
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: SB 775 **Hearing Date:** April 13, 2021
Author: Becker
Version: February 19, 2021
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Felony murder: resentencing*

HISTORY

Source: California Public Defenders Association

Prior Legislation: SB 1437 (Skinner), Ch. 1015, Stats. of 2018

Support: American Civil Liberties Union of California; California Attorneys for Criminal Justice; Drug Policy Alliance; Ella Baker Center for Human Right; Fresno Barrios Unidos; Legal Services for Prisoner with Children; National Association of Social Workers, California Chapter; ReStore Justice; San Francisco Public Defender; Smart Justice California; Young Women's Freedom Center

Opposition: None known

PURPOSE

The purpose of this legislation is to 1) clarify that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories; and 2) permit for the appointment of counsel in petitions for resentencing under these provisions when a court believes a petitioner fails to make an initial prima facie showing.

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

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

- It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.
- It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Existing law 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.)

Existing law 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.)

Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes 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.)

Existing law 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.)

- States that malice shall not be imputed to a person based solely on his or her participation in a crime.
- States that a participant in certain specified felonies is liable for first degree murder only if one of the following is proven.
 - The person was the actual killer;
 - 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,
 - The person was a major participant in the underlying felony and acted with reckless indifference to human life, as specified.
- 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.

Existing law, however, as enacted by Proposition 115, approved by the voters on the June 5, 1990 statewide general election, provides 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 LWOP. (Pen. Code, § 190.2.)

Existing law 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 clarifies that a person who was convicted of attempted murder under the natural and probable consequences doctrine 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.

This bill 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.

This bill requires a court to hold a prima facie hearing prior to the denying of a petition, and if the court believes the petitioner has not made a prima facie showing, to appoint counsel to represent the petitioner at the hearing.

This bill 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.

COMMENTS

1. Need for This Bill

According to the author:

Although SB 1437 changed California's long-held and unjust homicide laws that was overly punitive to those who did not kill or intend to kill, some appellate courts have reasoned, incorrectly, that SB 1437 applies only to murder and not to attempted murder. This has led to an absurd and unfair situation where people are eligible for resentencing if the victim died, but are ineligible if the victim did not die. Furthermore, although SB 1437 allowed a pathway for people who took pleas deals to lesser charges such as manslaughter to apply for resentencing, the bill did not explicitly include these people for resentencing. As a result, this has led to a situation where the least culpable people are still serving decades in prison even though they should be eligible for relief.

SB 775 clarifies existing law to include voluntary manslaughter and attempted murder convictions as eligible for relief under SB 1437. 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, and the thousands of similar people who did not file petitions yet because of the court rulings.

2. Homicide and Felony Murder Generally

Murder is the most egregious form of homicide, which is the taking of the life of another human being. Homicides are killings of another, whether lawful or unlawful. Under California law murder is defined as "the unlawful killing of a human being or a fetus with malice aforethought." (Pen. Code, § 187, subd. (a).) Murder is distinguishable from manslaughter because the element of "malice" is required to be convicted of murder.

Malice

Both first-degree murder and second-degree murder require what is known as “malice.” Malice may be expressed or implied. Express malice means that you specifically intend to kill the victim. Implied malice is when: (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was committed deliberately with the knowledge that of the danger to human life, and with a conscious disregard for that life.

The simplest way to understand the element of malice is that the act does not require ill will or hatred to a particular person. Merely acting with a wanton disregard for human life and committing an act that involves a high degree of probability that it will result in death, is acting with malice aforethought. (*People v. Summers* (1983) 147 Cal.App. 3d 180, 184.)

First-Degree Murder

There are three methods for convicting a person of first-degree murder in California:

- If the killing was willful, deliberate, and premeditated.
- The murder was committed: through use of a destructive or explosive device, with ammunition designed to penetrate armor, poison, by lying in wait, or by inflicting torture.
- *With the felony-murder rule* (by committing a specifically enumerated felony that turns any death committed during the course of that felony into first-degree murder, if the person was the actual killer, had the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life).

Second-Degree Murder

Second-degree murder is distinguishable from first-degree murder because it is willful, but it is not deliberate and premeditated. In principle, second-degree murder has always been intended to therefore encompass all murder that is not defined as first-degree murder. So for instance, if a defendant initiates a physical altercation with another person without intending to kill that person, nevertheless that person dies as a result of the altercation the defendant initiated, the defendant is likely to have committed second-degree murder (absent a legal defense).

Punishment

First-Degree Murder

In California a conviction for first-degree murder (including felony-murder) can result in one of three sentences:

- Imprisonment in state prison for a term of 25 years to life;
- Life imprisonment in state prison without the possibility of parole; or
- Death

If a prosecutor chooses, state law requires a sentence of life imprisonment without parole or death for homicides involving special circumstances set by the California Penal Code. For example, the court must consider whether the defendant:

- committed first degree murder while engaging in a felony or
- avoiding a lawful arrest,
- using a bomb or explosive device, or
- intending to kill another person for financial gain.

The court must also confer a sentence of life imprisonment without parole or death if the defendant:

- committed first degree murder of a peace officer,
- federal law enforcement officer,
- firefighter,
- prosecutor, or
- judge.

State laws also allow for the most stringent forms of punishment when the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity." This generally refers to murders involving torture.

Second-Degree Murder

California state laws set [the term of imprisonment for second degree murder](#) as 15 years to life in state prison. The term increases to 20 years to life if the defendant killed the victim while shooting a firearm from a motor vehicle. In addition, the term may increase to 25 years to life if the victim of the crime was a peace officer.

State laws also allow the court to consider whether the defendant has a prior criminal record. If the defendant has previously served time in prison for murder, the possible sentence for second degree murder may range between 15 years to life in state prison and life imprisonment without the possibility of parole.

