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Supreme Court of California
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S260598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

VINCE E. LEWIS,

Defendant and Appellant.

On Review From The Decision of the Court of Appeal,
Second Appellate Division, District 1
No. B295998

On Appeal From the Superior Court of the State of California,
County of Los Angeles,
The Honorable Ricardo R. Ocampo, Judge
No. TA117431

Request for Judicial Notice From Amici Curiae The Honorable Nancy Skinner and The Justice Collaborative Institute

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<u>REQUEST FOR JUDICIAL NOTICE</u>

Pursuant to California Rule of Court 8.252 and California Evidence Code section 452, Amici Curiae The Justice Collaborative Institute and Senator Nancy Skinner respectfully request this court take judicial notice of the following material.

<u>The Legislative Materials for Senate Concurrent Resolution 48 and Senate Bill 1437</u>

1) The Memorandum of Gabriel Caswell, Senate Committee on Public Safety, contained within the Secretary of State's Senate Public Safety File for Senate Bill No. 1437 (2017-2018 Reg. Sess.) and attached as Exhibit 1.

2) The California District Attorneys Association April 17, 2018 Letter to Senator Skinner, contained within the Secretary of State's Senate Public Safety Counsel File for Senate Bill 1437 File and attached as Exhibit 2.

3) The legislative history of Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session). The legislative history of SCR 48 is available on the California Legislative Information website here: https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180SCR48

4) The legislative history of Senate Bill 1437 (Stats. 2018 ch. 1015, 2017-2018 Regular Session). The legislative history of SB 1437 is available on the California Legislative Information website here:

https://leginfo.Legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB1437

5) All recorded hearings and debates on Senate Bill 1437 (Stats. 2018, ch. 1015, eff. Jan. 1, 2019):

   a) The Senate Public Safety Committee hearing, held on April 24, 2018, available here: https://www.youtube.com/watch?v=M0FbvnSoBk4.

   b) The Senate Appropriations Committee hearing, held on May 14, 2018, available here: https://www.youtube.com/watch?v=BC_2pHx_7xE..

   c) The Senate floor debate and vote held on May 30, 2018, available here: https://www.youtube.com/watch?v=ggJflRkeNzU&list=PL_mQBkokl5hKSdoRnI5zYZKSWgSBgStd6

   d) The Assembly Public Safety Committee hearing, held on June 26, 2018, available here: https://www.youtube.com/watch?v=BhOMrHWZ1sM.

   e) The Assembly floor debate and vote held on August 29, 2018, available here: https://www.sos.ca.gov/archives/calchannel. The debate on SB 1437 runs from 8:33:44-8:55:53 on the video counter.

6) The Judicial Council of California, Legislative Status Chart (2018), available on the California Courts' website: https://www.courts.ca.gov/documents/legislative-status-chart-2018.pdf

7) Judicial Council of California, Governmental Affairs, Position Letter (September 13, 2018), available at https://www.courts.ca.gov/documents/ga-position-letter-senate-sb1437-skinner.pdf

The above authorities are all proper subjects of judicial notice under Evidence Code section 452, subdivisions (a), (c) and (h). The materials that are available online, including recorded legislative hearings, are not attached but are hyperlinked above. The materials that are now in the Secretary of State's file in Sacramento– the Caswell Memorandum and California District Attorneys Association Letter -- are attached as Exhibits 1 and 2, respectively.

Newspapers and Other Media

Amici also requests that judicial notice be taken of the following materials, referred to in the brief of amici curiae.

8) Story and video clip of the "SB 1437" class taught throughout California Department of Corrections and Rehabilitation prisons, "California Inmates Convicted Under 'Felony Murder Rule' Prep For New Shot At Freedom" by Alex Emslie, Adam Grossberg, The California Report, December 26, 2018, KQED, available here:

https://www.kqed.org/news/11714600/california-inmates-convicted-under-felony-murder-rule-prep-for-new-shot-at-freedom

This is being offered not for the truth of the matters asserted within, but to show that a tour of prisons throughout California was organized and conducted by amici curiae. This fact is not "reasonably subject to dispute and is capable of immediate and accurate determination" pursuant to Evidence Code section 452, subdivision (h). Accordingly, it may be judicially noticed.

9) The following articles and media published in California and nationally while Senate Bill 1437 was being debated in the Legislature:

a) **The Los Angeles Times,** August 20, 2018 *Punish Californians for the crimes they've committed, not for murders they didn't do.*

b) **The New York Times,** June 27, 2018 *If He Didn't Kill Anyone, Why is it Murder?*

c) **The Marshall Project,** June 27, 2018 *Can It Be Murder If You Didn't Kill Anyone?*

d) **KPCC 89.3 AirTalk hosted by Larry Mantle,** June 28, 2018 *Should CA roll back its 'felony murder rule'?*

e) **CBS Radio KNX 10.70,** June 28, 2018 *A Bill Moving Through Calif. Legislature Could Eliminate 'Felony Murder Rule'*

f) **KQED Forum,** June 29, 2018 *California Bill Seeks to Overturn Rule that Charges Accomplices with Murder*

g) *It's time for CA to reform the felony-murder rule. Pass SB1437.* July 4, 2018. This editorial from the Southern California Newspaper Group Editorial Board appeared in the following publications:

- Orange County Register
- Pasadena Star News
- Daily Breeze (Torrance)
- Los Angeles Daily News
- The Press Enterprise (Riverside County)
- Redlands Daily Facts
- San Gabriel Valley Tribune
- Whittier Daily News
- Press Telegram (Long Beach)
- The Sun (San Bernardino County)

h) **KPBS,** July 10, 2018 *Should California Restrict the Felony Murder Rule?*

i) **American Bar Association,** July 5, 2018 *California considering end to felony murder rule*

j) East County Today**,** May 31, 2018 *Trio of Senator Skinner Bills Move Forward, Including Law Enforcement Transparency Bill*

k) San Quentin News, April 18, 2018 *New CA youth offender bills*

Amici curiae offer these materials, not for the truth of the matters asserted within, but in support of their argument that there was widespread public notice of this legislation during the time Senate Bill 1437 was in the Legislature. The Court may take judicial notice of newspaper articles or transcripts of radio or television broadcasts as evidence of the fact of their publication, but not as to the truth of their content. (*McKelvey v. Boeing*

North American, Inc. (1999) 74 Cal.App.4th 151, 162, superseded by statute on other grounds, [because of widespread publicity of contamination, plaintiff had notice of facts reported.] The fact of the publication of the above material is not reasonably subject to dispute and the Court may take judicial notice of these materials for that purpose pursuant to Evidence Code section 452, subdivision (h).

The articles are attached as Exhibit 3 and hyperlinked above. Other media that cannot be printed or are duplicative are not attached but are hyperlinked above.

Respectfully submitted,

November 15, 2020

/s/Kate Chatfield

The Justice Collaborative Institute

DECLARATION OF COUNSEL

I, Kate Chatfield, declare as follows:

1. I am an attorney licensed to practice before the courts of the State of California, State Bar No. 245403.
2. I am counsel for Amici Curiae in this matter and have personal knowledge of the facts stated in the Application for Permission To File Amici Curiae Brief and the Amici Curiae Brief on Behalf of The Honorable Nancy Skinner and The Justice Collaborative Institute.
3. Exhibit 1 is a true and correct copy of the Senate Committee on Public Safety Memorandum of Gabriel Caswell contained in the Secretary of State's Senate Public Safety File for Senate Bill No. 1437 (2017-2018 Reg. Sess.).
4. Exhibit 2 is a true and correct copy of the April 17, 2018 California District Attorney Association Letter contained in the Secretary of State's Senate Public Safety Counsel File, Senate Bill 1437 File.
5. Exhibit 3 are copies of articles that appeared in publications and online in California and throughout the country on or about the dates as stated in the Request for Judicial Notice.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information and belief. This declaration is executed in Brisbane, California on November 15, 2020.

/s/ Kate Chatfield

EXHIBIT 1

State of California
Secretary of State

I, ALEX PADILLA, Secretary of State of the State of California, hereby certify: Senate Public Safety Committee; Senate Bill 1437, 2018

That the attached transcript of 425 page(s) is a full, true and correct copy of the original record in the custody of this office.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this day of

February 27th, 2019

ALEX PADILLA
Secretary of State

MEMO

To: Senate Public Safety File for SB 1437 (Skinner), of the 2017-18 Legislative Session
From: Gabriel Caswell, Principal Consultant, Senate Public Safety Committee
Re: Constitutionality of SB 1437 (Skinner)

Murder is the killing of a human being, or a fetus, with malice aforethought. (PC § 187). Malice is either express or implied. (PC § 188). Murder is divided into either first or second-degree. (PC § 189).

Felony Murder Liability: All Participants in Underlying Felony Are Liable For First Degree Murder Regardless Of Intent

A killing that occurs during the commission, attempted commission, or flight from a statutorily enumerated felony is murder of the first degree. (PC § 189). Thus, a death may be accidental, unintentional, and unforeseen, but so long as it occurred during the course of, or flight from, a statutorily-enumerated felony, all participants–whether one performed the homicidal act or not, or was even at the scene of the killing-is liable for first degree murder.

Felony Murder History and Repeal In Other States

The felony-murder rule comes from English common law, but was abolished in the following common law jurisdictions:

- England (1957)
- Ireland
- Scotland
- India
- Canada (1990 in a judicial decision)

The following states have abolished felony murder:

- Hawaii
- Michigan
- Kentucky
- Ohio
- Massachusetts (Sept. 20, 2017)

Hawaii abolished felony murder legislatively in 1978, condemning its use and application in its findings. (See Hawaii Penal Code § 707-701, Commentary, *attached.*) In 1980, the Michigan Supreme Court abolished felony murder and condemned its use: "A felony-murder rule that punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, violates the most fundamental principle of the criminal law—'criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.'

