December 9, 2020

Mr. Fernando Lemus
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street
Los Angeles, CA 90012

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: Decision
Accomplice Liability for Felony Murder, 19-TC-02
Penal Code Sections 188, 189, and 1170.95 as added or amended by
Statutes 2018, Chapter 1015 (SB 1437)
County of Los Angeles, Claimant

Dear Mr. Lemus and Ms. Li:

On December 4, 2020, the Commission on State Mandates adopted the Decision denying the Test Claim on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 188, 189, and 1170.95 as added or amended by Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant	Case No.: 19-TC-02 *Accomplice Liability for Felony Murder* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 4,2020*) (*Served December 9, 2020*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 4, 2020.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 188, 189, and 1170.95 as added or amended by Statutes 2018, Chapter 1015 (SB 1437) Filed on December 31, 2019 County of Los Angeles, Claimant	Case No.: 19-TC-02 *Accomplice Liability for Felony Murder* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 4, 2020*) (*Served December 9, 2020*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 4, 2020. Lucia Gonzalez, Felicia Grant, and Craig Osaki appeared as witnesses for the County of Los Angeles (claimant). Christina Snider and John O'Connell appeared on behalf of the County of San Diego.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-3, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	No
Carmen Ramirez, City Council Member	Yes
Andre Rivera, Representative of the State Treasurer, Vice-Chairperson	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller	No

Summary of the Findings

This Test Claim filed by the County of Los Angeles (claimant) addresses Statutes 2018, chapter 1015, which amended Penal Code sections 188 and 189 and added Penal Code section 1170.95, with respect to accomplice liability for felony murder.

Generally, to prove the crime of murder, the prosecution must show that the defendant performed an act that took a human life and that the defendant had the necessary state of mind or "malice aforethought" to commit that act.[1] However, under prior law, if a killing occurred during the commission of another crime, then malice and the intent to kill could be presumed or implied to support a conviction of murder. For example, under the felony-murder rule, if a person is killed, even accidentally or by an accomplice while the defendant committed certain other felonies, the defendant could be convicted of murder without the prosecutor having to prove that the defendant intended or had the state of mind to kill.[2] Similarly, the natural and probable consequences doctrine allows for a conviction of murder without the need to prove the defendant's state of mind, if the killing was a natural and probable consequence of the "targeted" crime committed by the defendant.[3]

The test claim statute amended Penal Code sections 188 and 189, and added section 1170.95, to limit the definition of murder to be applicable only to those who have either an intent to kill or who were major participants in the underlying crime and acted with reckless indifference to human life. Thus, the law no longer allows a person to be convicted of murder simply based on implied or presumed intent. To apply these standards retroactively, Penal Code section 1170.95 sets forth a petition process allowing petitioners who were convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, to request the court to vacate the murder conviction and to resentence the petitioner on the remaining counts. The statute requires county district attorneys and public defenders, when appointed to defend the petitioner, to participate in the process and the hearing on the petition. The court shall vacate the murder conviction and recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.[4]

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[1] Penal Code sections 187, 188.

[2] *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; Penal Code section 189, as last amended by Statutes 2010, chapter 178.

[3] *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[4] Penal Code section 1170.95(d).

The Commission finds that this Test Claim was timely filed within 12 months of the effective date of the test claim statute.

The Commission finds that sections 188 and 189 of the Penal Code, as amended by the test claim statute, do not impose any requirements on local government and, thus, do not impose a state-mandated program. Penal Code sections 188 and 189 define "malice" and "murder" and, as amended, limit the definition of murder to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life.

The Commission further finds that Penal Code section 1170.95 imposes new requirements on county district attorneys and public defenders to participate in the petition process, however those requirements do not impose costs mandated by the state. Government Code section 17556(g), which implements article XIII B, section 6, provides that the Commission "shall not find costs mandated by the state" when the "statute or executive order created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction." The test claim statute changed the elements of the crime of murder and, in so doing, "vacated" or eliminated the crime of murder under the felony-murder rule and the natural and probable consequences doctrine unless it is proven beyond a reasonable doubt, that the defendant had the intent to kill or was a major participant acting with reckless indifference to human life and, thus, there are no costs mandated by the state within the meaning of Government Code section 17556(g).

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2019	The effective date of Statutes 2018, chapter 1015, amending Penal Code sections 188, 189, and enacting Penal Code section 1170.95.
12/31/2019	The claimant filed the Test Claim.[5]
04/17/2020	The Department of Finance (Finance) requested a 60-day extension of time to file comments on the Test Claim, which was approved for good cause.
06/19/2020	Finance filed comments on the Test Claim.[6]
06/26/2020	Commission staff issued the Draft Proposed Decision.[7]
07/16/2020	The County of San Diego requested a four-week extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
07/17/2020	The claimant filed Notice of Change of Representation.

[5] Exhibit A, Test Claim, filed December 31, 2019.

[6] Exhibit B, Finance's Comments on the Test Claim, filed June 19, 2020.

[7] Exhibit C, Draft Proposed Decision, issued July 21, 2020.

07/17/2020	The San Joaquin County Board of Supervisors' Chair filed comments on the Draft Proposed Decision.[8]
07/21/2020	The claimant requested a four-week extension of time to file comments on the Draft Proposed Decision and to postpone the hearing to December 4, 2020, which was approved for good cause.
08/04/2020	The County of San Diego requested an eight day extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.
08/10/2020	The California Public Defenders Association filed late comments on the Draft Proposed Decision.[9]
08/14/2020	The County of San Diego filed comments on the Draft Proposed Decision.[10]
08/14/2020	The claimant filed comments on the Draft Proposed Decision.[11]
08/17/2020	The Alameda County Public Defender's Office filed late comments on the Draft Proposed Decision.[12]

II. Background

A. A History of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine

1. The History of the Felony-Murder Rule in California

Generally, to be convicted of murder, proof must be shown that the defendant performed an act that took the life of a human being and had the necessary state of mind to commit that act.[13] Application of the felony-murder rule, however, removes the need to prove the defendant's malice, or state of mind.

> [T]he two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. From this profound legal

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[8] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020.

[9] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020.

[10] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020.

[11] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020.

[12] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020.

[13] Penal Code section 187 defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Penal Code section 188 defines "malice."

> difference flows an equally significant factual distinction, to wit, that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.
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> Despite this broad factual spectrum, the Legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an offense listed in section 189: regardless of the defendant's individual culpability with respect to that homicide, he must be adjudged a first degree murderer and sentenced to death or life imprisonment with or without possibility of parole — the identical punishment inflicted for deliberate and premeditated murder with malice aforethought.[14]

The felony-murder rule derives from English law.[15] In 1850, the California Legislature codified the felony-murder rule.[16] In 1872, the Legislature enacted the Penal Code with the inclusion of the felony-murder rule codified at Penal Code section 189.[17] Section 189(a) enumerates a list of felonies and if a killing occurs during the commission of one of the enumerated felonies, even if the death is unknown to the defendant or is accidental, then the defendant could be convicted of murder in the first-degree without the need for proof of the defendant's malice. The California Supreme Court explained the purpose of the felony-murder rule as follows:

> The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation omitted.] "The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer

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[14] *People v. Dillon* (1983) 34 Cal.3d 441, 476-477 citing Penal Code section 190 et seq.

[15] Exhibit I, Bald, *Rejoining Moral Culpability With Criminal Liability: Reconsideration of the Felony Murder Doctrine for the Current Time* (2017) 44 J. Legis. 239, 241-242, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1679&context=jleg (accessed on April 16, 2020); Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 546-547, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr (accessed on April 10, 2020).

[16] Statutes 1850, chapter 99, page 229; *People v. Dillon* (1983) 34 Cal.3d 441, 465.

[17] *People v. Dillon* (1983) 34 Cal.3d 441, 467-468.

> entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof."[18]

A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life, other than the felonies enumerated in Penal Code section 189, constitutes "at least second degree murder."[19]

The application of the felony-murder rule has been strongly criticized.[20] Three states have abolished it and several others have tempered its impact by lessening the degree of murder or homicide that can be charged.[21] The California Supreme Court has characterized the felony-murder rule as a "'barbaric' concept that has been discarded in the place of its origin"[22] and "a 'highly artificial concept' which 'deserves no extension beyond its required application'"[23] and that "'in almost all cases in which it is applied it is unnecessary' and 'it erodes the relation between criminal liability and moral culpability.'"[24]

While acknowledging that it was not empowered to overrule the Legislature, the court took a step toward reestablishing the relationship between criminal liability and culpability in *People v. Dillon*.[25] In that case, a 17-year-old was convicted of first-degree murder under the felony-murder rule for the shooting death of a property owner during an attempted robbery.[26] The defendant and several others armed themselves and entered a marijuana grow to steal some plants. The property owner and his security, also armed, responded.[27] The defendant heard gun fire. In the ensuing confusion, the defendant panicked and thinking that he was soon to be shot, the defendant shot the property owner nine times only stopping when his gun was empty.[28] Weighing the facts of the crime — the immaturity of the defendant, his panic and lack of intent to kill, only the defendant was charged with any type of homicide — against the punishment of life in prison, the court found the application of the felony-murder rule was unconstitutional in

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[18] *People v. Cavitt* (2004) 33 Cal.4th 187, 197.

[19] *People v. Ford* (1964) 60 Cal.2d 772, 795.

[20] *People v. Dillon* (1983) 34 Cal.3d 441.

[21] Exhibit I, Miller, *People v. Dillon: Felony Murder in California* (1985) 21 Cal. Western L.Rev. 546, 547-548, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1578&context=cwlr (accessed on April 10, 2020).

[22] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 583, footnote 6.

[23] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Phillips* (1966) 64 Cal.2d 574, 582.

[24] *People v. Dillon* (1983) 34 Cal.3d 441, 463 citing *People v. Washington* (1965) 62 Cal.2d 777.

[25] *People v. Dillon* (1983) 34 Cal.3d 441, 465.

[26] *People v. Dillon* (1983) 34 Cal.3d 441, 450.

[27] *People v. Dillon* (1983) 34 Cal.3d 441, 451-452.

[28] *People v. Dillon* (1983) 34 Cal.3d 441, 482.

this case and reduced the defendant's sentence from first-degree murder to second-degree murder.[29]

2. The History of the Natural and Probable Consequences Doctrine in California

The natural and probable consequences doctrine allows for a conviction for any crime, including murder, without the need to prove the defendant's malice or state of mind, if the "nontargeted" crime was a natural and probable consequence of the "targeted" crime that the defendant aided and abetted.[30]

> There are two distinct forms of culpability for aiders and abettors. "First, an aider and abettor with the necessary mental state is guilty of the intended crime [target offense]. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted [nontarget offense].'"[31]

The nontarget offense is a natural and probable consequence if it was foreseeable by an objective, reasonable person.[32] Like the felony-murder rule, the natural and probable consequences doctrine has been strongly criticized by legal scholars.[33] Indeed, the majority of states do not adhere to it and the Model Penal Code does not include it.[34]

The California Supreme Court took another step toward reestablishing the relationship between criminal liability and culpability in *People v. Chiu*.[35] In that case, high school students were gathered after school. The defendant made a remark to a young woman. Her friends engaged in

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[29] *People v. Dillon* (1983) 34 Cal.3d 441, 488-489.

[30] Exhibit I, Goldstick, *Accidental Vitiation: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1290, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr (accessed on April 10, 2020).

[31] *People v. Chiu* (2014) 59 Cal.4th 155, 158 citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117. Internal citations omitted in original.

[32] *People v. Chiu* (2014) 59 Cal.4th 155, 161-162.

[33] Exhibit I, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 243-244, https://works.bepress.com/john-decker/2/download/ (accessed on April 17, 2020); Goldstick, *Accidental Vitiation: The Natural and Probable Consequence of Rosemond v. United States on the Natural and Probable Consequence Doctrine* (2016) 85 Fordham L.Rev. 1281, 1285, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5268&context=flr (accessed on April 10, 2020).

[34] Exhibit I, Decker, *The Mental State Requirement For Accomplice Liability in American Criminal Law* (2008) 60 S.C. L.Rev. 237, 380, https://works.bepress.com/john-decker/2/download/ (accessed on April 17, 2020).

[35] *People v. Chiu* (2014) 59 Cal.4th 155.

a verbal exchange with the defendant and his friends. A brawl broke out. One of the defendant's friends drew a gun and shot and killed one of the woman's friends.[36] The defendant was convicted of first-degree premeditated murder.[37] The court explained that liability under the natural and probable consequences doctrine is vicarious. The defendant didn't intend for the nontarget offense, the shooting, to happen. So, the defendant's intent is imposed vicariously from the shooter's premeditation.[38] The court noted that premeditation "is uniquely subjective and personal" making it "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…."[39] The court held that the natural and probable consequences doctrine cannot support a conviction of first-degree premeditated murder.[40]

3. The U.S. Supreme Court Cases Analyzing the Range of Criminal Liability Under the Felony Murder Rule.

The U.S. Supreme Court examined the criminal liability under the felony-murder rule in two key cases that, when read together, form the two extremes on the continuum of criminal accomplice conduct. The first of these, *Enmund v. Florida*[41] (hereinafter *Enmund*), presented a constitutional challenge under the Eighth Amendment ban against cruel and unusual punishment.[42] Enmund and his companions planned to rob a couple in their home. Enmund remained in the car as the getaway driver while his companions robbed and ultimately killed the couple.[43] Even though Enmund did not kill, attempt to kill, or intend to kill, he was convicted of first-degree murder and sentenced to death.[44] The court held that the sentence of death was cruel and unusual punishment under the Eighth Amendment and that criminal liability must be limited to a defendant's participation in the crime.[45]

In *Tison v Arizona*[46] (hereinafter *Tison*) the issue was whether the rule in *Enmund* had been properly applied in the state court.[47] The Tison brothers broke their father and his cellmate, both convicted murderers, out of prison using a large ice chest full of guns. After their car was disabled by a flat tire, the group carjacked a family of four and drove them into the desert to

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[36] *People v. Chiu* (2014) 59 Cal.4th 155, 159-160.

[37] *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[38] *People v. Chiu* (2014) 59 Cal.4th 155, 164-165.

[39] *People v. Chiu* (2014) 59 Cal.4th 155, 166.

[40] *People v. Chiu* (2014) 59 Cal.4th 155, 166-167.

[41] *Enmund v. Florida* (1982) 458 U.S. 782.

[42] *Enmund v. Florida* (1982) 458 U.S. 782, 787.

[43] *Enmund v. Florida* (1982) 458 U.S. 782, 783-784.

[44] *Enmund v. Florida* (1982) 458 U.S. 782, 785, and 787.

[45] *Enmund v. Florida* (1982) 458 U.S. 782, 800-801.

[46] *Tison v Arizona* (1987) 481 U.S. 137.

[47] *Tison v Arizona* (1987) 481 U.S. 137, 145-146.

exchange vehicles. Their father indicated he was "thinking about" killing the family and sent the Tison brothers to bring the family some water. When the brothers were returning from retrieving the water from one of the cars, their father and his cellmate shot each of the family members, killing the parents and infant and mortally wounding the teenaged niece, who later died at the scene. The brothers at no point attempted to intervene or render aid to the victims. The group then fled and were apprehended during a shootout with police some days later.[48] Applying the felony-murder rule, the brothers were convicted of four counts of murder and sentenced to death.[49] In applying their own holding in *Enmund*, the court noted that the facts in *Tison* were different from those of *Enmund*. *Enmund* had examined the criminal participant who neither killed nor intended to kill and whose participation in the underlying crime was minor. The facts of *Tison* didn't fit that scenario. Although the Tison brothers were not participants who had killed or who intended to kill, the court found that the brothers were not minor participants and that they knew that their acts would likely result in the death of an innocent person.[50] The court focused on the importance of the brothers' mental state, but noted that the intent to kill is not necessarily a determinant of culpability.[51] Indeed, the court reasoned, "This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"[52] The court held that engaging in criminal acts that present a grave risk of death is acting with reckless indifference for human life and this mental state, along with the resulting death, may be part of decision process for setting a sentence.[53]

4. The California Supreme Court Case Analyzing Criminal Liability Under the Felony-Murder Rule

Against the backdrop of the *Enmund* and *Tison* cases, the California Supreme Court in *People v. Banks*[54] considered the felony-murder special circumstances conviction of a getaway driver who was sentenced to life imprisonment without parole.[55] At issue was Proposition 115[56] which had extended death penalty eligibility to major participants in felonies who demonstrated reckless indifference to human life under the felony-murder rule. Prior to Proposition 115, aiders and abettors had to have an intent to kill to be sentenced to death or life imprisonment without parole.[57] The court had never reviewed a case involving death penalty eligibility for aiders and

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[48] *Tison v Arizona* (1987) 481 U.S. 137, 139-141.

