
UNFINISHED BUSINESS

Bill No: SB 775
Author: Becker (D)
Amended: 9/1/21
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

SENATE FLOOR: 30-8, 6/2/21
AYES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd,
Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Kamlager, Laird, Leyva,
Limón, McGuire, Min, Newman, Pan, Portantino, Roth, Rubio, Skinner, Stern,
Umberg, Wieckowski, Wiener
NOES: Bates, Borgeas, Dahle, Grove, Hurtado, Jones, Ochoa Bogh, Wilk
NO VOTE RECORDED: Melendez, Nielsen

ASSEMBLY FLOOR: 41-28, 9/10/21
(ROLL CALL NOT AVAILABLE)

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.

Assembly Amendments:

- 1) Add legislative findings and declarations related to felony murder and the national, the probable consequences doctrine, and the right to counsel.
- 2) Clarify that at a hearing to determine whether a petitioner is entitled to relief, the prosecutor must prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder.
- 3) Set forth rules related to the admission of evidence at hearings to determine whether a petitioner is entitled to relief.

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 killed 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 Assembly Appropriations Committee:

- Costs (Trial Court Trust Fund) possibly in the low millions of dollars to trial courts for courts to hear and adjudicate additional requests for re-sentencing in second degree murder, attempted murder or manslaughter cases based on a theory of felony murder or the natural and probable consequences doctrine. An hour of court time costs approximately \$1,000 in staff workload. According to data provided by the California Department of Corrections and Rehabilitation (CDCR), as of 2020, there were approximately 588 inmates serving sentences for second degree murder, attempted murder and voluntary manslaughter. If the court spends four hours on each petition, the total cost would be approximately \$2.3 million. Costs will decrease over time since use of the felony murder rule was eliminated in 2018.
- Costs (General Fund) of \$210,000 in fiscal year (FY) 2021-2022, \$3 million in FY 2022-2023, and \$3 million in FYs 2023-2024 through 2025-2026 to the Department of Justice (DOJ) in up to 15 new staff to handle a significant increase in appeals, given this bill allows a defendant who's conviction is not final to challenge the validity of a conviction on direct appeal rather than by petition.
- Cost savings to CDCR possibly in the tens of millions of dollars, in incarceration costs given this bill may result in shorter terms of incarceration or release from custody in second degree murder, attempted murder and manslaughter cases. The annual cost per inmate to CDCR for incarceration is approximately \$112,000. If this bill results in 100 inmates serving five fewer years in prison, the total savings would be \$56 million annually.

SUPPORT: (Verified 9/10/21)

California Public Defenders Association (source)

ACLU California Action

All Rise Alameda

American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties

Bay Area Legal Aid

Bay Area Regional Health Inequities Initiative
Black Leadership Council
Building the Base Face to Face
California Attorneys for Criminal Justice
Californians for Safety and Justice
Center for Responsible Lending
Center on Juvenile and Criminal Justice
Change Begins With Me
Cloverdale Indivisible
Community Legal Services in East Palo Alto
Contra Costa Moveon
Defending Our Future: Indivisible in California
East Bay Community Law Center
East Valley Indivisibles
El Cerrito Progressives
Ella Baker Center for Human Rights
Homeboy Industries
Housing California
Indivisible 36
Indivisible 41
Indivisible Auburn
Indivisible Beach Cities
Indivisible CA-3
Indivisible CA-7
Indivisible CA-25 Simi Valley Porter Ranch
Indivisible CA 29
Indivisible CA 37
Indivisible CA-39
Indivisible CA Statestrong
Indivisible Claremont / Inland Valley
Indivisible Colusa County
Indivisible East Bay
Indivisible Elmwood
Indivisible Euclid
Indivisible Lorin
Indivisible Los Angeles
Indivisible Marin
Indivisible Media City Burbank
Indivisible Normal Heights
Indivisible North Oakland Resistance

Indivisible North San Diego County
Indivisible Northridge
Indivisible OC 46
Indivisible OC 48
Indivisible Petaluma
Indivisible Sacramento
Indivisible San Bernardino
Indivisible San Jose
Indivisible San Pedro
Indivisible Santa Barbara
Indivisible Sausalito
Indivisible Sebastopol
Indivisible SF
Indivisible-Sherman Oaks
Indivisible Sonoma County
Indivisible South Bay LA
Indivisible Stanislaus
Indivisible Suffragists
Indivisible Ventura
Indivisible Windsor
Indivisible Yolo
Indivisible: San Diego Central
Insight Center for Community Economic Development
Jose Cisneros, Treasurer, City and County of San Francisco
Lawyers' Committee for Civil Rights - San Francisco
Legal Services for Prisoners With Children
Legal Services of Northern California
Livermore Indivisible
Los Angeles Conservation Corps
Los Angeles County District Attorney's Office
Mayor of City & County of San Francisco London Breed
Mill Valley Community Action Network
Mountain Progressives
Multi-faith Action Coalition
National Association of Social Workers, California Chapter
Neighborhood Legal Services of Los Angeles County
Nothing Rhymes With Orange
Orchard City Indivisible
Orinda Progressive Action Alliance
Policylink

Prosecutors Alliance of California
Public Counsel
Root & Rebound
San Diego Indivisible Downtown
San Francisco Bay Area Planning and Urban Research Association
San Francisco Financial Justice Project
San Francisco Public Defender
Santa Cruz Indivisible
SFV Indivisible
Tehama Indivisible
Together We Will/Indivisible - Los Gatos
Underground Grit
Underground Scholars Initiative at the University of California, Irvine
Underground Scholars Initiative, University of California, Davis
University of California, Irvine School of Law Consumer Law Clinic
Vallejo-Benicia Indivisible
Venice Resistance
Yalla Indivisible
Youth Justice Coalition

OPPOSITION: (Verified 9/10/21)

California District Attorneys Association
California Narcotic Officers' Association
Peace Officers Research Association of California

ARGUMENTS IN SUPPORT: According to ACLU California Action, “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. /
9/10/21 20:27:48

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