On September 20, 2017, in *Commonwealth v. Brown* (2017) 81 N.E. 3d 1173, the Massachusetts Supreme Court followed the lead of these other countries and states and also abolished felony murder liability as a basis for a murder conviction. In doing so, it quoted a California Supreme Court case condemning felony murder, "We have recognized that the application of the felony-murder rule erodes "the relation between criminal liability and moral culpability." *Matchett,* 386 Mass. at 507, 436 N.E.2d 400, quoting *People v. Washington*, 62 Cal.2d 777, 783, (1965)."

Many states have limited its application significantly or abolished it for non perpetrators of the homicidal act: Arkansas, Connecticut, New Jersey, New York, North Dakota, Oregon, Washington, New Hampshire, Virginia, Wisconsin (if death occurs during felony, 15 year enhancement).

The California Supreme Court has repeatedly urged that it be abolished. However, in California, because it is statutory, the Supreme Court cannot abolish it; only the Legislature has that power.

> Defendant first asks us in effect to adopt the position taken by the Michigan Supreme Court in *People v. Aaron* (1980) 409 Mich. 672, and to abolish the felony-murder rule in a further exercise of the power we invoke in Part II of this opinion, i.e., our power to **conform the common law of this state to contemporary conditions and enlightened notions of justice.** (See, e.g., Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 393–398, and cases cited.) Defendant emphasizes the dubious origins of the felony-murder doctrine, the many strictures leveled against it over the years by courts and scholars, and the legislative and judicial limitations that have increasingly circumscribed its operation. **We do not disagree with these criticisms; indeed, our opinions make it clear we hold no brief for the felony-murder rule. We have repeatedly stated that felony murder is a "highly artificial concept" which "deserves no extension beyond its required application."** (*People v. Phillips* (1966) 64 Cal.2d 574, 582, *accord, People v. Henderson* (1977) 19 Cal.3d 86, 92–

93; *People v. Poddar* (1974) 10 Cal.3d 750, 756, 111; *People v. Satchell* (1971) 6 Cal.3d 28, 33–34; *People v. Sears* (1970) 2 Cal.3d 180, 186–187; *People v. Wilson* (1969) 1 Cal.3d 431, 440; *People v. Ireland* (1969) 70 Cal.2d 522, 539.) **And we have recognized that the rule is much censured "because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin" (Phillips, supra, at p. 583, fn. 6, of 64 Cal.2d) and because "in almost all cases in which it is applied it is unnecessary" and "it erodes the relation between criminal liability and moral culpability." (*People v. Washington* (1965) 62 Cal.2d 777, 783.)**

Nevertheless, a thorough review of legislative history convinces us that in California—in distinction to Michigan—the first degree felony-murder rule is a creature of statute. **However much we may agree with the reasoning of *Aaron*, therefore, we cannot duplicate its solution to the problem: this court does not sit as a super-legislature with the power to judicially abrogate a statute merely because it is unwise or outdated.** (See *Griswold v. Connecticut* (1965) 381 U.S. 479, 482; *Estate of Horman* (1971) 5 Cal.3d 62, 77; *People v. Russell* (1971) 22 Cal.App.3d 330, 335.)

People v. Dillon (1983) 34 Cal. 3d 441

Aider and Abettor Liability For Second Degree Murder Under the Natural and Probable Consequences Doctrine: Vicarious Liability

To be liable for second-degree murder, one has to act with implied malice, that is act with a "conscious disregard for human life." It is important to note that in the context of the natural and probable consequences doctrine of second-degree murder, a co-participant in a crime does not have to intend to kill. A person can engage in behavior with co-participants (i.e. a group fight outside of a high school) – this is referred to as the "target offense" -- and if one of the co-participants does an act that results in a death – the "non target offense" -- all of his or her co-participants can be liable for second degree murder.

By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. Because the nontarget offense is unintended, the *mens rea* of the aider and abettor

> with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.

People v. Chiu (2014) 59 Cal.4th 155, 164, underline added, citations omitted.

In *Chiu*, for example, there was a group fight, the prosecution alleged that the target offense was either disturbing the peace or assault, and the non-target offense was murder, as Chiu's confederate retrieved a gun from a car and shot a participant. Although Chiu did not personally commit the homicidal act, nor was there evidence that he personally intended for a homicide to occur -- he was liable for second degree murder under the natural and probable consequences doctrine.

Thus, this is a negligence standard – whether the crime was "reasonably foreseeable." In the context of young offenders, or offenders with particular mental illnesses, there is no "reasonable 20 year old person standard" or "reasonable person suffering from PTSD." A trier of fact will judge the defendant with an "objective standard," notwithstanding issues of maturity, brain development, etc. See *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 "The common law does not take account of a person's mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds 'the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.' (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)"

Penal Code: Culpability vs. Punishment

In the Penal Code, there are statutes that define the crime, or define the degree of the crime. Then, there are provisions that provide for the punishment for the crime. Sometimes, the elements of the crime and the punishment occur in the same statute. Many times, the elements of the crime and the punishment are established in different code sections and have been set forth at different times and by different legislative bodies, i.e. the legislature or the voters.

For example, Penal Code § 496, receipt of stolen property, establishes both liability for the crime and the punishment for the crime in the same subsection. The elements of the offense (what establishes one's culpability crime) are in italics; the punishment for the crime is underlined.

(a) Every person who *buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained*, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the

property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

In contrast, robbery, Penal Code § 211, enacted in 1872, establishes only the elements of the offense:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

"Fear" is defined in Penal Code § 212. Whether robbery is first or second degree is set forth in Penal Code section 212.5.

The punishment for robbery and attempted robbery is set forth in another statute, Penal Code § 213:

(a) Robbery is punishable as follows:
  (1) Robbery of the first degree is punishable as follows:
    (A) If the defendant, voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house, a vessel as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, a trailer coach as defined in the Vehicle Code, which is inhabited, or the inhabited portion of any other building, by imprisonment in the state prison for three, six, or nine years.
    (B) In all cases other than that specified in subparagraph (A), by imprisonment in the state prison for three, four, or six years.
  (2) Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years.
(b) Notwithstanding Section 664, attempted robbery in violation of paragraph (2) of subdivision (a) is punishable by imprisonment in the state prison.

Murder Culpability and Punishment Are Set Forth In Different Statutes

In the case of murder, there are different statutes – enacted at different times (over 100 years apart) and by different bodies -- that set forth liability for murder (what constitutes the crime of murder and the degree); the degree of murder; and the punishment for murder.

Penal Code § 187, originally enacted in 1872, establishes the crime of murder,

> § 187. "Murder" defined
>
> (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.
> (b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply . . .
> (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

Penal Code § 188, also originally enacted in 1872, defines "malice":

> Such malice may be express or implied. 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.
>
> When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, 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.

Penal Code § 189 establishes the elements of first degree murder and sets forth felony murder.

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means

of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

> As used in this section, "destructive device" means any destructive device as defined in Section 16460, and "explosive" means any explosive as defined in Section 12000 of the Health and Safety Code.

> As used in this section, "weapon of mass destruction" means any item defined in Section 11417.

> To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

Penal Code § 189 was originally enacted in 1872. It has been amended many times since then.[1] The punishment for (***no***t the definition of) first and second-degree murder under is set forth in Penal Code § 190(a).

> (a) Every person guilty of murder in the first degree shall be punished by 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 penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.
> Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

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[1] Enacted in 1872. Amended by Code Am.**1873-74**, c. 614, p. 427, §16;Stats.1**949**, First Ex.Sess., c. 16, p. 30, § 1, eff. Jan. 6, 1950; **Stats.1969**, c.923, p. 1852, § 1; **Stats.1970**, c. 771, p. 1456, § 3, eff. Aug. 19,1970;**Stats.1981**,c. 404, p. 1593, § 7; **Stats.1982**, c. 949, p. 3438, § 1, eff. Sept. 13, 1982; **Stats.1982**, c. 950, p. 3440, § 1, eff. Sept. 13, 1982; Initiative Measure (Prop. 115), approved **June 5, 1990**, eff. June 6, 1990 **Stats.1993**, c. 609, (S.B.310), § 1; Stats.1993, c. 610 (A.B.6), § 4, eff. Oct. 1, 1993; Stats.1993, c. 610 (A.B.6), § 4.5, eff. Oct. 1, 1993, operative Jan. 1, 1994; Stats.1993, c. 611 (S.B.60), § 4, eff. Oct. 1, 1993; Stats.1993, c. 611 (S.B.60), § 4.5, eff. Oct. 1, 1993, operative Jan. 1, 1994**; Stats.1999**, c. 694 (A.B.1574), § 1; **Stats.2002**, c. 606 (A.B.1838), § 1, eff. Sept. 17, 2002; **Stats.2010**, c. 178 (S.B.1115), § 51, operative Jan. 1, 2012.)

This portion of Penal Code § 190 was enacted in 1978 by Proposition 7 or the Briggs Initiative. Thus, the voters set the punishment for first and second degree murder. The initiative did not amend Penal Code § § 187-189 in any way nor do the enacted statutes say anything about what acts or mental state constituted a defendant's culpability for first or second degree murder.

The ballot summaries to Proposition 7 (*attached*) also say nothing about culpability for murder, or the elements of murder. The ballot summaries say nothing about accomplice liability, or about when a defendant may be found guilty of first degree murder or second degree murder. It only regarded the punishment for those found guilty of first or second degree murder.

The Distinction Between Culpability and Punishment Is A Cornerstone of our Jury System

The distinction between culpability and punishment exists not only in our statutes, but in our jury system itself. In our system, the jury (or the court, if a jury has been waived) determines a defendant's guilt based on the facts presented. The jury is instructed on the elements of the offenses and the jury decides if the prosecution has established all of the elements of the offense charged. The jury is explicitly instructed not to consider punishment or sentencing. (See CALCRIM 101; 706 [jury may not consider punishment when deciding special circumstance], attached.) The jury determines the fact; the judge imposes the punishment – subject to statutory limitations -- after the finding of guilt.

