Office of Senate Floor Analyses
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THIRD READING

Bill No: SB 775
Author: Becker (D)
Amended: 5/20/21
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-1, 4/13/21
AYES: Bradford, Kamlager, Skinner, Wiener
NOES: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: 5-2, 5/20/21
AYES: Portantino, Bradford, Kamlager, Laird, Wieckowski
NOES: Bates, Jones

SUBJECT: Felony murder: resentencing

SOURCE: California Public Defenders Association

DIGEST: This bill (1) clarifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder, a theory under which malice is imputed to a person, and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories; (2) permits for the appointment of counsel in petitions for resentencing under these provisions as specified; and (3) authorizes a person convicted of murder, attempted murder or manslaughter whose conviction is not final to challenge the validity of that conviction upon direct appeal.

ANALYSIS:

Existing law:

1) Defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. (Pen. Code, § 187, subd. (a).)

2) Defines malice for this purpose as either express or implied and defines those terms. (Pen. Code, § 188.)

a) It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.
b) It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
c) Provides that when it is shown that the killing resulted from an act with express or implied malice, 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 such awareness is included within the definition of malice. (Pen. Code, § 188.)

3) Defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies. (Pen. Code, § 189.)

4) Prescribes, as enacted by Proposition 7 (approved by the voters at the November 7, 1978 statewide general election), a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. (Pen. Code, § 190.)

5) Clarifies that for conviction of murder generally, a participant in a crime must have the mental state described as malice, unless specified criteria are met. (Pen. Code, § 189.)
a) States that malice shall not be imputed to a person based solely on his or her participation in a crime.
b) States that a participant in certain specified felonies is liable for first degree murder only if one of the following is proven: (i) the person was the actual killer; (ii) 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; and, (iii) the person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified.
c) Allows a defendant to be convicted of first degree murder if the victim is a peace officer who was killed in the course of duty, where the defendant was a participant in certain specified felonies and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of duty, regardless of the defendant's state of mind.

6) Provides, as enacted by Proposition 115 (approved by the voters on the June 5, 1990 statewide general election), that when a prosecutor charges a special circumstance enhancement and it is found true, a person found guilty of first

degree murder who are not the actual killer, acted with reckless indifference to human life, was a major participant in certain specified felonies, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of that felony shall be punished by death or life without the possibility of parole. (Pen. Code, § 190.2.)

7) Provides a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder. (Pen. Code, § 1170.95.)

This bill:

1) Clarifies that a person who was convicted of attempted murder under the natural and probable consequences doctrine or any other theory under which malice is imputed to the person based solely on their participation in a crime or who was convicted of manslaughter when the prosecution was allowed to proceed on a theory of felony murder or murder under the natural and probable consequences doctrine, to apply to have their sentence vacated and be resentenced.

2) Requires a court to find a prima facie showing has been made that a petitioner falls within resentencing provisions unless the declaration fails to show that they meet the requirements for resentencing.

3) Specifies that upon receiving a petition in which the information required is set forth or a petition where any missing information can be readily ascertained by the court, if the petitioner has requested counsel the court shall appoint counsel to represent the petitioner.

4) Specifies that a finding that there is substantial evidence to support a conviction of murder, attempted murder, or manslaughter is insufficient to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing.

5) Provides that a person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction.

Background

In 2018 California significantly reformed the felony-murder doctrine in California. Historically, the felony murder rule applied to murder in the first degree as well as murder in the second degree. The rule created liability for murder for actors (and their accomplices) who kill another person during the commission of a felony. The death needed not to be in furtherance of the felony, in fact the death could be accidental. The stated purpose for the rule has always been to deter those who commit felonies from killing by holding them strictly responsible for any killing committed by a co-felon, whether intentional, negligent, or accidental during the perpetration or attempted perpetration of the felony. (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

First-degree felony murder rule applied when a death occurs during the commission of one of a list of enumerated felonies. These felonies are as follows: arson, robbery, any burglary, carjacking, train wrecking, kidnapping, mayhem, rape, torture, and a list of sexual crimes (including rape, sodomy, oral copulation, forcible penetration, or lewd acts with a minor). (Pen. Code, § 189.)

