Cal.4th at p. 23) the evidence here does not support any such period." (*Id.* at p. 552.)

Although the defendant argued that his first degree murder conviction should be reversed because the jury was instructed on lying in wait as a basis for that charge, the Court noted that the jury had also been instructed on a theory of first degree murder based on premeditation and deliberation , for which there was sufficient evidence. (*Id.* at p. 552.)

Note: The dissenting opinion stated "there was no question that defendant had time to premeditate and deliberate" the murder while he went from where he left his bicycle to the car. "The jury could reasonably find that after concealing his bicycle, defendant engaged in 'substantial period of watching and waiting for an opportune time to act.' [Citation omitted.] Whether he arrived at the scene first or his victims did, it is inferable that as he approached the car from behind, he was watching the victims for any sign they might discover his presence, and waiting until he was in a position to shoot them before they did." (*Id.* at p. 575.)

However, the majority responded to the dissenters as follows. It acknowledged that a brief period of watching may suffice to support the lying-in-wait special circumstances, but said the evidence in this case did not support any such period. "[T[he fact that there was substantial evidence of premeditation and deliberation does not necessarily mean there was substantial evidence of watching and waiting for an opportune time to act." (*Id*. at p. 552.) It appears the determinative factor in the majority's analysis was the lack of *any* evidence about what occurred the moments before the defendant started shooting. Thus the circumstances here differ from the other cases summarized below. The first time the witness here saw the defendant, he was already shooting into the car.

2. *People v. Casares* (2016) 62 Cal.4th 808

The defendant arranged for Sanchez and another man to obtain cocaine for resale. After Sanchez obtained the drug, defendant got in their car directed them to the purported buyer's house. The defendant was seated in the back seat behind Sanchez, who was driving. Sanchez. The defendant directed Sanchez to drive up the road to wait for the drug buyer. Once Sanchez stopped the car, the defendant put a gun to Sanchez's head and ordered Sanchez to give him the cocaine. Sanchez complied, handing the cocaine back over his right shoulder. The defendant then shot Sanchez. (*Id*. at pp. 813-814.) The Supreme Court rejected the defendant's challenge to the lying-in-wait special circumstance allegation, concluding the evidence supported the jury's finding that "defendant mounted a surprise attack on Sanchez after a substantial period of watchful waiting for an opportune time to attack." (*Id*. at p. 829.)

3. *People v. Johnson* (2016) 62 Cal.4th 600

The defendant's liability for the murder was an aider and abettor. With the intent that the victim would be killed, the defendant drove with him from Costa Mesa to Anaheim on the pretext of buying heroin. The defendant led the victim into an alley where two men were waiting to execute him. When the defendant and the victim got halfway down the alley, the two men approached from behind "and from the position of advantage, [one of the men] carried out a surprise attack by shooting the victim in the back of the head. " (*Id*. at p. 637.) The Supreme Court found the lying in wait first degree murder and lying in wait special circumstance were supported by sufficient evidence. (*Id*. at p. 634.)

4. *People v. Cage* (2015) 62 Cal.4th 256

The defendant had physically abused his wife for years. The wife, with the help of her mother, took her and defendant's two children and secretly travelled to Puerto Rico. The defendant was upset with his wife's mother and wanted to do something to get back at her. He hid a shotgun in a basket of clothes and went to the mother's house. When she opened the door, the defendant fatally shot her. He then went upstairs to the bedroom of his wife's 16-year-old brother and shot him to death. (*Id*. at p. 263.) He was convicted of lying in wait first degree murder and the lying in wait special circumstance.

a. Concealment

The Supreme Court said there was evidence that the defendant concealed his true intent and purpose even though he did not conceal his presence when he went to the mother's door. "Defendant hid his shotgun in a laundry basket containing his and [his wife's] clothes and took the laundry basket with him up to the mother's door. A jury could rationally deduce from these facts that defendant planned and undertook a deliberate subterfuge aimed at making his presence appear to be an innocuous offer return [the wife's] clothes or request to do laundry so that the mother would open the door and admit him. The ruse disguised his intent to kill." (Id. at p. 279.)

