SENATE BILL 1437 :

GUIDE

TO

RESENTENCING

CREATED BY :

RE : STORE

JUSTICE

restorecal.org

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INTRODUCTION

Re:store Justice, an organization that worked with State Senator Nancy Skinner to write and eventually pass SB 1437, has prepared a form petition for use by persons who are eligible under SB 1437 for relief from murder convictions. The purpose of this form is to start proceedings in the superior court in which you were sentenced and cause that court to appoint an attorney to represent you in the resentencing process.

You are not required to use this form. The Judicial Council of the State of California may also prepare and make available a form petition for resentencing under SB 1437. Attorneys may prepare petitions that are not a form, but are unique to a petitioner.

SB 1437 takes effect on January 1, 2019. Persons eligible for resentencing are understandably eager to file the petition that begins the process. If you try to file a petition before January 1, 2019, the court in which you were sentenced may hold onto the petition until January 1, 2019, or it may send it back and tell you that it is premature.

The sentencing court is not obligated to take petitions in the order they were filed. It is fair to say that everyone who files a petition will want prompt attention. The only thing you can do to maximize your chances of prompt attention is to fill the form out carefully and completely.

If you cannot remember details such as the case number, you should obtain records *before* filling out the petition. The Abstract of Judgment, which is a record that goes with you from the sentencing court to CDCR, has the Superior Court case number, the year of your conviction, the charges for which you were convicted, and your sentence. This is in your C-File and if you are in custody, your counselor should be able to give you a copy.

There is no deadline to file the petition.

If your case is not final in the California courts, meaning that you are appealing from your conviction, and either the time has not passed for filing a petition for review from an adverse court of appeal decision or there is a petition for review pending, then you are currently represented by an attorney. *You should consult your attorney before filing a petition.* Your attorney may attempt to take advantage of the provisions of SB 1437 in your pending appeal, and filing a petition in the sentencing court could interfere with those efforts.

HOW TO USE THIS GUIDE

This guide is meant to help you determine if you are eligible to petition for resentencing under SB 1437. If you determine that SB 1437 does apply to your case, this guide offers in-depth explanations and information to determine which sections do or do not apply. What follows is an attempt to explain this new law so that you can fill out the petition accurately and truthfully to the best of your ability.

For the most part, it is broken down box by box in the order in which they appear in the Re:store Justice Petition. Each section begins with the box number and support information follows below.

This is by no means an exhaustive guide. Some questions will only be able to be answered by your counsel. Re:store Justice is not a law firm. What is provided here is general information; it is not legal advice. We do not provide legal advice, representation, or referrals, nor can we answer questions about individual cases. If you have an attorney, you should talk to your attorney about the law and your case and not rely solely on this guide. Your attorney may also be interested in this guide.

This guide was created in October of 2018, before SB 1437 has gone into effect and before courts have interpreted the law. As time goes on, and court decisions are published, we will update this guide. Subscribe for updates at restorecal.org/sb1437.

WHO IS ELIGIBLE TO FILE A PETITION FOR RESENTENCING

Being "eligible" to file a resentencing petition is not the same as being entitled to a favorable outcome. It is just the first step toward asking for relief.

You should not file a petition for resentencing under SB 1437 unless you believe that you are eligible. The Legislature has specified that resentencing petitions be filed in the form of declarations, meaning that factual assertions are made under penalty of perjury. For this reason, there is a potential downside to filing a petition if you are ineligible. Prosecutions for perjury are rare, and perjury does not extend to legal conclusions that you draw in good faith, but care should be exercised.

> ***For example,*** if you were the actual killer, the jury clearly found that you were the actual killer (for example, if the jury found that you personally used a firearm) and you allege in a resentencing petition that you were not the actual killer, a prosecutor could charge you with perjury and add time to your sentence or cause reimprisonment.

Further, this could lead to unintended and possibly adverse consequences at a future parole hearing.

To understand whether you are eligible, the starting point is to understand how SB 1437 has changed the law of homicide. There are more than a dozen ways that a defendant can be convicted of first degree murder or second degree murder. Whether a murder conviction makes a petitioner eligible to petition for resentencing depends on the "theory" under which the petitioner was convicted. This is explained in greater detail immediately below.

The understanding that all persons who were not the actual killers are eligible for resentencing, a rumor currently circulating in prisons, is incorrect.

SB 1437 resentencing applies to three specific categories of murder. If you do not fall within one of these categories, you are not eligible and you should probably not file a petition. At the very least, you should seek further legal advice from the attorneys who represented you at trial or on appeal.

Those who are eligible to petition for resentencing under SB 1437 are:

- certain accomplices to the underlying felony who were convicted of first degree felony murder;
- accomplices who were convicted under the natural and probable consequences doctrine as it relates to murder; and
- those convicted of second degree felony murder

You do not need to check anything other than Boxes 1, 2a or 2b, and 3 and serve the Petition as stated in Box 8. However, if you have a good faith belief, based on the facts that were presented in your case that Boxes 5 or 6, or, in a few cases, Box 7, applies to you, you should consider making these assertions. It will assist the court and the attorney that is appointed to represent you as to the issues that should be raised.

