



## **FELONY MURDER RULE ABOLISHED; MAJOR IMPACT EXPECTED**

In a major change to the California Penal Code, which will affect an as-yet unknown number of lifers and LWOP inmates, the California legislature decidedly passed changes to the so-called 'felony murder rule,' which has long allowed those with ancillary participation in a fatal crime to be held as accountable as the individual(s) who performed the actual murderous acts. The new law, SB 1437, Accomplice Liability for Felony Murder, passed the last legislative hurdle on August 31 and now is headed to the Governor's office for his signature. There are no indications Brown will not sign the bill, which will become effective January 1, 2019 if signed.

One of the most avidly watched and anticipated pieces of legislation this session, SB 1437 in the end passed largely along party lines, though nearly a third of the opposition to the bill in the Assembly came from Democrats. Introduced by Senator Nancy Skinner (D-Oakland), the final vote on the Senate floor was 26 to 11, with all 11 no votes cast by Republicans. On the Assembly side the final vote was a closer 42 to 36, with 10 negative votes coming from Democratic members, albeit many who predictably vote against any penal reform.

Under current law, passed in 1978, all those who are involved in a crime that results in a death, regardless of their level of participation, prior knowledge or aforethought, were adjudged to be as culpable as the individual who took the actions resulting in death. The new law requires convictions for murder to require 'malice aforethought' in involvement the crime and notes such malice cannot be imputed simply by participation in criminal acts that may be part of the crime.

Although this bill will change the conviction probability for those now serving time under the ‘aiding and abetting’ standard or the ‘natural and probable consequences’ of actions, those individuals who are participants in the crime can still be charged with the ultimate murder for aiding and abetting if they ‘counseled, commanded, induced, solicited, requested or assisted the actual killer’ with what the bill defines as ‘intent to kill.’ Under the new bill the first or second-degree murder conviction, which resulted in sentences of 25 to life, 15 to life or life without parole, would be vacated, but the individual could still be sentenced for the remaining counts (i.e. robbery, carjacking, etc.). The exception to this was an amendment added by the Assembly, which exempts those crimes wherein the victim was a peace officer in the performance of his/her duties and where the individual knew or should have reasonably known the victim was a peace officer.

These are the provisions going forward. For those already serving time under convictions and/or plea bargains done under the felony murder rule, relief is available via petitions to their sentencing court(s) asking for consideration for recall of sentence on the murder conviction. Those filing such petitions would also be eligible for appointment of counsel, likely members of the specific county’s public defenders’ office. If such petitions were successful and the murder conviction and resulting sentence was vacated, the court could still sentence the individual for participation in the underlying crime as well as mandating a term of parole supervision for 3 years following completion of any assessed sentence. Even if the murder conviction is vacated, the court cannot remove a strike from the inmate’s record.

These are the statutory requirements of the bill; how such hearings and possible releases will actually play out remains to be seen, affected no doubt by the sheer volume of possible participants filing petitions. Again, the bill has **not yet been signed by the Governor, and if signed will not become effective until January 1, 2019**, so petitions cannot be considered valid if filed before that date.



For the sake of clarity, below are quotes plucked from the exact language of the bill:

*“It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.”*

*“Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.”*

*In order to achieve redress of sentence individuals must:*

*“170.95. (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:*

*(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.*

*(2) The petitioner was convicted of first degree or second-degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second-degree murder.*

*(3) The petitioner could not be convicted of first or second-degree murder because of changes to Section 188 or 189 made effective January 1, 2019.*

*(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition.”*

*“At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.*

*“A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.”*

It is up to the petitioner (prisoner seeking relief) to prove the prima facie case (at first look, or first evidence) that he or she comes under the guidelines of the bill and request counsel, if desired. It is also important to note that this bill will not wholly absolve many individuals from participation in a crime, such as robbery or assault that resulted in a death. While it may vacate the murder conviction, the courts are free to sentence the petitioner on the underlying or residual crime, and it is conceivable that those who may find relief from a murder conviction and be re-sentenced for the other offenses may still find themselves incarcerated, albeit probably with an end in sight.

As SB 1437 is signed, chaptered and enacted more details on both the process and impact will become available and we will report as those details are available. In the meantime, those who believe they may find relief under SB 1437 can take heart and begin marshalling their forces, both factual, legal and support system, ahead of a time when they can petition their sentencing court for possible recall of sentence.



## **THE COMMUTATION AND PARDON PROCESS**

It seems not a day goes by that LSA doesn't receive a letter from an inmate, or call or email from an inmate's family, asking about the commutation of sentence process, how it works, timelines and who to contact for follow up. And the answer is—there really isn't an answer.

California law provides the Governor with the power to pardon or commute the sentences of prisoners, for whatever grounds he may see fit. There are some checks on this power, but those checks are rather subjective and rarely brought to bear. As all in the prison reform movement are aware, Governor Brown has stepped up his consideration of such requests, as his term winds down more and more such petitions are seeing action from that office.

By in large, pardons are bestowed on those who have served their time and have been released from prison, usually low-level offenders who wish to have their record cleared in order to obtain jobs, benefits or simply move their lives along. Commutation of sentences are available to those still in prison, and those commutations (or decrease in time) range from time served, to reduction in number of years of a determinate sentence to, of prime interest to lifers, change in Life Without Parole sentence to Life With Possibility of Parole.