[49] *Tison v Arizona* (1987) 481 U.S. 137, 141-143.

[50] *Tison v Arizona* (1987) 481 U.S. 137, 150-152.

[51] *Tison v Arizona* (1987) 481 U.S. 137, 156-157 [noting as examples the defenses of self-defense and provocation].

[52] *Tison v Arizona* (1987) 481 U.S. 137, 157.

[53] *Tison v Arizona* (1987) 481 U.S. 137, 157-158.

[54] *People v. Banks* (2015) 61 Cal.4th 788.

[55] *People v. Banks* (2015) 61 Cal.4th 788, 794-795.

[56] Proposition 115, Primary Election (June 5, 1990).

[57] *People v. Banks* (2015) 61 Cal.4th 788, 798.

abettors.[58] The court examined the two U.S. Supreme Court decisions, *Enmund* and *Tison*. Harmonizing the decisions into the *Tison-Enmund* standard, the Court concluded that punishment must relate to the individual's culpability and the determination of such culpability requires individualized analysis.[59] The court reversed the sentence of life imprisonment without parole.[60]

B. The Test Claim Statute, Statutes 2018, Chapter 1015, Amended Sections 188 and 189 and Added Section 1170.95 to the Penal Code to Limit the Application of the Felony-Murder Rule and the Natural and Probable Consequences Doctrine.

1. The Test Claim Statute

During the 2017-2018 legislative session, the Senate, citing the decision in *People v. Banks*, adopted Concurrent Resolution 48, which set forth the factual bases upon which the Legislature would seek to align penalty with criminal liability in the application of the felony-murder rule and the natural and probable consequences doctrine. The factual bases included: prison overcrowding with the housing of inmates at an average of 130 percent of capacity, the $70,836 annual cost to taxpayers to house an inmate, the fundamental unfairness in punishing felons in a manner not commensurate with their individual culpability, and the felony-murder rule had been limited or rejected by several states and is no longer followed in England where it originated. The resolution resolves, "That the Legislature recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime."[61]

The Legislature followed through on the resolution with the passage of the test claim statute, Statutes 2018, chapter 1015, which limited the applicability of the felony-murder rule and the natural and probable consequences doctrine.

> It is necessary to amend the felony murder 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.[62]

Statutes 2018, chapter 1015, section 1(g) further states the Legislature's intent: "Except as stated in subdivision (e) of Section 189 of the Penal Code [regarding felony murder], a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea [mental state]."

Thus, the test claim statute amended Penal Code sections 188 and 189. Penal Code section 188 was amended to add subdivision (a)(3), which states as follows:

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[58] *People v. Banks* (2015) 61 Cal.4th 788, 800-801.

[59] *People v. Banks* (2015) 61 Cal.4th 788, 800-805.

[60] *People v. Banks* (2015) 61 Cal.4th 788, 812.

[61] Exhibit I, Senate Concurrent Resolution 48 (2017-2018 Reg. Sess.), resolution chapter 175.

[62] Statutes 2018, chapter 1015, section 1(f).

> (3) Except as stated in subdivision (e) of Section 189 [regarding felony murder], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

Penal Code section 189 was amended to add subdivision (e), which specifies the proof necessary to apply the felony-murder rule; that is, the liability for murder is limited to the actual killer, someone with the intent to kill who assisted the killer, or a major participant who acted with reckless indifference to human life.

Penal Code section 1170.95 was added to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine, who would not have been convicted under the amended Penal Code sections 188 and 189, can obtain a review by filing a petition to have their murder conviction vacated and to be resentenced on any remaining counts:

> (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:
>
> > (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
> >
> > (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.
> >
> > (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.
>
> (b)(1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:
>
> > > (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).
> > >
> > > (B) The superior court case number and year of the petitioner's conviction.
> > >
> > > (C) Whether the petitioner requests the appointment of counsel.
> >
> > (2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d)(1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

The legislative history supporting the test claim statute cites to the disproportionately long sentences, the lack of deterrent effect, and that other countries had abandoned the felony-murder

rule.[63] Appropriations committees in both houses detailed the high costs involved in implementing the bill which included: the courts' costs to conduct the hearings, the Department of Corrections and Rehabilitation's costs to transport and supervise inmates going to hearings and to review records, as well as the costs to local governments for the time of district attorneys and public defenders to prepare for and appear at the hearings.[64] The Senate Appropriations Committee also noted the downstream savings on incarceration costs.[65] The bill passed both houses. As one court observed, "[t]hus, the Legislature's dual intents — making conviction and punishment commensurate with liability, and reducing prison overcrowding by eliminating lengthy sentences where unwarranted — dovetailed."[66]

2. The California Appellate Court Upholds Constitutionality of Test Claim Statute.

The constitutionality of the test claim statute was challenged in *People v. Superior Court (Gooden)*, after petitioners, convicted of murder under both the felony murder rule and the natural and probable consequences doctrine, petitioned the court to have their murder convictions vacated under Penal Code section 1170.95.[67] The People moved to dismiss the petitions on the ground that the test claim statute, which the voters did not approve, invalidly amended Propositions 7[68] and 115[69], which increased the punishments for murder and augmented the list of predicate offenses for first-degree felony murder liability under Penal Code section 189.[70] The California Constitution provides that the Legislature may only amend or repeal a statute enacted by voter initiative if there is voter approval or as provided in the initiative.[71] The Legislature may also amend statutes enacted by the voters if the initiative neither authorizes nor prohibits such action.[72] The court held that the test claim statute was not an invalid amendment to Proposition 7 or Proposition 115 because it neither added to, nor took

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[63] Exhibit I, Senate Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), April 24, 2018, pages 3-8; see also, Assembly Committee on Public Safety, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), June 26, 2018, pages 4-7.

[64] Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1; Assembly Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), Aug. 8, 2018, page 1.

[65] Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.), May 14, 2018, page 1.

[66] *People v. Munoz* (2019) 39 Cal.App.5th 738, 763.

[67] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270.

[68] Proposition 7, General Election (Nov. 7, 1978).

[69] Proposition 115, Primary Election (June 5, 1990).

[70] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 274.

[71] California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 279.

[72] California Constitution, article II, section 10, subdivision (c), *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280 citing *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.

away from, the initiatives and, therefore, the test claim statute was constitutional in that respect.[73]

Specifically, the amendments made by Proposition 7 did three things to increase the punishment for murder: 1) set the penalty for murder in the first-degree at death, or confinement for life without possibility of parole, or confinement for 25 years to life; 2) set the penalty for murder in the second-degree at confinement for 15 years to life; and 3) expanded the list of special circumstances that would result in a conviction of murder in the first-degree.[74] The prosecution argued that the test claim statute changed the penalties for murder. The court reasoned that such an argument stemmed from confusing the elements of murder[75] and the punishment for murder.[76] As the court explained, "the language of Proposition 7 demonstrates the electorate intended the initiative to increase the punishments, or consequences, for persons who have been convicted of murder. Senate Bill 1437 did not address the same subject matter. . . . Instead, it amended the mental state requirements for murder."[77] The court held that the test claim statute did not amend Proposition 7.[78]

The amendments made by Proposition 115 added kidnapping, train wrecking, and sex offenses to the list of felonies that can result in a charge of murder. Like the test claim statute, Proposition 115 changed the circumstances under which a person may be liable for murder. The issue, reasoned the court, was whether the test claim statute addressed what Proposition 115 authorized or prohibited. The court concluded that the test claim statute only changed the mental state necessary for a murder conviction, not the listed felonies which were the subject of Proposition 115.[79] The court held that the test claim statute did not deprive the voters from what they enacted under either initiative.[80]

The test claim statute is currently under review by the California Supreme Court to determine whether it applies to *attempted* murder liability under the natural and probable consequences doctrine.[81]

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[73] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275.