One Must Distinguish between Felony Murder *Simpliciter* (Penal Code § 189) and Felony Murder Special Circumstance (Penal Code § 190.2 (a)(17)

It is very important not to confuse felony murder *simpliciter* (Penal Code §189, enacted in 1872) with felony murder special circumstances as enacted by the voters in 1978 by repealing and amending Penal Code § 190.2(a)(17). There are critical distinctions between the two.

For aiders and abettors in the underlying felony, but not the actual killers, felony murder special circumstances (PC § 190.2(a)(17) imposes additional requirements for a conviction. These additional requirements are that the accomplice be both 1) a "major participant" in the underlying felony and 2) act with "reckless indifference to human life." Felony murder *simpliciter* (PC § 189) does not impose these additional requirements. (*People v. Mil* (2012) 53 Cal. 4th 400, 407 [discussing additional requirements for non-killer under § 190.2 as held by the court in *People v. Anderson* (1987) 43 Cal. 3d 1104 and as Penal Code § 190.2(c) and (d) were added by the voters in Proposition 115.]) (See CALCRIM 540B and CALCRIM 703, *attached.*)

In *People v. Banks* (2015) 16 Cal. 4th 788, 810 the Court held that to conflate elements of felony murder 189 with special circumstance felony-murder for non-killers violates the constitution.

A Special Circumstance Is Charged Separately. The Jury Is Instructed With Separate Instructions And Must Make A Separate Factual Inquiry.

As § 189 and § 190.2 are different statutes, and contain different requirements, the court process is also distinct. A person may be charged and convicted of first-degree murder under a felony murder theory and not be charged with and/or convicted of felony murder special circumstances. These are separate statutes and require separate charges and jury findings.
If the prosecution wants to charge a special circumstance, then it must be charged separately from the murder charge. In such a case, only if and when the jury finds the defendant guilty of first degree murder, does it then turn to to the special circumstance charge. The jury is instructed separately on the special circumstance and on the evidence required to prove the special circumstance. (See CALCRIM 700-708, 730.) In order to make a true finding, the elements of the special circumstance must be proven beyond a reasonable doubt. The jury will be given a separate verdict form to determine whether the special circumstance listed in 190.2(a) has been established beyond a reasonable doubt.

The California Supreme Court has held that the special circumstance finding that the jury makes when they consider whether defendant is guilty of Penal Code § 190.2 is not a sentencing function. As Penal Code section 190.2(a) is a separate and distinct statute from felony murder *simpliciter*, (or other murder charges) there must be a separate factual determination, separate instructions, and separate elements.

> Proceedings do not move into the penalty, or sentencing, phase until after a defendant is convicted of first degree murder *and* the special circumstance is found to be true. (Pen.Code, §§ 190.1, 190.2.) In the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen.Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole. The fact or set of facts to be found in regard to the special circumstance is no less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which, when found by a jury, define the crime rather than a lesser included offense or component.

People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803, italics in original, footnote omitted.

California Supreme Court Case Law Authorizes An Amendment to Penal Code § § 189 or 188 For Accomplice Liability by A Majority Vote

A. The Law

The California Supreme Court has repeatedly held that the Legislature is free to amend statutes, despite the fact that there has been a voter initiative, when the amendment addresses the same general subject matter that an initiative addresses. The Legislature is free to address:

1) a related but distinct area of law or
2) a matter that an initiative does not "specifically authorize or prohibit."

(*People v. Superior Court (Pearson)* (2010) 48 Cal. 4th 464; *People v. Kelly (2010)* 47 Cal. 4th 1008; *People v. Cooper* (2002) 27 Cal. 4th 38

Only when the statutory language is unclear may a court look to the ballot materials to determine voter intent. A court (or in this case the legislature) may not find read into the language some assumed voter intent not apparent from the language of the statute. If there is ambiguity, then the ballot materials may be examined to divine the voter intent. (*People v. Superior Court* (*Pearson*) (2010) 48 Cal. 4th 564, 571.)

1. *People v. Superior Court (Pearson)* (2010) 48 Cal. 4th 464

Pearson was a case in which the Court addressed Legislative amendment of the same statute that was added by an initiative. (Penal Code § 1054)[2] After Proposition 115, the Legislature added Penal Code § 1054.9, passing it with a majority, which allowed for post-conviction discovery on habeas. The district attorney opposed a motion for post conviction discovery, arguing that Penal Code § 1054.9 was an unconstitutional amendment of Proposition 115. The Court looked to the language of the initiative to say that, notwithstanding Prop 115's language that no discovery in criminal cases should occur except as authorized by its language, post-conviction discovery on habeas is a related but distinct area of law not prohibited by 115.

> We have described an amendment as "a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) But this does not mean that any legislation that concerns the same subject matter as an initiative, or even augments an initiative's provisions, is necessarily an amendment for these purposes. "The Legislature remains free to address a ' "related but distinct area" '

[2] In contrast, Propositions 7, 21, 36, enacted or amended different statutes – not § § 187-189. Proposition 115 amended Penal Code Section 189, adding crimes. Those amendments are discussed below.

> [citations] or a matter that an initiative measure 'does not specifically authorize or prohibit.' " (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025–1026; see also *Cooper*, *supra*, at p. 47; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 830, 81 Cal.Rptr.3d 461.) In deciding whether this particular provision amends Proposition 115, we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits.

The Court held that post-conviction discovery was a related but distinct area of law, not specifically prohibited by Proposition 115. The Court also stated that if the statutory language was subject to multiple interpretations, a court could look to ballot summaries and arguments to determine voter intent.

> "[T]he voters should get what they enacted, **not more and not less."** (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)
> ¶ This is a question of statutory interpretation. When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and **we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language**. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, 56 Cal.Rptr.3d 814, 155 P.3d 226.)
> *Pearson, supra,* 48 Cal. 4th at 571, emphasis added.

1. *People v. Kelly* (2010) 47 Cal. 4th 1008

Although *Kelly* involved an entirely different subject matter, it is useful to examine *Kelly* because it involved the scope of what the Legislature may do on a subject matter that has previously been passed by voter initiative.

Kelly was a case involving the Compassionate Use Act (CUA) ballot initiative and the subsequent Legislatively-enacted Medical Marijuana Program (MMP).
The CUA, enacted by the voters, allowed for a person who was facing felony charges of marijuana possession to present a defense that the amount s/he possessed was "reasonably necessary" for his or her medical needs. The CUA did not impose quantity limitations. The CUA did not protect a person from arrest, it allowed for an affirmative defense at trial.

The Legislature then enacted the MMP that, among other things, set up an identification card program for Medical Marijuana users. The MMP provided protection from arrest to those who had a valid MM card. However, the MMP also set up a quantity limit on possession that purported that 8 oz. of marijuana and a certain number of plants was what was "reasonably necessary" to qualify not only for protection from arrest, but the limits of possession under the CUA.

As to limiting the amount to possess to present an affirmative defense under the CUA, the Court held that that was an unconstitutional amendment of the CUA. However, as to the main issue, the *Kelly* Court reversed the Court of Appeal, and found that the 8 oz. quantity limitations in the MMP for those who voluntarily participated in the identification card program of the MMP was *not* an unconstitutional amendment of the CUA.

In so holding, the Court re-affirmed a broader view of the Legislature's ability to pass legislation despite the fact that the general subject matter has been the subject of an initiative and questioned past cases holding otherwise. The Court's holding means that the fact that voters enacted an initiative related to something does not mean that henceforth, that initiative occupies the entire field related to the subject matter. The Legislature was free to legislate medical marijuana, or institute an identification card program with its own rules, ("a related but distinct area of law") so long as the legislation doesn't authorize or prohibit that which the initiative authorizes or prohibits. To the extent the MMP limited an affirmative defense under CUA, it would be unconstitutionally applied. To the extent it created distinct legislation that involves the same matter, (medical marijuana), it was fine.

2. *People v. Cooper* (2002) 27 Cal. 4th 38

In *Cooper,* the Court held that the Legislature's 1994 enactment of § 2933.1, which limited pre-sentence conduct credits under § 4019 for people convicted of murder, was not an unconstitutional amendment of Proposition 7.

The Court found that the amendment was constitutional because the Briggs Initiative *did not specifically authorize or prohibit presentence conduct credit.* Thus, section 2933.1 was not an invalid modification of the initiative.

B. Proposition 7 Does Not Prohibit The Legislature From Amending Penal Code § § 188 or 189

As noted above, Proposition 7 repealed and added Penal Code § § 190, et. seq. It did not repeal or amend in any way amend Penal Code § § 188 or 189.

In Proposition 7, the voters set the punishment for first and second degree murder. Not only did Proposition 7 not amend Penal Code § § 187-189, but the statutes that it did enact say nothing about what acts or mental state constituted a defendant's liability for first or second- degree murder under Penal Code § § 187-189. The statutory language said nothing about an accomplice's liability under Penal Code § 189 nor for second degree murder under § 188.

Under the two-part inquiry regarding whether the proposed amendment is a "related but distinct" are of law, or an amendment does something that the initiative expressly prohibits: 1) culpability for murder is related to the punishment one can receive, but as addressed above, culpability and punishment are clearly distinct, both in the statutes, and in our entire jury system; and 2) there is nothing in Proposition 7 that specifically prohibits the Legislature from amending the statutes that govern this culpability.

If there is any ambiguity in the statutory language of Proposition 7, then one could look to the ballot materials. The ballot summaries say nothing about aider and abettor liability, about when a defendant may be found guilty of first degree murder or second degree murder pursuant to Penal Code § § 188 or 189. There is a limited discussion about the intent requirement for the death penalty or a special circumstance requirement. However, that is different, as the California Supreme Court has repeatedly held. The materials regarded the punishment for those found guilty of first or second degree murder, not the culpability for murder.