In recent years, historically around various holidays, Governors, including Brown, have issued pardons/commutations for a few select individuals. In recent years, and more to the point in recent months, Brown has stepped up his use of pardon/commutation powers, focusing often on LWOP inmates, providing them an opportunity to show their life-change and be considered for parole. Most recently, at the August Executive Meeting of the BPH, there were 8 commutation and two pardon requests before the commissioners. In July, there were 6 commutation and one pardon consideration and in May, 4 commutation and one pardon were considered. Clearly, the pace has increased.

Commutations begin with a petition from the inmate, via a letter to the Governor or a form available both on the Governor's website or from an institutional counselor. It's up to the inmate and his/her family to present a compelling petition and support documentation to convince both the Governor, and any investigators involved, that the inmate is deserving of relief under this process. Once the petition is received by the Governor's office the procedure is slightly different, depending on the crime(s) for which the individual is serving time.

For those convicted of a single felony, the Governor, considering the results of any investigation he may order (investigations of commutation requests are done by the BPH Offender Investigations and Screening Division), can decide thumbs up or down unilaterally. If the petitioner is a twice-convicted felon (one crime, various criminal counts or more than one crime), the BPH is required not only to

provide an investigation of the petitioner, but to consider the request during the en banc hearing portion of the monthly board meetings.

It is at this point that friends and family supporters of the inmate and those opposing commutation, can voice that support or opposition, by appearing in Sacramento at the board meeting, where they will be given 5 minutes to express their opinion and any supporting facts. The entire board, all existing 15 members (or as many as are in attendance and any given board meeting, always a quorum) will consider the results of the investigation, any speakers pro or con, and their own experience and vote to either recommend favorably or unfavorably on the petition.

Two final steps remain for those with multiple felony convictions: if the parole board sends a favorable recommendation and the Governor wishes to proceed with the consideration, the petition then goes to the California Supreme Court, where at least 4 sitting justices must agree on a recommendation to the Governor. Once the recommendation of the Cal Supremes is sent to the Governor, he is free to make his decision.

Convolutd? Of course—who would expect anything less from the California penal system. As for time lines, there appears to be no time frame required for the Governor to act, or that he act at all. He could simply ignore the petition, take his time, or act swiftly.

And as to where, in the pipeline, a submitted petition may be and who to contact for that information, well, there's the rub. There is no official contact, number or person. At best, we have occasionally been successful in finding out some information by contacting the Governor's office, legal team or aide who, in an abundance of helpfulness, can sometimes provide some information.



Will we do this for all inmates who have submitted petitions? Oh please...there aren't enough hours in the day. At best, we recommend any prisoner who may have submitted a petition enlist family or friends to contact Brown's office, and plead, beg or cajole staffers for help.

Here's the contact information for Governor's office: Phone: (916) 445-2841, the Governor's office can also be reached by email, by using the Contact tab on the webpage at [www.gov.ca.gov](http://www.gov.ca.gov).

Most recently, in mid-August, Brown's office released a list of 36 pardons and 31 commutation of sentences issued by the Governor. Of those 31 commutations, 19 were LWOP inmates, now commuted to life with the possibility of parole. In taking action on LWOP sentences Brown largely commutes those extreme sentences to 25 years to life. In many cases the inmates in question have served in excess of 25 years, bringing them to parole hearings in an accelerated time frame.

A full analysis of the most recent spate of commutations, detailing common factors, comments from Brown and other details of both initial crime and post-conviction performance by those successful in their commutation petition will be available in next month's Lifer-Line.

### ATTORNEY SURVEY

Life Support Alliance is seeking information on the performance and reliability of state appointed attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not particularly helpful. Mail to PO Box 277, Rancho Cordova, CA. 95741. We appreciate your help in addressing these issues.

NAME\* \_\_\_\_\_ CDC #\* \_\_\_\_\_ HEARING DATE\* \_\_\_\_\_

COMMISSIONER \_\_\_\_\_ GRANTED/DENIED(YRS) \_\_\_\_\_

INITIAL/SUBSEQUENT (how many) \_\_\_\_\_ EVER FOUND SUITABLE/WHEN \_\_\_\_\_

ATTORNEY:private/state\* \_\_\_\_\_ PRISON \_\_\_\_\_

MEET BEFORE HRG? (# of times, length) \_\_\_\_\_ HOW FAR IN ADVANCE OF HRG? \_\_\_\_\_

TIME SPENT CONSULTING \_\_\_\_\_ OBJECT TO PSYCH EVAL? \_\_\_\_\_

LANGUAGE PROBLEMS? \_\_\_\_\_ WAS ATTORNEY PREPARED? \_\_\_\_\_

DID S/HE BRING ANY DOCS NEEDED? \_\_\_\_\_ SUGGEST STIP/WAIVE? \_\_\_\_\_

**COMMENTS:**

(Please provide details regarding attorney's performance, or lack of, including interaction with parole panel and/or any DAs and VNOK present. Was attorney attentive during pre-hearing meeting and hearing, did s/he provide support/advice to you? Was s/he knowledgeable re: your case and/or parole process? Had s/he read your C-file before meeting with you? )

\*required