DETERMINING WHICH THEORY WAS USED

Theories are what prosecutors use to build their cases and arguments against a defendant. A theory of murder -- for example, whether it is a "premeditated and deliberate murder" or a "felony murder" -- is based on both case law (what the courts have said) and statutes.

There are many "theories" or kinds of murder. SB 1437 only applies to specific kinds of murder.

Q : Will the "charging document" tell me what the theory of murder was?
A : No.

The charging document will generally only say that a defendant is charged with murder, a violation of Penal Code section 187. The charging document does not say what kind of first or second degree murder you were charged with.

> Here is an example from a felony murder case.
>
> *The said defendants, XXXX, XXXX, and XXXX, did in the City and County of San Francisco, State of California, on or about the XXX day of July, 20XX, commit the crime of felony, to wit: Violating Section 187 of the California Penal Code, in that the said defendants did wilfully, unlawfully and with malice aforethought murder NAME OF VICTIM, a human being.*
>
> *It is further alleged that the above offense is a serious felony within the meaning of Penal Code section 1192.7(c)(1).*

If you do not remember what the prosecutor argued at your trial, and are not sure what theory was given to your jury, you should try to acquire the jury instructions from your case. The instructions are in the "record on appeal" if you appealed, and the attorney who represented you on appeal probably offered to send that record to you.

There are two series of jury instructions, CALCRIM and CALJIC. If you had a jury trial, the jury would have been instructed with either CALCRIM or CALJIC instructions. These instructions lay out the theory of the case. In the below instructions, we refer to the numbers of the CALCRIM or CALJIC jury instructions that may have been used in your case.

If you no longer have your record of appeal, you may have to have a friend or family member go to the clerk of the Court of Appeal that decided your appeal. The Courts of Appeal have a policy of retaining appeal records in criminal cases for at least 15 years. If your appeal was concluded more than 15 years ago, you should try to contact your trial attorney and see if they still have a file with the instructions given.

Jury instructions are typically between 30 and 50 pages long, and a copy service that would go to the Court of Appeal to make copies will charge .50 cents a page plus a travel fee.

If you make a good faith effort to recall what theory was presented to your jury, and believe that SB 1437 applies to you, but you cannot get the trial records to confirm it, you should check boxes 1, 2a or 2b, and 3. If you have a good faith belief in what happened, then you do not have the mental state required for perjury. Bear in mind, however, that once the petition is filed, the prosecutor in your county of conviction will take measures to find the record of the jury instructions given, and may have its own file going back 20 years or more.

If you are out of custody, you may petition the court for resentencing under SB 1437.

THE PETITION

Petitioner Name **CDCR # (if applicable): _____** **Institution Name (if applicable): _____** ** **R:J TIP :** State Prison Name here* **Street Address: _____** **City: _____** **State: _____** **Zip: _____** **Attorney Name (if applicable): _____** **State Bar No: _____** ** **R:J TIP :** If you are represented by an attorney already for this petition, your attorney can put in his/her name.*	*For Court Use Only* ** **R:J TIP :** This place is for the court to file stamp the petition when they receive it.* *We suggest submitting 2 copies of the petition to the court with a cover letter requesting that one file stamped copy be returned to you in the self-addressed stamped envelope.*
Superior Court of California, County of _____ **Street Address: _____** **Mailing Address: _____** **City, State, Zip: _____** **Branch Name: _____**	**Superior Court Case Name** **People of the State of California** **v.** ***Name*** **_____** **Superior Court Case Number _____** ** **R:J TIP :** If you have the case number, this will assist the court. The Superior Court case number is different than the appellate court number. The case number will be on your **Abstract of Judgment,** which is sent to CDCR and is in your C-File.* *If you had an appeal, the Superior Court case number will also be listed on your appeal.* **Year of Conviction: _____**
PETITION FOR RESENTENCING **(Penal Code § 1170.95)**	*For Court Use Only* Date: Time: Department:

THE PETITION ASSERTIONS

The following pages are designed to help you fill out the petition.
Check all boxes that apply.

I, _____, declare as follows:
Print your name on the above line.

Box #1

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

What Is A "Complaint, Information, or Indictment"?

- *A **complaint** is generally the first document the prosecution files in a case.*
- *A **felony information** is filed after the preliminary hearing.*
- *An **indictment** is filed if there was a grand jury.*

Complaints, informations, and indictments are known as charging documents or accusatory pleadings. A charging document states what Penal Code sections were violated.

Boxes #2a OR #2b

☐ **2a.** At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine;

OR

☐ **2b.** I pled guilty or no contest to 1st or 2nd degree murder in lieu of going to trial because I believed I could have been convicted of 1st or 2nd degree murder at trial pursuant to the felony murder rule or the natural and probable consequences doctrine.

Box #3

☐ **3.** I could not now be convicted of 1st or 2nd degree murder because of changes made to Penal Code § § 188 and 189, effective January 1, 2019.

**** R:J TIP : Box 1, Box 2a or 2b, and Box 3 must all be checked and must all apply in order to be eligible for resentencing under Penal Code § 1170.95.***

Under the resentencing law of SB 1437, *Boxes #1, #2a or #2b and #3 are actually the only assertions that need to be made.*

You must check Boxes #1, #2a *or* #2b, and #3.