The Legislature Has Amended Penal Code § 189 since the passage of Proposition 7

The provisions of Proposition 7 may only be amended by a statute that becomes effective upon the approval of the voters. Penal Code § 189 was not addressed in Proposition 7. As further evidence of this, it is thus important to note that Penal Code § 189 has been amended by the Legislature multiple times since 1977.

Between 1977 and 1990, (the time of Proposition 115), Penal Code § 189 was amended twice. In 1981, § 189 was amended to clarify the definition of "deliberate and premeditated." In 1982, § 189 was amended to add that a murder from the knowing use of metal piercing ammunition was first-degree murder. Neither of these amendments were passed by initiative. Thus, the opinion at the time was that Proposition 7 did **not** prevent the Legislature from amending § 189.

Further, in 1989, the Legislature enacted § 190.05, which allowed for either a 15 to life punishment or an LWOP sentence for second-degree murder when that person had committed a prior first or second degree murder. § 190.05 also enacted specific evidentiary requirements that must be met before a person could be liable for the enhanced penalty. Thus, § 190.05, adopted

by Legislative statute, increased the punishment for a particular kind of second-degree murder. It does not appear that this statute was viewed as something that was prohibited by Penal Code § 190(a) of the Briggs Initiative, which provided for a 15 to life sentence for second-degree murder.

A. Proposition 115 Does Not Prevent The Legislature From Amending Penal Code § 189 To Affect Non-Killer Liability. Proposition 115 Did Not Amend Penal Code § 188.

Penal Code § 189, initially enacted in 1872, was amended by Proposition 115 in 1992. Sec. 9 of Proposition 115 added the following crimes to the list of felony-murder: kidnapping, trainwrecking, and certain sex crimes (Penal Code §§ 286, 288, 288a, and 289.) This was the text of Sec. 9, Proposition 115:

> Section 189 of the Penal Code is amended to read:
> 189. All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, **<<+ kidnapping, train wrecking,+>>** or any act punishable under <<-* * *->> **<<+Section 286, 288, 288a, or 289,+>>** is murder of the first degree; and all other kinds of murders are of the second degree.
>
> As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.
>
> To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or act.

Thus, in contrast to Proposition 7, which repealed and replaced all the statutes it addressed (again, not Penal Code § § 187-189), Proposition 115 did not repeal and replace all of Penal Code § 189, it simply added language to the existing Penal Code § 189.

Proposition 115 did not amend or address second-degree murder in Penal Code § 188.

Proposition 115 also contained the following language:

> SEC. 30. The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

It is thus true that the Legislature cannot abolish the statutory provisions added to Penal Code § 189 --kidnapping, train-wrecking, and Penal Code sections 286, 288, 288a, and 289 -- by a 2/3 vote of the Legislature.

However, merely because these provisions were added to Penal Code §189 by Proposition 115 does not end the inquiry as to those who did not commit the homicidal act.

Proposition 115, which amended Penal Code § 189 by adding other felonies to support felony-murder liability, does not say anything about non-killer liability under those provisions (kidnapping, train wrecking, Penal Code sections 289, 288, 288a, or 289) Thus, it does not contain a reference to the body of law that imposes liability for murder on mere accomplices under the felony murder doctrine, nor does it specifically authorize or prohibit anything regarding accomplice liability under felony-murder.

Thus, although the Legislature cannot strike out the provisions added by Proposition 115, it can limit liability for accomplices who did not commit the homicide.

C. Proposition 21 Does Not Prevent Legislative Amendments To Penal Code § § 188 or 189.

1. The Provisions of Proposition 21 (2000), The Gang Violence and Juvenile Crime Prevention Act of 1998

Juvenile Crime

Proposition 21 provided that Juveniles 14 years of age or older charged with committing certain types of murder or a serious sex offense, under Prop 21, were generally no longer eligible for juvenile court and prosecutors were allowed to directly file charges against juvenile offenders in adult court for a variety of circumstances without having to get the permission of juvenile court to do that. This was changed with Proposition 57.

Proposition 21 also provided that probation departments did not have the discretion to determine if juveniles arrested for any one of more than 30 specific serious or violent crimes should be released or detained; rather, Prop 21 made detention mandatory under those defined circumstances.

The initiative also prohibited the use of informal probation for any juvenile offender who committed a felony and reduced confidentiality for juvenile suspects and offenders by barring

the sealing or destruction of juvenile offense records for any minor 14 years of age or older who has committed a serious or violent offense.

Gang Enhancement

Proposition 21 amended PC § 186.22. Section 186.22(a) is a substantive crime of membership in a gang. Proposition 21 added 186.22(i) to affirm an appellate court holding that in order to be convicted of § 186.22(a), it is not necessary that the defendant devote a "substantial amount of time to the gang." (Proposition 21, Sec. 35.)

Proposition 21 increased the extra prison terms for gang-related crimes to two, three, or four years, for non-serious and nonviolent crimes. For serious or violent crimes done for "the benefit of the gang," the new extra prison terms would be five and ten years.

Serious and Violent Crimes

Proposition 21 also added to the list of serious or violent offenses, making most of them subject to the longer sentence provisions of existing law related to serious and violent offenses. (PC § § 667.5 and 1192.7)

Special Circumstances

Proposition 21 also provided that if it is shown that a defendant committed a murder for the benefit of a gang, that defendant was eligible for the death penalty or LWOP. (Penal Code § 190.2(a)(22).)

Although the statutes in Proposition 21 contain multiple references to "murder" and "attempted murder" "voluntary manslaughter," and "unlawful homicide," these references were present in the existing statutes, i.e. Penal Code § § 186.22, et. seq.; 629.52, 667.5, 1192.7. Proposition 21 merely increased the punishment in certain circumstances related to gang crimes, including authorizing a new special circumstance for a murder done for the benefit of the gang.

1. The Findings and Declarations of Proposition 21

The Findings and Declarations of Proposition 21 made clear that its purpose was related to increasing punishment for juvenile offenders and for gang crimes.

SECTION 1. SHORT TITLE.

This act shall be known, and may be cited, as the Gang Violence and Juvenile Crime Prevention Act of 1998.

SEC. 2. FINDINGS AND DECLARATIONS.

The people find and declare each of the following:

(a) While overall crime is declining, juvenile crime has become a larger and more ominous threat. The United States Department of Justice reported in 1996 that juvenile arrests for serious crimes grew by 46 percent from 1983 to 1992, while murders committed by juveniles more than doubled. According to the California Department of Justice, the rate at which juveniles were arrested for violent offenses rose 54 percent between 1986 and 1995.
(b) Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized in recent years. Some gangs, like the Los Angeles-based 18th Street Gang and the Mexican Mafia are properly analyzed as organized crime groups, rather than as mere street gangs. A 1996 series in the Los Angeles Times chronicled the serious negative impact the 18th Street Gang has had on neighborhoods where it is active.
(c) Vigorous enforcement and the adoption of more meaningful criminal sanctions, including the voter-approved "Three Strikes" law, Proposition 184, has resulted in a substantial and consistent four year decline in overall crime. Violent juvenile crime has proven most resistant to this positive trend.
(d) The problem of youth and gang violence will, without active intervention, increase, because the juvenile population is projected to grow substantially by the next decade. According to the California Department of Finance, the number of juveniles in the crime-prone ages between 12 and 17, until recently long stagnant, is expected to rise 36 percent between 1997 and 2007 (an increase of more than one million juveniles). Although illegal drug use among high school seniors had declined significantly during the 1980s, it began rising in 1992. Juvenile arrest rates for weapons-law violations increased 103 percent between 1985 and 1994, while juvenile killings with firearms quadrupled between 1984 and 1994. Handguns were used in two-thirds of the youth homicides involving guns over a 15-year span. In 1994, 82 percent of juvenile murderers used guns. The number of juvenile homicide offenders in 1994 was approximately 2,800, nearly triple the number in 1984. In addition, juveniles tend to murder strangers at disproportionate rates. A murderer is more likely to be 17 years old than any other age, at the time that the offense was committed.
(e) In 1995, California's adult arrest rate was 2,245 per 100,000 adults, while the juvenile arrest rate among 10 to 17-year-olds was 2,430 per 100,000 juveniles.

(f) Data regarding violent juvenile offenders must be available to the adult criminal justice system if recidivism by criminals is to be addressed adequately.

(g) Holding juvenile proceedings in secret denies victims of crime the opportunity to attend and be heard at such proceedings, helps juvenile offenders to avoid accountability for their actions, and shields juvenile proceedings from public scrutiny and accountability.

(h) Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity.

(i) The rehabilitative/treatment juvenile court philosophy was adopted at a time when most juvenile crime consisted of petty offenses. The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders.

(j) Juvenile court resources are spent disproportionately on violent offenders with little chance to be rehabilitated. If California is going to avoid the predicted wave of juvenile crime in the next decade, greater resources, attention, and accountability must be focused on less serious offenders, such as burglars, car thieves, and first time non-violent felons who have potential for rehabilitation. This act must form part of a comprehensive juvenile justice reform package which incorporates major commitments to already commenced "at-risk" youth early intervention programs and expanded informal juvenile court alternatives for low-level offenders. These efforts, which emphasize rehabilitative protocols over incarceration, must be expanded as well under the provisions of this act, which requires first time, non-violent juvenile felons to appear in court, admit guilt for their offenses, and be held accountable, but also be given a non-custodial opportunity to demonstrate through good conduct and compliance with a court-monitored treatment and supervision program that the record of the juvenile's offense should justly be expunged.

(k) Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence. Californians deserve to live without fear of violent crime and to enjoy safe neighborhoods, parks, and schools. This act addresses each of these issues with the goal of creating a safer California, for ourselves and our children, in the Twenty-First Century.

