REVISITING THE CALIFORNIA FELONY MURDER RULE

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INTRODUCTION

The purpose of this article is to explore the distinction and interplay in the vicarious theories of accomplice liability: (1) aider and abettor, (2) natural and probable consequences, and (3) the felony murder rule. Although the felony murder doctrine has existed at common law for centuries, it is difficult to state its precise scope. In its broadest form it brings within the definition of murder all homicides committed in the perpetration of any felony, regardless of whether there existed an intention to cause death or great bodily harm.[1]

Recent legislation in the state of California has modified the use of the above theories to decrease the possibility of convicting someone who is not the direct perpetrator of murder. Particularly, California *Senate Bill 1437* has limited the use of accomplice liability for felony murder. The bill intended to prohibit murder convictions where the participant was not the actual killer or a direct aider or abettor of the murderer. Thus, it was the intent of the California Legislature to correct what was perceived to be a need for statutory changes that would provide for more equitable sentencing of homicide offenders in accordance with their actual involvement in the crime. This was based on the bedrock principle of law and of equity that provides that a person should be punished for their actions according to their own level of indi-

1 *Cornell Law Review,* Volume 20, Issue 3 April 1935 Article 5.

vidual culpability. Because the felony murder rule was being used to convict defendants of murder who had not killed nor possessed the intent to kill, it was necessary to amend the rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.[2]

Legislative History of California Senate Bill 1437

California Senate Bill 1437 provides the following to explain the legislative intent behind the senate bill:

Existing law defines murder as the unlawful killing of a human being . . . with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms. This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine. An aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule.

FELONY MURDER RULE

The origins of the Felony Murder Rule are steeped in mystique and is a very divisive topic among those who know about it, but its genesis is even murkier than its principles. Some scholars attribute the formation of the doctrine to Edward Coke, the famed English barrister known for his influence on the English Common Law Legal System. Others find the that the genesis of the Rule was when Henry de Bracton, another English jurist, wrote in the thirteenth century that when a person throws a rock at a bird and unexpectedly hits a passerby, he or she is guilty of murder if the act of throwing the rock was "improper." Thus, when one is intentionally engaged in a wrongful act, the intent can be imputed to murder. More commonly, and regardless of its earliest origins, the modern conception of the rule is attributed to Williams Hawkins. In his *Treatise of Pleas to the Crown,* he argued that the malice required for murder was implicit in certain felonies that had the tendency to produce injury.

A closer look at English and American history, which are so intertwined in many ways, shows no application of a Felony Murder Rule in England prior to the American Revolution. Liability for murder was reserved for those who had the culpability to kill in one way or another. Some of these applications demonstrated the concept of transferred intent but none imposed liability for those who did not at the minimum have the intent to harm or kill. By the time the English law recognized a Felony Murder Rule it was applied to cases where a death was caused through violent acts or acts that were inherently dangerous to human life while attempting a felony. This version of the rule did not have a manifestly different effect than doctrines of transferred intent. It can be said that this version of the Felony Murder Rule was nearly identical in application and concept to the reformed versions of the rule that persist in American Jurisprudence today.

Thus, regardless of its earliest beginnings, the Felony Murder Rule saw its complete realization in the United States of America post-American Revolution. The rule is taught in law schools in common law jurisdictions as being a common law rule. This simply means that it is a judge or court made law as opposed to a rule enacted by legislature. Despite this common assumption, it seems that the first Felony Murder Rules were codified in numerous state criminal codes in the United States. Much of American jurisprudence

2 California Senate Bill No. 1437, Chapter 1015. Stats. 2018, Ch. 1015, § 1, sub. (f).)

was essentially grand fathered in from England.[3]

During the course of the early common law, a homicide resulting from any felony committed in a dangerous way, was considered murder.[4] The primary use of the felony murder rule at common law therefore was to deal with a homicide that occurred in furtherance of an attempted felony that failed. Since attempts were punished as misdemeanors, the use of the felony murder rule allowed the courts to punish the actor in the same manner as if his attempt had succeeded. Thus, a conviction for attempted robbery was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death.[5]

In *Tison*, the court discussed the interrelationship between being a major participant and having reckless indifference to human life. The court states: "These requirements significantly overlap . . . for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life." Further, the court found that an intent to kill could be found where the defendant "contemplated or anticipated . . . that lethal force . . . might be used . . . in accomplishing the underlying felony."