b. Watching and Waiting

The defendant argued there was insufficient evidence of a substantial period of watching and waiting for an opportune time to act. The Supreme Court noted that the evidence did not establish the specific length of time that the defendant waited for the mother to open the door, "but nothing in the trial record suggests it happened instantaneously upon defendant's arrival at the house. A jury could infer there some period of watching and waiting at the door." (*Id*. at p. 279.) Additionally, a neighbor testified that the mother's dog barked briefly and

that shots were fired several minutes later, supporting an inference that the defendant spoke with the mother for a few minutes before removing the gun from the basket and shooting her. The Supreme Court stated, "Although the evidence of watching and waiting in this case is not overwhelming, it is sufficient to support the jury's first degree murder verdict and true finding on the special circumstances allegation." (*Id.* at p. 280.)

c. Surprise Attack

"It is also apparent from the record that defendant's surprise attack on [the mother] and [the brother] followed in a continuous flow of events upon defendants successful use of his ruse to persuade [the mother] to open her front door. The jury could reasonably determine that defendant's actions met the requirement of an immediate surprise attack on unsuspecting victims from a position of advantage." (*Id*. at p. 280.)

5. *People v. Streeter* (2012) 54 Cal.4th 205

The defendant and the victim had a son together, who was four years old at the time of the murder. The victim also had two older children. After incidents of domestic violence, the victim moved out with the children and applied for a restraining order against the defendant. Several months later, the defendant contacted the victim and convinced her to let him see their son. They met in a public area without incident. Afterwards, the defendant called the victim frequently attempting to reconcile. Several weeks after the first visit, the defendant asked to see his son again. The victim agreed to meet him at a restaurant. After she pulled into the parking lot and stopped the car, the defendant grabbed the child and proceeded towards his car. The victim and the defendant argued and the victim attempted to pull the child from the car, but the defendant pushed her away. He went to the trunk of his car and retrieved a plastic container of gasoline and poured it on the victim's car. When the victim ran, the defendant chased her, poured gasoline on her and set her on fire. (*Id*. at pp. 211-213.) The evidence was sufficient to support the first-degree murder conviction and the lying in wait special circumstance. (*Id*. at pp. 259-260.)

a. Concealment

The Supreme Court concluded the evidence established that defendant concealed his intent to kill the victim. He concealed his purpose by luring the victim to the restaurant under the pretext of an attempted reconciliation and a familial visit. The defendant had the opportunity to leave after he secured the child in the car, but he did not. In fact, before the victim arrived, he had secured the steering wheel with a "Club," an act not conducive to flight with the child. The gas cap was off the gas tank, indicating that he had filled the plastic container in anticipation of the victim's arrival. Rather than leaving with the child, the defendant poured gasoline on the victim. (*Id*. at p. 247.)

b. Watching and Waiting

The Supreme Court said that "watchful" does not require actual watching. "It can include being 'alert and vigilant' in anticipation of the victim's arrival to take him by surprise." (*Id*. at p. 247.) The defendant was at the restaurant long enough to secure his car with the locking device and remove gasoline from his gas tank to fill up the plastic container in the trunk. Additionally, although the defendant testified that he planned to meet the victim at 4:00 p.m., the 911 call reporting that the victim was on fire was received at 3:21 p.m. "The jury could have reasonably concluded that if the victim was early for the meeting, the defendant arrived even earlier and waited to take her by surprise." (*Id*. at pp. 247-248.)

c. Surprise Attack

The Court said the evidence shows that the defendant launched a surprise attack on the unsuspecting victim from a position of advantage. "Immediately after [the victim's] arrival, defendant grabbed [the child] and placed him in his car. From this evidence, the jury could have reasonably inferred that defendant placed his son there for safety purposes, to protect him from the fire defendant intended to start." (*Id.* at p. 248.) After the unsuccessful struggle to get her son, the victim tried to get away but the defendant caught her and set her on fire.