CRIMES—JUVENILES—GANG VIOLENCE, 2000 Cal. Legis. Serv. Prop. 21 (WEST)

1. Proposition 21 Does Not Amend Penal Code § § 188 or 189. It Does Not Address Culpability for Murder Nor Does It Address Accomplice Liability Under Penal Code § § 188 and 189

There is nothing in Proposition 21 that established a defendant's culpability for murder, referenced culpability for felony murder, or referred to culpability for second degree murder. In fact, its references are to "murder," without reference to first or second degree murder. The only exception is the addition to 190.2(a)(22), referring to a defendant "intentionally" killing the victim, because 190.2(a) already required a first-degree murder conviction. It references

"unlawful homicide or manslaughter" and refers generally to the homicide statutes, "commencing with section 187."

Proposition 21 provides for enhancements for murders committed for the benefit of the gang. There is nothing in Proposition 21 that prohibits the legislature from amending a statute to address an accomplice's liability for felony-murder or accomplice liability for second degree murder under the natural and probable consequences doctrine. There is nothing in the proposed amendments to § § 188 or 189 that Proposition 21 even addresses, let alone prohibits. A defendant convicted of first or second degree murder (or manslaughter) would still be subject to the enhanced punishment of § 186.22 or § 190.2(a)(22) if those murders were done for the benefit of the gang.

As *Cooper* held, only if the statutory language is ambiguous should one turn to the ballot materials. There is nothing ambiguous in Proposition 21's language regarding culpability for murder. However, if one were to examine the ballot materials, (the findings and declarations to Proposition 21 are in full above) there is nothing that remotely suggests that the voters' intent of Proposition 21 was to address the way in which a defendant could be found liable for first or second degree murder. Proposition 21 clearly addressed enhanced *punishment* for gang members who were found guilty of a whole number of felonies, from vandalism to murder. There is nothing in Proposition 21 that expresses an intent by the voters to determine how a defendant may be found liable for these underlying felonies.

D. Proposition 36 Does Not Prevent Legislative Amendments To Penal Code § § 188 or 189.

1. The Provisions of Proposition 36

California voters passed Proposition 36 in 2012. Proposition 36 made changes to Proposition 184, the California Three Strikes Law, which mandated a sentencing model where individuals with a prior serious or violent felony would have their sentence doubled for any subsequent felony. The law also mandated that individuals with two prior violent or serious felonies would receive a sentence of 25 years to life for any subsequent felony. Proposition 36 changed the sentencing model as follows: 1) changed the sentencing structure to only allow life sentence when the new felony conviction is "serious or violent" (with certain exceptions listed in § 1170.12(c)(2)(C)) and 2) allows offenders serving a life sentence for a third strike that was not serious or violent to petition for resentencing.

2. The Findings and Declarations of Proposition 36

The Findings and Declarations of Proposition 36 say nothing about culpability for any of the felonies listed, but address only punishment for recidivists.

SECTION 1. Findings and Declarations:
The People enact the Three Strikes Reform Act of 2012 to restore the original intent of California's Three Strikes law--imposing life sentences for dangerous criminals like rapists, murderers, and child molesters.
This act will:
(1) Require that murderers, rapists, and child molesters serve their full sentences--they will receive life sentences, even if they are convicted of a new minor third strike crime.
(2) Restore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime.
(3) Maintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.
(4) Save hundreds of millions of taxpayer dollars every year for at least 10 years. The state will no longer pay for housing or long-term health care for elderly, low-risk, non-violent inmates serving life sentences for minor crimes.
(5) Prevent the early release of dangerous criminals who are currently being released early because jails and prisons are overcrowded with low-risk, non-violent inmates serving life sentences for petty crimes.

PROPOSITION—THREE STRIKES REFORM ACT, 2012 Cal. Legis. Serv. Prop. 36 (Proposition 36) (WEST)

1. Proposition 36 Does Not Address the Definition of Murder, Or Accomplice Liability

Proposition 36 prevents a life sentence for a third strike if the offense is not a serious or violent felony, however, where a prior conviction involved murder, Proposition 36 maintained the 25 to life penalty. Nothing in Proposition 36 effects how murder or homicide are defined; the proposition only impacts punishment and which felony convictions constitute serious and/or violent felonies.

2. Penal Code Section 1170.125 Limits the Relief A Defendant May Get Under Proposition 36. It Does Not Address the Definition of Murder.

Section 1170.125 does not freeze the definition of serious and/or violent felonies; rather it limits the relief defendants may get under Proposition 36. Section 1170.125 must be read in reference to the sections it explicitly references.

Penal Code section 1170.125 states that "for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012."

Section 1170.12(b) states that a "prior conviction of a serious and/or violent felony shall be defined as [a]ny offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state."

Section 1170.126 sets forth the provisions for re-sentencing under the revised Three Strikes law for people who are serving third strike sentences when the 3rd strike was for a non-serious/violent felony.

Thus, under 1170.12 and 1170.126 if a felony listed in 1170.12 is changed after November 2012, the person convicted does not get the benefit of re-sentencing. In that case, 1170.125 is activated — i.e. because § 189 (or whatever felony is at issue) was what it was in November 2012, not in 2018, the defendant does not get the benefit of the new legislation.

Similarly, assume a defendant is convicted for a 3rd non-serious/violent felony and has two prior serious felony convictions, one of which was for a homicide offense. Penal Code section 189 or 188 has been amended as proposed. That defendant makes the argument that s/he can't be sentenced under 3 strikes because under the facts of his or her case, s/he could not now be convicted of murder. However, pursuant to § § 1170.125 and 1170.12(c)(2)(C)(IV), the defendant does not get the benefit of any change to the murder statutes.

The purpose of amending the Penal Code to include PC 1170.125 was to 1) incorporate new punishment, enhancement, and priorability provisions, 2) set forth how resentencing provisions would work, and 3) confirm the list of convictions that would constitute serious and/or violent felonies. Nothing in this section affects how murder is defined.

Proposition 36 may confirm the list of felony convictions that constitute serious and/or violent felonies, but Proposition 36 did not define or set forth the felonious conduct that constitutes the underlying felony offense. For instance, if a legislative amendment sought to remove murder

from the list of serious and/or violent felonies, that would conflict with the voter's intent and would require a 2/3 vote. Conversely, adding or removing elements necessary to prove murder have no bearing on whether the ultimate murder conviction can be categorized as a serious and/or violent felony.

3. The Statutory Provisions of Provisions of Proposition 36 Are Not Ambiguous. However, There Is Nothing in The Ballot Materials That Discuss A Defendant's Culpability For Murder.

If statutory language in an initiative is ambiguous, then a court could look to ballot literature to determine voter intent.

There is nothing within Proposition 36 regarding whether voters intended to set a defendant's culpability for any of the felonies listed in that initiative. Further, there is nothing discussed in the ballot materials for Proposition 36 that address culpability for murder, either first or second degree, the elements of murder, or the elements of any offense listed as a serious and/or violent felony.

Through Proposition 36, voters only intended to label the offenses listed in subdivision (c) of Section 667.5 as violent and label those offenses listed in subdivision (c) of Section 1170.12 as serious. Proposition 36 sets forth punishment for recidivists who are convicted of serious or violent felonies. Proposition 36 does not set forth provisions on culpability for the offenses listed in them or set forth the elements to prove a conviction.

Attachments

- Hawaii Penal Code § 707-701, Commentary regarding abolition of felony murder
- Proposition 7 Ballot Summaries
- CALCRIM 101 (jury may not consider punishment)
- CALCRIM 706 (jury may not consider punishment when deciding special circumstance)
- Proposition 115 Ballot Summary
- CALCRIM 540B (felony murder *simpliciter*: Co-participant allegedly committed homicidal act)
- CALCRIM 703 (felony murder special circumstance when defendant not the actual killer)

SECRETARY OF STATE, ALEX PADILLA
The Original of This Document is in
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EXHIBIT 2

State of California
Secretary of State

I, ALEX PADILLA, Secretary of State of the State of California, hereby certify: Senate Public Safety Committee; Senate Bill 1437, 2018

That the attached transcript of 425 page(s) is a full, true and correct copy of the original record in the custody of this office.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this day of

February 27th, 2019

ALEX PADILLA
Secretary of State

California District Attorneys Association

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CEO
Mark Zahner

April 17, 2018

The Honorable Nancy Skinner
California State Senate
State Capitol
Sacramento, CA 95814

RE: SB 1437 – Oppose

Dear Senator Skinner:

On behalf of the California District Attorneys Association (CDAA), I regret to inform you that we are opposed to your measure, Senate Bill 1437, as currently drafted. This bill eliminates murder liability for those who participate in felonies that are inherently dangerous to human life in which a death occurs if those participants do not personally commit the homicidal act, do not act with premeditated intent to aid and abet an act in which a death would occur, or for those who do not act as a major participant in the underlying felony. While we agree that there is room for some measured reform in this area, the complete elimination of murder liability goes too far and draws no distinction between those who participate in dangerous felonies that result in the death of someone and those which do not.

There are a number of concerns raised in this bill:

First, the retroactive application of this bill applies to convictions that resulted from both jury and bench trials as well as convictions that resulted from negotiated plea bargains. Under the provisions of this measure, a resentencing hearing will necessarily require a full court record, including transcripts and exhibits, to determine the exact level of participation in the crime in order to determine whether a particular defendant is entitled to relief. In cases that resolved through a negotiated plea, no such record exists and virtually all participants in murders may qualify for relief to which they may not be entitled.

Additionally, this bill requires the prosecution to prove beyond a reasonable doubt that the petitioner falls into one of the categories that precludes resentencing. In cases that resolved through a negotiated plea, the absence of a full court record will necessarily prevent the people from establishing beyond a reasonable doubt whether a petitioner is excluded. The result will entitle virtually all petitioners who apply, even those who were major participants in the crime which resulted in death, to be entitled to a resentencing and the elimination of their well-deserved criminal liability.

