
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

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Bill No: SB 300 **Hearing Date:** April 6, 2021
Author: Cortese
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Consultant: GC

Subject: *Crimes: murder: punishment*

HISTORY

Source: California Coalition for Women Prisoners
Californians United for a Responsible Budget (CURB)
The Drop LWOP Coalition
Ella Baker Center for Human Rights
Families United to End LWOP (FUEL)
Felony Murder Elimination Project
Silicon Valley De-Bug

Prior Legislation: SB 1437 (Skinner), Ch. 1015, Stats. of 2018
SCR 48 (Skinner), Ch. 175, Stats. 2017
AB 2195 (Bonilla), 2016, failed passage in Assembly Appropriations
SB 878 (Hayden), 1999, failed passage on the Senate Floor

Support: 8th Amendment Project; Alliance San Diego; American Civil Liberties Union of California; American Constitution Society Chapter for Santa Clara University School of Law; American Friends Services Committee; Asian Americans Advancing Justice – California; Asian Law Alliance; Asian Prisoner Support Committee; Asian Solidarity Collective; Bay Rising; Bend the Arc: Jewish Action; California Attorneys for Criminal Justice; California Catholic Conference; California Federation of Teachers; California Immigrant Policy Center; California Nurses Association; Californians for Safety and Justice; Center on Juvenile and Criminal Justice; Change Begins With Me Indivisible Group; Communication Workers of America Local 9415; Communities United for Restorative Youth Justice (CURYJ); Community Health Council; Courage California; Dignity and Power Now; Dream Corps; Drug Policy Alliance; Empowering Pacific Islander Communities; Friends Committee on Legislation of California; Heals Project – Helping End All Life Sentences; Homies Unidos INC; Human Impact Partners; Human Rights Watch; Immigrant Legal Resource Center; Indivisible San Francisco; Initiate Justice; Interfaith Movement for Human Integrity; Islamic Shura Council of Southern California; La Defensa; Lawyers’ Committee for Civil Rights of S.F. Bay Area; League of Women Voters of California; Legal Aid at Work; Legal Services for Prisoners with Children; Lincoln Memorial Congregational Church; Los Angeles Urban League; MILPA; National Association of Social Workers, California Chapter; National Center of Lesbian Rights; Pillars of the Community; Place4grace; Prison Policy Initiative; Prisoner Advocacy Network; Progressive Democrats for Social Justice; Resilience

Orange County; Reuniting Families Contra Costa; Root& Rebound; Rubicon Programs; San Francisco Public Defender; San Mateo County Participatory Defense; Secure Justice; Showing Up for Racial Justice (SURJ) at Sacred Heart in San Jose; Showing Up for Racial Justice (SURJ) – Bay Area; Showing Up for Racial Justice (SURJ) – Marin; Showing Up for Racial Justice (SURJ) – San Diego; Showing Up for Racial Justice (SURJ) – North County; Smart Justice California; The Social Justice Ministry of the Live Oak Unitarian Universalist Congregation of Goleta, CA; Special Circumstances Conviction Project; Starting Over INC.; Team Justice; Think Dignity; Time for Change Foundation; Transformative In-Prison Workgroup; Uncommon Law; United Core Alliance; United Food and Commercial Workers Western States Council; Viet Rainbow of Orange County; Voices for Progress; We the People – San Diego; Western Regional Advocacy Project; White People 4 Black Lives; Young Women’s Freedom Center; YWCA Berkeley/Oakland; multiple individuals

Opposition: California District Attorneys Association; California Police Chiefs Association; Peace Officers’ Research Association of California (PORAC)

PURPOSE

The purpose of this legislation is to repeal the provision of law requiring punishment by death or imprisonment for life without the possibility of parole (LWOP) for a person convicted of murder in the first degree who is not the actual killer, but acted with reckless indifference for human life as a major participant in specified dangerous felonies.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

Existing law defines malice for this purpose as either express or implied and defines those terms. (Pen. Code, § 188.)

- It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.
- It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Existing law provides that when it is shown that the killing resulted from an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice. (Pen. Code, § 188.)

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189.)

Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190.)

Existing law clarifies that for conviction of murder generally, a participant in a crime must have the mental state described as malice, unless specified criteria are met. (Pen. Code, § 189.)