Boxes #2a and #2b cannot both be checked: you either went to trial or took a plea.

DISCLAIMER BEFORE MOVING FORWARD :

You do not need to check Boxes #4, #5, #6, or #7 if you do not want. However, you do need to mail the petition to the prosecutor and to the public defender or your trial attorney. (See Box #8.)

As noted above, the petition must be signed under penalty of perjury. You should understand what it is you are checking and whether SB 1437 does, in fact, apply to you.

Box #4

☐ **4.** I request that this court appoint counsel for me during this resentencing process.

**** R:J TIP :*** Although you can certainly represent yourself or hire your own attorney, a significant aspect of SB 1437 is that it provides for the appointment of counsel just upon submitting the signed petition with the appropriate boxes checked to the court. If you choose to hire an attorney, you should hire an attorney with experience in trying homicide cases.

If you currently have an attorney representing you already on appeal, habeas, or trial, you should not submit a petition without first talking to your attorney.

If you want an appointed attorney to assist you, you should check Box #4.

Box #5

☐ **5. (If applicable)** I was convicted of 1st degree felony murder and I could not now be convicted because of changes to Penal Code § 189, effective January 1, 2019, for the following reasons (all must apply):

☐ I was not the actual killer.

☐ I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree.

☐ I was not a major participant in the felony **or** I did not act with reckless indifference to human life during the course of the crime or felony.

☐ The victim of the murder was **not** a peace officer in the performance of his or her duties, **or** I was not aware that the victim was a peace officer in the performance of his or her duties and the circumstances were such that I should not reasonably have been aware that the victim was a peace officer in the performance of his or her duties.

**** R:J TIP : To determine if SB 1437 applies to you if you were convicted of first degree murder under a felony murder theory, all parts of Box #5 must apply to you.***

Box #5 In-Depth Explanation

Understanding The First Degree Felony Murder Rule

All murders are "felonies," but not all murders are "felony murder."

There are many types of first degree murder. A murder can be first degree murder if it is committed by:

- Lying in wait;
- Torture;
- Poison;
- A destructive device;
- An explosive;
- A weapon of mass destruction;
- Knowingly using armor-piercing ammunition;
- Any other type of wilful, deliberate, premeditated killing;
- Discharging a firearm from a motor vehicle with intent to kill; or

FELONY MURDER : Killing in the perpetration of, or attempt to perpetrate, specified felonies.

These felonies are arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289.

These felonies in felony murder are often referred to as the "underlying felony."

For example, if a death occurs during a robbery, the robbery is the "underlying felony." Sometimes these felonies are called the "enumerated felonies" or the "predicate felony."

For first degree murders, SB 1437 only applies to accomplices to the underlying felony where a death occurred - the felony murder category.

IMPORTANT NOTE:

An Accomplice To A Felony In Which A Death Occurred **Is Different Than** An Accomplice to A Planned Murder.

The most common type of first degree murder is a "willful, deliberate, and premeditated killing" or an "express malice" murder.

SB 1437 does **not apply** to accomplices for this kind of murder.

One way to think about an accomplice in a felony murder vs. an accomplice in another kind of first degree murder is to think about the intention of the parties.

Key Example #1 : The Intention to Commit A Felony

Sam sees Victor walking down the street. Sam turns to his friend Pete and says, "Hey, let's go get him." Pete understands that Sam means to commit a robbery. Sam and Pete then run over and rob Victor. After the robbery, Sam runs away. However, Pete stays and stabs Victor. Sam had the intention to commit the robbery but he did not intend to kill anybody. Sam did not do anything to directly aid or encourage Pete in the killing of Victor.

This is a felony murder. By participating in the robbery (an enumerated felony under the felony murder law) under CA's law before SB 1437, Sam is responsible for Pete's murder of Victor.

However, under SB 1437, Sam is entitled to petition for resentencing. At the resentencing hearing, the determination will be made whether Sam killed, intended to kill, or acted as a major participant to the felony and with reckless indifference to human life.

In most, but not all instances in which a person has been convicted as an accomplice to an enumerated felony, the enumerated felony will also have been charged and the jury will

have convicted on it. However, a prosecutor is not required to charge or obtain a separate conviction on the enumerated felony.

Key Example #2 : The Intention To Commit a Murder

Arthur and Robert decide to kill Shay. Arthur and Robert ride their bicycles over to Shay's house together. Arthur shoots and kills Shay. A jury convicts Arthur and Robert for Shay's murder.

Even though Robert did not pull the trigger and was not the "actual killer" of Shay, he was Arthur's direct accomplice in a first degree deliberate and premeditated homicide. Under the law, Robert is just as responsible as Arthur.

Robert is not entitled to be resentenced under SB 1437.

Being convicted as an accomplice to murder is not the same as being convicted as an accomplice to an enumerated felony. Accomplices to murder (sometimes called "direct accomplices") are persons who knew that another person was going to kill, and with that knowledge, gave the killer assistance or encouragement with the intent that the killing occur.

Direct accomplices to murder are not eligible under SB 1437, even though they may not have been the "actual killer." This is because, by definition, they acted with express malice.