[74] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 280-281.

[75] "'Every crime consists of a group of elements laid down by the statute or law defining the offense and every one of these elements must exist or the statute is not violated.'" (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281, quoting *People v. Anderson* (2009) 47 Cal.4th 92, 101.)

[76] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281.

[77] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

[78] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 286.

[79] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 287, footnote omitted.

[80] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 289.

[81] *People v. Lopez*, California Supreme Court, Case No. S258175, review granted November 13, 2019, on the following question:

III. Positions of the Parties

A. County of Los Angeles

The claimant alleges that the test claim statute results in reimbursable increased costs mandated by the state. Specifically, the claimant alleges that the test claim statute "requires the County to provide representation, prosecution, and housing to the petitioners who file a resentencing petition . . . ." under Penal Code section 1170.95.[82] The claimant argues that the test claim statute "does not eliminate the felony murder rule" but rather revises "the felony murder rule to prohibit a participant in the commission or attempted commission of a felony that has been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act."[83] The claimant alleges new requirements on District Attorneys, Public Defenders, Alternate Public Defenders, and Sheriffs as follows:

> [T]he subject law mandates the following activities on Public Defender:
>
> > a) To file a petition with the court that sentenced the petitioner if: 1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; 2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder; and 3) The petitioner could not be convicted of first or second degree murder because of changes to sections 188 or 189 of the Penal Code effective January 1, 2019. (Penal Code §§ 1170.95 (a), (1), (2), and (3);
> >
> > b) If the Court reviews the petition and determines that the petitioner has proven the *prima facie* showing that he/she qualifies for resentencing who has requested a counsel, the court appoints a counsel to represent the petitioner. The Counsel will have to prepare for attendance at the resentencing hearing. (Penal Code § 1170.95 (c));

> The petitions for review are granted. The issues to be briefed and argued are limited to the following: (1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868, 143 Cal.Rptr.3d 659, 279 P.3d 1131 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 and *People v. Chiu* (2014) 59 Cal.4th 155, 172 Cal.Rptr.3d 438, 325 P.3d 972?

[82] Exhibit A, Test Claim, filed December 31, 2019, page 5.

[83] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 2.

> c) In preparing for and appearing at the re-sentencing hearing, counsel will have to review discovery, read transcripts, interview the defendant, retain experts, utilize investigators, review reports prepared by experts and investigators, and draft legal briefs for presentation to the court. (Penal Code §§ 1170.95 (c) & (d) (1)); and
>
> d) Participation of counsel in training to competently represent the petitioners. (Penal Code§ 1170.95 (c))

On average, it will take at least: a) 25 hours per case excluding visitation with clients, b) additional investigation hours, and c) four (4) to five (5) hours of research. In total, a minimum of 30 hours per case.[84] [¶] . . . [¶]

> [A]fter the petitioner serves his/her petition on the prosecution, the prosecutor shall:
>
> a) File a response within 60 days of service of the petition. The petitioner may file and serve a reply within 30 days after the prosecutor response is served. If the petitioner makes a *prima facie* showing that he or she is entitled to relief, the court shall issue an order to show cause. Within 60 days after the order to show cause is issued, the court will set a resentencing hearing date. (Penal Code § 1170.95 (c))
>
> b) Preparation and attendance at the resentencing hearing. (Penal Code§ 1170.95 (d) (1))
>
> c) To prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. The prosecutors may rely on the record of conviction or offer new or additional evidence to meet their respective burdens or request additional documents. (Penal Code § 1170.95 (d) (3))
>
> d) Retention and utilization of experts to evaluate the petitioner's eligibility for resentencing. (Penal Code§ 1170.95 (d) (3))
>
> e) Participation of counsel in training for a competent prosecution. (Penal Code § 1170.95 (d) (3))

On average, it will take at least 20 hours per case for obtaining documents, reviewing voluminous records, writing responses, and litigating in court. Some cases require significantly more research and development time due to the loss of records that will be used to establish the firm basis for the petition.[85]

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[84] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), pages 14-15. Footnotes omitted. See also Section 6, Declaration of Harvey Sherman, the Deputy-in-Charge of the Public Integrity Assurance Section, Los Angeles County Public Defender’s Office, pages 22-24.

[85] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), pages 15-16. Footnotes omitted. See also Section 6, Declaration of Brock Lunsford, the Deputy-in-Charge of the Murder Resentencing Unit, County of Los Angeles District Attorney's Office, pages 25-28.

The claimant alleged the following costs of complying with the requirements of the test claim statute:

Department	**FY 2018-19**	**FY 2019-20**
District Attorney	$1,592,284	$1,295,852
Public Defender	$ 206,496	$ 471,595
Total	**$1,798,780**	**$1,767,447**[86]

Relying on the statistics provided to the Senate Committee on Appropriations by the California Department of Corrections and Rehabilitation, the claimant concluded "there would be a statewide cost estimate of about $18,153,459."[87]

The claimant alleges that there are no funding sources to cover these costs.[88] Finally, the claimant alleges that "none of the exceptions in Government Code Section 17556 excuse the state from reimbursing Claimant for the costs associated with the implementing the required activities."[89]

In its comments on the Draft Proposed Decision, the claimant disagrees with the conclusion that test claim statute eliminated a crime within the meaning of Government Code section 17556(g).[90] The claimant argues that the test claim statute amended Penal Code sections 188 and 189 to limit their application to the felony-murder rule and the natural and probable consequences doctrine, which are legal theories and not crimes.[91]

The claimant further argues that Penal Code section 1170.95 sets forth a post-conviction proceeding allowing convicted individuals to petition the court to vacate their murder convictions. The claimant asserts that the right to counsel attaches in a criminal proceeding before conviction and the claimant is not seeking reimbursement of those costs. Post-conviction proceedings do not invoke a constitutional right to counsel. The test claim statute, however,

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[86] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 16; see also Section 6, Declaration of Sung Lee, Departmental Finance Manager, Los Angeles County Public Defender's Office, pages 29-32 and Declaration of Ping Yu, Accounting Officer, County of Los Angeles District Attorney's Office, pages 37-39.

[87] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 18; see also Exhibit I, Senate Committee on Appropriations, Analysis of Senate Bill 1437 (2017-2018 Reg. Sess.) May 14, 2018, page 3.

[88] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 10.

[89] Exhibit A, Test Claim, filed December 31, 2019 (Section 5), page 13.

[90] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2, 4.

[91] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4.

compels the counties to provide representation in the post-conviction proceeding set forth in Penal Code section 1170.95.[92]

Finally, the claimant argues that even if the test claim statute eliminated a crime, the post-conviction proceeding does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g). The post-conviction proceeding "is separate and apart from the pre-conviction enforcement of the crime of murder."[93] The proceeding itself is not a simple motion, but rather a complicated procedure akin to a civil commitment under the Sexually Violent Predators Act or a habeas corpus proceeding.[94] The handling of the petitions by the Los Angeles County District Attorney's Office is time consuming work with voluminous records requiring review and reinvestigation.[95] As a result, a new unit was created within the office.[96] The Los Angeles County District Attorney's Office received 2,036 petitions as of July 2020 with attorneys spending about 20 hours per case. The claimant estimates that it could potentially receive 9,704 petitions.[97] The Los Angeles County Public Defender's Office received 898 petitions with attorneys spending about 25 hours per case.[98] The fact-finding nature of the post-conviction proceeding to determine if relief can be granted has nothing to do with the enforcement of the prohibition against murder.[99]

The claimant reports the actual costs for the Public Defender's Office was $206,496 for fiscal year 2018-2019 and estimates that it will incur $471,595 to comply with the test claim statute in fiscal year 2019-2020.[100]

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[92] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.