- States that malice shall not be imputed to a person based solely on his or her participation in a crime.
- States that a participant in certain specified felonies is liable for first degree murder only if one of the following is proven.
 - The person was the actual killer;
 - The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; and,
 - The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified.
- Allows a defendant to be convicted of first degree murder if the victim is a peace officer who was killed in the course of duty, where the defendant was a participant in certain specified felonies and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of duty, regardless of the defendant's state of mind.

Existing law, however, as enacted by Proposition 115, approved by the voters on the June 5, 1990 statewide general election, provides that when a prosecutor charges a special circumstance enhancement and it is found true, a person found guilty of first degree murder who are not the actual killer, acted with reckless indifference to human life, was a major participant in certain specified felonies, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of that felony shall be punished by death or LWOP. (Pen. Code, § 190.2.)

This bill would repeal the provisions of law that requires punishment by death or LWOP for persons convicted of murder in the first degree who are not the actual killer, but acted with reckless indifference to human life as a major participant in specified dangerous felonies.

Existing law provides a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder. (Pen. Code, § 1170.95.)

This bill creates a procedure for persons previously convicted of one or more felony murder special circumstances and awaiting execution or serving LWOP to petition the court to recall the sentence and resentence the inmate.

- An incarcerated person may file a petition to have the special circumstance findings vacated and have their sentence recalled for any count in which the person was not the actual killer and did not act with the intent to kill.
- The petition is filed in the court that sentenced the petitioner and notice is provided to the district attorney and the attorney that represented the petitioner.
- The petition must contain a declaration by the petitioner, the case number, year of conviction, and whether the petitioner requests appointment of counsel.
- Courts must appoint counsel when requested.
- Prosecutors must file and serve a response within 60-days, and a reply 30-days after that. These deadlines may be extended by showings of good cause.
- If a petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause.
- Within 60-days of the showing of the order to show cause courts shall hold a hearing to determine whether to vacate the special circumstance finding or findings and recall the sentence and resentence the petitioner. This deadline may be extended for good cause.
- The burden is on the prosecutor to show that the petitioner is ineligible for relief beyond a reasonable doubt. The prosecutor or the petitioner may rely on the record of conviction or offer new or additional evidence to meet their burden.

This bill makes the following uncodified findings and declarations:

- There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in crimes where a death occurs.
- It is a bedrock principle of law and of equity that a person should be punished for their actions according to their own level of individual culpability.
- Currently, people are sentenced to death and life without the possibility of parole in California even though they did not kill and did not act with intent to kill.
- Current law makes the punishment of either death or imprisonment for life without the possibility of parole the mandatory sentence if a jury finds true any special circumstance, denying judges the discretion to impose a sentence of imprisonment for life with the possibility of parole, even when the judge believes such a sentence is fair and just.
- It is the intent of the Legislature to limit the application of special circumstances to accomplices who acted with intent to kill and to restore judicial discretion to dismiss special circumstances, and to abrogate the changes made regarding these issues in Proposition 115, passed by the voters at the June 5, 1990, statewide primary election.
- It is the intent of the Legislature to apply this change to Section 190.2 of the Penal Code retroactively, to ensure that no person remains under sentence of death or life without the possibility of parole if they did not personally kill or intend to kill. It is the intent of the Legislature to apply the repeal of Section 1385.1 of the Penal Code retroactively, to provide judges with discretion to impose appropriate sentences in the interests of justice during resentencing proceedings.
- California's special circumstance law is one of the most expansive in the nation. It does not adequately limit the number of people a prosecutor can charge with death or life without the possibility of parole. Although the California Supreme Court may find that our special circumstance law is unconstitutional for this reason, this does not relieve the

Legislature of its duty to address this injustice, particularly for accomplices in felony murder who neither killed nor intended to kill.

COMMENTS

1. Need for This Bill

According to the author:

SB 300 will address the injustice of the felony murder special circumstance law by allowing for a sentence other than the death penalty or life in prison without parole for a person who did not kill anyone, nor intend for anyone to die.