Second, by placing the burden on the prosecution to prove beyond a reasonable doubt that petitioners do not qualify for resentencing, this bill will require the litigation of facts previously not litigated in the original case, particularly in cases that resolved through a plea. It is unclear from this bill whether the determination of those facts

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will be conducted by the resentencing judge or will necessitate a jury – which has significant procedural and constitutional implications as well as significant costs.

Moreover, this bill provides no exception to allow for the trial transcript to be used in a resentencing hearing. The effect of this would be to necessitate the calling of witnesses, other victims, and family members who may have been involved in the original case. The effects of this to crime victims and survivors would be devastating.

Finally, the requirements placed on a petitioner to seek a resentencing hearing merely require the submission of a request indicating that a petitioner was convicted of murder and that the prosecution theory could have included a theory of first or second degree felony murder. Charging documents, plea forms, jury verdict forms and other documents involved in the prosecution of murder cases do not specify the theory under which someone is charged or even convicted of murder. The only way to determine whether a felony murder theory was advanced in a particular case would be to examine the transcripts at trial. The effect of this provision of the bill would be to allow everyone convicted of murder – actual killers, those acting with premeditated intent, and major participants acting with reckless indifference to human life included – to successfully petition to have a resentencing hearing. 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 actual killers and those who played major roles in the killing of others during dangerous felonies.

We are committed to working to find a reasonable and measured approach to felony murder reform. Unfortunately this bill falls short and creates some potentially disastrous and costly problems that renders this bill unworkable.

I greatly appreciate your consideration of our concerns and look forward to discussing these issues further. Please don't hesitate to contact me.

Very truly yours,

Sean Hoffman
Director of Legislation

SECRETARY OF STATE, ALEX PADILLA
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EXHIBIT 3

Los Angeles Times

Op-Ed: Punish Californians for the crimes they've committed, not for murders they didn't do

By Kate Chatfield and Lara Bazelon
Aug. 20, 2018
4:05 AM

A.J. acted as a decoy in an armed robbery committed by her boyfriend in downtown San Francisco in 2005. She was sitting in a parked car a block away when he attempted to rob a second man 15 minutes later, then shot and killed him. Today, A.J. sits in prison in California serving a 25-years-to-life sentence for that murder.

Velia also sits in a California prison, also serving 25-years-to-life for murder, although she too was not present at the scene. Her crime was telling the killer where to find the victim, believing that he was only going to rob him, after the killer threatened to harm her elderly father. When Velia heard that the victim had been hurt, she came to his aid and had her father drive him to the hospital.

Bobby went to an adult prison in California at the age of 15. He spent the next 22 years there for a killing he didn't do and that he never conceived would happen during the course of a street robbery he committed with a group of teenagers.

A.J., Velia and Bobby were convicted of first-degree murder — the crime that carries the harshest penalties — under what's called the felony murder rule. The law permits this draconian outcome whenever an individual agrees to commit a serious crime and a death occurs, even if the individual didn't intend for the victim to be killed, didn't foresee or know that a killing would occur, or didn't cause the death. In 1983, the California Supreme Court called the felony murder rule "barbaric" because it divorced intent from culpability, but the justices said that only the Legislature could fix the problem.

The felony murder rule is not only unjust on its face, it is unjust in its application.

Thirty-five years later, this important change may finally come about through Senate Bill 1437, jointly authored by state Sen. Nancy Skinner (D-Berkeley) and Sen. Joel Anderson (R-Alpine). The bill is straightforward: If a participant in a crime did not kill, intend to kill, or did not act

with reckless indifference to human life in the death in question, that person cannot be found liable for murder.

The idea is to punish defendants for what they did — robbery or burglary, for example — not for a murder they never fathomed. This bill also applies retroactively to allow people such as A.J., Velia and Bobby — who didn't kill anyone, didn't assist in a killing, and didn't even act with recklessness — to have a court determine if they should be resentenced.

SB 1437 is not, as some opponents have claimed, a get-out-of-jail-free card. Far from it. Each defendant is still guilty of the serious felony he or she committed.

The felony murder rule is not only unjust on its face, it is unjust in its application. A recent survey of California prisoners revealed that the felony murder rule was disproportionately used against youth of color and that 72% of women serving time for first-degree murder under the felony murder rule were not the perpetrators of the homicide.

Although exact numbers are hard to come by, research indicates that there may be up to 800 people who did not kill nor intend to kill, but who have nevertheless been sentenced to life imprisonment in California. Despite the way they've been labeled, these people are not murderers. They should be provided the opportunity to return to court and ask to be resentenced.

All other nations that trace their legal systems to England's common law tradition — including England, Canada, Ireland and India — have abolished felony murder. Some states, including Massachusetts, Hawaii, Kentucky and Michigan, have also abolished it. But SB 1437 merely revises California's statute, so as to better apportion criminal liability according to individual responsibility.

If SB 1437 is signed into law, anyone who intentionally kills another person or aids and abets the killer can still be found guilty of murder. Anyone who conspires with another to commit a murder can still be found guilty of murder. Anyone who acts with reckless indifference to human life can still be found guilty of murder. The bill would not change the way gang members are prosecuted for killings carried out to benefit their gangs. It would not affect the three-strikes law or any of the hundreds of "enhancements" — such as using a weapon — that mandate long sentences for serious felonies.

The broad application of the felony murder rule in California has resulted in scores of what amount to wrongful convictions. A.J., Velia and Bobby should be held accountable for what they did, not sent away for life — and at great taxpayer expense — for murders they did not commit, intend or foresee.

Kate Chatfield is the policy director for Re:Store Justice, a California criminal justice reform organization. Lara Bazelon is an associate professor at the University of San Francisco School of Law, where she directs the Criminal and Juvenile Justice Clinic and the Racial Justice Clinic. Bazelon is on the board of directors of Re:Store Justice.

The New York Times

If He Didn’t Kill Anyone, Why Is It Murder?

Shawn Khalifa, center, with, from left, his sister, nephew and mother. Mr. Khalifa is serving 25 years to life, convicted under the felony murder rule.

By Abbie VanSickle

- June 27, 2018

SACRAMENTO — Late in the evening on Jan. 27, 2004, four teenagers broke into an elderly neighbor's house in the Southern California town of Perris, looking for cash.

One of them, Shawn Khalifa, guarded the back door. Shawn, who had just turned 15, slipped into the kitchen and stole some chocolate candies. He briefly saw that the homeowner was seriously hurt, and he ran back outside.

No one accused Shawn of laying a hand on the victim, Hubert Love, 77, but a jury convicted the teenager of first-degree murder.

Mr. Khalifa, now 29 and serving a sentence of 25 years to life, is one of hundreds of people convicted in California under a legal doctrine known as the felony murder rule, which holds that anyone involved in certain kinds of serious felonies that result in death is as liable as the actual killer.

"I knew I didn't kill anyone," Mr. Khalifa said. "I felt and kind of knew that I was going to spend the rest of my life in prison. It didn't seem like there was any room to be a human being again. My life was over."

But the hard doctrine that sent Mr. Khalifa to prison may be softening. A bill moving through the California Legislature would change state law so that only someone who actually killed, intended to kill or acted as a major player with "reckless indifference to human life" could face murder charges.

The measure, already approved by the California Senate, cleared another important hurdle Tuesday when it won the blessing of the Assembly's Public Safety Committee, despite strong opposition from law enforcement groups.

If the bill passes the State Assembly, California will join a growing number of states in abolishing or severely restricting felony murder. Over the decades, legislatures in Hawaii and Kentucky have abolished the rule, and, last fall, Massachusetts joined Michigan in ending it through the courts. The Pennsylvania Legislature is weighing a bill aimed at curtailing the practice.

"Many times in California, if you didn't commit the murder, didn't know the murder occurred, you could be charged and have the same sentence as the actual murderer," said State Senator Nancy Skinner, who introduced the legislation in part because, she said, felony murder cases disproportionately affect women and young black and Latino men. "They had bad judgment, but they didn't commit a murder — and when I understood this, I knew we had to fix that."

Image

Mack Wilson held a photo of his son Neko Wilson, who was charged under the felony murder rule, during the committee hearing in Sacramento.Credit...Max Whittaker for The New York Times

The total number of people serving sentences for felony murder in California is unknown because the cases are not tracked separately from other murder convictions. But proponents of the bill estimate that it is between 400 and 800. In 2016, lawmakers rejected a bill that would have required prosecutors to collect data on felony murder prosecutions and report it to the state.

A survey answered by 1,000 prisoners convicted of murder found that the felony murder rule disproportionately affects women and young people. Of the women serving life sentences for murder in California, 72 percent were not the killers, according to the survey, which was conducted by Restore Justice, the Youth Justice Coalition and the Anti-Recidivism Coalition, California groups that support criminal justice reform.

The origins of the felony murder rule are murky. Generations of law students have been taught that it is a relic of British common law.

But Guyora Binder, a professor at the University at Buffalo School of Law and a leading expert on felony murder, said he had found otherwise. He traced modern felony murder doctrine to the 1820s, when state legislatures in the United States codified criminal offenses.

England abolished its version of felony murder in 1957, followed by India, Canada and other common law countries, and the United States remains the only country where the felony murder doctrine still exists. A Michigan Supreme Court ruling that did away with it in that state nearly four decades ago called it “a historic survivor for which there is no logical or practical basis for existence in modern law.”