[93] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4.

[94] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 4-5.

[95] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 7 (Declaration of Brock Lunsford).

[96] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 8 (Declaration of Brock Lunsford).

[97] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 9 (Declaration of Brock Lunsford).

[98] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 12 (Declaration of Harvey Sherman).

[99] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 5.

[100] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 15 (Declaration of Sung Lee).

The claimant urges the Commission to find that the test claim statute imposes a reimbursable state mandate.[101]

B. Department of Finance

Finance filed comments on June 19, 2020, recommending that the Commission deny the test claim as follows: "Finance believes SB 1437 is subject to Government Code section 17556, subdivision (g), the 'crimes and infractions' exclusion since SB 1437 changed the application of and the penalty for the felony murder rule. Accordingly, the Commission should deny this claim because SB 1437 does not impose costs mandated by the state."[102]

Finance did not file comments on the Draft Proposed Decision.

C. Chair of the San Joaquin County Board of Supervisors

The Chair of the San Joaquin County Board of Supervisors filed comments on behalf of the Board of Supervisors in support of the Test Claim. Noting that the test claim statute "redefined liability in first-degree and second-degree murder convictions" and established "a statutory mechanism" to allow convicted inmates and parolees to retroactively overturn their murder convictions, the Board of Supervisors concludes that the test claim statute is an unfunded state mandate.[103] The Chair explains that "there is significant workload associated with reviewing petitions, including reviewing each homicide file in order to assess and make a determination on the number of eligible defendants and which petition filings to prioritize. These extensive files include: trial transcripts, crime reports, investigation, motions, probation reports and other documents to determine initial eligibility."[104] Relying on data from the California Department of Corrections, there are 432 individuals from San Joaquin County that are currently incarcerated for murder in the first- or second-degree and another 78 on parole for such convictions. New staff have been hired to address the 107 petitions filed to overturn murder convictions to date and eligible applicants could exceed 500. The Chair asserts, that implementation costs for San Joaquin County District Attorney and Public Defender are $1,648,657 as of July 17, 2020.[105] The Chair agrees with the claimant that the test claim statute imposes a reimbursable state mandated program.[106]

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[101] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 5.

[102] Exhibit B, Finance's Comments on the Test Claim, filed June 19, 2020, page 2.

[103] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[104] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[105] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 1.

[106] Exhibit D, San Joaquin County, Board of Supervisors' Chair's Comments on the Draft Proposed Decision, filed July 17, 2020, page 2.

D. California Public Defenders Association

The California Public Defenders Association (CPDA) filed late comments in support of the Test Claim. CPDA disagrees with the analysis and conclusion of Finance and the Draft Proposed Decision on two grounds: "(1) No crime was eliminated by SB 1437's amendments to sections 188 and 189; these amendments merely modified the elements of an existing crime, the crime of Murder, and (2) Even if SB 1437 could be viewed as eliminating a crime, Penal Code section 1170.95, the resentencing provision of SB 1437, does not "relate directly to the enforcement of the crime or infraction."[107]

CPDA argues its first ground explaining that murder has been a crime in California since being codified as Penal Code section 187 in 1872. So, too, malice has been defined in Penal Code section 188 since 1872. Through the test claim statute, the Legislature clarified that malice would no longer be imputed to an individual based solely on that individual's participation in a crime. Thus CPDA concludes that the crime of murder was not eliminated nor was the penalty changed, but the definition of malice was amended. CDPA also asserts that the test claim statute also amended Penal Code section 189, but again, not to eliminate the crime of murder, nor to change the penalty, but to clarify the circumstances under which an individual can be liable for the crime of murder.[108]

CPDA argues its second ground noting that Government Code section 17556(g) includes the language "but only for that portion of the statute *relating directly to the enforcement* of the crime or infraction."[109] CPDA explains, "Assuming, arguendo, that SB 1437, in part, eliminated a class of conduct formerly punishable as murder (death resulting from certain felonious acts committed by a person acting as an aider or abettor to the principal, who was not the killer, did not intend to kill another person, was not a major participant, and did not display reckless indifference to human life), the resentencing statute enacted by SB 1437, Penal Code section

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[107] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 1. Pursuant to 1183.6(d) of the Commission's regulations, "[i]t is the Commission's policy to discourage the introduction of late comments, exhibits, or other evidence filed after the three-week comment period. . . The Commission need not rely on, and staff need not respond to, late comments, exhibits, or other evidence submitted in response to a draft proposed decision after the comment period expires." However, in this case, although the CPDA filed comments approximately three and one-half weeks after they were due and without requesting an extension of time, it was feasible to consider the comments in the Proposed Decision since the matter had already been postponed at the request of the claimant. In the future, such late comments without an approved extension may be simply added to the record but not added to, considered, or discussed, in the decision after they were due and without requesting an extension of time.

[108] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2.

[109] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2. Emphasis in citation.

1170.95, does *not* relate directly to the *enforcement* of any crime."[110] Relying on the Meriam Webster definition, CPDA asserts that "enforce the law" is generally understood as "make sure that people obey the law," which makes no sense when applied to the proceedings described in Penal Code section 1170.95. These proceedings do not ensure that individuals follow the law, and they do not enforce the law; rather, they enforce justice. Resentencing proceedings provide relief to those who committed acts but whose treatment under prior law was unjust. "When it enacted SB 1437, the California Legislature concluded that it was unjust to punish certain felonious acts resulting in unintended deaths as Murder, and so, in addition to amending Penal Code sections 188 and 189, it enacted Penal Code section 1170.95, to restore justice to those eligible individuals who were convicted and sentenced for the crime of Murder based on felonious acts they committed in the past, but who could not be convicted of murder today. This cannot reasonably come within the meaning of 'law enforcement.'"[111]

CPDA concludes that SB 1437 has produced a considerable financial burden on counties to handle the "complex postconviction proceedings" and these costs are reimbursable. CPDA urges the Commission to grant the test claim.[112]

E. <u>County of San Diego</u>

The County of San Diego filed comments on the Draft Proposed Decision, asserting that Penal Code section 1170.95 does not eliminate a crime, but "simply creates a post-conviction petition procedure."[113] The County states that the placement of Penal Code section 1170.95 under Part 2, "Of Criminal Procedure" and not under Part 1 "Of Crimes and Punishments" is indicative of the fact that the section sets forth a procedure rather than a crime, noting that this approach was persuasive in the Decision in *Youth Offender Parole Hearings*, 17-TC-29.[114] Also, Penal Code section 1170.95 does not change the penalty for a crime within the meaning of Government Code section 17556(g). "Section 1170.95 provides a methodology to vacate a sentence based on the assumption that the crime of murder was not even committed."[115] The County asserts that the changes to Penal Code sections 188 and 189 neither changed the crime of murder, nor did they eliminate a crime. "Those sections merely changed a **theory of liability** for the crime of murder.

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[110] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3. Emphasis in citation.

[111] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3.

[112] Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3.

[113] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 1.

[114] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 1, footnote 1.

[115] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote 2.

The crime of murder still exists."[116] The County points to the fact that a jury need not reach a unanimous decision on the theory of liability. They must only agree that the defendant is liable for murder to convict. The Commission, however, need not reach this issue as the Test Claim seeks reimbursement for costs solely incurred due to the resentencing petition process which is found only in Penal Code section 1170.95.[117]

Specifically, the County argues, Penal Code section 1170.95 is a separate statute and should be analyzed independently from Penal Code sections 188 and 189 as to whether section 1170.95 eliminated a crime. The County states that the Draft Proposed Decision analyzes the sections separately as to whether they impose requirements on local government and the analysis as to whether they eliminate a crime should be no different.[118] Since the Draft Proposed Decision acknowledges that Penal Code section 1170.95 is a petition and hearing process, the County concludes, "[t]his petition and hearing process provides a method to reverse a conviction, but it does not change the crime of murder itself. [citation] Accordingly, Section 1170.95 does not fall within the exception set forth in [Government Code] Section 17556(g)."[119]

F. <u>Alameda County Public Defender's Office</u>

The Alameda County Public Defender's Office filed late comments on the Draft Proposed Decision explaining: "Alameda County is the seventh largest county in the state. In 2019 alone, our office was appointed to represent 86 habeas corpus petitioners who were seeking relief under Penal Code section 1170.95; One full time and two part time attorneys were assigned to handle these cases. They worked more than 3300 hours and, by year's end, had resolved 56 of them."[120]

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[116] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote 3. Emphasis in original.