The felony-murder doctrine traditionally attributed death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. This rule has been based on the idea of transferred intent; the defendant's intent to commit the felony satisfies the intent to kill required for murder.[6] The felony murder rule was an effort to create felony liability for accidental killings caused during the course of an attempted felony.[78]

In a felony murder case, the proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction.[9]Traditionally, under California law, felony-murder liability extended to all persons jointly engaged in the commission of a felony at the time of a killing when one of the joint actors kills in furtherance of the common design.[10] Thus, in the State of California, in a prosecution for first degree murder, a theory of felony murder rule is viable if there was an unlawful killing of a human being whether intentional, unintentional, or accidental which occurred during the commission or attempted commission of certain enumerated crimes such as robbery, burglary, kidnapping, and the like. In order to prove such crime, it must be proven beyond a reasonable doubt that the defendant had the specific intent to commit the enumerated crime.[11]

California Senate Bill 1437, seeking to limit the application of the felony murder rule, requires that in order for a person who is not the actual killer to be convicted for murder, it would have to be proven the person had the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. Additionally, as mentioned, a person may be convicted of murder if that person was a major participant in the underlying felony and acted with reckless indifference to human life.[12]

Therefore, the Senate Bill does not change the parameters of first-degree felony murder. The legislative intent is concerned with providing protections in its application to second-degree felony murder. The distinction between first and second degree felony murder involves the enumerated crimes provisions required in first degree murder. Second degree felony murder requires that the homicide be the direct result of the commission or attempt to commit a felony inherently[13] dangerous to human life, other than the enumerated felonies as listed in California Penal Code 189.[14]

3 *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statut*es, Leonard Birdsong. Thurgood Marshall Law Review, Vol. 30, 2006.
4 Perkins, *Criminal Law* 39 (2d Ed. 1969); See Also W. Lafave & A. Scott, *Handbook on Criminal Law* § 71 (1972)
5 *Tison v. Arizona*, 481 U.S. 137 (1987).
6 *Miller v. Alabama*, 567 U.S. 460, (2012).
7 ALI, *Model Penal Code* § 210.2, Comment, p. 31, n. 74 (Off. Draft and Revised Comments 1980).
8 *Enmund v. Florida*, 458 U.S. 782 (1982).
9 Harris v. Oklahoma, 433 U.S. 682 (1977).
10 *Hedgpeth v. Pulido*, 555 U.S. 57 (2008).
11 *California Jury Instructions. (CALJIC) 8.21*.
12 California Penal Code section 189.
13 People v Nichols, (1970) 3 Cal. 3d 150.
14 *People v Nichols*, (1970) 3 Cal. 3d 150.

In summary, the purpose of the felony-murder rule was to deter those who commit the enumerated felonies by holding them strictly responsible for any killing committed by another defendant, whether intentional, negligent, or accidental, during the perpetration or attempted perpetuation of the felony. In California, the felony murder rule made the perpetrator of an enumerated offense automatically guilty of murder when he personally caused the death of another in the course of committing the target offense. Further, the rule goes further extended culpability beyond the actual killer to all persons jointly engaged at the time of such killing in the perpetration of or an attempt to perpetrate the predicate felony.[15] The legislative intent of California Senate 1437 is to curtail the rule.

NATURAL AND PROBABLE CONSEQUENCES

"Anglo-American criminal law defines a crime as the concurrence of an actus reus [the physical act] and a mens rea [the mental state required for the crime]. This basic definition of a crime remains unchanged when a defendant is prosecuted as an accomplice, rather than a principal. However, the natural and probable consequence doctrine, an accomplice law doctrine, allows for accomplice liability to exist in the absence of sufficient proof of mens rea. The doctrine came from the common law and, as a result, has seen disparate application among both state and federal courts."[16] This doctrine has come under scrutiny in Senate Bill 1437.

In regard to the doctrine, the United States Supreme court over one hundred years ago, states: "This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act."[17] Prior to the enactment of Senate Bill1437, California applied the natural and probable consequences doctrine very broadly. Accordingly, not limiting liability to subsequent crimes that resemble the target offense, the state had extended liability to some matters on the most threadbare of theories. California included as principals all those persons concerned in the commission of a crime, regardless of the level of participation and whether or not they were present at the time of the crime. Hence, the natural and probable consequences doctrine extended liability to collateral crimes.

California had taken the view that one's liability was not governed by any fixed standard.[18] However, under California Senate Bill 1437, the common law theory of accomplice liability in which liability extends to the natural and probable consequences of the offense, has been altered. Historically, under the concept of natural and probable consequences, a person who aids and abets another person in the commission of a crime, is not only guilty of the crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime that was originally aided and abetted.