The true distinguishing feature of "direct complicity" is that the nonkiller intended that a killing occur, while the felony murder accomplice intended only the felony. If you were charged as a direct accomplice and you had a trial, your jury would have been instructed with CALCRIM 400 or CALJIC 3.00 and 3.01.

Jury Instructions for Felony Murder

As noted above, it may be helpful for you to review the jury instructions in your case.

The first degree felony murder rule instructions for accomplices are found in CALCRIM Nos. 540B and 540C. If 540A was given, it is because one or more defendants was the actual killer.

The first degree felony murder rule instructions for accomplices to an enumerated felony in felony murder are found in CALJIC Nos. 8.10 and 8.27.

SB 1437 Does Not Apply To All Defendants In A First Degree Felony Murder.

Under California's old felony murder rule, all participants in certain felonies – for example, a robbery or a burglary – were equally liable for any death that occurred. This was so even if a participant had no direct role in the homicide and had no intent that anyone would be hurt. So, for example, a person who acted as a "lookout" during a robbery would be just as guilty as the person who shot and killed someone. SB 1437 only provides the eligibility for resentencing for certain participants in a felony.

Four Examples of Accomplices in a Felony Murder Who Are Eligible to Apply For Resentencing

Although these examples involve facts taken from real cases, people's real names are not used and some facts have been changed.

Anne's Case

"Anne" was found guilty of first degree felony murder for her participation in a robbery that led to a death. A man that Anne knew, John, asked Anne to call him and notify him when her neighbor, Bob returned home so that John could "come up" on Bob (commit a robbery) because Bob owed John money. Anne knew that John intended to rob Bob.

When Bob was walking down the street to his house, Anne called John. Anne was in her house when she heard John hit Bob. She heard John run and she heard Bob moaning. Anne ran outside and Anne then took Bob to the hospital, where he died. Because Anne

assisted in the robbery (by calling John, knowing that John was going to rob Bob), she was sentenced to 25-years-to-life under the felony murder rule.

Anne is eligible to petition for resentencing under SB 1437.

Joey's Case

Joey, an 18 year old boy, agreed to participate in a snatch and grab robbery of a marijuana dealer, Sam. Joey was not armed. His co-participant in the crime, Doug, was armed with a knife. When Sam resisted, Doug killed him. Joey did participate in the robbery.

Joey was charged with first degree murder. Joey was also charged with a special circumstance under Penal Code § 190.2(d). The jury in Joey's case found that he was guilty under the felony murder rule. However, the jury also found that the special circumstance allegation was "not true." In other words, the jury found that Joey either was not a "major participant" or that Joey did not act with "reckless indifference to human life."

Joey received a 25 years to life sentence under the felony murder rule.

Joey is eligible to petition for resentencing under SB 1437. He is also eligible to check Box #7 on the petition, which is discussed in more detail below on page 19.

Franny's Case

Franny and a group of friends went out at night with the intent to commit some street robberies of drug dealers. Franny and her friend approached a man and asked for drugs. The two men said no. Franny's two co-defendants then came up and robbed this man. Franny was so under the influence they had to tell [her] to come on and get in the car. The group all traveled to another stop.

At that point, her two co-defendants got out of the car and walked away. Her two co-defendants attempted to commit another robbery, and tragically, killed the victim in the course of the attempted robbery. Franny was in the parked car, a block and a half away, when the attempted robbery and murder occurred. However, because of her role in the earlier robbery, she was convicted of first-degree felony murder.

Franny is eligible to petition for resentencing under SB 1437.

Carlos's Case

Carlos and his friend Jonny rode their bikes to a local storm drain intending to tag the drain. Once there, Jonny told Carlos that he had a gun in his backpack, stating that it was for protection. A group of kids arrived and asked them if they wanted to buy marijuana. They said no and the group left. Jonny asked Carlos if they should rob the dealers. Carlos agreed. Jonny took the gun out of his backpack, approached and pointed the revolver at Bobby, who had offered them the marijuana earlier. Jonny demanded the weed. Bobby reached into his back pocket. As Carlos turned to pick up his bike and get away, shots rang out. Jonny had killed Bobby. Carlos was charged with first degree murder with special circumstances.

The jury **did** find true the special circumstances under Penal Code § 190.2(d). However, this finding was made before a line of cases from the California Supreme Court came down that clarified that acting as a "major participant" and with "reckless indifference to human life" required more than courts had been applying the past.

Even though Carlos received LWOP, he *may* still be eligible for relief under SB 1437. This is discussed in more detail below on page 27.

The Change to the First Degree Felony Murder Rule under SB 1437

Under SB 1437, a person involved in a felony in which a death occurs is only eligible for resentencing if that person:

- **did not actually kill;**
- **did not intend to kill, or aid or encourage the killing in any way;**
- **did not act as a major participant in the felony with reckless indifference to human life; and**
- **and the victim was not a police officer who was acting in the performance of their duties *or* the individual defendant did not know of the police officer's status and that status was not reasonably apparent under the circumstances.**

In the four examples above, the accomplices did not kill, intend to kill, nor act with reckless indifference to human life. Sometimes, they were not even at the scene of the killing or many feet away.

What does the following assertion in Box #5 mean? :

"I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony."

Who Is A "Major Participant" Who Acted With "Reckless Indifference To Human Life"?