By repealing Penal Code section 1358.1, SB 300 will restore judicial discretion to dismiss one or more special circumstances in the interest of justice, pursuant to Penal Code section 1385, when the judge believes a sentence of life with the possibility of parole is just and appropriate. This is particularly important for cases where the district attorney or Secretary of Department of Corrections and Rehabilitation recommend recall and resentencing pursuant to Penal Code section 1170(d). SB 300 will provide judges the discretion to dismiss a special circumstance and impose a sentence of 25 years to life in these resentencing proceedings.

SB 300 also provides an avenue for currently incarcerated people sentenced to death or LWOP under the felony murder special circumstance law to petition the court for resentencing, offering recourse to Californians who have been unjustly sentenced.

2. Murder Generally

Murder is the most egregious form of homicide, which is the taking of the life of another human being. Homicides are killings of another, whether lawful or unlawful. Under California law murder is defined as “the unlawful killing of a human being or a fetus with malice aforethought.” (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter because the element of “malice” is required to be convicted of murder.

Malice

Both first-degree murder and second-degree murder require what is known as “malice.” Malice may be expressed or implied. Express malice means that you specifically intend to kill the victim. Implied malice is when: (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was committed deliberately with the knowledge that of the danger to human life, and with a conscious disregard for that life.

The simplest way to understand the element of malice is that the act does not require ill will or hatred to a particular person. Merely acting with a wanton disregard for human life and committing an act that involves a high degree of probability that it will result in death, is acting with malice aforethought. (*People v. Summers* (1983) 147 Cal.App. 3d 180, 184.)

First-Degree Murder

There are three methods for convicting a person of first-degree murder in California:

- If the killing was willful, deliberate, and premeditated.
- The murder was committed: through use of a destructive or explosive device, with ammunition designed to penetrate armor, poison, by lying in wait, or by inflicting torture.
- *With the felony-murder rule* (by committing a specifically enumerated felony that turns any death committed during the course of that felony into first-degree murder, if the person was the actual killer, had the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life).

Second-Degree Murder

Second-degree murder is distinguishable from first-degree murder because it is willful, but it is not deliberate and premeditated. In principle, second-degree murder has always been intended to therefore encompass all murder that is not defined as first-degree murder. So for instance, if a defendant initiates a physical altercation with another person without intending to kill that person, nevertheless that person dies as a result of the altercation the defendant initiated, the defendant is likely to have committed second-degree murder (absent a legal defense).

Punishment

First-Degree Murder

In California a conviction for first-degree murder (including felony-murder) can result in one of three sentences:

- Imprisonment in state prison for a term of 25 years to life;
- Life imprisonment in state prison without the possibility of parole; or
- Death

If a prosecutor chooses, state law requires a sentence of life imprisonment without parole or death for homicides involving special circumstances set by the California Penal Code. For example, the court must consider whether the defendant:

- committed first degree murder while engaging in a felony or
- avoiding a lawful arrest,
- using a bomb or explosive device, or
- intending to kill another person for financial gain.

The court must also confer a sentence of life imprisonment without parole or death if the defendant:

- committed first degree murder of a peace officer,
- federal law enforcement officer,
- firefighter,
- prosecutor, or
- judge.

State laws also allow for the most stringent forms of punishment when the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity." This generally refers to murders involving torture.

Second-Degree Murder

California state laws set the term of imprisonment for second degree murder as 15 years to life in state prison. The term increases to 20 years to life if the defendant killed the victim while shooting a firearm from a motor vehicle. In addition, the term may increase to 25 years to life if the victim of the crime was a peace officer.

State laws also allow the court to consider whether the defendant has a prior criminal record. If the defendant has previously served time in prison for murder, the possible sentence for second degree murder may range between 15 years to life in state prison and life imprisonment without the possibility of parole.

Special Circumstances

In California "special circumstances" are delineated and exist to provide a method to distinguish when the punishment of LWOP or death may be imposed in a conviction of first-degree murder. Whether a special circumstance is charged is entirely up to the prosecutor. Due to the level of the penalty, California requires a jury find a "special circumstance" exists beyond a reasonable doubt.

California does not require intent to kill for the imposition of special circumstances. For instance, the accidental death of a person in the commission of a dangerous felony can result in a death sentence of LWOP.

"Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole." Cal. Pen. Code § 190.2, subd. (b).

In fact, the special circumstances provisions go even further and explicitly provide for the imposition of a death sentence of LWOP when a person is found guilty of first degree murder, whether they intended to kill or not if they were in the process of committing an enumerated dangerous felony.

