



PRISON LAW OFFICE
General Delivery, San Quentin, CA 94964
Telephone (510) 280-2621 • Fax (510) 280-2704
www.prisonlaw.com

Director:
Donald Specter

Managing Attorney:
Sara Norman

Staff Attorneys:
Rana Anabtawi
Steven Fama
Alison Hardy
Sophie Hart
Corene Kendrick
Rita Lomio
Margot Mendelson
Thomas Nosewicz
Camille Woods
Lynn Wu

Your Responsibility When Using the Information Provided Below:

When putting this material together, we did our best to give you useful and accurate information because we know that prisoners often have trouble getting legal information and we cannot give specific advice to all prisoners who ask for it. The laws change often and can be looked at in different ways. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and still applies to your situation. Most of the materials you need should be available in your facility's law library.

New Laws on Felony Murder and “Natural and Probable Consequences” Murder

(Senate Bill 1437)

(October 11, 2018)

We send this information in response to your request for information concerning the recent changes to California's laws regarding certain types of murder convictions. Unfortunately, we cannot provide individual responses to everyone who contacts us. We hope this letter will help answer your questions.

The California Legislature passed a bill (SB 1437) that changes some of the laws for when a person can be convicted of murder. The Governor signed the bill, and it will take effect on January 1, 2019. The new law applies to current and future cases in the trial courts, and it may apply to cases that are still on appeal. The law also provides a way for people who already have convictions to petition a court to have their murder convictions overturned based on the new law.

There are still many unknowns about how SB 1437 will be put into effect. We will attempt to update this letter when we have significant new information.

I. What Parts of the Murder Laws did SB 1437 Change?

California murder laws are complex. There are several legal rules by which a person can be convicted of murder even if they do not personally kill anyone and/or even if they do not intend to kill anyone. SB 1437 changes the law by limiting the legal bases for convicting someone of the crime of murder. Note that even under the new law, some people who do not personally kill and/or who do not intend to kill can still be found guilty of murder.

Board of Directors
Penelope Cooper, President • Michele WalkinHawk, Vice President
Marshall Krause, Treasurer • Christiane Hipps • Margaret Johns
Cesar Lagleva • Laura Magnani • Michael Marcum • Ruth Morgan • Seth Morris

II. How Can I Know if My Murder Conviction Is Affected by the Change in the Law?

The short answer is that “it’s complicated.” Some of the details about the murder laws and the changes made by SB 1437 are discussed in Section VI below. You should try to contact a lawyer who knows your case or is a specialist in criminal law, like your trial or plea attorney, your appeal attorney, or the public defender’s office in the county where you were convicted.

III. What Should I Do if I Have a Murder Conviction That is Still on Appeal (or Was Recently Decided on Appeal)?

Under a rule established in a case called *In re Estrada* (1965) 63 Cal.2d 740, new laws that reduce punishment usually apply automatically to anyone whose criminal case is not yet final when the law takes effect. A criminal case is not final if a direct appeal is still pending in the court of appeal, a petition for review can still be filed or is pending in the California Supreme Court, or the 90-day timeline for filing a petition for writ of certiorari in the U.S. Supreme Court has not expired.

However, it is not clear if the *In re Estrada* rule will apply to SB 1437, because SB 1437 provides a way for people who have already been convicted of murder to petition to have their convictions vacated. Courts might decide that a person who is already serving a murder sentence must use this petition procedure, even if their case is not yet final. (See *People v. Conley* (2016) 63 Cal.4th 646 (new three-strikes laws under Prop. 36 did not automatically apply to cases that were still on appeal because Prop. 36 created procedure for people already serving sentences to petition for relief).

If you have a murder conviction and your case is not yet final, you should contact the attorney who handled or is handling your sentencing and/or your direct appeal for advice and assistance.

IV. What Should I Do if I Have a Murder Conviction That is No Longer on Appeal?

If your murder conviction is already final (see Section III, above), the best thing to do in the immediate future is to contact the public defender’s office in the county where you were convicted, your trial attorney, and/or your appeal attorney to see whether they can give you specific advice about how SB 1437 might affect your case. Depending on the situation, one of those attorneys may be able to help you file a petition about your conviction with a court, as permitted under the new law (see Section V, below).

V. What is the Process for Petitioning to Have My Sentence Vacated if my Conviction is Final?

Starting January 1, 2019, some people can file a petition asking to have their murder convictions vacated. The process is described in a new statute, Penal Code § 1170.95. There are no “form” petitions available yet, but it is likely that the courts, public defenders, or other advocates will create some forms in the next few months. The law does not set a deadline for filing a petition.

You can petition to vacate your murder conviction if (1) the charge against you allowed the district attorney could argue a “felony murder” or a “natural and probable consequences” theory of guilt, (2) you were convicted (by either a trial or a plea) of first-degree or second-degree murder, and (3) could not be convicted of murder if you were prosecuted now because of the changes made by SB

1437. See Section VI, below, for an overview of the concepts of “felony murder,” and “natural and probable consequences,” and the changes to the law made by SB 1437.