The courts in California have defined the terms "major participant" and "reckless indifference to human life." At a resentencing hearing, the prosecution has the burden of proof to prove beyond a reasonable doubt that a petitioner was ***both*** a major participant in the felony ***and*** acted with reckless indifference to human life.

"Major Participant"

In determining whether someone was a major participant in the underlying felony for the purposes of felony-murder liability, the California Supreme Court has considered the following factors:

- The role the defendant had in planning the felony that led to the killing. (A major participant need not be a ringleader, but a ringleader is a major participant.)
- The role the defendant had in supplying or using lethal weapons.
- The defendant's awareness of particular dangers posed by the nature of the felony, weapons used, or past experience or conduct of the other participants.
- The defendant's presence at the scene of the killing,
- his/her position to assist or to prevent the actual murder,
- the role his/her actions or inactions played in the death. (In cases where lethal force is not part of the agreed-upon plan, absence from the scene may significantly diminish culpability for death.)
- What the defendant did after lethal force was used.

The cases that lay out these factors are: *People v. Clark* (2016) 63 Cal.4th 522, 611; *People v. Banks* (2015) 61 Cal.4th 788, 803; *In re Miller* (2017) 14 Cal.App.5th 960, 971; *People v. Williams* (2015) 61 Cal.4th 1244, 1281; and *In re Bennett* (2018) 26 Cal.App.5th 1002.

The California Supreme Court has said, "no one of these considerations is ***necessary***, nor is any one of them ***necessarily sufficient."*** In other words, these are factors for a court to weigh.

"Reckless Indifference"

The Supreme Court and the California Courts of Appeal have said that in order to determine whether someone acted with reckless indifference to human life, a court or jury must assess a person's "***individual responsibility for the loss of life***, not just his or her vicarious responsibility for the underlying crime." (*In re Bennett* (2018) 26 Cal.App.5th 1002.)

> '[R]eckless indifference to human life' is commonly understood to mean that the defendant was **subjectively aware** that his or her participation in the felony involved a **grave risk of death**." (*People v. Estrada* (1995) 11 Cal.4th 568, 577.) Thus, "the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' [citation]...." (*Ibid.)*
>
> "The defendant must be aware of and **willingly involved in the violent manner in which the particular offense is committed,** demonstrating reckless indifference to the significant risk of death his or her actions create." (*Banks, supra*, 61 Cal.4th at p. 801.) "[I]t encompasses a **willingness to kill (or to assist in another killing) to achieve a distinct aim**, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark, supra*, 63 Cal.4th at pp. 616-617.)

The factors that the courts have applied somewhat overlap with those of major participant.

In determining whether someone acted with reckless indifference to human life for the purposes of felony-murder liability, the California Supreme Court has considered the following factors:

- The defendant's knowledge of weapons, and the use and number of weapons.
- The defendant's proximity to the felony and opportunity to stop the killing or aid the victim. (Proximity to the murder and the events leading up to it may be particularly significant where the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force.)

- The duration of the restraint of the victims before the murder.
- The defendant's knowledge (either before or during the commission of the felony) that another participant was likely to kill. (Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient.)
- The defendant's efforts to minimize the possibility of violence during the felony. (A defendant's good faith but unreasonable belief that he or she was not posing a risk to human life in pursuing the felony does not suffice to foreclose a determination of reckless indifference to human life.)

Jumping to Box #7

Does Box #7 Apply To My Case?

We will discuss Box #7 of the petition here because this box only deals with those who were convicted under the first degree felony murder rule and there has already been a determination by a court or jury that a petitioner was not a major participant or acted with reckless indifference to human life under Penal Code section 190.2(d). Box #6 will be discussed starting on page 20 below.

☐ **7. (If applicable)** There has been a prior determination by a court or jury that I was not a major participant and/or did not act with reckless indifference to human life under Penal Code § 190.2(d). Therefore, I am entitled to be re-sentenced pursuant to § 1170.95(d)(2).

A petitioner may have had a prior determination that he or she did not participate in the crime with reckless indifference or as a major participant. This means that in an earlier proceeding, the issue of reckless indifference was presented to a judge or jury and found not proven or not true. There are only a handful of prior events that would qualify as a prior favorable adjudication.

If you had a jury trial and the jury found a felony murder special circumstance "not true," then you are entitled to have your murder vacated or reduced to the target offense. (This was Joey's case, above.)

If you had a court trial and the judge found a felony murder special circumstance "not true," then you are entitled to have your murder vacated or reduced to the target offense.

If following a preliminary hearing, the judge did not "hold you to answer" on the special circumstance and the prosecution never re-filed the special circumstance, that is a prior determination by a court. If there was a "995" motion prior to your trial in which a judge dismissed a felony murder special circumstance for lack of evidence, and the prosecutor did not appeal or seek a writ, you are entitled to have your murder vacated or reduced to the target offense.

Finally, if a Court of Appeal reversed a special circumstance for lack of sufficient evidence, either before or after trial, you are entitled to have your murder vacated or reduced to the target offense. (This applies to people who have had the special circumstance removed after filing habeas petitions known as "*Banks* petitions" following the cases of *People v. Banks* and *People v. Clark*.)

