Staff Memorandum 2024-14
Accomplice and Other Liability for Murder and Firearm Enhancements and Related Matters

At its October 2024 meeting, the Committee on Revision of the Penal Code will address accomplice and other liability for murder and firearm enhancements and related matters.

This memorandum gives general background and staff recommendations for the Committee's consideration. A supplement to this memorandum, which will be released shortly, will present written submissions from invited panelists.

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Introduction

This memorandum explores accomplice liability for murder and certain firearm enhancements. There is a particular emphasis on the state of the law following the enactment of SB 1437 (Skinner 2018), which updated legal doctrines that had allowed people to be punished for murders they did not directly commit or intend. Since this change in the law, a legal theory of accomplice liability that was apparently never or rarely used before has been identified by courts and prosecutors. This theory — aiding and abetting implied malice murder — applies to many of the same fact patterns that SB 1437 likely intended to capture. But the complexity and novelty of this doctrine raises serious questions about whether its continued use to affirm and impose murder convictions is appropriate.

Other legal theories and laws analyzed in this memorandum have similar problems. The current law of "provocative act" murder — which allows a defendant to be convicted of murder for a killing done by another person who was provoked by the defendant's violent or aggressive actions during a crime — allows sentences of life without parole or potentially death. And some firearm enhancements apply to accomplices who were not aware that another person possessed or used a gun. (An Appendix to this memorandum contains a one-page glossary of key concepts.)

The topics discussed in this memorandum are complex but all present the same core issue: when should people be criminally punished for actions they did not directly commit or intend? As the Committee will explore at its October meeting, these issues present serious questions about fairness, racial equity, and public safety.

Elements of Murder in California

California law defines murder as "the unlawful killing of a human being or a fetus with malice aforethought."[1] An unlawful killing without malice is manslaughter.[2]

"Malice" Defined

"Malice aforethought" — a key element of murder offenses — is a legal term that indicates a person's intent to do harm. The Penal Code defines both "express" and "implied" malice.[3]

[1] Penal Code § 187(a).
[2] Penal Code § 192. Manslaughter is generally divided into three categories: voluntary, involuntary, and vehicular. Penal Code § 192(a)–(c).
[3] Penal Code § 188(a).

Express malice

Express malice, in the words of the Penal Code, means "there is manifested a deliberate intention to unlawfully take away the life of a fellow creature."[4] Courts have interpreted this language to require that the defendant desired to cause death or knew "to a substantial certainty" that death would occur as a result of their act.[5]

Express malice does not require direct evidence of a person's intent[6] and can be inferred from the accused's actions and circumstances of the crime,[7] such as pointing a gun at someone's head and pulling the trigger.[8]

Implied malice

Unlike express malice, implied malice murder does not require an intent to kill. The Penal Code defines implied malice murder as a "killing show[ing] an abandoned and malignant heart"[9] — archaic language long criticized for its inscrutability.[10]

Courts have translated this language into the following elements: "[1] the killing is proximately caused by an act, [2] the natural consequences of which are dangerous to life, [3] which act was deliberately performed by a person who knows that his conduct endangers the life of another and [4] who acts with conscious disregard for life."[11] The life-endangering act in an implied malice murder must involve a "high degree of probability that it will result in death," not just a possibility.[12]

Common factual scenarios in implied malice murder cases include physical assaults and weapons use,[13] driving under the influence resulting in death,[14]