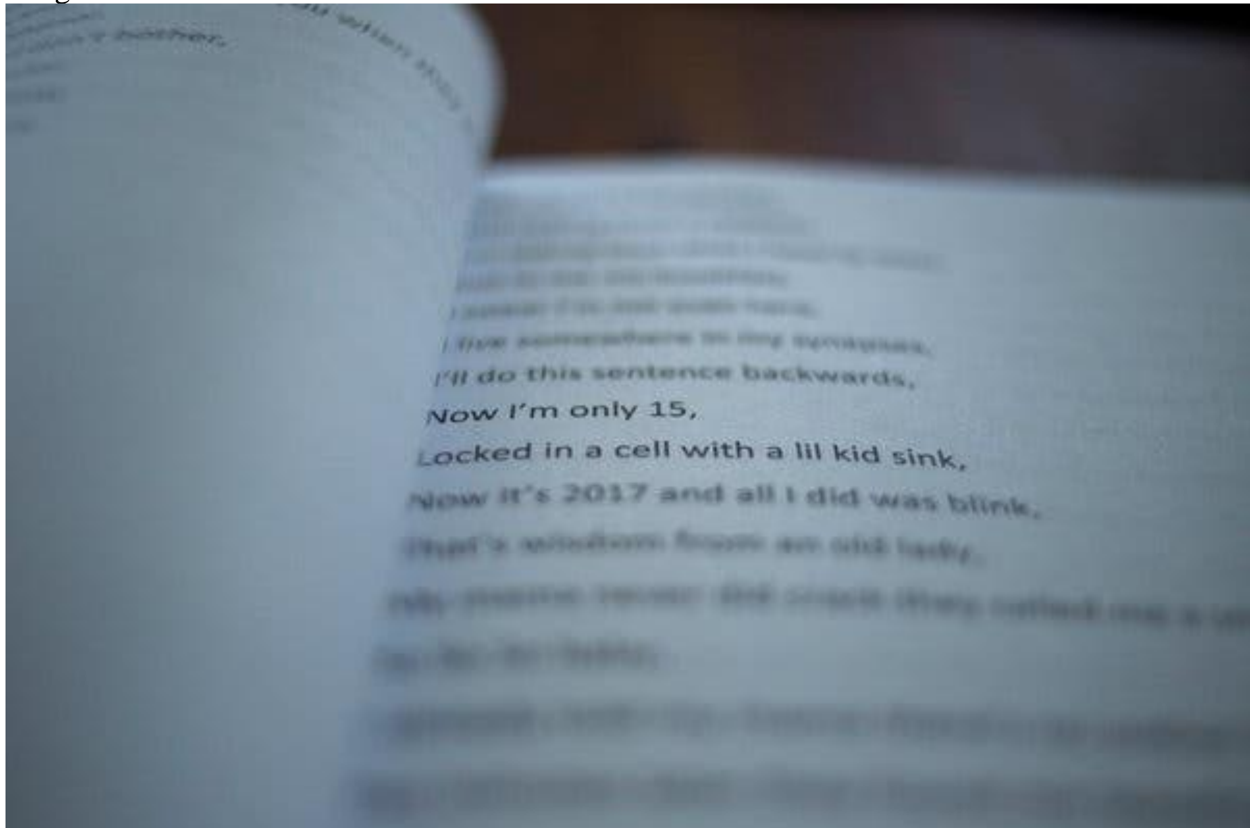
The proposed California legislation would not undo felony murder entirely, but it would carve out the group of people who had very little involvement in the underlying crime and no intent to kill anyone, Mr. Binder said. That could make it a model for other states.

“This proposed bill is a very clever reform because it addresses the least popular and the least defensible aspects of the rule,” he said.

But opponents of the bill argue that people will be less likely to commit crimes if they know they will face maximum penalties if someone dies.

“The deterrence value is people are discouraged from participating in serious, dangerous felonies,” said Sean Hoffman, legislative director for the California District Attorneys Association, when he testified Tuesday in opposition to the bill.

Image



Lines from of a poem written by Mr. Khalifa.Credit...Jenna Schoenefeld for The New York Times

Prosecutors and victims' rights advocates say that the doctrine is justified because people who choose to participate in dangerous crimes do so knowing that an innocent person could die.

"The way the legislation is written, it gives everyone a path out, and only penalizes the actual shooter," said Eric Siddall, a prosecutor and vice president of the Association of Deputy District Attorneys for Los Angeles County. Mr. Siddall said the legislation could make gang prosecutions more difficult.

Critics of the rule say felony murder can lead to absurd results. In some cases, accomplices have been charged with felony murder when the death actually occurred at the hands of the police or even the victim.

In one notorious 2012 case in Indiana, a group of young men who became known as the Elkhart Four, broke into a house searching for cash. The homeowner, who was napping upstairs, awoke, grabbed his gun and fatally shot one of the intruders. The remaining defendants were convicted of first-degree murder under the felony murder rule. The State Supreme Court later overturned three of the four convictions, but the felony murder rule remains.

California courts have criticized felony murder, while leaving the rule intact. In 1983, the California Supreme Court called felony murder a "barbaric" rule of "dubious origins" from a "bygone age," but concluded that only the Legislature could change it.

A killing in California in 1995 drew national attention after a group of young men received life sentences. Five teenagers had gone to another high school student's house near Malibu to buy marijuana. During an altercation, one of the five fatally stabbed another teen. Four of the five — Micah and Jason Holland, Brandon Hein and Anthony Miliotti — were prosecuted for felony murder.

"That case still haunts me," said Robert Derham, a lawyer who represented Micah Holland on appeal. "It's completely artificial. The punishment doesn't fit the crime."

Tuesday's committee hearing focused on the human impact of the felony murder rule.

Jacque Wilson, a longtime San Francisco deputy public defender, recounted how in the summer of 2009 he got a call that his younger brother Neko had been accused of planning to rob a couple at a marijuana grow house in the Central Valley. During the robbery the couple, Gary and Sandra De Bartolo, were killed.

According to testimony at one defendant's trial, Neko Wilson, 27 at the time, never went inside the house, but he was charged with first-degree murder.

Image

At a public safety committee hearing, State Senator Nancy Skinner defended a bill that would reform the felony murder rule.Credit...Max Whittaker for The New York Times

“At that point, my world stopped,” Jacque Wilson said. “I had to explain it to my dad, how his son could be charged with murder without killing anyone.”

Mr. Wilson eventually took over as lead counsel to represent his brother, who has been in Fresno County Jail awaiting trial for almost a decade.

California has become a kind of national laboratory for prison reform since 2011, when the United States Supreme Court upheld a court-imposed cap on the state’s prison population, finding the prisons so overcrowded that inmates were dying. A series of legislative actions and ballot initiatives has reduced some felony crimes to misdemeanors, earmarked money for alternatives like drug and mental health treatment, and shifted more responsibility to the counties for supervising former prisoners.

The reforms have prompted a backlash from many law enforcement groups, who say the changes have led to the release of dangerous criminals, caused an increase in property crime and removed incentives for people to participate in drug court. Many of these groups are backing a proposed ballot measure aimed at rolling back the reforms.

One of the most contentious features of the felony murder bill is that it is retroactive, meaning that people currently serving life sentences for felony murder could petition the court to have their sentence reviewed.

The prosecutors association has said the bill goes too far, raising concerns that retroactivity would cause "potentially disastrous and costly problems."

Felony murder convictions in California are not tracked or labeled, opening the gates for anyone with a murder conviction to ask for a re-examination of their case. For those who took plea deals, there may be little on the record to examine. A state fiscal analysis found that it could cost millions of dollars to process resentencing petitions, as well as to transport people to and from courts for resentencing.

Ms. Skinner and the bill's supporters say the costs will be offset by savings from shorter sentences. The average cost to incarcerate an inmate in a California prison is about $80,000 a year.

Shawn Khalifa's mother, Colleen Khalifa, is hopeful the bill could give her son a second chance. He was tried as an adult and has already served 14 years behind bars for his role as a lookout.

"It would give us our lives back," she said. "Just the thought that there might be light at the end of the tunnel has given us hope. I already feel the anguish and stress being lifted."

Abbie VanSickle is a staff writer for The Marshall Project, a nonprofit news organization that focuses on criminal justice issues.

A version of this article appears in print on June 28, 2018, Section A, Page 13 of the New York edition with the headline: In Prison for Murder, Without Having Put A Hand on the Victim.
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OPINION

It’s time for California to reform the felony-murder rule. Pass SB1437.

In this Feb. 21, 2013 file photo, an inmate at the Madera County Jail is taken to one of the inmate housing units in Madera, Calif.

By **THE EDITORIAL BOARD** | opinion@scng.com |
PUBLISHED: July 4, 2018 at 8:00 p.m. | UPDATED: July 5, 2018 at 7:30 p.m.

If our criminal justice system is to fulfill its purpose and exact justice, it is imperative that laws are designed to truly hold individuals accountable for their actions.

With Senate Bill 1437 by Sen. Nancy Skinner, D-Berkeley, California has an opportunity to better serve the interests of justice with respect to the crime of felony murder.

Inherited from English law, the felony-murder rule is at best an archaic legal doctrine in need of serious reconsideration and reform.

Under the felony-murder rule, individuals involved in the commission of a felony can be charged with murder if someone is killed in the commission of that felony. Even if they had no knowledge a killing was to take place or intent to kill anyone, individuals participating in the felony are treated as if they committed the murder themselves.

“It does not matter whether the death was intended or whether a person had knowledge that the death had even occurred,” explained Skinner. “The result is that California’s felony murder statute has been applied even when a death was accidental, unintentional or unforeseen but occurred during the course of certain crimes.”

To be sure, it is important that individuals involved in committing crimes which result in someone’s death are held accountable for their actions. But that can be done without the felony-murder rule as it currently stands.

SB1437 reforms existing law by making clear the distinction between individuals who participated in an underlying crime like burglary and robbery, but did not know a murder was to take place and did not participate in the murder, and individuals who chose to take someone’s life in the commission of other crimes or aided in the process.

Precisely, SB1437 would prevent participants in specified felonies from being held liable for murder, “unless the person was the actual killer or 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.”

The reform does not apply to anyone who “was a major participant in the underlying felony and acted with reckless indifference to human life.”

This distinction is important, and one that has long since been understood by courts and nations across the world.

Abolished in England and Wales in 1957, the felony-murder rule has long been denounced by the California Supreme Court as a “barbaric” and “highly artificial” rule which “not only ‘erodes the relation between criminal liability and moral culpability’ but also is usually unnecessary for conviction.” While it remains on the books in most states, it has been abolished in Hawaii, Kentucky, Michigan and Ohio.

