

UNEQUAL PUNISHMENT: REPEALING FELONY MURDER SPECIAL CIRCUMSTANCES

BY JOANNE SCHEER



Author Joanne Scheer at a Drop LWOP rally, 2018. Photograph. Source: Drop LWOP Coalition.

The California penal code governing “special circumstances” pertaining to first-degree murder demands that mandatory capital punishment—that is, the death penalty or a death-in-custody sentence of life in prison without the possibility of parole (LWOP)—be imposed upon a person when a death occurs during the commission of another underlying felony, such as robbery.¹ In order to convict someone of “felony murder special circumstances,” and sentence them to one of these two forms of death penalty, a prosecutor does not have to prove that someone killed intentionally. Furthermore, those convicted do not need to be the actual perpetrators of the killing. As long as a prosecutor can prove they were a major participant in committing one of the 13 underlying offenses, and that they acted with “reckless indifference,” they can be convicted.

WHILE FELONY MURDER does not require a prosecutor to prove that a defendant killed anyone, intentionally or not, it can be punished more severely than first-degree murder, which requires a prosecutor to prove a defendant intentionally, willfully, and maliciously perpetrated a killing. The minimum sentence for an intentional first-degree murder is 25 years to life, while the minimum sentence for felony murder special circumstances is either the death penalty or LWOP.²

This particularity of California criminal law thus relegates people convicted of felony murder to staggeringly disproportionate sentences. It also has particularly detrimental effects on women and on transgender and gender non-conforming people. Many of the over 200 women and transgender people in California women’s prisons serving LWOP were sentenced as aiders and abettors with special circumstan-

es, including under the felony murder rule. The majority of incarcerated women and transgender people were themselves survivors of abuse, such as intimate partner violence, child abuse, sexual violence, and trafficking.^{3,4}

The passage of California Senate Bill 1437 in 2018 has limited the conditions under which defendants can be convicted and subsequently sentenced as aiders and abettors in certain felony murder cases.⁵ However, further reform is urgently needed to fully abolish felony murder special circumstances and thereby ensure consistency in California sentencing law.

PROBLEM DESCRIPTION

The particularities of California’s penal code have created a situation in which those convicted of committing felony murder, whether or not the death was intentional, could suffer harsher punishments than those convicted of intentional first-degree murder. The minimum penalty for first-degree murder in California is 25 years to life. However, the California Penal Code contains provisions that enumerate 22 special circumstances under which those who have been convicted of first-degree murder *must* serve a minimum sentence of LWOP or the death penalty.⁶ All but one of these 22 provisions requires that the killing be intentional. The exception allows for defendants who are convicted of felony murder with special circumstances, regardless of whether they were the actual killer or whether the killing happened intentionally, to be sentenced to LWOP or the death penalty. Thus, those convict-

ed of intentional first-degree murder without a special circumstance can be sentenced to 25 years to life, but those convicted of felony murder with special circumstances, whether or not they intended for the death to happen, *must* be sentenced to LWOP or the death penalty.

While the legal theory of felony murder has existed for many years, originating in eighteenth-century England, ballot initiatives passed in California in the last four decades have expanded the number of special-circumstance crimes for felony murder, and first weakened and then removed the necessity of proving intent, thus precipitously expanding the number of people convicted under felony murder.

The 1977 death penalty law made it clear that no one could be sentenced to LWOP or death for first-degree murder unless that person intended to kill the victim.⁷ While one who only aided another in committing a felony could be convicted of first-degree murder, the 1977 law required that person be physically present and intend the death before special circumstances could be found.⁸ In 1978, voters passed Proposition 7, which replaced that more specific language with the much broader and more ambiguous “intent to kill.”⁹ In addition, in the case of felony murder, Proposition 7 contained two contradictory clauses that introduced ambiguity around the necessity of proving intent. One clause listed the underlying crimes that would trigger the felony-murder rule, but did not specify that intent was necessary,¹⁰ while another clause mandated that prosecutors prove intent-to-kill in felony murder cases in order to convict for first-degree murder.¹¹ This ambiguity seems to have resulted in an increased number of false convictions.¹²

Proposition 115, The Crime Victims Justice Reform Act (passed in 1990), removed that ambiguity once and for all by making it possible to convict without proof of intent. Proposition 115 mandated that those aiders/abettors who acted with “reckless indifference to human life and as a major participant” could also be convicted of first-degree felony murder, removing the requirement of intent.¹³