6. *People v. Mendoza* (2011) 52 Cal.4th 1056

Defendant, recently released on parole from the California Youth Authority, had a parole condition prohibiting him from possessing weapons. About a month or two before the incident, defendant told his girlfriend Johanna Flores that he was on parole and "didn't want to go back" or "couldn't go back to jail." On the night of May 11, 1996, defendant was walking in an isolated area with Flores and a friend named Sparky. Both knew that defendant was carrying a gun. Flores had earlier seen the gun in defendant's waistband. A police car driven by Pomona police officer Fraembs approached them from behind, and the officer lit them with a spotlight. Flores and Sparky told defendant to run, but he stayed put. Fraembs got out of the car, approached the threesome and asked, "How are you guys doing tonight?" Flores testified that the officer was "real nice" and she thought he was stopping them for a curfew check. Defendant responded "What the hell are you stopping us for?" At that point, Officer Fraembs told defendant and Flores to have a seat on the curb and called Sparky over to the patrol car, where the officer began pat searching him. Defendant, who had remained standing, slowly got behind Flores and moved her forward towards the officer, keeping his right hand free. Using Flores as a shield, he was able to get within six or seven feet of the officer. He then drew his gun, pushed Flores aside, and quickly stepped closer to the officer. Defendant took aim with both arms extended and shot the officer in the face, killing him. Fraembs was taken "utterly by surprise" and had no opportunity to reach for his weapons. (52 Cal.4th at p. 1070, 1074.)

Defendant asserted there was insufficient evidence of a "substantial" period of watching and waiting, because the entire encounter was "fleeting." (52 Cal.4th at p. 1073.) The Supreme Court observed that "it may be that only a few minutes elapsed between the time that Officer Fraembs pulled up in his car and the time of the shooting." (*Id*. at p. 1074.) However, the court noted that a rational jury could find that defendant, who was in violation of his parole, decided at or near the outset of the encounter that he would rather kill the officer than return to custody. Recounting defendant's furtive approach of the officer, the court concluded that "a rational jury could conclude that defendant did not react impulsively to Fraembs's appearance at the scene, but that he watched Fraembs's for a substantial period as he not only waited for, but affirmatively engineered, the opportune moment to launch a surprise attack." (*Ibid*.)

The court also rejected defendant's argument that insufficient evidence supported the requirements of concealment and a surprise attack on an unsuspecting victim from a position of advantage. "Although Officer Fraembs was certainly aware of defendant's physical presence, the evidence reflected that defendant managed to conceal his murderous purpose so well that he took the officer completely by surprise when he fired." (52 Cal.4th at p. 1074.) The court also stated: "From this evidence, a rational jury could infer that defendant did not kill out of rash impulse, but rather in a purposeful manner that required stealth and maneuvering to gain a position of advantage over the unsuspecting officer." (*Ibid*.)

7. *People v. Moon* (2005) 37 Cal.4th 1

Defendant and his ex-girlfriend argued in her home after she accused him of stealing money from the house. She told him she had called her mother, who was returning home. Defendant killed the ex-girlfriend and then waited in the garage for the mother to arrive. After the mother arrived, he entered the house and encountered her at the top of the stairs. He pushed her down the stairs and then choked her, killing her.

Defendant argued there was insufficient evidence that he waited and watched for a substantial period of time, claiming he had only waited "a few scant minutes" before killing the mother. The court concluded that, even accepting defendant's testimony as to the length of time, it was sufficient. The jury could have reasonably inferred that defendant, after killing the girlfriend, resolved to kill the mother so as to eliminate her as the only witness who could place him in the house. "Although the period of waiting was relatively short, it was sufficient to negate any inference that the murder of the mother was the result of panic or sudden impulse." (37 Cal.4th at p. 24.)

The court also rejected defendant's argument that there was insufficient evidence that he attacked the mother from a point of advantage. Defendant hid his presence from the victim until she was positioned at the top of the stairs, making her more vulnerable.