There’s scant evidence it even serves much of a public safety purpose. Research by law professor Anup Malani assessing the impact of the felony-murder rule on crime trends in the United States found that “it does not substantially affect either the overall felony or felony murder rate.”

Yet it remains in place in California today, resulting in people sentenced to prison as murderers who never intended to and never did murder anyone.

SB1437 is a prudent move in the right direction, which can bring needed coherence to the criminal justice system without compromising safety, by holding people accountable for their actions.

ABAJOURNAL

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CRIMINAL JUSTICE

California considering end to felony murder rule

BY JASON TASHEA (HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/64729/)

JULY 5, 2018, 11:27 AM CDT

The California State Capitol. SchnepfDesign / Shutterstock.com

A bill in the California legislature could curtail felony murder prosecutions in the state.

The Marshall Project (https://www.themarshallproject.org/2018/06/27/can-it-be-murder-if-you-didn-t-kill-anyone) reported last week that the California State Assembly's Public Safety Committee had recommended the approval of a bill to limit murder prosecutions to people who intended to kill, actually killed or behaved with

reckless indifference to human life. The bill has already been passed by the California State Senate.

Under state's felony murder doctrine, people involved in certain serious felonies that lead to death face the same liability as the killer—even if they did not intend to kill anyone. "Many times in California, if you didn't commit the murder, didn't know the murder occurred, you could be charged and have the same sentence as the actual murderer," State Sen. Nancy Skinner, the legislation's sponsor, told the Marshall Project. "They had bad judgment, but they didn't commit a murder—and when I understood this, I knew we had to fix that."

The bill (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437&search_keywords=%22felony+murder%22) under consideration in California would make it so only those who killed, intended to kill or aided in the murder of someone could be charged with murder.

The state does not keep statistics on how many people have been convicted of felony murder. However, according to the Marshall Project, advocates of the reform say that the state currently incarcerates 400 to 800 people on felony murder convictions.

A survey (http://www.endfmrnow.org/statistics.html) from the Felony Murder Elimination Project, a coalition of advocacy groups, found that black and Hispanic people disproportionately make up those imprisoned for felony murder, while 72 percent of women serving life sentences for murder in California were not the killer.

This bill comes on the heels of a cavalcade of reforms prompted by *Brown v. Plata* (https://www.abajournal.com/news/article/supreme_court_upholds_cap_on_calif._prison_population_scalia_hits_radical_i/), a 2011 U.S. Supreme Court ruling that California's overcrowded prison system violated that Eighth Amendment's prohibition on cruel and unusual punishment.

However, this is not the first attack on the felony murder rule in California. Going back to the 1960s, state judges have called the rule "highly artificial" and "barbaric", going as far to say that it "not only `erodes the relation between criminal liability and moral culpability' but also is usually unnecessary for conviction…."

Calling the rule "unwise" and "outdated," a concurrence (https://scholar.google.com/scholar_case?case=16336126005486548570&q=people+v.+dillon&hl=en&as_sdt=4,5) from the state's highest court in 1983 admitted that it was only the legislature that could fix the problem.

Even with this strong language, not everyone is ready to let the rule go.

Eric Siddall, a prosecutor and vice president of the Association of Deputy District Attorneys for Los Angeles County, told the Marshall Project that: "The way the legislation is written, it gives everyone a path out, and only penalizes the actual shooter."

Beyond future prosecutions, the bill also provides the means for retrospective vacatur and resentencing for those already convicted of felony murder.

Forty five states still have felony murder rules, 24 of which allow for the death penalty in such cases. Hawaii, Kentucky, Massachusetts and Michigan have abolished the rule by either legislation or

through the courts. In 2014, the Ohio Supreme Court ruled (http://www.sconet.state.oh.us/rod/docs/pdf/0/2014/2014-Ohio-4800.pdf) that "attempted felony murder" is "impossible" to commit and refused to recognize it as a crime.

The Pennsylvania Legislature is currently assessing a bill to limit the rule.

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East County Today

Trio of Senator Skinner Bills Move Forward, Including Law Enforcement Transparency Bill

By
ECT
-
May 31, 2018

Over the past few days, three bills by Senator **Nancy Skinner** have moved forward ranging from the Protecting Communities and Law Enforcement, gun violence restraining orders and updating the felony murder rule.

California Senate Passes SB 1421, Senator Nancy Skinner's Protecting Communities and Law Enforcement Bill

With bipartisan support, the California State Senate passed SB 1421, Senator Nancy Skinner's (D-Berkeley) "Protecting Communities and Law Enforcement" legislation. SB 1421 would open the door for a limited set of records related to a law enforcement officer's use of serious force, on the job sexual assault, or dishonesty to be available to the public. Skinner's bill must now pass the Assembly and be signed by Governor Brown to become law.

"California is an outlier when it comes to providing public access to law enforcement records" said Senator Skinner. "SB 1421 is a sunshine ordinance that will help build trust and accountability."

California's existing confidentiality rules on law enforcement records, which SB 1421 would modify, are among the most secretive in the country. Under existing law, the public, and in some cases even hiring agencies, do not have access to internal reports or investigations into officer use of force. These restrictions erode public trust, and can allow officers with repeated incidents to bounce from agency-to-agency undetected.

Specifically, SB 1421 requires law enforcement agencies to provide public access to records related to:

1. Discharge of a firearm, or use of force that results in death or serious bodily injury,
2. On the job sexual assault, including coercion or exchanging sex for lenience, or
3. Dishonesty in reporting, investigating or prosecuting a crime.

"Law enforcement has never been better trained or better educated and incidents of officer misconduct are decreasing, yet distrust between many communities and law enforcement continues to grow," said Senator Skinner. "Transparency can help build the trust so needed to keep our communities safe." More info

California Senate Passes SB 1200, Senator Skinner's Bill to Strengthen California's Gun Violence Restraining Order

Today, the California Senate passed Senator Nancy Skinner's (D-Berkeley) SB 1200, "Strengthening California's Gun Violence Restraining Order." SB 1200 would enhance California's existing Gun Violence Restraining Order (GVRO), a law Skinner authored when she was in the Assembly. SB 1200 is now on its way to the Assembly for approval.

Skinner's new legislation, SB 1200, eliminates any fees for requesting a GVRO and adds ammunition, magazines and firearm components to the list of items which can be confiscated. SB 1200 requires law enforcement personnel that serve the order to verbally ask the recipient if they have firearms or accessories and also requires GVROs that are issued for a 21-day period have a hearing held within that time period to allow for that GVRO to be extended for a year.

Senator Skinner authored AB 1014, the bill that established California's GVRO, after the Isla Vista shooting in 2014. The law took effect in January 2016 and allows firearms to be taken away if there is credible evidence that the person presents a violent threat. Skinner's law was the first in the U.S. to allow immediate family members of a person threatening violence to petition for the order. California has issued over 250 GVROs since the law was established. There are now five states: California, Connecticut, Indiana, Oregon and Washington with similar laws, also known as "Extreme Risk Protection Orders," on the books. More info

California Senate Passes Senator Skinner's SB 1437 BESTT Practices bill
SB 1437, "Better and Equitable Sentencing Through Thoughtful (BESTT) Practices" by State Senator Nancy Skinner (D-Berkeley), passed the California Senate today on a bipartisan vote. SB 1437 was introduced to clarify the application of California's "felony murder" rule to ensure that individuals are charged appropriately for the crime they actually committed. Skinner's bill must now pass the Assembly and be signed by Governor Brown to become law.

Under California's current application of the felony murder rule, a person who participates in any portion of certain felonies that result in a death can be charged with first-degree murder. In practice this means that even if someone was unaware that a killing would or did take place, they could still face a first-degree murder charge and receive a sentence that is equally or, in some cases, more severe than the one handed down to the person who actually committed murder.

SB 1437 would clarify California's murder statutes to reserve the most serious murder charges for those who actually commit a homicide and/or who knowingly participate in or plan an act intended to kill. SB 1437 also establishes a process for those who may have been wrongfully sentenced under the current interpretation of felony murder to seek resentencing.

"Punishment should fit the crime," said Senator Skinner. "SB 1437 directs our toughest punishments to individuals whose actions were intentional rather than sweeping up those who may have had little to no role in the crime." More info

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New California youth offender bills

April 11, 2018 by San Quentin News Contributer

California legislators are introducing two new bills that will affect accomplices of felony murder and youth offenders under SB 260, 261, and AB 1308.

The first bill, SB 1437, introduced by Senator Nancy Skinner, will set forth new guidelines for sentencing (certain) accomplices of murder.

"This bill would prohibit malice from being imputed to a person based solely on his or her participation in a crime," California Legislative Information (CLI) published.

"The bill would prohibit a participant or conspirator in the commission or attempted commission of a felony inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act."

The bill, however, would exclude participants or conspirators in the perpetration or attempted perpetration if the person acted with:

Premeditated intent to aid and abet an act wherein a death would occur, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

"This bill would provide a means of 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, 2nd degree felony murder or murder under the natural and probable consequences doctrine," CLI reported.

The second bill, SB 1242, introduced by Senator Josh Newman, will exclude individuals from the youth offender parole hearing process if they had been convicted of murdering a peace officer or former police officer.

The new bill also sets forth standards an inmate must meet before the board grants parole.

The standards include:

A. The inmate demonstrates remorse and insight into the nature of the crime, unless the inmate asserts his or her factual innocence.

B. The inmate has not minimized his or her role in the crime, and is found to be credible about his or her role in the crime.

C. The inmate demonstrates the changes he or she has made to illustrate his or her departure from prior criminality.

D. The inmate demonstrates that he or she has been free from disciplinary actions for a reasonable period of time prior to the hearing.

E. The inmate demonstrates positive activities while in custody.

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/17/2020 by Celia Wong, Deputy Clerk

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Supreme Court of California

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