[117] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 2, footnote. 3.

[118] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.

[119] Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, page 3. Citation omitted in the original.

[120] Exhibit H, Alameda County Public Defender's Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 1. Pursuant to 1183.6(d) of the Commission's regulations, "[i]t is the Commission's policy to discourage the introduction of late comments, exhibits, or other evidence filed after the three-week comment period. . . The Commission need not rely on, and staff need not respond to, late comments, exhibits, or other evidence submitted in response to a draft proposed decision after the comment period expires." However, in this case, although the Office filed comments approximately one month after they were due and without requesting an extension of time, it was feasible to consider the comments in the Proposed Decision since the matter had already been postponed at the request of the claimant. In the future, such late comments without an approved extension may be simply added to the record but not added to, considered, or discussed, in the decision.

The Office asserts that the test claim statute did not eliminate a crime, rather SB 1437 modified the scope of malice aforethought.[121] Penal Code section 189(f) narrows the scope of the new law by stating that a defendant that kills a police officer while committing a felony is guilty of felony murder regardless of intent and, thus, the crime of murder was not eliminated.[122] Further, the case law confirms that while the changes to Penal Code sections 188 and 189 modified the scope of murder, these changes did not eliminate any crime nor eliminate the felony murder or natural and probable consequences theories, themselves. The court in *People v. Superior Court (Gooden)* noted that SB 1437 only amended the mens rea, or mental state, requirement for murder.[123] The court in *People v. Solis* noted that SB 1437 limited the application of the felony-murder rule and the natural and probable consequences doctrine by changing the mens rea element.[124] In *People v. Cervantes*, the court stated, "SB 1437 modified the felony murder rule and natural and probable consequences doctrine to ensure murder liability is not imposed on someone unless they were the actual killer, acted with the intent to kill, or acted as a major participant in the underlying felony and with reckless indifference to human life."[125] The court in *People v. Martinez* noted that SB 1437 changed the definitions of malice and murder.[126] In *People v. Gentile,*[127] the court rejected the argument that SB 1437 eliminated murder liability under the natural and probable consequences theory:

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[121] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 1-2.

[122] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2.

[123] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 281, 287.

[124] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Solis* (2020) 46 Cal.App.5th 762, 768-769.

[125] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220.

[126] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 2, citing *People v. Martinez* (2019) 31 Cal.App.5th 719, 722.

[127] *People v Gentile* (2019) 35 Cal.App.5th 932, review granted September 11, 2019 (California Supreme Court Case No. S256698), on the following question:

> The petition for review is granted. The issues to be briefed and argued are limited to the following: 1. Does the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 eliminate second degree murder liability under the natural and probable consequences doctrine? 2. Does Senate Bill No. 1437 apply retroactively to cases not yet final on appeal? 3. Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder?

…"defendant argues that the amendment to section 189, "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine." *We disagree.* This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu,* and would lead to absurd results. Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances."[128]

The Alameda County Public Defender's Office concludes: "Of the nearly two dozen published cases interpreting SB 1437, not a single one has said that it eliminated a crime."[129]

The Office asserts that the test claim statute did not change the penalty for a crime within the meaning of Government Code section 17556(g)[130] and the Draft Proposed Decision did not analyze whether Penal Code section 1170.95 is directly related to the enforcement of a crime or infraction as set forth in Government Code section 17556(g). Noting that the "30 or so cases that have invoked section 17556 have never defined the word 'enforcement,'" the Office relies on the Black's Law Dictionary's definition "to compel obedience to" and Webster's definition "to compel observance of a law."[131] The Office asserts that section 1170.95 does not compel obedience to the law nor does it apply to the arrest or prosecution of individuals for murder. Section 1170.95 is a resentencing statute. Even if SB 1437 eliminated a crime, section 1170.95 does not relate directly to the enforcement of the crime of murder as defined in Penal Code sections 188 and 189. The Office urges the Commission to grant the Test Claim, explaining that "Penal Code section 1170.95 petitions involve complex legal issues that require experienced counsel and substantial amounts of legal research, writing and courtroom litigation. It has placed a considerable burden on our office's staff as well as our budget."[132]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Oral argument was heard on October 7, 2020. This case is currently pending and additional briefing has been ordered on the retroactivity of SB 1437.

[128] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3 citing *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944. Emphasis in original.

[129] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 2-3.

[130] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3.

[131] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3-4.

[132] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 4.

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service ….

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[133] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …."[134]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[135]
2. The mandated activity constitutes a "program" that either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[136]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[137]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[138]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[139] The determination whether a statute or executive order imposes a reimbursable

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[133] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[134] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[135] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[136] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 [reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56].

[137] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[138] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[139] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

state-mandated program is a question of law.[140] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[141]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) states: "test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations, effective April 1, 2018, defines "12 months" as 365 days.[142]

The test claim statute became effective on January 1, 2019,[143] resulting in a January 1, 2020 deadline for the filing of a test claim. The claimant filed this Test Claim on December 31, 2019, within twelve months of the effective date.[144] Accordingly, this Test Claim was timely filed.

B. Penal Code Sections 188 and 189, as Amended by the Test Claim Statute, Do Not Impose Any Requirements on Local Government.

As indicated in the Background, the test claim statute amended sections 188 and 189 of the Penal Code, which define "malice" and "murder," to limit the application of the felony-murder rule and the natural and probable consequences doctrine to the actual killer, someone with the intent to kill who assisted the killer, or a major participant in the crime who acted with reckless indifference to human life. These code sections do not impose any requirements on local government and, thus, they do not impose a state-mandated program.

C. Penal Code Section 1170.95, as Added by the Test Claim Statute, Does Not Impose "Costs Mandated by the State" Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17556(g).

Penal Code section 1170.95 imposes requirements on county district attorneys and public defenders. However, those requirements do not impose costs mandated by the state.

1. Penal Code section 1170.95 allows a person convicted of first- or second-degree murder under the felony-murder rule or the natural and probable consequences doctrine to file a petition to have their conviction vacated and to be resentenced, and imposes new requirements on counties to prosecute and defend that petition.

As indicated in the Background, the claimant seeks reimbursement for costs associated with Penal Code section 1170.95, which sets forth a petition and hearing process for persons convicted of first- or second-degree murder under the felony-murder rule or the natural and

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140 *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

141 *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

142 California Code of Regulations, title 2, section 1183.1(c), Register 2018, No. 18 (eff. April 1, 2018).

143 Statutes 2018, chapter 1015.

144 Exhibit A, Test Claim, filed December 31, 2019, page 1.

probable causes doctrine to seek to vacate their conviction and to be resentenced, when it is alleged that the petitioner did not have the intent to kill or was not a major participant in the crime acting with reckless indifference to human life.[145]

The process begins with a person convicted under the felony-murder rule or the natural and probable consequences doctrine filing a petition with the sentencing court and serving the petition on the county district attorney and the petitioner's defense counsel or the county public defender.[146] The statute states that the person convicted will file the petition. The claimant alleges that the petitioner has a statutory right to counsel and, thus, the petitioner's defense counsel will write, file, and serve the petition.[147] The right to counsel is specifically conferred by the statute, however, the California Supreme Court will determine when the right to counsel under section 1170.95 attaches, in the case of *People v. Lewis* which is currently pending.[148] In that case, the petitioner requested a review under Penal Code section 1170.95 and sought the appointment of counsel.[149] The trial court denied the petition without hearing and without appointing counsel.[150] On appeal, the court held that the petitioner's right to counsel derived from the statute, but only after an initial review of the petition by the court. The court relied on the steps listed in Penal Code section 1170.95(c) which require that the court "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section" and, if so, the court appoints defense counsel if requested.[151]

After the petition is filed and served, the plain language of the test claim statute requires county district attorneys to file and serve a response to a petition within 60 days from the date the

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[145] Penal Code section 1170.95(a).