Second degree murder occurs when a death occurs during the commission of a felony that has not been enumerated in code as constituting first-degree felony murder, but that courts have defined as "inherently dangerous." (*People v. Ford* (1964) 60 Cal.2d 772.) The standard courts are supposed to use for inherently dangerous is that the felony cannot be committed without creating a substantial risk that someone could be killed. (*People v. Burroughs* (1984) 35 Cal. 3d 824, 833.)

So therefore, a defendant who fired a weapon in the air to deter criminals from burglarizing their property could be convicted of second-degree felony murder if the firing of the weapon kiled a human being. That defendant could have been convicted of 15-years to life in state prison.

SB 1437 (Skinner, Chapter 1015, Statutes of 2018) reformed the felony murder rule in California by clarifying that malice cannot be imputed to a person based solely on his or her participation in a specified crime. This eliminated second degree felony murder as a basis for murder liability. The participant in those specified felonies can only be liable for murder if one of the following factors is proved: (1) the person was the actual killer; (2) the person was not the actual killer, but had the intent to kill and they aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of the murder; or (3) the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Additionally, SB 1437 provided a procedure for incarcerated persons to petition to have their sentences recalled and to be resentenced pursuant to the provisions and standards of the bill.

SB 1437 (Skinner) has left California in a peculiar situation. While it may seem obvious that persons who have pled or been convicted of manslaughter or attempted murder at trial under a felony murder or natural and probable consequences theory should be entitled to the same relief as persons convicted of more serious offenses of first and second degree murder some courts have ruled that they are not. This bill seeks to clarify that obvious inequity in the law. If this bill passes, people who are serving a sentence of manslaughter or attempted murder that were prosecuted under a felony murder theory or a natural and probable consequences theory will be able to have their sentences recalled under the same standards as people who have been convicted of first and second-degree murder.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

- *Courts:* Unknown, potentially-major one-time costs in the low millions of dollars to the courts to hold prima facie hearings and adjudicate new resentencing petitions. The courts are likely to receive an influx of petitions during the initial years after enactment of this bill, then new filings likely would taper off. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations. For illustrative purposes, the Governor's proposed 2021-2022 budget would appropriate $118.3 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations. (General Fund*)

- *Department of Justice:* The department reports the following costs associated with this measure: $210,000 (and 2.0 PYs) in FY 2021-2022, $3.443 million (and 15.0 PYs) in FY 2022-2023, and $3.335 million (and 15.0 PYs) in FYs 2023-2024 through 2025-2026. (General Fund)

- *Transportation & supervision:* Unknown, potentially-significant workload costs in the thousands of dollars to the Department of Corrections and Rehabilitation to supervise and transport individuals in state custody to attend hearings to vacate first-degree murder convictions and for resentencing. Actual costs would depend on the number of incarcerated persons who file a petition

pursuant to this measure and make a prima facie showing that they are entitled to relief and for whom remote/video appearances at the proceedings are not exercised. (General Fund)

- *Incarceration savings:* Unknown, potentially-major savings annually in reduced state incarceration costs for individuals whom the courts resentence to a shorter term of imprisonment and/or release from state facilities and for those who, absent this measure, would be convicted to first-degree murder prospectively. The proposed FY 2020-2021 per capita cost to detain a person in a state prison is $112,691 annually, with an annual marginal rate per person of over $13,000. Actual savings would depend on the number of individuals who are resentenced and who avoid incarceration in state prison because of this measure. Aside from marginal cost savings per individual, however, the department would experience an institutional cost savings only if the number of persons incarcerated decreased to a level that would effectuate the closing of a prison yard or wing. (General Fund)

*Trial Court Trust Fund

SUPPORT: (Verified 5/20/21)

California Public Defenders Association (source)
ACLU California
California Attorneys for Criminal Justice
California Catholic Conference
Californians for Safety and Justice
Californians United for a Responsible Budget
Drug Policy Alliance
Ella Baker Center for Human Rights
Fresno Barrios Unidos
Initiate Justice
Legal Services for Prisoner with Children
National Association of Social Workers, California Chapter
Re:store Justice
San Francisco Public Defender
Smart Justice California
We the People-San Diego
Young Women's Freedom Center