Moreover, because the victim was well-acquainted with the defendant, she would not have immediately suspected she was in danger merely because she discovered him in the house. (37 Cal.4th at p. 24.)

8. *People v. Edwards* (1991) 54 Cal.3d 787

Defendant drove his truck into a campground where he saw two 12-year old girls walking together in the opposite direction. He turned his truck around and drove up alongside them. He stopped and said, "Girls." He then fired two shots from a pistol, shooting each in the head. The Supreme Court upheld the lying in wait special circumstances. It found evidence of concealment: "Defendant drove alongside the victims where there were no witnesses and where they would be most vulnerable. While they were completely unsuspecting, he called them so they would look his way . . . After gaining this position of advantage, he shot and killed." (54 Cal.3d at p. 825.)

There was also sufficient evidence of waiting and watching. "Rather than shoot [the girls] when he first saw them, he turned around, followed them, and when they had reached the most isolated spot in the area, struck. He knew the area well from prior visits." (52 Cal.4th at p. 825.) The jury could conclude he reached the place of maximum vulnerability before shooting. "A killer need not view his intended victim during the entire period of watching and waiting." (*Ibid*.)

Only a matter of minutes elapsed between when defendant first saw the victims until he shot them. "This was substantial." (*Id*. at p. 826.)

9. *People v. Stevens* (2007) 41 Cal.4th 182

Defendant was convicted of four first degree murders and six attempted murders based on a series of random shootings on or near Interstate 580 in Oakland. A lying in wait special circumstance was found true as to his final victim, Raymond August. Just a short time before August was killed, defendant had pulled his car alongside Randy Stokes on Interstate 580, about 1:15 a.m. Both vehicles slowed. Stokes lowered his passenger window and looked over at defendant to see if he knew him. Defendant motioned as though trying to get Stokes's attention. Defendant then shot at him. Stokes lay down on the seat, briefly losing control of his car. Defendant fired twice more and pulled away.

Stokes sped up to follow defendant. He saw defendant slow down and pull alongside Raymond August's car. Those were the only two cars in front of Stokes on the road. Stokes testified that defendant got August's attention because both sets of brake lights came on. Stokes then heard gunshots, after which August's car crashed.

The Supreme Court rejected defendant's argument that there was insufficient evidence of an adequate period of watching and waiting to support the lying in way special circumstance for the August murder: "The facts of this case and the jury's conclusion that defendant acted with deliberation and premeditation dispel any inference that he killed as a result of rash impulse. Even a short period of watching and waiting can negate such an inference. [Citation.] The facts here are more than sufficient to establish that after the assault on Stokes, defendant turned his attention to a new target. He selected August, the driver of the only other nearby car on the road ahead of him, as his next victim. He approached and concealed his deadly purpose by pulling up alongside of August and induced him to slow down. August did so, just as Stokes had. This process may not have taken an extended period, because defendant did not have to wait long until his next target became available. But there is no indication of rash impulse. To the contrary, it was reasonable for the jury to conclude that defendant acted to implement his plan of luring a victim of opportunity into a vulnerable position by creating or exploiting a false sense of security. The jury could also reasonably conclude that August was taken by surprise. He did not flee, but slowed down and drove side-by-side with defendant, just as Stokes had done. Once the intended victim slowed down, the time to act became opportune. Defendant stopped watching and started shooting. Such behavior is completely consistent with, and provides substantial evidence for, the watching and waiting element of the lying-in-wait special circumstance." (41 Cal.4th at p. 203.)

10. *People v. Ruiz* (1988) 44 Cal.3d 589

Defendant was convicted of the murder of his second wife and her son, whose bodies were later recovered buried in a shallow grave on defendant's property. Defendant argued there was insufficient evidence to support the lying in wait theory of first degree murder. The Supreme Court rejected the argument: "The victim's bodies were clothed in bedclothes and wrapped in bedding, and each victim was shot at close range in the back of the head. From such evidence, the jury reasonably could infer that defendant watched and waited until his victims were sleeping and helpless before executing them." (*Id*. at p. 615.)