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[4] Penal Code § 188(a)(1).
[5] *People v. Davenport*, 41 Cal.3d 247, 262 (1985).
[6] See *People v. Lee*, 43 Cal.3d 666, 679 (1987).
[7] *People v. Smith*, 37 Cal.4th 733 (2005).
[8] See *In re Thomas C.*, 183 Cal.App.3d 786 (1986).
[9] See *People v. Summers*, 147 Cal.App.3d 180, 184 (1983).
[10] See, e.g., *People v. Chun*, 45 Cal.4th 1172, 1181 (2009) ("This definition of implied malice is quite vague. Trial courts do not instruct the jury in the statutory language of an abandoned and malignant heart. Doing so would provide the jury with little guidance.").
[11] *People v. Reyes*, 14 Cal.5th 981, 988 (2023) (cleaned up). See also CALCRIM No. 520. Until *Reyes*, there was some ambiguity in exactly what was required to show implied malice murder as California courts had articulated two standards that may have differed in some respects. See generally *People v. Cravens*, 53 Cal.4th 500, 512–514 (2012) (Liu, concurring).
[12] *People v. Reyes*, 14 Cal.5th 981, 989 (2023).
[13] See *People v. Cravens*, 53 Cal.4th 500 (2012). See also *People v. Nieto Benitez*, 4 Cal.4th 91 (1992).
[14] *People v. Watson*, 30 Cal.3d 290 (1981). See also *People v. Murphy*, 80 Cal.App.5th 713 (2022); *People v. Doaifi*, 2024 WL 3157289 (2024) (speeding while not under the influence), California Supreme Court Case No. S286155 (on October 16, 2024, the Court declined to review this case, but two justices noted it may be appropriate to consider in the future whether similar facts satisfy the standard for implied malice murder).

furnishing dangerous drugs to a person who dies as a result of taking them,[15] and child abuse or neglect.[16]

Degrees and Punishment

A murder is classified as second-degree murder unless certain additional elements are proven that elevate the offense to first-degree murder — including that the murder was committed during one of 14 enumerated felony offenses.[17] In these cases of "felony-murder," prosecutors are not required to show that the person acted with malice,[18] which can make proving the case significantly easier.[19]

The punishment for second-degree murder is generally 15 years to life.[20] The punishment for first-degree murder starts at 25 years to life but can be life without parole or death if certain "special circumstances" are found to be true.[21] The most common "special circumstance" is that a killing was committed during a specified felony.[22] Notably, the fact that a killing was committed during a specified felony can be used to both establish the offense as first-degree murder *and* as a special circumstance that increases punishment.[23]

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[15] See *People v. Tseng*, 30 Cal.App.5th 117 (2018).
[16] See *People v. Dellinger*, 49 Cal.3d 1212 (1989).
[17] Penal Code § 189(a). The felonies are arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, oral copulation, lewd or lascivious acts with a child under 14, sexual penetration by force, and shooting at a person from a motor vehicle with the intent to kill. Other elements that elevate a murder to first degree as a killing by specified means such as poison or lying in wait, or "any other kind of willful, deliberate, and premeditated killing." Penal Code § 189(a).
[18] Penal Code § 188(a)(3).
[19] *People v. Dillon*, 34 Cal.3d. 441, 476–477 (1983).
[20] Penal Code § 190(a). The punishment for second-degree murder increases to 20 years to life if the killer completed the killing by shooting a firearm out of a motor vehicle, 25 years to life if the victim was a peace officer, or life without parole if they have previously been convicted of murder. Penal Code §§ 190(b), 190(d), 190.05.
[21] Penal Code §§ 190(a) & 190.2.
[22] Penal Code § 190.2(a)(17); Committee on Revision of the Penal Code, 2021 Annual Report, Figure 25.
[23] Penal Code § 190.2(a)(17). Torture and shooting from a vehicle have their own special circumstances and are not included in (a)(17). See Penal Code §§ 190.2(a)(18) & (a)(21). The felony-murder special circumstance requires additional proof for people who were not the actual killers or did not have the intent to kill: they must have acted with "reckless indifference to human life," and been a "major participant" in the underlying felony which resulted in the killing. Penal Code § 190.2(d). This language, which was added to the Penal Code by Proposition 115 in 1990, codifies guidance from the United States Supreme Court on when the Eighth Amendment allows the execution of people who were not the actual killers and did not intend to kill. *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

Accomplice Liability for Murder

General Rules

For every offense, the Penal Code provides that "all persons concerned in the commission of a crime" whether they "directly commit" an offense or "aid and abet in its commission" can be held legally responsible for the intended crime.[24] Courts have held that the act (or omission) that assists or encourages the crime does not need to be a substantial factor in the commission of the crime.[25] In addition to these actions, courts have specified that an accomplice must also have "knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends."[26]