[146] Penal Code section 1170.95(a) and (b)(1).

[147] Exhibit A, Test Claim, filed December 31, 2019, page 14. The claimant also states that the right to counsel is not constitutional, but given by Penal Code section 1170.95. (Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3.) The claimant is correct. (See, *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064, and *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555, which hold that there is no constitutional right to counsel when mounting collateral attacks on the conviction.)

[148] *People v. Lewis* (2020) 43 Cal.App.5th 1128 review granted March 18, 2020 (California Supreme Court, Case No. S260598), on the following question:

> The petition for review is granted. The issues to be briefed and argued are limited to the following: (1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c).

[149] *People v. Lewis* (2020) 43 Cal.App.5th 1128 review granted March 18, 2020 (California Supreme Court, Case No. S260598).

[150] *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134.

[151] *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1139-1140.

petition is served.[152] If the parties agree or if the court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the parties can waive the hearing and, in such cases, the court shall vacate the petitioner's conviction and resentence the petitioner without a hearing.[153] If the court sets a hearing, the district attorney bears the burden of proof to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.[154] If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.[155]

In California, indigent defendants in criminal proceedings are represented by the county public defender's office and the people are represented by the county district attorney's office. Therefore, county district attorneys and public defenders representing indigent defendants who are appointed under Penal Code section 1170.95(c) are required to represent their clients in the petition process and hearing pursuant to Penal Code section 1170.95, and these requirements are new.

2. The requirements imposed on counties by Penal Code section 1170.95 do not result in costs mandated by the state because the test claim statute eliminates a crime within the meaning of Government Code section 17556(g).

Article XIII B, section 6 is not intended to provide reimbursement for the enforcement or elimination of crime. Government Code section 17556(g), which implements article XIII B, section 6 and must be presumed constitutional by the Commission,[156] provides that the Commission "shall not find costs mandated by the state" when the "statute or executive order created a new crime or infraction, *eliminated a crime or infraction*, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction." This exception to the reimbursement requirement is intended to allow the State to exercise its discretion when addressing public safety issues involving crimes, without having to consider whether reimbursement to local government would be required under article XIII B, section 6 as a result of its actions.[157] As described below, the test claim statute eliminates a crime or infraction under Government Code section 17556(g) and, thus, there are no costs mandated by the state.

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[152] Penal Code section 1170.95(c).

[153] Penal Code section 1170.95(d)(2).

[154] Penal Code section 1170.95(d)(3).

[155] Penal Code section 1170.95(d)(3).

[156] California Constitution, article III, section 3.5.

[157] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1191 (recognizing the three exceptions to reimbursement, as stated in article XIII B, section 6(a), as "(1) mandates requested by the local government, (2) legislation concerning crimes, and (3) mandates implemented prior to January 1, 1975.").

Under prior law, the felony-murder rule and the natural and probable consequences doctrine allowed the prosecution to convict a defendant of murder without proving the defendant's state of mind.[158] The test claim statute changed that. One of the reasons the test claim statute was enacted was "to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual."[159]

Thus, as amended, Penal Code sections 188 and 189 now require proof beyond a reasonable doubt that the defendant intended to kill or that the defendant was a major participant in the crime who acted with reckless indifference to human life in order for the defendant to be found guilty of first- or second-degree murder. As explained in *Gooden*, these amendments changed the elements of the crime of murder by now requiring proof that the defendant had the requisite mental state at the time of the crime to support a conviction of murder.[160] A conviction of murder can no longer be found when malice is imputed or implied based solely on the defendant's participation in a crime.

Penal Code section 1170.95 was enacted to provide a petition and hearing process by which those convicted of first- or second-degree murder under the felony murder rule or the natural and probable consequences doctrine, who would not have been convicted of murder under the Penal Code sections 188 and 189 as amended by the test claim statute, to obtain a review by filing a petition to have the murder conviction vacated and to be resentenced on any remaining counts. Penal Code section 1170.95(d) states that the court shall "vacate the murder conviction and . . . recall the sentence when:

- The parties stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing.
- The court or jury at the original trial made specific findings that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony.
- The district attorney fails to sustain its burden of proof, beyond a reasonable doubt, that the petitioner is ineligible to have the murder conviction vacated and for resentencing; in other words, the district attorney fails to prove that the petitioner intended to kill or was a major participant in the crime and acted with reckless indifference to human life.

Thus, the test claim statute eliminates the crime of murder under the felony-murder rule and the natural and probable consequences doctrine for those who either lacked intent to kill or who were not major participants acting with reckless indifference to human life.

The claimant and local agency interested parties and interested persons argue that the test claim statute did not eliminate a crime. They argue that the amendments to Penal Code sections 188 and 189 modified the element of malice in the existing crime of murder and limited the

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[158] Penal Code section 189, as last amended by Statutes 2010, chapter 178; *People v. Dillon* (1983) 34 Cal.3d 441, 467-468; *People v. Chiu* (2014) 59 Cal.4th 155, 158.

[159] Statutes 2018, chapter 1015, section 1(e).

[160] *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 282.

application of legal theories that give rise to liability for murder.[161] In support of their position, the Alameda County Public Defender's Office cites several cases including *People v. Gentile.* The Office asserts that the *Gentile* court rejected the argument that the test claim statute eliminated murder liability under the natural and probable consequences theory.[162] Finally, the claimant, interested parties, and interested persons argue that even if the test claim statute eliminated a crime, the petition and hearing process set forth in Penal Code section 1170.95 does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g).[163]

The Commission disagrees with these comments. It is correct that the test claim statute modified the element of malice. As stated in Penal Code section 188, malice shall no longer be imputed to a person based solely on his or her participation in a crime. However, there is no question that persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, may no longer be found guilty of murder as a result of the test claim statute. If the crime of murder under these circumstances was not eliminated, there would be no need to have the process set forth in section 1170.95 to petition the court to *vacate* the murder conviction.

Furthermore, the parties' reading of *People v. Gentile* is not correct. In *Gentile*, the defendant argued that the amendment to Penal Code section 189 by the test claim statute "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine."[164] The court disagreed that the statute eliminated *all* murder liability.[165] The court quoted the plain language of Penal Code section 189(e), as amended by the test claim statute, which now provides that a person may still be convicted of murder if the person is the actual killer, has the intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life:

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[161] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2, 4; Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 2; Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 1-2; Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 1-2.

[162] Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, page 3, citing *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944.

[163] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed August 14, 2020, page 4; Exhibit E, California Public Defenders Association's Late Comments on the Draft Proposed Decision, filed August 10, 2020, page 3; Exhibit F, County of San Diego's Comments on the Draft Proposed Decision, filed August 14, 2020, pages 2-3; Exhibit H, Alameda County Public Defenders' Late Comments on the Draft Proposed Decision, filed August 17, 2020, pages 3-4.

[164] *People v Gentile* (2019) 35 Cal.App.5th 932, 943-944.

[165] *People v Gentile* (2019) 35 Cal.App.5th 932, 944.

> A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.[166]

The test claim statute and the court cases make it clear, however, that the crime of murder has been eliminated for those persons who lack intent to kill while committing other felonies, or who are not major participants acting with reckless indifference to human life, as they may no longer be found guilty of murder. The test claim statute "amend[s] the felony murder 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."[167]

The Commission also disagrees with the argument that, even if the test claim statute eliminated a crime, the petition and hearing process set forth in Penal Code section 1170.95 does not directly relate to the enforcement of any crime within the meaning of Government Code section 17556(g). This interpretation of section 17556(g) is not supported by the plain language of the statute or with past decisions of the Commission. Government Code section 17556(g) provides that the Commission "shall not find costs mandated by the state" when the "statute or executive order created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute directly relating to the enforcement of the crime or infraction." The "but only" clause affects only the last provision or antecedent before the comma ("changed the penalty for a crime or infraction"), but is not relevant and has no effect on the first two provisions when the test claim statute creates or eliminates a crime or infraction.

