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Unconstitutionally Redefining Murder: CA Legislature takes a significant overstep with S.B. 1437.

Senate Bill 1437 (“S.B. 1437”), effective January 1, 2019, substantially changed the law relating to accomplice liability under the felony murder rule (the “FMR”) and the doctrine of natural and probable consequences. State prosecutors have **challenged** S.B. 1437 as an unconstitutional amendment of Propositions 7 and 115, and as a violation of the separation of powers. Polarized **rulings** from the state’s trial courts suggest a dispositive California Supreme Court decision is forthcoming to address the divide. Social policy considerations weigh heavily on the controversial issues engendered by this bill and will likely influence adjudication of the legislature’s authority to enact S.B. 1437, and the constitutionality of the substantive changes made to accomplice liability under the FMR. For the reasons presented in this article, opponents of the bill present a more compelling argument for the bill’s unconstitutionality.

Section 1 of S.B. 1437 expressly states that the purpose of the bill is to (1) provide statutory



State Sen. Nancy Skinner (D-Berkeley) and Sen. Joel Anderson (R-Alpine), co-authors of Senate Bill 1437, talk during the Senate session. Photo by Rich Pedroncelli/AP.

changes to equitably sentence offenders in accordance with individual culpability in the context of homicides; and, (2) limit convictions and subsequent sentencing to fairly address the culpability of the individual and assist in reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with individual culpability.

The three integral components of the bill include: (1) restrictions on prosecuting a person for murder who is not the actual killer; (2) elimination of the natural and probable consequences doctrine as it applies to murder

(and likely second degree felony murder); and, (3) establishment of a resentencing procedure for those convicted of felony murder or murder under the natural and probable consequence doctrine. S.B. 1437 substantively accomplishes this by: (1) amending the definition of malice contained in Penal Code Section 188 (“Section 188”); (2) redefining the degrees of and liability for murder contained in Penal Code Section 189 (“Section 189”); and, (3) providing for retroactive application of the bill’s resentencing provision through the addition of Penal Code Section 1170.95 (“Section 1170.95”).

Briefly summarized, S.B. 1437 requires a principal in commission of murder to act with malice aforethought unless the defendant participated in commission, or attempted commission of the predicate felony where a person was killed *and* either (1) defendant was the actual killer (Pen. §189, subd. (e)(1)); (2) defendant, *with intent to kill*, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in committing first degree murder (Pen. §189, subd. (e)(2)); or (3) defendant was a *major participant* in the predicate felony *and* acted with reckless indifference to human life (Pen. §189, subd. (e)(3)). Malice may not be imputed to the defendant for his or her participation in the crime. (Pen. §188, subd.(a)(3).) Lastly, persons convicted of felony murder or murder under a natural and probable consequences doctrine may petition the court that sentenced them to *vacate* their murder conviction pursuant to Section 1170.95 if all requirements of that section are satisfied.

The prominent issues facing the trial courts cover the legislative intent behind Propositions 7 and 115, whether the changes made by S.B.1437 to Propositions 7 and 115 are amendatory, and if the California Constitution and judicial precedence authorize or prohibit the legislative provisions enacted under S.B. 1437. Article II, section 10, subdivision (c) of the California Constitution states that “[a] statute enacted by voter initiative may be changed only with approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval.”

In *People v. Kelly (2010)*, the California Supreme Court held that “[T]he purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to protect the people’s initiative powers by precluding the Legislature from undoing what the people have done without the electorate’s consent, and courts have a duty to zealously guard the people’s initiative power, and hence to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process be not improperly annulled by a legislative body.”

S.B. 1437 Unconstitutionally Amends Proposition 7

The Briggs Initiative ([Proposition 7](#)) passed in 1978 by seventy-one percent (71%) of voters in California amended Penal Code Section 190 “to substantially increase the punishment for persons convicted of first- and second-degree murder . . . [and] did not authorize the Legislature to amend its provisions without voter approval.” (*People v. Cooper (2002)*.) In addition, “[t]he initiative added several special circumstances to [Section 190.2](#) (see subs. (a)(8), (9), (11)–(16), (19)), expanded the list of felonies subject to the “felony-murder” special circumstance, and deleted the requirement that a felony murder be willful, deliberate, and premeditated [citation] . . . these additions broadened the class of persons subject to the most severe penalties known to our criminal law.” (*People v. Weidert (1985)*.)