Moreover, in determining whether a consequence is natural and probable, an objective test is used for the determination. Thus, it is not based on what the person actually intended, but on what a person of reasonable and ordinary prudence would have expected to likely occur.[19] Therefore, a person who knowingly aids and abets criminal conduct is guilty of not only the intended target offense crime such as robbery, but also of any other crime such as murder, that the perpetrator actually commits that is a natural and probable consequence of the intended crime.

The question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable.[20] Liability under the natural and probable consequences doctrine is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reason-

15 *People v. Cavitt* (2004) 33 Cal.4th 187.
16 *Fordham Law Review*. Volume 85 | Issue 3 Article (2016).
17 *Allen v. United States*, 164 U.S. 492 (1896).
18 *Berkeley Journal of Criminal Law,* Volume 15 | Issue 2 Article 4, 2010.
19 CALJIC, California Jury Instructions, 3.02.
20 *People v. Prettyman*, (1996) 14 Cal.4th 248.

ably foreseeable consequence of the act aided and abetted.[21]

Relatively few jurisdictions have expressly rejected the natural and probable consequences doctrine, and many States and the Federal Government apply some form or variation of that doctrine or permit jury inferences of intent in certain circumstances.[22] In *People v. Chiu,* the California Supreme Court has held that a defendant cannot be convicted of first-degree premeditated murder under the natural and probable consequences doctrine.[23] The court concluded that, given the vicarious nature of liability under the natural and probable consequences doctrine, "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved ."

The California Supreme Court's conclusion that an aider and abettor or conspirator may not be convicted of first-degree premeditated murder under the natural and probable consequences doctrine does not foreclose liability for crimes based on direct aiding and abetting principles. In Chiu, the Court held that a defendant cannot be found guilty of first degree murder under the natural and probable consequences theory of accomplice liability but did not hold that an aider or abettor could never be convicted of murder; it simply limited liability for first degree premeditated murder to offenders whose convictions were based on direct aiding and abetting principles. For aiders and abettors convicted under the natural and probable consequences theory, the Court held that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder. Senate Bill 1437 has expanded *Chiu* to prevent a second-degree murder conviction based on natural and probable consequences.

Aider and Abettor

The aider and abettor principle allows for a person to be convicted of murder if they weren't actually the killer but know that another person intends to commit murder and they aid and abet the killer. This is distinguished from the natural and probable consequences rule which allows for a murder conviction for someone who aided and abetted a felonious crime other than murder that could result in someone being killed. It must be reasonably foreseeable, or naturally and probable, that the crime could result in death. To be convicted under the aider and abettor principle, one would have more culpability than one charged under the natural and probable consequences rule.[24]

In California, a person may be guilty of a crime in two ways. First, the person may have directly committed the crime, this person is known as the perpetrator. Second the person may have aided and abetted a perpetrator, who directly committed the crime. Thus, a person can be found guilty of a crime whether the person committed it personally or aided and abetted the perpetrator.[25] Thus, to prove that the defendant is guilty of a crime based on aiding and abetting that crime, the prosecution must prove (1) that the perpetrator committed the crime; (2) that the defendant knew that the perpetrator intended to commit the crime; (3) before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and (4) the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.[26] Consequently, for purposes of culpability the law does not distinguish between perpetrators and aiders and abettors. However, the required mental states that must be proved for each are different. One who engag-

21 *People v. Nguyen* (1993) 21 Cal. App.4th 518, 535.
22 *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).
23 *People v. Chiu* (2014) 59 Cal.4th 155.
24 Supra: *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, Thurgood Marshall Law Review, Vol. 30, 2006.
25 *CAL CRIM Jury Instruction 400, Aiding and Abetting: General Principles.*
26 *CAL CRIM Jury Instruction 401. Aiding and Abetting: Intended Crime*.

es in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor of the crime.[27]

Factors relevant to determining whether a person is an aider and abettor include presence at the scene of the crime, companionship, and conduct before or after the offense.[28][29] The United States Supreme court has opined that an aider and abettor must act purposefully or with intent. Prominent among these cases is *Nye & Nissen v. United States,* 336 U.S. 613 (1949), the Court, quoting Judge Learned Hand's formulation *in United States v. Peoni,* 100 F. 2d 401 (CA2 1938), said that an aider and abettor must 'participate in [the crime] as in something that he wishes to bring about, and seek by his action to make it succeed."'[30] The commonly held view is that the issue was resolved in 1938, and, as stated by Judge Learned Hand, the aider and abettor must not only know that his or her act will assist the principal, but also want or intend his or her act to assist the principal. He explained that the aiding and abetting statute requires that the aider and abettor "in some sort associate himself with the venture" and wants his actions to contribute to the success of the venture.[31]