As discussed above, it is recommended that you contact the public defender’s officer in the country where you were convicted, your trial attorney, and/or your appeal attorney to try to get advice or help in filing a petition.

If you do end up needing to file a petition yourself, you should file the petition in the court that sentenced you and serve copies on the district attorney and the public defender or other attorney who represented you in the sentencing court. The petition should include the court case number and year of the conviction, a declaration stating that you meet the three criteria (see above), and a statement of whether you are requesting appointment of counsel. If the court believes you have made a basic showing of eligibility, the case should go forward and the court should appoint you a lawyer if you requested one. The district attorney will have an opportunity to file a response and your attorney will have an opportunity to file a reply. The court will then decide whether to hold a hearing. The burden will be on the district attorney to prove beyond a reasonable doubt that you are not eligible for relief under SB 1437. Both sides may rely on the record of conviction and/or offer new and additional evidence at the hearing.

If the prosecutor does not meet their burden of proof, the court should vacate your murder conviction and any attached enhancements (or reduce the murder to the underlying felony that was the basis for the felony murder charge), and you should be resentenced on any remaining counts. The new total sentence cannot be longer than the original total sentence. Note that the law does not allow a court to deny a petition based on a finding of “dangerousness” (unlike Proposition 36 and Proposition 47 resentencing petitions).

If you are resentenced, you should get credit for time served. The judge may require you to serve up to three years parole upon completion of your sentence.

VI. Details about the New Murder Law

To understand the changes to the law, it’s helpful to know the basics about the two legal rules that are affected by SB 1437 -- “felony murder” and “natural and probable consequences”:

- ◆ To be convicted of either first-degree or second-degree murder, a person must act with a mental state (sometimes called by the Latin term *mens rea*) of “malice.” “Malice” can be express,” meaning the person actually intended to kill. “Malice” can also be “implied” when “no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” “*Felony murder*” is a legal rule by which a person can be convicted of murder if they commit or attempt to commit dangerous felonies and someone is killed in the commission of the crime – *without the prosecutor having to prove that they actually acted with malice*. Instead, for felony murder the law presumes (“imputes”) malice because the person committed some other felony and in the course of that felony someone was killed. Felony murder is first-degree if the underlying felony was arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286, 288, 288a, or 289 [various sex offenses]. Felony murder is second-degree if the underlying felony is some other crime that is “inherently dangerous to human life.”

- ◆ People can be convicted of murder if they are the actual killer. People can also be convicted of murder if they know that another person intends to commit murder and they “aid and abet” the killer. The “natural and probable consequences” rule takes this further by allowing a person to be convicted of second-degree murder if they intended to “aid and abet” some other type of crime that could reasonably and foreseeably result in someone being killed, and the person they aided and abetted actually did kill someone.

SB 1437 limits convictions based on “felony murder” and “natural and probable consequences.” A person who does not actually kill now cannot be presumed to have acted with “malice” just because they participated in a crime. (Penal Code 188(a).) It appears SB 1437 has made the following three changes to the law (note that there may be legal disputes about how SB 1437 is interpreted):

First, a person may be convicted of first-degree felony murder only if the prosecutor proves that one of the following is true:

- ◆ the person was the actual killer; OR
- ◆ the person (who was not the actual killer) “*with the intent to kill*, aided, abetted, counseled, induced, solicited, requested, or assisted the actual killer in the commission of murder;” OR
- ◆ the person (who was not the actual killer) was a “*major participant*” in the underlying felony and acted with “*reckless indifference*” to life; OR
- ◆ the victim was a peace officer engaged in the performance of their duties.

(Penal Code § 189.)

Second, a person cannot be convicted of murder as an aider and abettor under a “natural and probable consequences” theory (unless the prosecutor proves one of the requirements listed in the preceding paragraph). Also, the crime that is aided and abetted must be a felony; it cannot be a misdemeanor.

Third, criminal justice advocates believe there is a good argument that SB 1437 entirely eliminates the crime of second degree felony murder, for both actual killers and aider/ abettors.

If you went to trial, the legal theories that the district attorney used in your case will have been part of the instructions that were given to the jury. However, if you do not have access to the jury instructions, you might not know or remember what theory the district attorney used. Also, sometimes jurors are instructed on more than one theory of murder, and they aren’t necessarily required to state which theory they relied on when they reached their verdict. Furthermore, issues like whether you were a “major participant” might never have been presented to the jury. Similarly, if you entered a plea bargain, the legal theory behind the murder charge might not have been made clear.

The bottom line is that, if you think you might possibly benefit from SB 1437, you should take action to get your case reviewed by a lawyer and/or considered by a court.