S.B. 1437 states its purpose is to address the dire social impacts of inequitable sentencing and prison overcrowding. S.B. 1437 accomplishes this purpose by eliminating imputed malice murder constructions (Pen. Code §188, subd., (a)(3)), and requiring additional conduct to be held liable for first-degree felony-murder (Pen. Code §189, subd., (e)). The amendment of Section 188, coupled with the declaration of intent in section 1 of S.B. 1437 indicate an intent to eliminate the “natural and probable consequences doctrine,” and permit a conviction of murder *only* if there is something more than a person’s participation in a non-homicide target offense. The direct result is a reduction in the total number of individuals eligible for punishment for first- or second-degree murder. By redefining murder, S.B. 1437 circumvents the voters’ determination of the appropriate penalties for murder by limiting who may be prosecuted for murder.

Men in prison in Tracy, California. Photo by Rich Pedroncelli/AP/Shutterstock.

S.B. 1437 Unconstitutionally Amends Proposition 115

The Crime Victims Reform act of 1990 ([Proposition 115](#)) amended Section 189 to declare that acts punishable under Sections 286, 288, 288a, and 289 could form the basis of a first-degree murder conviction under the FMR. It expanded the first-degree murder definition by adding additional felonies under Section 189, and the “major participant” term in the special circumstance portion of the death penalty scheme ([Penal Code section 190.2, subdivision \(d\)](#)).

S.B. 1437 expressly “amend[s] the felony murder rule and 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.” (Sen. Bill No. 1437 (2017-2018 Reg. Sess.), section 1.) Inclusion of the “major participant” term now imposes equivalent requirements for aider and abettors to qualify for first degree murder and calls into question the ability of the state to seek the death penalty for aiders and abettors under the FMR. Whereas Proposition 115 directly amended Section 189 to expand the murder definition, S.B. 1437 directly amends Section 189 to limit and restrict that definition. The direct result of S.B. 1437’s amendment of Proposition 115 is an increase in the requirements for aider and abettors to qualify for first degree murder. The legislature cannot amend Section 189 to redefine murder in order to indirectly limit the penalty under Section 190.

Proponents of the bill rely heavily on the *Pearson* decision to support the argument that changes made to the definition of a crime, such as S.B. 1437’s amendment of Section 188 and 189, are in a “related, but distinct area” from the matching punishment in Section 190. In *Pearson*, the California Supreme Court distinguished between pre-trial discovery in criminal cases and post-conviction discovery in habeas proceedings, holding that the “. . . electorate that

passed Proposition 115, in providing for pre-trial discovery in a criminal case, intended neither to provide for nor to prohibit discovery in a separate habeas corpus matter.” (*People v. Superior Court (Pearson)* (2010).) Therefore, it does not logically follow that when the voter’s passed Propositions 7 and 115 they neither meaningfully contemplated nor embraced the statutory definition and judicial interpretations of the specific crime to which they were attributing punishment. Propositions 7 and 115 incorporated existing definitions of murder. Crime and punishment are not related but distinct areas—they are inseparably connected, such that definition of criminal conduct has a direct bearing on the punishment prescribed for that conduct.

Penal Code Section 1170.95 Unconstitutionally Amends Proposition 7

S.B. 1437 also added Penal Code Section 1170.95, which presents the issue of whether the legislature may change the penalty for conduct resulting in a lawful murder conviction, not by amending Proposition 7, but by redefining the crime of murder to retroactively vacate lawful convictions.

Section 1170.95 provides that “[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition . . . to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts” in accordance with the new limitations on murder liability enacted by S.B. 1437, thereby, allowing a defendant lawfully convicted of murder to secure a sentence less than that specified in Section 190.

Proponents of the bill argue that Section 1170.95 lawfully provides post final-judgment relief “when there has been a change in the law affecting the petitioner.” (*In re Harris* (1993).) However, *Harris* primarily concerned a change in law affecting habeas corpus proceedings and is inapposite to the issues engendered by Section 1170.95.

The legislature was not free to enact S.B. 1437, except under the perimeters defined in Article II, Section 10 of the California Constitution to amend Proposition 7, or by the supermajority requirements

Adnan Khan is seen leaving the Martinez Detention Facility on Jan. 18, 2019 after being convicted of aiding and abetting a first-degree murder in 2004, and having his sentence vacated pursuant to Section 1170.95. Photo by Nate Gartrell/Bay Area News Group.

described in Proposition 115. S.B. 1437 was not enacted by either procedure, and therefore should be considered unconstitutional. Adopting proponents’ perspective of upholding constitutionality requires viewing statutes and their provisions in isolation, and thereby detracts from their overall interdependent functionality within the entire penal code. The formalistic parsing of the definition of crime and its commensurate punishment undermine the scope, effect, and purpose of existing law that the electorate passed through initiative.

The need for criminal reform transcends political parties and engenders progressive legislative responses, like S.B. 1437. However, those responses cannot impermissibly forsake laws governing such legislative action.

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