In addition to offenses that an accomplice directly aids and abets, criminal liability also extends to any offenses that are a "natural and probable" consequence — meaning they are "reasonably foreseeable" — of the initial crime assisted or encouraged."[27] Whether these additional offenses are foreseeable is an objective question evaluated from the position of a "reasonable person in the defendant's position" and the "accomplice need not actually foresee" them or have any intent to commit them.[28] For example, accomplices to a robbery of a tanning salon were properly convicted of sexual assault committed against the robbery victims by another accomplice because the offenses were a reasonably foreseeable result of the robbery.[29]

The application of these general accomplice liability rules to murder has undergone recent changes in California, as discussed below.[30] But even with

[24] Penal Code § 31. See also *People v. Beeman*, 35 Cal.3d 547, 560 (1984). People who "not being present, have advised and encouraged [an offense's] commission" can also be convicted of offenses committed by the perpetrator. Penal Code § 31.
[25] *People v. Swanson-Birabent*, 114 Cal.App.4th 733, 743 (2003) (citing *People v. Durham*, 70 Cal.2d 171, 185, fn. 11 (1969).
[26] *People v. Gentile*, 10 Cal.5th 830, 843 (2020). This formulation of accomplice ability is referred to as "direct aiding and abetting."
[27] *People v. Nguyen*, 21 Cal.App.4th 518, 531 (1993).
[28] *People v. Gentile*, 10 Cal.5th 830, 843–44 (2020). The offense that is directly aided and abetted is referred to as the "target" offense and the reasonably-foreseeable offenses that also occurred are called "nontarget" offenses. People can also be guilty of crimes they did not directly commit if they are a member of a conspiracy. Penal Code § 182. Like accomplices, a member of a conspiracy is legally responsible for the crimes they conspire to commit, and any other crimes committed by members of the conspiracy done in furtherance of the conspiracy that "follow as a probable and natural consequence of the common design, even though it is not intended as a part of the original design or common plan." *People v. Superior Court (Shamis)*, 58 Cal.App.4th 833, 842–843 (1997) (cleaned up).
[29] *People v. Nguyen*, 21 Cal.App.4th 518, 533–535 (1993).
[30] SB 1437 (Skinner 2018).

these reforms, under current law, many people who did not personally kill or intend to kill someone can be convicted of murder as an accomplice.

Accomplice Liability for Murder Before SB 1437

Before 2019, two legal theories — the felony-murder and natural and probable consequences doctrines — were frequently used to convict accomplices of murder. SB 1437 (Skinner 2018) significantly changed or eliminated how these theories worked for people who were not the "actual killers."

Second-degree felony-murder

As described above, the current version of the felony-murder rule found in the Penal Code provides that a killing during the commission of certain felonies is first-degree murder, without any requirement to determine whether the perpetrator had the mental state of malice.[31]

Until SB 1437 became effective in 2019, courts also allowed a variant of the felony-murder rule to establish second-degree murder liability for killings during any felony — not just those specified in the Penal Code — that was "inherently dangerous to human life," meaning the offense carried a "high probability" that death would result from it.[32]

This "second-degree felony-murder rule" applied not just to those who actually killed another but also to any accomplices to the underlying felony, regardless of whether they participated in, intended, or were aware of the murder.[33]

Natural and probable consequences murder

The "natural and probable" consequences doctrine, discussed above, also made accomplices guilty of a murder committed by another when the killing was a "reasonably foreseeable" consequence of the crime originally aided.[34] Unlike the second-degree felony murder doctrine, there was no requirement that the underlying offense be "inherently dangerous to human life." For example, while child abuse was not an "inherently dangerous felony" for the second-degree felony-murder rule, the offense supported murder charges under the natural and probable consequences doctrine.[35]

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[31] Penal Code § 188(a)(3).
[32] *People v. Chun,* 45 Cal.4th 1172, 1182 (2009); *People v. Patterson,* 49 Cal.3d 615, 617–618 (1989) (in determining whether a felony in inherently dangerous to human life, fact-finder must consider the elements of the felony in the abstract, not the particular facts of the case (citing *People v. Williams,* 63 Cal.2d 452, 458 (1965)).
[33] *People v. Cavitt,* 33 Cal.4th 187 (2004).
[34] *People v. Prettyman,* 14 Cal.4th 248, 254 (1996). In 2014, the California Supreme Court specified that natural and probable consequences liability could not extend to first-degree premeditated murder because doing so was "inconsistent with reasonable concepts of culpability." *People v. Chiu,* 59 Cal.4th 155 (2014).
[35] See *People v. Culuko,* 78 Cal.App.4th 307, 321 (2000).

