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Dear Colleague,

Last fall, Senate Bill No. 1437 was enacted, making significant changes in California murder law through amendments to Penal Code §§ 188 and 189. We set out below a copy of that portion of the law (with the substantive changes in italics).[1] We then offer our preliminary thoughts on the effects of the changes and the implications for various cases in our casebook.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

The Legislature finds and declares all of the following:
(a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
(b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
(c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
(d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
(e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
(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.

SEC. 2.

Section 188 of the Penal Code is amended to read:

188.

(a) For purposes of Section 187, malice may be express or implied.
(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

[1] The law also added § 1170.95 to the Penal Code, establishing a mechanism for setting aside convictions obtained under the prior law.

(3) 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.
(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

SEC. 3.

Section 189 of the Penal Code is amended to read:

189.

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.
(b) All other kinds of murders are of the second degree.
(c) As used in this section, the following definitions apply:
(1) "Destructive device" has the same meaning as in Section 16460.
(2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.
(3) "Weapon of mass destruction" means any item defined in Section 11417.
(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.
(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
(1) The person was the actual killer.
(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.
(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

ANALYSIS OF THE STATUTORY CHANGES

First Degree Felony-Murder Accomplices

The statute eliminates strict liability for accomplices to first degree felony-murders and requires the prosecution to prove that the defendant intended the killing or that the defendant was a "major participant" in the felony and acted with "reckless indifference to human life." Those terms were taken from Cal. Penal Code § 190.2(d), defining accomplice liability for special circumstances. The terms were not defined in § 190.2(d) and are not defined in the present statute. Fifteen years ago, the California Supreme Court analogized the "reckless disregard" standard to the standard for implied malice and held the standard had no technical legal meaning and would be commonly understood. *People v. Estrada*, 11 Cal.4th 568, 577-80 (1995). The Court of Appeal reached the same conclusion regarding "major participant." See *People v. Proby*, 60 Cal.App.4th 922, 933-34 (1998). More recently, the California Supreme Court has attempted to give more content to the two standards. In *People v. Banks*, 61 Cal.4th 788, 803 (2015), the court said this about "major participation":

> Among the relevant factors in determining this question, we set forth the following: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?"

Subsequently, in *People v. Clark*, 63 Cal.4th 522, 618-22 (2016), the court found five factors relevant to its analysis of "reckless indifference: (1) defendant's knowledge of weapons, and use and number of weapons; (2) defendant's physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) defendant's knowledge of cohort's likelihood of killing; and (5) defendant's efforts to minimize the risks of the violence during the felony.

With regard to our casebook, the new statute obviously has implications for the two felony-murder cases in Chapter 14 on Scope of Vicarious Liability: *People v. Kauffman* (p. 693) and *People v. Cavitt* (p. 697). Putting aside for the moment the fact that the victim in *Kauffman* was a police officer (see below), we think that whether the defendant would be guilty of murder under the new statute could be the basis of good discussion. On the one hand, the defendant was aware that all of the defendants were armed; he, himself, was playing a major role because he had the nitroglycerin needed to open the safe; and he was present at the killing. On the other hand, a killing by this group would not have been foreseeable, given their unwillingness to confront the single guard at the cemetery; Kauffman objected to suggestions to commit other crimes and apparently raised his hands when confronted by the police officer; and there was nothing he could have done to prevent the killing or aid the victim. In *Cavitt*, if the prosecution could not prove that the defendants directly caused the victim's death, this would be a difficult case under the new statute. Although they were undoubtedly major participants in the

robbery, it does not seem that they should have anticipated the possibility that the victim's daughter would deviate from the plan and, for personal reasons, kill the victim.

Special Rule for Police Killings

Kauffman, of course, was a police officer killing, and the statute specifically addresses such killings in § 189(f). The intent of the Legislature to retain strict liability for such killings is clear. The Senate Digest for the bill states that "the provisions of the bill do not apply when the decedent is a peace officer" and that the felony-murder rule applies "regardless of the defendant's state of mind." However, to us, it appears that the text of the bill is at odds with this intent. Section 188(a)(3) states the general rule that the prosecution must always prove malice, and identifies § 189(e) as an exception to that rule. § 189(f) says that subd. (e) (the exception) does not apply in the case of the killing of a police officer. Since the exception in subd. (e) does not apply, the general rule (the prosecution must always prove malice) should apply to the killing of a police officer. It will be for the courts to determine whether the legislative intent controls and the text should be disregarded because of a "drafting error" (see *People v. Skinner*, 39 Cal.3d 765, 775 (1985)) or whether the section is unintelligible and cannot be enforced.

Natural and Probable Consequences Doctrine

The statute eliminates the natural and probable consequences doctrine as a way to prove murder. In *People v. Medina* (p. 708), the California Supreme Court held that defendants who joined in an attack on the victim with fists could be found guilty of first degree murder for the subsequent premeditated shooting of the victim by another of the attackers. In *People v. Chiu* (p. 718), the court overturned *Medina* to the extent that it permitted a conviction of *premeditated* murder on the natural and probable consequences doctrine. Where *Chiu* held that premeditation could not be imputed to a non-killing accomplice, the statute extends *Chiu* by stating that malice, too, cannot be imputed to a non-killing accomplice.

Second Degree Felony-Murder

Although there's no explicit statement in the legislative history of an intent to eliminate the second-degree felony-murder rule, we believe that is what S.B. 1437 has done. Sec. 188(a)(3) requires that malice must be proved unless the exception in § 189(e) comes into play, but that exception only covers the "first-degree" felonies in § 189(a). Further, § 188(a)(3) states: "Malice shall not be *imputed* to a person based solely on his or her participation in a crime." That command rejects the premise of the second-degree felony-murder rule because the California Supreme Court has repeatedly held that the rule is based on imputing malice.

> The felony-murder rule renders irrelevant *conscious-disregard-for-life* malice, but it does not render malice itself irrelevant. Instead, the felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. (*People v. Patterson,* 49 Cal.3d 615, 626 (1989).) It simply describes a different form of malice under section 188. "The 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. Hansen,* 9 Cal.4th 300, 308.)"

People v. Chun, 45 Cal.4th 1172, 1184 (2009).

If our reading of the statute is correct, *People v. Chun* (pp. 304, 331) and *People v. Patterson* (p. 322) in our casebook are no longer good law.

Third-Party Killings

There has been some discussion among criminal law professors about how the statute might affect the "provocative acts" theory of murder. In our view, the statute will have no effect because that theory does not *impute* malice, but only comes into play when the prosecution can prove the defendant acted with express or implied malice and his/her actions caused another to kill. Nothing in the statute changes the law about the degree-setting function of the felonies listed in § 189, so that, if the prosecution can prove murder, it is first degree murder if it occurred during one of the listed felonies.

We hope you find this analysis useful, and we welcome any comments or questions you might have.

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