Recent legislation has limited, but not eliminated, the basis for felony-murder convictions. SB 1437 (2018) allows a person previously convicted of second-degree felony murder (for being an accomplice under the felony-murder rule), or through the “natural and probable consequences” theory of law, to petition their original court of conviction for a resentencing to the underlying felony only.¹⁴ It also allows those currently undergoing trial a similar basis for challenging the charge of felony murder. Natural and probable consequences is a legal theory that asserts culpability if it can be proven that an aider/abettor could have reasonably foreseen that a death could occur as a direct result of the underlying crime. Though district attorneys across California have challenged the constitutionality of SB 1437 in the courts, such cases have slowed, but not prevented, the application of the new statute. A number of petitioners have been released under the new statute, most notably Adnan Khan, the first person released under the new law and the co-founder of Re:Store Justice, the criminal justice reform organization that spearheaded SB 1437.¹⁵

As encouraging as these instances are, there is still much work to be done to eliminate the felony-murder category altogether. SB 1437 does not apply to everyone convicted of felony murder special circumstances, only those who

were prosecuted and convicted of second-degree felony murder as an aider/abettor or under the natural and probable consequences doctrine. Those who were convicted of felony murder with a special circumstance as a major participant, or as acting with reckless indifference to human life; as the actual perpetrator of the killing; as an aider/abettor with the intent to kill; or if the person killed was a police officer in the performance of his or her duties, are not eligible for resentencing under SB 1437.

CRITIQUE

These felony-murder provisions lend themselves to capricious and unjust sentencing. While malice for burglary and other offenses clearly does not equal malice for murder, people are being punished as if it does. In addition, the decision to charge someone with special circumstances for felony murder (rather than simply for the underlying felony or for felony murder without special circumstances) is at the sole discretion of the District Attorney, resulting in inconsistent, unequal, and potentially biased application of this lethal law.

Felony murder violates key tenets of the state’s own definition of appropriate punishment. In the *People v Dillon* (1983) decision, the California Supreme Court states that “the state must exercise its power to prescribe penalties within the limits of civilized standards and must treat its members with respect for their intrinsic worth as human beings.” It further states, “punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated.” They conclude that a punishment may violate the California constitutional prohibition “if, although not cruel or unusual in its method, it is so disproportionate

to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.”

The United States is one of the few countries in the world to use the felony-murder rule.¹⁶ Acknowledging the capriciousness and unfairness of this rule, England, its country of origin, abolished the felony-murder rule in 1957.¹⁷ Various states in the United States have also abolished the felony-murder rule, including Hawaii, Kentucky, Michigan, Ohio, and New Hampshire.¹⁸

RECOMMENDATIONS

We recommend that the California Penal Code be amended to abolish special circumstances penalties for felony murder, so that the criteria of proving intent-to-kill is consistent with all other determinations of the charge of murder, regardless of whether or not the deaths happened during the commission of an underlying felony. This would require abolishing those sections of the California Penal Code that punish people convicted of felony murder regardless of intent, that is, Penal Code sections 190.2(b), 190.2(c), and 190.2(d).¹⁹

These changes to the Penal Code could only be implemented via a ballot initiative or a two-thirds majority vote in the state legislature. Proposition 7 and Proposition 115, which established the current statutes governing felony murder special circumstances, were ballot initiatives. Changes to Proposition 7 that abolish felony murder special circumstances altogether would require another ballot initiative. Abolishing the sections of the Penal Code that punish those convicted of felony murder special circumstances without intent-to-kill means changing

certain portions of Proposition 115. Proposition 115 was written so that it could be changed by either a ballot initiative or a two-thirds majority vote in the legislature. Anticipating the difficulty of garnering enough support to win a two-thirds majority vote or to win a ballot initiative, the authors of SB 1437 only changed language not directly specified in either proposition. As such, the main provisions defining felony murder special circumstances—that is, intent-to-kill or “acting with reckless indifference and as a major participant”—remain unchanged by SB 1437. We therefore recommend introducing legislation, passed by a two-thirds majority, to abolish sections of the California Penal Code that punish people convicted of felony murder special circumstances regardless of intent to kill.



JOANNE SCHEER is the founder of the *Felony Murder Elimination Project*, a growing group of concerned citizens whose goal is the elimination of the felony murder rule from California law. When her only child (Tony Vigeant, featured in the picture with his mother) was convicted under the felony murder rule and sentenced to the death sentence of life in prison without the possibility of parole, she began the work of bringing an end to one of the most heinous of California’s laws. Striving not only to eliminate the felony murder rule, the *Felony Murder Elimination Project* endeavors to bring relief to those who are serving harsh and disproportionate sentences imposed by the rule’s application.

With nothing but the resolve to eliminate a law that so easily and unjustly sentences youth to death, she sponsored Assembly Bill 2195 in 2016, co-sponsored Senate Concurrent Resolution 48 in 2017, and co-sponsored Senate Bill 1437 in 2018, which virtually eliminated second-degree felony murder and the natural and probable consequences doc-

trine. She continues to fight for the elimination of first-degree felony murder and special circumstances.