OPPOSITION: (Verified 5/20/21)

California District Attorneys Association

ARGUMENTS IN SUPPORT: According to ACLU California, "In 2018, with the passage of SB 1437 (Skinner), the legislature recognized a person's culpability for murder should be premised upon that person's own actions and subjective intent. Following the passage of the law, people can no longer be prosecuted for a murder they did not personally commit unless they intended to kill and assisted another in the killing or they were a major participant in an enumerated felony and acted with reckless indifference to human life.

"For the past two years, incarcerated people who were prosecuted under a theory of first-degree felony murder or murder under the natural and probable consequences doctrine have been able to apply for resentencing if they could no longer be charged with murder if they to be prosecuted after the enactment of SB 1437.

"Unfortunately, despite the legislature's intent to resentence less culpable people who were convicted of a lesser charge, the courts have chosen to narrowly interpret the law to apply to only those convicted of first or second-degree murder. The courts have also ruled that people accused of attempted murder under the same flawed theories cannot ask to be resentenced, even though their crimes had less of an impact on society than an actual killing.

"SB 775 clarifies existing law to grant those convicted of voluntary manslaughter and attempted murder the opportunity to apply for resentencing. This simple reform would assist hundreds of incarcerated people who have been deemed by the appellate courts to be excluded by the technical language of SB 1437. This narrow interpretation of the law has left incarcerated the people who prosecutors and jurors thought were less culpable, while many people convicted of murder have successfully petitioned the court for release.

"It is important to hold those who commit serious crimes accountable. It is also important to have a just legal system in which the punishment imposed for crimes is proportional to an individual's own culpability. SB 1437 was enacted to accomplish both of these goals. Now, SB 775 would officially clarify this for the court."

ARGUMENTS IN OPPOSITION: According to the California District Attorneys Association, "The purpose of SB 1437 was to reduce lengthy sentences that were not commensurate with the culpability of the individual. The language of SB 1437 regarding the new requirements for imposing first degree *felony murder* liability is adopted from Penal Code Section 190.2, which in turn, derives from United States Supreme Court cases imposing limitations on punishing non-killers in felony murder cases through an Eighth Amendment analysis. The Court

premised its arguments in those cases on the idea that punishing someone by death (or life without the possibility of parole) could be unconstitutionally disproportionate to the offense. The punishment for first degree murder is "death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." The punishment for second degree murder is a state prison term of 15 years to life.

"The sentences imposed for the crimes of voluntary manslaughter and attempted murder are significantly shorter than the sentences imposed for murder. The punishment for voluntary manslaughter is imprisonment for 3, 6, or 11 years. The punishment for attempted murder is imprisonment for 5, 7, or 9 years. If a jury finds a premeditation allegation to be true (which demonstrates an intent to kill and falls outside of both SB 1437 and this bill), then the punishment is life with the possibility of parole after 7 years.

"No state or federal court case has ever held that the sentences imposed for voluntary manslaughter, attempted murder, or premeditated attempted murder are "not commensurate with the culpability of the individual." Moreover, nothing in SB 1437 indicated that the sentences for the crimes of voluntary manslaughter or attempted murder were not commensurate with an individual's culpability for the crime.

"In addition to the substantive objections of this bill, there are similar logistical issues in this bill as the ones in SB 1437 that are still the subject of timely and costly litigation. The application of this bill to convictions that resulted from negotiated pleas that contain no admissible record of conviction for an evidentiary hearing is problematic.

"Additionally, the effect of a number of the procedural provisions of the bill would be to allow everyone convicted of voluntary manslaughter or attempted murder to successfully petition to have a resentencing hearing regardless of the underlying theory advanced by the prosecution. Combined with the burden on the prosecution to prove beyond a reasonable doubt the petitioner's ineligibility for a resentencing, this bill will effectively authorize the release of those who attempted to kill and those who played major roles in the killing of others."

Prepared by: Gabe Caswell / PUB. S. /
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