The natural and probable consequences doctrine was most often used instead of the felony-murder rule in cases where the underlying felony offense "merged" with the murder, such as assault.[36] The California Supreme Court forbade application of the felony-murder rule in these cases because most murders could also be charged as some form of assault and allowing prosecutors to use assault to invoke the felony-murder rule would eliminate the requirement to prove malice in nearly every murder.[37] Once the court imposed this limitation on the felony-murder rule, the natural and probable consequences doctrine became the primary theory used to hold accomplices responsible for murders committed during assaultive crimes.[38]

SB 1437

In 2018, after decades of criticism of the felony-murder rule,[39] the Legislature passed Senate Bill 1437, authored by Senator Skinner, to reestablish "the bedrock principle … that a person should be punished for his or her actions according to his or her own level of individual culpability."[40]

SB 1437 reaffirmed that, except in cases of first-degree felony-murder, "in order to be convicted of murder, a principal in a crime shall act with malice aforethought" and specified that "[m]alice shall not be imputed to a person based solely on his or her participation in a crime."[41] These amendments eliminated second-degree felony-murder and murder convictions based on the natural and probable consequences doctrine because both of these rules allowed imputed malice based on participation in a crime and did not require proof of the defendant's actual mental state.[42]

In addition, SB 1437 modified the first-degree felony-murder rule. The first-degree felony-murder rule — applicable to specific felonies listed in the Penal Code — now only applies if the charged person is (1) the actual killer, (2) an accomplice who shared the intent to kill, or (3) a "major participant in the

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[36] *People v. Ireland,* 70 Cal.2d 522, 539 (1969).
[37] *Id.*
[38] See Jason Maryland, *Implied Malice Aiding and Abetting: A Doctrinal Maze,* Loyola of Los Angeles Law Review, Vol. 57, No. 1, 261 (March 2024) (citing cases).
[39] See, e.g., *People v. Burroughs,* 35 Cal.3d 824, 836–854 (1984) (Bird, C.J., concurring) ("The time has come for this court to discard the artificial and court-created offense of second degree felony murder.").
[40] *Id.* § 1(d).
[41] Penal Code § 188(a)(3).
[42] *People v. Gentile,* 10 Cal.5th 830 (2020). The law also abolished murder liability for conspirators based on the natural and probable consequences doctrine. See CALCRIM 417.

underlying felony" who "acted with reckless indifference to human life."[43] As has always been the case with any felony murder, malice need not be shown.[44]

Accomplice Liability for Murder After SB 1437

While SB 1437 eliminated second-degree felony-murder and murder liability under the natural and probable consequences doctrines, it did not specifically foreclose other legal theories allowing an accomplice who did not kill or have the intent to kill to be convicted of murder.[45] The resentencing provisions created by the law, which made people ineligible for relief if they could be convicted of murder under any other valid theory, may have encouraged novel theories of liability to develop.[46]

Aiding and abetting implied malice murder

The leading new theory is aiding and abetting an implied malice murder. This theory was mentioned in dicta by the California Supreme Court in December 2020, almost two years after SB 1437 became law.[47] A series of decisions from intermediate appellate courts explored the theory more thoroughly through 2021 and 2022.[48] One court theorized that there was a "dearth of decisional law on aiding and abetting implied malice murder" because the natural and probable consequences doctrine was an easier way to obtain murder convictions before SB 1437.[49]

The California Supreme Court fully considered aiding and abetting implied malice murder in 2023 in *People v. Andres Quinonez Reyes*.[50] Reyes was convicted of second-degree murder even though he was not the person who shot and killed the victim.[51] Instead, Reyes, who was 15, was part of a group that rode their bikes to the edge of a rival gang territory and harassed people before another person in the group shot and killed the victim.[52]

