

GENERAL OFFICE MEMORANDUM 18-149

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE   
Chief Deputy District Attorney

SUBJECT: SB 1437'S CHANGES TO ACCOMPLICE LIABILITY  
FOR MURDER

DATE: NOVEMBER 27, 2018

Senate Bill (SB) 1437 recently made significant changes to accomplice liability for murder. Under amended Penal Code section 188, subdivision (a)(3), **all principals must personally act with malice aforethought to be guilty of murder**, except as provided in a new limited first degree felony-murder rule found in subdivision (e) of section 189. This means:

- Second degree felony murder is eliminated;
- An accomplice may not be guilty of murder under the natural and probable consequences doctrine;
- First degree felony murder is now limited to:
  - An actual killer;
  - A principal who intends to kill; or
  - A “major participant” who acts with “reckless indifference to human life” (i.e., the same standard for the felony-murder special circumstance)

There is an exception to the new felony-murder limitations where the victim is a peace officer performing his or her duties and the defendant knew or should have known this. (§ 189, subd. (f).) In such a case, all principals are still liable for first degree murder under the “old” felony-murder rule.

The full text of SB 1437 can be found [here](#).

SB 1437 did not change the definition of malice, which may still be express or implied. Thus, theories of murder based on the perpetrator’s *personal* implied malice—such as provocative-act murder and *Watson* murder—are not affected, although *accomplice* liability under these theories now requires personal malice. SB 1437 also did not otherwise change which murders are of the first and second degree.

In addition to these prospective changes, SB 1437 adds a new retrospective provision, section 1170.95, which will require resentencing for all prior convictions obtained under a now-invalid theory of murder. This provision will be addressed in a later GOM once the court announces how it will process the resentencing petitions.

Although the changes mandated by SB 1437 do not take effect until January 1, 2019, the new section 1170.95 will inevitably apply the changes to all convictions obtained in between now and the effective date of the legislation. In order to insulate convictions from resentencing, deputies should proceed with all pending cases as if the new laws applied today.

Until updated CALCRIM instructions are available, deputies must modify existing instructions to ensure that the court instructs the jury only on valid theories of accomplice liability and felony murder. The straight aiding-and-abetting instruction (CALCRIM 401) should not be affected. Use current CALCRIM 540A for actual killers on a felony-murder theory. For accomplice theories of felony murder, use a hybrid of current CALCRIM 540B with appropriate language from CALCRIM 703 to explain major participation and reckless indifference to life. When the victim is a peace officer, use the currently appropriate felony-murder instruction and add the peace-officer-victim element.

Do not use CALCRIM 402 or 403 (natural and probable consequences) or similar language from CALCRIM 417 (natural and probable consequences of a conspiracy) if the only non-target crime is murder. If the court is instructing the jury on the natural and probable consequences doctrine for non-target crimes other than murder, deputies should make clear to the jury that the natural and probable consequences doctrine applies only to those other crimes, and they may not convict a defendant of murder based upon a natural and probable consequences theory.

For pleas, deputies should make clear that the factual basis for the plea includes facts that will satisfy the new laws.

After January 1, 2019, pending charges may be vulnerable to 995 motions if a valid theory of liability was not proved at the preliminary hearing. If an omission can be quickly remedied, deputies may try to introduce additional evidence under section 995a, subdivision (b). If substantial new evidence is required, deputies will need to dismiss and refile. If a murder charge cannot be proved, it must be dismissed, and the deputy may proceed on any other viable counts.

Finally, it remains unclear how SB 1437 will affect manslaughter or attempted murder prosecutions under a natural and probable consequences theory. Absent controlling case law to the contrary, deputies should proceed as if accomplice liability for manslaughter is not affected (since it is, by definition, a killing without malice). For attempted murder, in addition to the required specific intent to aid the target crime *and* attempted murder being a reasonably foreseeable consequence, deputies should also prove that the defendant personally acted with implied malice (reckless indifference to human life).

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