There is a special case where a Court of Appeal reversed your felony murder special circumstance for reasons other than lack of evidence. If that Court ordered the prosecutor to retry the special circumstance within two months or 6 months, and the prosecutor chose not to, then there may be a double jeopardy bar to reconsideration of the issue. This is something your appointed attorney will handle.

Box #6

☐ **6. (If applicable)** I was convicted of 2nd degree murder under the natural and probable consequences doctrine or under the 2nd degree felony murder doctrine and I could not now be convicted of murder because of changes to Penal Code § 188, effective January 1, 2019.

**** R:J TIP :*** **If you were convicted under one of two theories of second degree murder, Box #6 applies to you.**

Read Box #6 explanation below.

Box #6 In-Depth Explanation

SB 1437 also made changes to Penal Code section 188. These changes got rid of two theories of second-degree murder:

- accomplice liability for murder under the natural and probable consequences doctrine;
- and second degree felony murder.

Second degree felony murder and murder under the natural and probable consequences doctrine (NPC) do not appear anywhere in the Penal Code. In other words, they are "court created doctrines." The first sentence of the Legislative findings and declarations in SB 1437 says,

> (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.

This means that it is the Legislature, not the courts, who should be determining what crimes are and how they should be punished. More of the findings and declarations as they relate to NPC and second degree felony murder are discussed in those sections.

SECOND DEGREE FELONY MURDER

Second Degree Felony Murder versus First Degree Felony Murder

Second degree felony murder is different than first degree felony murder. A conviction for second degree felony murder has a sentence of 15 years to life. First degree felony murder has a sentence of 25 years to life.

Another difference is that in first degree felony murder (discussed above) there are "enumerated felonies" that are listed in the Penal Code.

However, **in second degree felony murder, there is not a list of felonies in the Penal Code, but rather certain felonies that the courts have said or a jury has found to be "inherently dangerous."**

Second degree felony murder is not commonly used because of limitations that the California Supreme Court has placed on its use.

Second Degree Felony Murder After SB 1437

Before SB 1437, if a death occurred during the commission of one of these felonies, all participants in the felony were liable for 2nd degree felony, even if the death was accidental.

The courts have said that a participation in one of these felonies is like acting with "implied malice" (acting with a conscious disregard for human life).

"The (2nd degree) felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life." *People v. Chun* (2009) 45 Cal.4th 1172.

SB 1437 made changes to Penal Code section 188 that ends second degree felony murder.

Section 188 says "**Malice may not be imputed to a person solely based on his or her participation in a crime**."

In other words, just because a defendant participated in a crime that a court later said was "inherently dangerous" it does not mean that that defendant actually acted with conscious disregard for human life. There has to be something more to lead to a murder conviction.

Jury Instructions for 2nd Degree Felony Murder

CALCRIM 541A and 541B, and CALJIC 8.32 lay out the theory of second degree felony murder liability. However, because this theory is less straightforward than first degree felony murder, prosecutors sometimes asked for and received special non-form jury instructions that are unique to a case. An attorney should review the jury instructions in your case to see what theory or theories were presented.

MURDER CONVICTIONS UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE ARE ELIGIBLE FOR SB 1437 RESENTENCING

California's NPC doctrine allows second-degree murder liability, based on another person's commission of murder, for a defendant who did not personally act with either express or implied malice.

There is a "target" offense: the crime that the defendants jointly participated in with a common purpose. Most crimes, including some misdemeanors, can be the "target" offense.

Then, a death occurs: this is the "non-target" offense for the accomplice. The reason the homicide is labeled a "non-target" offense for the accomplice is because the accomplice never intended to cause a death and may not have done anything to cause a death.

Example of NPC

Adam and Bob get in a schoolyard fight against 2 other schoolmates, Chuck and Dan. Adam and Chuck fight. Bob and Dan fight. The "target" offense is disturbing the peace; the one they all intended to commit.

However, during the fight, Adam pulls out a pocket knife and stabs and kills Chuck. Adam could be found guilty of murder for his killing of Chuck. But what about Bob, who only intended to get in a fight?

Under the natural and probable consequences doctrine, Bob could suddenly be guilty for Chuck's death. The courts have said, as an aider and abettor to a fight, Bob should have "reasonably foreseen" that the fight could lead to a murder. That is, Bob should have predicted that Chuck could be killed.

So, Bob, who did not kill, intend to kill, or do anything that showed a "conscious disregard for human life" (in this case Chuck's life) could be guilty under the NPC doctrine for Chuck's murder.

The courts have said that it does not matter that the defendant did not actually know or intend anyone to be killed. If the death was "reasonably foreseeable" – that is, if Bob should have been able to predict Chuck's death, even if Bob actually did not -- then Bob could be found guilty of murder without having done anything to the victim.

The "natural and probable consequences" doctrine has been very criticized because it does not require what murder should require in California: malice. In other words, it does not matter what Bob's actual state of mind (his subjective "*mens rea*") was. Under the NPC doctrine, all "principals" (a principal can be a direct perpetrator or an aider and abettor) in a target offense are held equally liable for the actions of one principal who kills someone.