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[43] Penal Code § 189(e). This language mirrors explication of the felony-murder special circumstance from Proposition 115. See Penal Code §§ 190.2(c) & (d). These limitations on first-degree felony murder do not apply if the victim was a peace officer. Penal Code § 189(f).
[44] Penal Code § 188(a)(3). See also *People v. Lopez,* 88 Cal.App.5th 566 (2023).
[45] Similarly, SB 1437 made no changes to the legal theory of aiding and abetting express malice murder, which holds an accomplice liable for a murder they did not commit when they assisted with the shared intent to kill. See Penal Code § 189(e)(2).
[46] See Jason Maryland, *Implied Malice Aiding and Abetting: A Doctrinal Maze,* Loyola of Los Angeles Law Review, Vol. 57, No. 1, 263–264 (March 2024).
[47] *People v. Gentile,* 10 Cal.5th 830, 850 (2020).
[48] See *People v. Powell,* 63 Cal.App.5th 689 (2021); *People v. Superior Court of San Diego County (Valenzuela),* 73 Cal.App.5th 485 (2021); *People v. Glukhoy,* 77 Cal.App.5th 576 (2022).
[49] *People v. Powell*, 63 Cal.App.5th 689, 711, fn.26 (2021).
[50] *People v. Reyes,* 14 Cal.5th 981 (2023).
[51] *Id.* at 984.
[52] *Id.* at 985.

The Court specified that the following — which combines the elements of accomplice liability and implied-malice murder — must be shown to convict someone of aiding and abetting implied malice murder:

1. the perpetrator of the killing committed a "life-endangering act" that had a "high degree of probability that it will result in death";
2. the accomplice "by words or conduct" did "whatever acts constitute aiding the commission of the life-endangering act";
3. the accomplice knew that the perpetrator "intended to commit" the life-endangering act;
4. the accomplice intended "to aid the perpetrator in the commission" of the life-endangering act;
5. the accomplice had "knowledge that the [life-endangering] act was dangerous to human life"; and,
6. the accomplice acted "in conscious disregard of human life"

The Court emphasized repeatedly that the "relevant act is the act that proximately causes death"[53] — not just general involvement in the circumstances leading to the killing. ("Proximate cause" is a legal term that requires the defendant's act to have been a substantial factor in contributing to the result, rather than insignificant or merely theoretical.)[54]

The Court did not determine whether there was sufficient evidence of aiding and abetting implied malice murder in Reyes' case and returned it to the trial court to consider whether he had knowledge of the dangerousness of and intent to aid the perpetrator's life-endangering act of shooting the victim.[55] Reyes' defense counsel reported to Committee staff that as of October 2024, the case is still pending in Orange County Superior Court.

Provocative act murder

California courts have long allowed a person to be convicted of murder if they commit or assist a "provocative act" — a violent or aggressive action during the crime likely to provoke a deadly response — which leads to someone else (such as a crime victim or police officer) killing someone in response.[56] The doctrine applies even if the killing was committed by someone other than the perpetrator or accomplice or if the person killed committed the underlying crime.[57] Courts

[53] *Id.*
[54] *Id.* at 987 (citing *People v. Jennings*, 50 Cal.4th 616, 643 (2010)).
[55] *Id.* at 990–992.
[56] *People v. Gilbert*, 63 Cal.2d. 690 (1965). See also CALCRIM 560.
[57] *Id.* at 703. See also *People v. Gallegos*, 54 Cal.App.4th 453, 461 (1997).

have held that the provocative act murder doctrine is a valid legal theory even after SB 1437.[58]

When the underlying crime will not necessarily invoke a deadly response, such as robbery, the provocative act must go beyond what is necessary to accomplish the underlying crime.[59] However, in some cases, such as an assault with a firearm, the underlying felony itself can be the provocative act because it is likely to invoke a deadly response.[60] Unlike the current felony-murder rule, the Penal Code does not enumerate specific offenses that allow provocative-act murder.