"[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4. Cal. Pen. Code § 190.2, subd. (d).

This bill would remove this last provision of law, thereby requiring intent to kill for a person to be punished by death or LWOP in California.

3. SB 1437 and The Felony Murder Doctrine in California

In 2018 California significantly reformed the felony-murder doctrine in California. Historically, the felony murder rule applied to murder in the first degree as well as murder in the second degree. The rule created liability for murder for actors (and their accomplices) who kill another person during the commission of a felony. The death needed not to be in furtherance of the felony, in fact the death could be accidental. The stated purpose for the rule has always been to deter those who commit felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental during the perpetration or attempted perpetration of the felony. (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

First-Degree Felony Murder

First-degree felony murder rule applied when a death occurs during the commission of one of a list of enumerated felonies. These felonies are as follows: arson, robbery, any burglary, carjacking, train wrecking, kidnapping, mayhem, rape, torture, and a list of sexual crimes (including rape, sodomy, oral copulation, forcible penetration, or lewd acts with a minor). (Pen. Code, § 189.)

Second-Degree Felony Murder Before SB 1437 of 2018

Second degree murder occurs when a death occurs during the commission of a felony that has not been enumerated in code as constituting first-degree felony murder, but that courts have defined as “inherently dangerous.” (*People v. Ford* (1964) 60 Cal.2d 772.) The standard courts are supposed to use for inherently dangerous is that the felony cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal. 3d 824, 833.)

So therefore, a defendant who fired a weapon in the air to deter criminals from burglarizing their property could be convicted of second-degree felony murder if the firing of the weapon killed a human being. That defendant could have been convicted of 15-years to life in state prison.

SB 1437 (Skinner), Ch. 1015, Stats. of 2018

SB 1437 (Skinner) reformed the felony murder rule in California by clarifying that malice cannot be imputed to a person based solely on his or her participation in a specified crime. This eliminated second degree felony murder as a basis for murder liability. The participant in those specified felonies can only be liable for murder if one of the following factors is proved:

1. The person was the actual killer;
2. The person was not the actual killer, but had the intent to kill and they aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of the murder; or
3. The person was a major participant in the underlying felony and acted with reckless indifference to human life.

Additionally, SB 1437 provided a procedure for incarcerated persons to petition to have their sentences recalled and to be resentenced pursuant to the provisions and standards of the bill.

The State of Special Circumstances Felony Murder Following SB 1437

SB 1437 (Skinner) did not amend the special circumstances provisions of the California Penal Code. Those provisions were implemented by Proposition 115 in 1990 and require a 2/3 vote by both houses of the state legislature to amend.

The implementation of SB 1437 left a peculiar scenario where persons who were not sentenced to LWOP or death were able to petition courts for relief by showing they never intended to kill and they met the qualifications for resentencing, but those who were sentenced to death and LWOP could not petition for relief. This bill would correct that discrepancy by allowing persons sentenced to death or LWOP to petition for relief and resentencing.

4. Lack of Deterrent Effect on Criminal Behavior

“The Legislature has said the effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first-degree murder for any homicide committed in the course thereof.” (People v. Cavitt (2004) 33 Cal. 4th 187, 197.)

The deterrent effect of the felony-murder doctrine has been debated for decades. Countless legal scholars and law review articles have addressed the issue. Most recent studies have concluded that the felony murder rule does not have a deterrent effect on the commission of dangerous felonies or deaths during the commission of a felony.¹ Proponents have argued that the felony-murder rule encourages criminals to reduce the number of felonies they commit and take greater care to avoid causing death while committing a felony. Opponents argue that criminals are unaware that the felony-murder rule even exists, and that it is impossible to deter criminals from committing unintentional and unforeseeable acts.