> By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is <u>not premised upon the intention</u> of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense

> committed by the direct perpetrator that is a natural and probable consequence of the target offense. Because the nontarget offense is unintended, the *mens rea* of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.

People v. Chiu (2014) 59 Cal.4th 155, 164, underline added, citations omitted.

The new Penal Code section 188 (a)(3) of SB 1437 says:

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.**

Additionally, the Legislative findings in SB 1437 refer back to a Senate Concurrent Resolution (a resolution is not a law, but just a statement by the Legislature about an issue) that the Legislature passed in 2017. This was SCR 48. In SCR 48, the Legislature stated that NPC was unfair and criticized it.

The Legislative findings in SB 1437 further state:

> (f) 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.
>
> (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective *mens rea*.

In other words, using the example of Bob above, juries and courts must look to what Bob actually did and what Bob actually intended. "Subjective *mens rea*" is just the legal way of saying what is actually in a person's mind.

Between roughly 1994 and 2014, prosecutors sought first degree murder convictions under a theory that a petitioner was an accomplice to a "target" offense and that another person involved in the commission of that target offense killed someone in a foreseeable manner. In 2014, the California Supreme Court, in *People v. Chiu*, concluded that liability for first

degree murder is disproportionate to the culpability of someone who merely aided and abetted a target offense, and that all such murders should be reduced to murders of the second degree.

A prosecutor would not have relied on the NPC theory if the target offense was an enumerated felony – one of the felonies discussed under the first degree felony murder discussion, above --because then the first degree felony murder accomplice rule would apply.

Many people convicted of first degree murder under an NPC theory have already gotten reductions to second degree murder by appeal, or by habeas corpus. Prosecutors after 2014 sometimes seek second degree murder convictions under an NPC theory. After the passage of SB 1437, no jury will be instructed on an NPC theory again.

Even if you got a second degree murder by reduction or jury verdict, you can get additional relief with SB 1437. SB 1437 abolishes the NPC doctrine entirely. The petition process can lead to the murder conviction being replaced with a conviction of the target offense, but subject to reinstatement of a murder conviction based on a finding, in a hearing, that the petitioner acted as a major participant in the killing with a mental state of reckless indifference.

Confusion about What NPC Is And Jury Instructions

There is a lot of confusion over NPC liability because the phrase "natural and probable consequence" appears in a lot of other jury instructions that **do not convey** the theory of murder as a natural and probable consequence of aiding and abetting a target crime.

The NPC theory that allows a petitioner to petition for resentencing will almost always include a jury instruction that talks about a "target" crime. See CALCRIM 402, CALJIC 3.02. The CALJIC instruction does not always contain an NPC theory, but when it does, it uses the following language:

> *One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [P] In order to find the petitioner guilty of the crime of murder, as charged in Count 1, you must be satisfied beyond a reasonable doubt that, one, the crime of [target crime] was committed; two, that the petitioner aided and abetted that crime; three, that a coprincipal in that crime*

committed the crime of murder; and four, the crime of murder was a natural and probable consequence of the commission of the crime of [target crime]

If the jury instructions in your case did not have something very similar or identical to the language above, then you were not convicted of murder under an NPC theory.

Serving the Petition

☐ **8.** I have mailed a copy of this Petition to the following:

☐ Office of the District Attorney

County of _____

_____
[Street Address]

_____
[City, State, Zip]

☐ Office of the Public Defender

County of _____

_____
[Street Address]

_____
[City, State, Zip]

OR

☐ _____
[Trial Attorney Name]

_____
[Firm Name]

_____
[Street Address]

_____
[City, State, Zip]

SB 1437 requires that you mail a copy of your petition to the District Attorney (or, in the rare case where the Attorney General prosecuted you in the trial court to the AG) and to the Office of the Public Defender or to your trial attorney, if it was not the Public Defender.

Addresses for all DA and PDs offices are being compiled by Re:store Justice. You will be able to access these lists through the Re:store Justice website. If you were not represented by the public defender and you cannot find the address for your trial attorney, you should mail the petition to the public defender's office.

DOES SB 1437 APPLY TO THOSE WHO HAVE A SPECIAL CIRCUMSTANCE?

People who received death or Life Without the Possibility of Parole (LWOP) necessarily have a special circumstance finding. But SB 1437 itself does not disqualify them. If there is any argument that a petitioner could not have been convicted of murder under SB 1437, people with special circumstances are eligible to file petitions under SB 1437.

For example, if you were an accomplice to a felony murder or were charged as an accomplice under the NPC doctrine and you did not kill, intend to kill, and did not act with reckless indifference to human life and as a major participant in the felony, and the only special circumstance charged was multiple murder – because the actual killer killed more than one person -- you may be eligible for resentencing.

If the special circumstance in your case was Penal Code § 190.2(d)

As mentioned above in the section related to felony murder, because of recent CA Supreme Court and Court of Appeals cases, people have been filing habeas petitions under *Banks* if their special circumstance was Penal Code § 190.2(d) and they can show that they were not major participants acting with reckless indifference.