3. Manslaughter and Attempted Murder are Lesser Included Offenses to Murder

Under California law a "lesser included offense" is a term for a crime that is contained within a more serious crime. Generally, the elements that must be shown to commit a lesser included offense are also included in the overall greater and more serious offense. This is the case for manslaughter and attempted murder as lesser included offenses of the more serious offense of murder.

Manslaughter Generally

Manslaughter is the killing of another without the element of "malice." Manslaughter can be divided into two types, voluntary manslaughter and involuntary manslaughter.

Voluntary manslaughter is generally the killing of another person during a sudden quarrel, in the heat of passion, or based on an honest but unreasonable belief in the need to defend oneself. Voluntary manslaughter is a lesser included offense to murder and it is often the subject of a plea bargain in murder cases in exchange for a dismissal of a murder charge. The punishment for voluntary manslaughter is 3, 6, or 11 years in state prison as opposed to an indeterminate term for first or second-degree murder.

Involuntary manslaughter is the unintentional killing of a person while committing a crime that is not inherently dangerous or a lawful act that might produce death. A conviction for involuntary manslaughter is up to 4 years in jail. Involuntary manslaughter does not require intent to kill.

Attempted Murder

Attempted murder is when a person intends to kill another person and takes a direct step towards killing that person, but the intended victim does not die. A “direct step” is defined as more than simple planning, it is putting the plan into action. So for instance, buying a gun is not a direct step but firing a gun at someone would be.

First-degree attempted murder is when the defendant acts willfully, deliberately, and with premeditation. The punishment is life with the possibility of parole. However if the intended victim is a peace officer, firearm, or other protected person the defendant must serve at least 15-years if the victim was on-duty at the time of the offense.

Second-degree attempted murder is any attempted murder that does not count as a first-degree murder. These convictions can result in 5, 7, or 9 years in state prison.

Like manslaughter, attempted murder convictions are frequently the subject of plea agreements in murder cases.

Because manslaughter and attempted murder are lesser included offenses to murder, convictions for these crimes can be achieved when a person is prosecuted for murder, but not convicted of murder. Instead the jury convicts the defendant of manslaughter or attempted murder. The same can be said for murder trials where the theory of the case was based on felony murder or the natural and probable consequences theory. This bill seeks to permit persons convicted of manslaughter or attempted murder who were convicted of these lesser included offenses on a theory of felony murder.

4. SB 1437 and The Felony Murder Doctrine in California

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

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 Felony Murder Before SB 1437 of 2018

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), Ch. 1015, Stats. of 2018

SB 1437 (Skinner) 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.

The State of Manslaughter and Attempted Murder Following SB 1437

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.

5. Lack of Deterrent Effect on Criminal Behavior

“The Legislature has said the effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first-degree murder

for any homicide committed in the course thereof.” (*People v. Cavitt* (2004) 33 Cal. 4th 187, 197.)

The deterrent effect of the felony-murder doctrine has been debated for decades. Countless legal scholars and law review articles have addressed the issue. Most recent studies have concluded that the felony murder rule does not have a deterrent effect on the commission of dangerous felonies or deaths during the commission of a felony.¹ Proponents have argued that the felony-murder rule encourages criminals to reduce the number of felonies they commit and take greater care to avoid causing death while committing a felony. Opponents argue that criminals are unaware that the felony-murder rule even exists, and that it is impossible to deter criminals from committing unintentional and unforeseeable acts.

A 2002 study of FBI crime data found that nearly 20 percent of all murders annually between the years of 1970-1998 were felony murders. The results of the study suggested that the felony-murder rule has a relatively small effect on criminal behavior, and it does not substantially affect either the overall felony or felony-murder rate. Secondly, the study found that the effects varied by type of felony. While difficult to determine, the rule may have had a positive effect on reducing deaths during theft related offenses, it may have actually increased the rates of death in robbery-homicides. The rule was found to have no effect on rape deaths.²

6. Elimination of the Felony Murder Doctrine Worldwide

The United States adopted the felony murder rule as a form of English Common Law. English Common Law is the common legal system and concepts that has been adopted by courts throughout England, the United Kingdom, and their colonies worldwide.

- Abolished in England and Wales via the Homicide Act of 1957.
- Abolished in Northern Ireland via the Criminal Justice Act of Northern Ireland in 1966.
- Held unconstitutional in Canada as breaching the principles of fundamental justice. (*R v Vaillancourt* (1987) 2 SCR 636.)
- Abolished in Australia and replaced with a modified version known as “constructive murder” which requires that the offender commit an offense with a base penalty of 25 years to life in prison and that the death occurred in an attempt, during, or immediately after the base offense. Abolished and modified in the Crimes Act of 1958.
- There was never a felony murder rule in Scotland.

In the United States there are still 46 states that have some form of a felony murder rule. Hawaii, Kentucky, Michigan, and Ohio have completely abolished the felony murder rule. In 24 of those states, including California, the punishment can be death. The felony murder rule has been removed from the American Law Institute’s Model Penal Code.

¹ *The American Felony Murder Rule: Purpose and Effect* by Daniel Ganz, 2012, UC Berkeley; *The Culpability of Felony Murder* by Guyora Binder, 2008 Notre Dame Law Review; *Felony-Murder Rule a Doctrine at Constitutional Crossroads* by Nelson E. Roth and Scott E. Sundby, 1985 Cornell Law Review

² *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data* by Anup Malani, 2002, (clerk to Justice Sandra Day O’Connor, U.S. Supreme Court)

7. Argument in Support

According to the ACLU:

The American Civil Liberties Union of California is pleased to support SB 775 which clarifies the legislature's recent changes to the law known as the "Felony Murder Rule."

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.

-- END --