The provocative act doctrine is additionally distinct from the felony-murder rule because it involves a third-party's lethal response to the perpetrator's actions during the commission of a crime, as opposed to a killing by a perpetrator or accomplice during the commission of a specified felony.[61] Because a third-party caused the death, courts have held that the felony-murder rule does not apply, even though many provocative acts cases likely occurred during a felony that could trigger the felony-murder rule.[62]

However, once murder is established under the provocative act doctrine, the felony-murder rule can elevate the offense to first-degree murder if the underlying felony is one enumerated in statute.[63] And once the person is convicted of first-degree murder, a felony-murder special circumstance can then elevate the potential punishment even further to life without the possibility of parole or death.[64]

The effect of these rules is that someone who did not directly kill another and did not intend to kill can be sentenced to life without parole or, potentially, death because of a violent reaction provoked by their actions. There is no reliable data on the number of people convicted of first-degree murder under these circumstances but the number is likely relatively small.

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[58] *People v. Antonelli*, 93 Cal.App.5th 712, 721 (2023).
[59] CALCRIM 560. See generally *In re Aurelio R.*, 167 Cal.App. 3d 52, 59–60 (1985).
[60] See *People v. Gallegos*, 54 Cal.App.4th 453, 461 (1997). See also *In re Aurelio R.*, 167 Cal.App. 3d 52, 59–60 (1985).
[61] *People v. Washington*, 62 Cal.2d 777, 781-783 (1965). See also *People v. Antonelli*, 93 Cal.App.5th 712 (2023).
[62] *People v. Washington*, 62 Cal.2d 777, 781–783 (1965).
[63] Penal Code § 189(a); *People v. Gilbert*, 63 Cal.2d 690 (1965). See also *Pizano v. Superior Court*, 21 Cal.3d 128, 139, fn. 4 (1978).
[64] Penal Code § 190.2(a)(17); *People v. Briscoe*, 92 Cal.App.4th 568, 595 (2001).

Resentencing limitations

In addition to substantive changes to the law, SB 1437 created a process for people convicted of murder to petition to vacate their conviction on the basis that it was obtained in reliance on the felony-murder or natural and probable consequences doctrines.[65] The law stated that petitioners could be denied relief if they could be convicted of murder under a still-valid theory.[66]

In 2021, the Legislature passed SB 775, which extended relief to people who were convicted of manslaughter or attempted murder in a case where the now-abolished doctrines, or "any other theory under which malice is imputed to a person based solely on that person's participation in a crime" were used.[67] The law also clarified that for a person convicted of murder to be ineligible for relief, the prosecution must prove that the petitioner is guilty beyond a reasonable doubt under a currently valid theory of murder liability.[68]

But relief under these bills has been denied even though a first-degree murder conviction is no longer valid so long as there is sufficient evidence to convict them of second-degree murder.[69] One court has noted that this results in "rough justice rather than perfect justice" and that the Legislature could amend the Penal Code "to ensure that no defendant remains convicted of a crime greater than what he or she would be guilty of under the revised statutes."[70]

Accomplice Liability for Firearm Enhancements

There are two firearm enhancements in the Penal Code that can be applied to accomplices who did not know another person had or was going to use a gun.

"Armed" enhancement

The first is the "armed" firearm enhancement that adds 1 year to a sentence for being armed with a firearm during the commission or attempted commission of any felony.[71] (The enhancement is 3 years when the firearm is an assault weapon or machine gun.[72]) The enhancement applies both to individuals who were personally armed and to accomplices who were not.[73] Accomplices are not

[65] Penal Code § 1172.6.
[66] Penal Code § 1172.6(a)(3).
[67] Stats. 2021, ch. 551 (SB 775) (amending former section 1170.95, 1172.6 renumbered).
[68] *Id.* Penal Code § 1172.6(d)(3).
[69] See *People v. Gonzalez*, 87 Cal.App.5th 869, 880–881 (2023).
[70] *People v. Didyavong*, 90 Cal.App.5th 85, 96–97 (2023).
[71] Penal Code § 12022(a)(1). The arming enhancement cannot be applied to offneses in which possession of a gun is an element of the offense. See *Ex parte Shull*, 23 Cal.2d 745, 749-751 (1994); *People v. Clark*, 62 Cal.App.5th 939 (2021).
[72] Penal Code § 12022(a)(2).
[73] *People v. Overten*, 28 Cal.App.4th 1497, 1501 (1994).