On the other hand, there are cases to which the Supreme Court also appears to hold that the requisite mens rea is merely knowledge.[32][33] The United States Supreme Court refers interchangeably to both tests, leaving the law in the somewhat conflicted state that previously existed.[34] Further, aiding and abetting theories of liability have survived Senate Bill1 437. "Because there is no material distinction between an aider and abettor and principals in any jurisdiction of the United States . . . aiding and abetting an offense is the functional equivalent of personally committing that offense and that offense constitutes an aggravated felony."[35] The actus reus requirement for an aider and abettor to first degree felony murder is aiding and abetting the underlying felony or attempted felony that results in the murder.[36] The mens rea for an aider and abettor to first degree felony murder is the same as that for the actual shooter."

27 *People v. Cook* (1998) 61 Cal. App.4th 1364, 1371.
28 *People v. Singleton* (1987) 196 Cal.App.3d 488, 492, *citing People v. Chagolla* (1983) 144 Cal.App.3d 422, 429.
29 *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.
30 *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949).
31 *Fordham Law Review*, Volume 70, issue 4, Article 5, (2002).
32 *Pereira v. United States,* 347 U.S. 1, 12 (1954).
33 *Bozza v. United States*, 330 U.S. 160, 164-165 (1947).
34 *Rosemond v. United States*, 572 U.S. 65 (2014).
35 *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).
36 *California Penal Codes §§ 31, 189.*

NOTES:

1. Cornell Law Review, Volume 20, Issue 3 April 1935 Article 5.
2. California Senate Bill No. 1437, Chapter 1015. Stats. 2018, Ch. 1015, § 1, sub. (f).)
3. Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes¸Leonard Birdsong. Thurgood Marshall Law Review, Vol. 30, 2006.
4. Perkins, Criminal Law 39 (2d Ed. 1969); See Also W. Lafave & A. Scott, Handbook on Criminal Law § 71 (1972)
5. Tison v. Arizona, 481 U.S. 137 (1987).
6. Miller v. Alabama, 567 U.S. 460, (2012).
7. ALI, Model Penal Code § 210.2, Comment, p. 31, n. 74 (Off. Draft and Revised Comments 1980).
8. Enmund v. Florida, 458 U.S. 782 (1982).
9. Harris v. Oklahoma, 433 U.S. 682 (1977).
10. Hedgpeth v. Pulido, 555 U.S. 57 (2008).
11. California Jury Instructions. (CALJIC) 8.21.

12. California Penal Code section 189.
13. People v Nichols, (1970) 3 Cal. 3d 150.
14. People v Nichols, (1970) 3 Cal. 3d 150.
15. People v. Cavitt (2004) 33 Cal.4th 187.
16. Fordham Law Review. Volume 85 | Issue 3 Article (2016).
17. Allen v. United States, 164 U.S. 492 (1896).
18. Berkeley Journal of Criminal Law, Volume 15 | Issue 2 Article 4, 2010.
19. CALJIC, California Jury Instructions, 3.02.
20. People v. Prettyman, (1996) 14 Cal.4th 248.
21. People v. Nguyen (1993) 21 Cal. App.4th 518, 535.
22. Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007).
23. People v. Chiu (2014) 59 Cal.4th 155.
24. Supra: Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes, Thurgood Marshall Law Review, Vol. 30, 2006.
25. CAL CRIM Jury Instruction 400, Aiding and Abetting: General Principles.
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28. People v. Singleton (1987) 196 Cal.App.3d 488, 492, citing People v. Chagolla (1983) 144 Cal.App.3d 422, 429.
29. People v. Campbell (1994) 25 Cal.App.4th 402, 409.
30. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).
31. Fordham Law Review, Volume 70, issue 4, Article 5, (2002).
32. Pereira v. United States, 347 U.S. 1, 12 (1954).
33. Bozza v. United States, 330 U.S. 160, 164-165 (1947).
34. Rosemond v. United States, 572 U.S. 65 (2014).
35. United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017).
36. California Penal Codes §§ 31, 189.