A 2002 study of FBI crime data found that nearly 20 percent of all murders annually between the years of 1970-1998 were felony murders. The results of the study suggested that the felony-murder rule has a relatively small effect on criminal behavior, and it does not substantially affect either the overall felony or felony-murder rate. Secondly, the study found that the effects varied by type of felony. While difficult to determine, the rule may have had a positive effect on reducing deaths during theft related offenses, it may have actually increased the rates of death in robbery-homicides. The rule was found to have no effect on rape deaths.²

¹ *The American Felony Murder Rule: Purpose and Effect* by Daniel Ganz, 2012, UC Berkeley; *The Culpability of Felony Murder* by Guyora Binder, 2008 Notre Dame Law Review; *Felony-Murder Rule a Doctrine at Constitutional Crossroads* by Nelson E. Roth and Scott E. Sundby, 1985 Cornell Law Review

² *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* by Anup Malani, 2002, (clerk to Justice Sandra Day O'Connor, U.S. Supreme Court)

5. Elimination of the Felony Murder Doctrine Worldwide

The United States adopted the felony murder rule as a form of English Common Law. English Common Law is the common legal system and concepts that has been adopted by courts throughout England, the United Kingdom, and their colonies worldwide.

- Abolished in England and Wales via the Homicide Act of 1957.
- Abolished in Northern Ireland via the Criminal Justice Act of Northern Ireland in 1966.
- Held unconstitutional in Canada as breaching the principles of fundamental justice. (*R v Vaillancourt* (1987) 2 SCR 636.)
- Abolished in Australia and replaced with a modified version known as “constructive murder” which requires that the offender commit an offense with a base penalty of 25 years to life in prison and that the death occurred in an attempt, during, or immediately after the base offense. Abolished and modified in the Crimes Act of 1958.
- There was never a felony murder rule in Scotland.

In the United States there are still 46 states that have some form of a felony murder rule. Hawaii, Kentucky, Michigan, and Ohio have completely abolished the felony murder rule. In 24 of those states, including California, the punishment can be death. The felony murder rule has been removed from the American Law Institute’s Model Penal Code.

6. Argument in Support

According to the Felony Murder Elimination Project:

The death penalty and life without the possibility of parole (LWOP) are punishments so extreme they are virtually unheard of in much of the world. California not only regularly imposes these sentences but currently *requires* judges to impose them for any adult convicted of “murder with special circumstances,” even if the person did not kill anyone nor intend anyone to die. Like other enhancements, special circumstances law allows for unchecked prosecutorial discretion that has resulted in disturbing racial disparities in death penalty and LWOP sentences. Under current law, if a person dies during the course of certain felonies, even if the death is accidental, anyone involved in the felony is subject to these severe punishments even though the death was not caused by their individual action or intent.

SB 300 will address this injustice by allowing for a sentence other than the death penalty or LWOP for a person who did not kill anyone or intend for anyone to die. This bill takes a modest step towards repealing our unjust special circumstances scheme by allowing judges to impose a parole eligible sentence, should they deem that a death penalty or LWOP sentence is disproportionate. The bill also provides an avenue for currently incarcerated people to petition the court for resentencing, offering recourse to Californians who have been unjustly sentenced to LWOP or execution.

Decades of research have failed to show any public safety benefit from LWOP or the death penalty. On the contrary, severe punishments like these have driven the mass incarceration crisis that has destroyed lives, families, and entire

communities, particularly Black and Brown communities that have long been deprived of supportive investments and programs while being targeted by policing, racism, and oppression. Reducing our reliance on punishment and imprisonment, including for people serving extreme sentences, will benefit our communities by returning people to their families and freeing up funds that can be invested in addressing true community safety and well-being.

7. Argument in Opposition

According to PORAC:

In 1990, Proposition 115 was passed to provide that a person, not the actual killer, who is found guilty of first-degree murder, and who, with reckless indifference to human life and as a major participant in certain specified violent felonies, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of that felony, shall be punished by death or imprisonment in the state prison without the possibility of parole. SB 300 would repeal the aforementioned provision requiring punishment by death or imprisonment for life without the possibility of parole for a person convicted of murder in the first degree who is not the actual killer, but acted with reckless indifference for human life as a major participant in certain specified violent felonies.

Prop 15 was passed because the voters recognized that regardless of whether an individual was the actual person who committed the murder, the fact that they had participated in the act, with the intent to kill or knowing full well their actions could cause the death of someone, is just as egregious as the act of murder itself. Under this legislation, if two individuals shoot at a law enforcement officer and that officer dies, but it is proven that only one bullet killed the officer, then the person whose shot did not hit the officer will not be subject to the same penalties of the actual shooter. For these reasons, PORAC opposes SB 300.

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