required to have known that another principal was armed for the enhancement to apply.[74]

For example, a getaway driver for a robbery can receive this enhancement even if they did not know that the individuals who completed the robbery were armed with guns.[75] According to one appellate court, "the Legislature was quite aware" that this sentencing enhancement did not require the accomplices to know anyone was armed.[76]

Data from the California Department of Corrections and Rehabilitation show that from 2013 to 2023, there were approximately 2,000 people admitted to prison with the armed enhancement as part of their sentence. The data does not distinguish between people who were directly armed and those who may have received the enhancement as an accomplice. There were significant race and age disparities: 87% of people with the enhancement were non-white and nearly 50% were 25 years old or younger when they were admitted to prison.

"Use" enhancement in gang cases

The second enhancement arises only in gang cases. The Penal Code has a sentence enhancement for personal use or discharge of a firearm during certain enumerated felonies.[77] This enhancement — sometimes called the "10-20-life" gun enhancement — imposes a consecutive term of 10 years for using a firearm, 20 years for personally and intentionally discharging a firearm, and 25 to life for causing great bodily injury or death by personally and intentionally discharging a firearm.[78] There is generally no accomplice liability for this enhancement — meaning it applies only to people who directly use a gun and not to accomplices who do not.[79]

But the Penal Code specifically allows the enhancement to be applied to accomplices if a gang enhancement is also proven, even if they did not have knowledge that the perpetrator used or intended to use the firearm.[80] The effect of this rule is that someone who did not personally use a firearm against another

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[74] *Id.*
[75] *Id.*
[76] *Id.* at 1502.
[77] Penal Code § 12022.53. The distinction between gun "use" and being "armed" requires the court to ask whether the person took some action — not necessarily firing the weapon — with the gun in furtherance of the crime; if so, the gun was "used." See *Alvarado v. Superior Court,* 146 Cal.App.4th 993 (2007).
[78] *Id.* A person can receive multiple enhancements for one occasion in which they used or discharged a firearm if they are convicted of multiple charges based on multiple victims. *In re Tameka C.,* 22 Cal.4th 190, 195–198 (2000).
[79] *People v. Walker,* 18 Cal.3d 232 (1976).
[80] Penal Code § 12022.53(e). See also *People v. Gonzales,* 87 Cal.App.4th 1, 11–19 (2001).

in a gang case can have a 20-year or life-sentence gun enhancement imposed. However, the gang enhancement and personal use of a firearm enhancement cannot be added together unless the person is the actual shooter.[81]

Data from CDCR show that only 603 people were admitted to prison between 2013 and 2023 with sentences that included both gang and personal use enhancements. Nearly all people (96%) who had both enhancements were Black or Hispanic. Over 50% of them were 25 years old or younger at the time they were admitted to prison, and 96% were 39 or younger. Nearly 80% of people who were convicted of both enhancements had additional time added to their sentence for each one — which indicates they actually used a firearm. But there were 108 people who were convicted of both enhancements but sentenced to additional time on only one — suggesting that they were convicted as accomplices who did not actually use a gun.[82]

Staff Recommendations

The Committee may wish to consider the following proposals to address the issues raised in this memorandum.

- **Align accomplice liability for implied malice murder with SB 1437.** SB 1437 sought to limit accomplice liability for murder based on the principle that a person should only be punished according to their own actions and culpability. To accomplish this, SB 1437 eliminated the two leading doctrines that had been used to establish liability for murders for accomplices who did not intend to kill. However, the newly-developed theory of aiding and abetting implied malice murder allows accomplices to be convicted of murders they did not intend, commit, or act as major participants in. Additionally, the legal standards for "implied malice" and "accomplice liability" are complex and may be difficult for courts and juries to apply consistently. The intent of SB 1437 could be furthered in either of the following ways:
    - Eliminating murder liability for aiding and abetting implied malice murder. Defendants could still be convicted of the offenses they otherwise committed or were accomplices to, which typically include assault, burglary, or other serious crimes.
    - Creating a new offense of murder in the third-degree that would impose a determinate punishment more commensurate with the culpability of someone who is convicted on a theory of aiding and abetting implied malice murder.