However, if you have not yet had a Court of Appeal look at this issue for you after *Banks* and you file a petition under SB 1437 in the trial court, there is a feeling among appellate lawyers and others that the SB 1437 judge will deny the petition. This is because the court will see from the court file that there was a jury or court determination that the person was the actual killer, intended to kill, or was a "major participant who acted with reckless indifference to human life." It is highly unlikely that the court will overturn the special circumstance finding made by a jury. Further, if this issue was raised on appeal, and the Court of Appeals affirmed the finding the superior court may not have jurisdiction to overturn it, even if the appellate decision was before *Banks.*

Therefore, the current best suggestions is that you first file a *Banks* habeas petition in the Court of Appeal and try to get the special circumstance based on § 190.2(d) set aside. If that occurs, then you are entitled to be resentenced under SB 1437.

The Special Problem of Murder Convictions When the Jury was Presented with Multiple Theories

There is a major legal uncertainty surrounding SB 1437 that will eventually be worked out in appellate courts. Many people were convicted of murder in a trial where the jury was allowed to rely on more than one theory. There is no limit on how many theories a prosecutor can pursue, except that a judge is not supposed to instruct on theories that have no support in the evidence.

So, for example, in your individual case, the prosecutor might have argued in the alternative that you were guilty of murder as the actual killer, or that you were a direct accomplice to murder, or that you were an accomplice to an enumerated felony murder, or that you were an accomplice to a target offense, the natural and probable consequence of which was a murder by another person. As explained above, the theories that were presented to you jury are determined by looking at your jury instructions. There could be one theory, and it could be either felony murder accomplice or NPC, in which case the law is clear. But what if you had multiple theories?

Jurors are not required to say how they reached their verdict. In fact, they cannot even be asked. And, when multiple theories are available, jurors need not unanimously agree. One juror could rely on felony murder and another on direct aiding and abetting. So the fact that you were convicted of murder in a multiple theory case does not "prove" that you were convicted on a felony murder accomplice or an NPC theory.

In an appeal, or a habeas corpus petition, if the petitioner demonstrates that one theory of many was wrong, that petitioner is entitled to reversal unless the appeals court can determine, from the verdicts, that the jury **must have** relied on a valid theory. There are many examples of how this can be done, but the best one is this: Two petitioners are charged with murder. The prosecutor asks for instructions on premeditated murder, direct aiding and abetting, felony murder accomplice, and NPC. The jury finds that one petitioner personally used a firearm. That is sufficient proof that the petitioner who personally used a firearm was convicted as an actual killer and **not** under a felony murder accomplice or NPC theory.

Special circumstance findings also tend to be given effect in determining why a jury convicted. This is a complicated issue that cannot be fully explained here.

In the majority of appeals, if one theory of murder is invalid, Courts of Appeal cannot tell how the jury reached its verdict. Under these circumstances, the Court of Appeal will reverse the murder and give the prosecutor the option of retrying the case without the defective theory.

SB 1437 does not expressly address what happens if a petitioner was tried on multiple theories. Reasonable legal minds differ on how SB 1437 should be interpreted.

Perhaps the trial judge at the briefing stage is allowed to say "the jury was given a valid theory, so we don't have to worry about felony murder accomplice liability or NPC liability. The murder stands."

However, other lawyers say that a judge must apply the same standard that an appeals court applies, and go forward with a hearing if there is a reasonable possibility that any juror relied on a felony murder accomplice theory or an NPC theory.

Your appointed attorney should argue that the appellate standard applies. As a matter of legal ethics, attorneys in California are required to preserve the client's claims for appeal if the law is uncertain. (See *People v. Jones* (1983) 145 Cal. App. 3d 751, 759; *People v. McCary* (1985) 166 Cal. App.3d 1, 8.)

You may lose in the superior court, but when this issue is ultimately resolved in the appellate courts, you will have preserved it. It is important that you and your appointed attorney be attentive to the multiple theory problem and place objections on the record as needed.

A Special Note About Attempted Murder

The SB 1437 petition for resentencing is not available to challenge convictions of attempted murder. It applies only to a murder that fits within the three categories above. However, petitioners should be aware that there are potential changes to the decisional law of the state of California concerning attempted murder that may have favorable consequences in the next few years.

In *People v. Mateo*, the California Supreme Court is being asked to overrule *People v. Favor,* which was a 4-3 decision by justices who have since retired. *Favor* said that if you aided and abetted an attempted murder, and the actual killer acted with premeditation, then that premeditation is imputed to you, regardless of whether you actually premeditated. If *People v. Favor* is overruled and the decision is given retroactive effect, then most premeditated attempted murders by accomplices will be reduced to "ordinary" attempted murders. The sentence for ordinary attempted murders is a determinate term, not a life sentence.

The abolition of the NPC doctrine by SB 1437 may be judicially extended to crimes of conviction other than murder, like attempted murder. Anyone convicted of attempted murder, premeditated or ordinary, based on aiding and abetting a target crime, may eventually have their attempted murder conviction reduced to aggravated assault or the target crime. This is not a certainty, but it is a reason to make inquiries to defense attorneys periodically over the next few years.

THANK YOU

Senator Nancy Skinner for championing SB 1437 and making this process a reality

The Re:store Justice Team

All Co-Sponsor Organizations of SB 1437

The SB 1437 Legal Drafting Committee

Those Who Will Be Representing People In SB 1437 Resentencing

And all those impacted by SB 1437 who continue to push us forward