

Felony Murder

"Do not pursue with the terrible scourge him who deserves a slight whip."
Horace—*Satires*. I. 3. 119.

By: Dana Grimes, CASD President &
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The felony murder rule in California has just been dramatically changed with the signing of SB 1437.



California law defines murder as the unlawful killing of a human being with malice aforethought. The law defines the mental state of malice for this purpose as either express or implied and developed caselaw defining those terms. The former "felony murder rule" was a departure from the mental state required for murder. Under the previous felony murder rule in this state, a defendant who knowingly committed or aided and abetted the commission a long list of violent felonies could be found guilty of first-degree murder if a death occurred during the crime, even if the defendant did not kill anybody or intend to kill anybody, and even if that death was not reasonably foreseeable based on the circumstances. It was not necessary for the DA to prove the elements of premeditation, deliberation, or malice aforethought in felony murder cases. This list of violent felonies is codified in Penal Code 189, and includes arson, kidnapping, carjacking, a number of sex crimes, and robbery.

A lot of felony murder prosecutions resulted from a low level robberies gone bad. For example, the driver of a getaway car in a robbery could get 25-to-life if a co-conspirator unexpectedly killed a liquor store clerk during the course of the robbery. The getaway driver could even get 25-to-life if the liquor store clerk pulled a gun from under the counter and killed the driver's co-conspirator.

The new felony murder rule prohibits a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

Democratic Senator Nancy Skinner and Republican Senator Joel Anderson jointly sponsored SB 1437. England abolished its version of the felony murder rule in 1957, followed by India and Canada and other common law countries. In the US, there has been a recent tendency for individual states to either abandon it or to modify it, as California has just done.

This law is retroactive. The San Diego District Attorney's office estimates that 143 inmates now in state prison after being convicted of felony murder in San Diego Superior Court may qualify to have those convictions set aside. In a case where that occurs, the inmate will still have to serve the sentence for any other crime, such as robbery, for which he was convicted. If the sentence for other crimes has already been served, the inmate will be released upon the setting aside of his felony murder conviction.

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One argument in support of the old felony murder rule was that it served to deter people from committing violent crimes. The reality is that the people who are committing crimes like armed robbery are not good at analyzing the risk vs. reward, as demonstrated by the fact of their commission of an armed robbery. It is not realistic to presume that anyone contemplating driving a getaway car in a liquor store robbery will be deterred by the nuances of homicide jurisprudence.

Another justification offered for the old felony murder rule was that it held criminals responsible for the consequences of their acts when someone died during the commission of the crime. Supporters of SB 1437 note that will still happen under the new law, in those cases where the defendant had the requisite criminal intent to be held responsible. A defendant will still be liable for first-degree felony murder if he kills a person, if he

aids or abets the commission of murder with the intent to kill, if he was a "major participant" in the felony and acted with "reckless indifference to human life". (If during the course of a felony a peace officer was killed by anyone, the only mental state required to convict all co-conspirators is knowledge that an on-duty officer was present, not reckless indifference to life). Facts the court will consider in determining if a defendant was a "major participant" include his role in planning the crime, whether he supplied any weapons to commit the crime, and if he was present at the scene of the murder. The penalty for first-degree felony murder will still be 25-to-life in prison, and in some cases may be life in prison without parole or the death penalty. Second-degree felony murder is any felony murder that does not qualify as first-degree felony murder, and is punished by 15-years-to-life. **TBN**

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