[81] Penal Code § 12022.53(e)(2).
[82] For an additional 28 people, neither enhancement added time to the sentence.

- **Allow courts to change the degree of murder when appropriate.**
  Petitioners for resentencing under SB 1437 are only entitled to relief if they cannot be convicted of murder under *any* existing theory of law. Courts have interpreted this rule to deny resentencing petitions of people convicted of first-degree murder as long as the evidence shows that they are guilty of second-degree murder under another valid theory of law. These resentencing provisions could be amended to allow judges to reduce murder convictions and sentences to the appropriate degree so that no person remains convicted of a crime greater than current law would allow.

- **Eliminate the use of the felony-murder rule in provocative-act murder cases.**
  Prohibit the felony-murder rule from elevating a murder conviction based on the provocative-act doctrine from second-degree to first-degree murder.

- **Require knowledge as an element of the "armed" enhancement.**
  Require that accomplices must have actual knowledge that another principal has a gun for the "armed" enhancement to apply. Accomplices could still receive this enhancement even if they were not personally armed.

- **Require intent as an element of the "use" enhancement in gang cases.**
  Similarly, require that accomplices share the intent of the person who actually uses or discharges a firearm during a felony for the "10-20-life" firearm enhancement to apply in gang-involved cases. The accomplice would still not need to have personally used the firearm for the enhancement to apply in these cases.

Conclusion

The Legislature has taken significant steps to modernize accomplice liability for murder in California. However, the development of novel legal theories has shown that additional reforms may be needed to accomplish the Legislature's stated goals. Accomplice liability for "arming" and "use" present similar fairness concerns. The Committee should consider the analysis and proposals here to make recommendations that further align accomplice liability with an individual's actions and culpability and improve public safety while reducing unnecessary incarceration and addressing equity concerns.

Respectfully submitted,

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Appendix: Glossary of Key Concepts

Felony-murder rule: The general rule that a killing committed during a felony is murder without any need to show the otherwise-required element of "malice."

- **Second-degree felony-murder**: This doctrine applied to non-enumerated "inherently dangerous" felonies. Second-degree felony murder liability was eliminated by SB 1437.
- **First-degree felony-murder**: Applies when a killing occurs during one of 14 enumerated felonies. Before SB 1437, this doctrine applied to both actual killers and accomplices without limitation. After SB 1437, the doctrine only applies to (1) actual killers, (2) accomplices who share the intent to kill, or (3) accomplices who are major participants in the underlying felony and act with reckless indifference to life.
- **Felony-murder special circumstance**: If a first-degree murder was committed during an enumerated felony, that "special circumstance" elevates punishment to death or life without the possibility of parole. For this special circumstance to apply to people who were not the actual killer or an accomplice with the intent to kill, they must have acted with "reckless indifference to human life" and been a "major participant" in the underlying felony.

Natural and probable consequences murder: Under this theory, perpetrators and accomplices of a crime were guilty of second-degree murder when the killing was a "reasonably foreseeable" result of the intended crime, with no proof of malice. This theory was eliminated by SB 1437.

Aiding and abetting express malice murder: This theory allows an accomplice who assists or encourages a murder with the specific intent to kill to be criminally responsible for murder. It is unchanged by SB 1437.

Aiding and abetting implied malice murder: This theory, recognized by the courts after SB 1437, allows an accomplice to be convicted of murder when they intentionally assist a life-endangering act that results in death, with knowledge and conscious disregard of the risk to human life.

Provocative act murder: This theory allows a perpetrator or accomplice to be convicted of a murder committed by a third-party when one of the defendants commits an aggressive action that is likely to provoke a deadly response during a crime. Once liability is established, the first-degree felony-murder rule and felony-murder special circumstance can elevate the degree and punishment for the murder.