RECOMMENDED READING

Tomkovicz, James J., “The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law.” *Washington and Lee Law Review* 51, no. 4:8 (1994): 1429-1480.

Birdsong, Leonard, “Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Rule Statutes.” *Thurgood Marshall Law Review* 30 (2006): 1-27.

NOTES

1. California Penal Code, Part 1, Title 8, Chapter 1, Section 190.2(a)(17) Homicide, https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=190.2.&lawCode=PEN.
2. “Proposition 115: the Crime Victims Justice Reform Act, (1990),” Ballotpedia, accessed May 20, 2020, 66, [https://ballotpedia.org/California_Proposition_115_the_%22Crime_Victims_Justice_Reform_Act%22_\(1990\)](https://ballotpedia.org/California_Proposition_115_the_%22Crime_Victims_Justice_Reform_Act%22_(1990)).
3. Zust, Barbara, “Assessing and Addressing Domestic Violence Experienced By Incarcerated Women,” *Creative Nursing* 14, no. 2 (2008): 22-24.
4. Richie, Barbara, *Compelled to Crime: The Gender Entrapment of Battered Black Women* (New York: Routledge, 1995).
5. SB1437: Accomplice liability for felony murder, California Legislative Information (2018), https://leginfo.ca.gov/faces/bill_TextClient.xhtml?bill_id=201720180SB1437.
6. California Penal Code, Part 1, Title 8, Chapter 1, Section 190.2(a)(17) Homicide, https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=190.2.&lawCode=PEN.
7. *Statutes of California 1977-78 Regular Session*, California State Assembly, Volume 1, Chapter 316 (1977): 1255-1266, https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1977/77Vol1_Chapters.pdf.
8. Uelman, Gerald F., “Death Penalty: Blame Briggs, Not Court,” *Los Angeles Times*, April 22, 1986, <https://www.latimes.com/archives/la->

xpm-1986-04-22-me-1499-story.html.

9. "California Proposition 7: The Death Penalty Act, 1978," Ballotpedia, accessed May 20, 2020, [https://ballotpedia.org/California_Proposition_7,_the_Death_Penalty_Act_\(1978\)](https://ballotpedia.org/California_Proposition_7,_the_Death_Penalty_Act_(1978)).

10. California Penal Code, Part 1, Title 8, Chapter 1, Section 190.2(a)(17) Homicide, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=190.2.&lawCode=PEN.

11. California Penal Code, Part 1, Title 8, Chapter 1, Section 190.2(b) Homicide, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=190.2.&lawCode=PEN.

12. One legal analyst's comparison of death penalty appeals found that special-circumstances convictions (whether for felony murder or murder) that were won under the 1977 law, were upheld by the California Supreme Court 75 percent of the time, while special-circumstances convictions won under the 1978 law were only upheld 25 percent of the time. Uelman, Gerald F., "Death Penalty: Blame Briggs, Not Court," *Los Angeles Times*, April 22, 1986, <https://www.latimes.com/archives/la-xpm-1986-04-22-me-1499-story.html>.

13. "Peace Officer Hearsay Testimony Pursuant to the Crime Victims Justice Reform Act," Commission on Peace Officer Standards and Training, accessed May 20, 2020, <https://post.ca.gov/Proposition-115-Peace-Officer-Hearsay-Testimony-Pursuant-to-the-Crime-Victims-Justice-Reform-Act>.

14. SB1437: Accomplice liability for felony murder, California Legislative Information (2018), https://leginfo.legislature.ca.gov/faces/bill_TextClient.xhtml?bill_id=201720180SB1437.

15. McKenney, Hope, "My Intention Was Not To Kill: Adnan Khan First to Be Released from Prison Under New Law," *KQED News*, January 25, 2019, accessed 1/31/2020, <https://www.kqed.org/news/11720792/my-intentions-were-not-to-kill-adnan-khan-is-first-to-be-released-from-prison-under-new-law>.

16. Roth, Nelson E., and Scott Sundby, "Felony Murder Rule: A Doctrine at Constitutional Crossroads," *Cornell Law Review* 70, no. 3 (March 1985): 447-8.

17. Homicide Act of 1957, Parts 5-7, UK Pub-

lic General Acts (1957), <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/11/contents/enacted>.

18. Bonnie, R.J. et al., *Criminal Law*, Second Edition (New York: Foundation press, 2004): 860.

19. California Penal Code Part 1, Title 8, Chapter 1, Sections 190.2(b), 190.2(c), and 190.2(d) Homicide, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=190.2.&lawCode=PEN.