The first step in the interpretation of statutory language is to give the words their plain and ordinary meaning. Where these words are unambiguous, they must be applied as written and may not be altered in any way. In addition, statutes must be given a reasonable and common sense construction designed to avoid absurd results.[168] Section 17556(g) contains the modifier, "but only for that portion of the statute relating directly to the enforcement of the crime or infraction." To avoid ambiguity, rules of grammar suggest that modifiers be placed next to the word they modify.[169] Also known as the "last antecedent rule," this construction is not followed

[166] *People v Gentile* (2019) 35 Cal.App.5th 932, 943.

[167] *People v. Cervantes* (2020) 46 Cal.App.5th 213, 220, emphasis added.

[168] *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *People v. King* (1993) 5 Cal.4th 59, 69.

[169] Strunk & White, The Elements of Style (3d ed. 1979), page 30.

when strict adherence to the rules of grammar would result in statutory interpretation that contravenes legislative intent.[170]

Under the "last antecedent rule," the "but only" clause modifies only the third phrase: "changed the penalty for a crime or infraction." This application is in accordance with legislative intent and the rules of construction. It would not make sense for the "but only" clause to modify the first phrase, "created a new crime or infraction," because that exception to reimbursement is already provided for in article XIII B, section 6(b), of the California Constitution without the "but only" language.[171] Inserting the "but only" limitation in that instance would conflict with the Constitution.[172] Similarly, it would not make sense for the "but only" clause to modify the second phrase, "eliminated a crime or infraction," because an eliminated crime cannot be enforced. Thus, the "but only" language applies only to a statute that changes the penalty for a crime or infraction.

Although the Commission does not designate its past decisions as precedential, and old test claims do not have precedential value,[173] the Commission's findings in this matter are consistent with its prior decisions, all of which applied the "but only" language to changes in the penalty for a crime. Recently, in *Youth Offender Parole Hearings*, 17-TC-29, the claimant sought reimbursement for the costs of parole hearings to review the suitability for parole during the 15th, 20th, or 25th year of incarceration of any prisoner who was 25 or younger at the time of their controlling offense and was sentenced to 15 years or more, or who was sentenced to life in prison without the possibility of parole for an offense committed when the offender was under 18.[174] The Commission reasoned that incarceration and parole are part of the penalty for committing the underlying crime. The Commission found that Penal Code section 3051 changed the penalty for crimes within the meaning of Government Code section 17556(g) and denied reimbursement.[175]

In *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, the claimant sought reimbursement for the costs of additional research of the defendant's criminal history, increased trial rates and third strike appeals for both the district attorney and public defender's office, and

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[170] 67 Ops.Cal.Atty.Gen. 452, 454 (1984).

[171] "[T]he Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (b) Legislation defining a new crime or changing an existing definition of a crime."

[172] See, *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1151 ("A statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality.")

[173] 72 Ops.Cal.Atty.Gen. 173, 178, footnote 2 (1989).

[174] Decision, *Youth Offender Parole Hearings*, 17-TC-29, September 27, 2019, https://www.csm.ca.gov/decisions/093019.pdf (accessed on September 25, 2020), pages 18-23.

[175] Decision, *Youth Offender Parole Hearings*, 17-TC-29, September 27, 2019, https://www.csm.ca.gov/decisions/093019.pdf (accessed on September 25, 2020), pages 53-54.

increased workload for its sheriff and probation departments.[176] The Commission reasoned that the Three Strikes law "changed the sentencing scheme by subjecting a double strike defendant to a penalty of double the term of imprisonment previously required under the Penal Code for the current crime committed" and that this constituted a change in the penalty for a crime pursuant to Government Code section 17556(g).[177] The Commission found that the plain meaning of the language of section 17556(g) ("enforcement of the crime or infraction") meant to carry out to completion of the penalty or punishment imposed by the criminal statute, and thus "encompasses those activities that directly relate to the enforcement of the statute that changes the penalty for the crime from arrest through conviction and sentencing."[178] The Commission found that Penal Code section 667 changed the penalty for a crime within the meaning of Government Code section 17556(g) and denied reimbursement.[179]

In *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, the Commission found that changes to Penal Code section 1203.097, which required counties to perform several activities to assess convicted domestic violence offenders who were ordered to complete a batterer's program as part of the terms and conditions of probation, were not reimbursable as they were directly related to the enforcement of the crime under Government Code section 17556(g).[180] However, the Commission approved the activities required by the test claim statutes to generally administer the batterer treatment program, provide services to victims of domestic violence, and to assess the future probability of the defendant committing murder, on the ground that these activities were not directly related to the enforcement of the offender's domestic violence crime.[181]

In *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, the Commission found that modification to Penal Code sections 273a, 273d, and 273.1, which made changes to the criteria for treatment programs required by the terms and conditions of probation for convicted child abusers, did not impose costs mandated by the state pursuant to Government

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[176] Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), page 6.

[177] Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), pages 6-7.

[178] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020), pages 8-9.

[179] Statement of Decision, *Sentencing: Prior Felony Convictions (Three Strikes)*, CSM-4503, June 25, 1998, https://www.csm.ca.gov/decisions/4503sod.pdf (accessed on September 25, 2020).

[180] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on September 25, 2020), pages 6-8.

[181] Statement of Decision, *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, April 23, 1998, https://www.csm.ca.gov/decisions/213.pdf (accessed on September 25, 2020), pages 9-11.

Code section 17556(g).[182] Using a similar analysis to the one in *Domestic Violence Treatment Services – Authorization and Case Management*, CSM-96-281-01, the Commission found that the modification in law changed the penalty for convicted child abusers.[183] The Commission, however, approved reimbursement for the activities required to develop or approve a child abuser's treatment counseling program, as these activities were not directly related to the enforcement of the underlying crime.[184]

Unlike the statutes at issue in each of the cited Commission Decisions, the test claim statute here does not change a penalty for a crime, but rather eliminates a crime and, thus the "but only" language does not apply here.

Additionally, even if the "but only" language applied to the elimination of a crime or infraction, the process set forth in Penal Code section 1170.95 is directly related to the enforcement of the crime of murder when construed in context with the amendments to Penal Code sections 188 and 189.

In analyzing statutes, "[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible."[185] As set forth in detail above, changes to Penal Code sections 188 and 189 eliminated the crime of murder within the meaning of Government Code section 17556(g) for aiders and abettors by limiting the application of the felony-murder rule and the natural and probable consequences doctrine. Penal Code section 1170.95 established a petition and hearing process for aiders and abettors already convicted under the prior law to use current law to vacate their convictions. This petition and hearing process is not a stand-alone process, but instead is inexorably linked to the amendments to section 188 and 189 and therefore part of the elimination of a crime under Government Code section 17556(g).

The rest of the analysis turns on the definition of the phrase "the enforcement of the crime or infraction." As there is no court decision interpreting Government Code section 17556(g), the Commission may rely on a dictionary definition. Black's Law Dictionary defines enforcement as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement."[186] This definition is easy to understand within the parameters of compelling compliance with a new criminal law. The government enforces the new criminal law by

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[182] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on September 25, 2020), page 9.

[183] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on September 25, 2020), pages 6-9.

[184] Statement of Decision, *Child Abuse Treatment Services Authorization and Case Management*, 98-TC-06, September 29, 2000, https://www.csm.ca.gov/decisions/98tc06sod.pdf (accessed on September 25, 2020), page 9.

[185] *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

[186] Black's Law Dictionary (11th ed. 2019).

compelling compliance with the law through the criminal legal process of charging the crime, proving the elements, and obtaining a conviction. The definition may also apply to the elimination of a crime if the entire crime has not been eliminated, but rather the crime has been eliminated for a certain group of individuals. Under those circumstances, the government enforces the criminal law that now contains a new mental state element by compelling compliance with the law through a process that allows individuals who were convicted without proof of their mental state to apply the new law to their prior convictions. In this way, the law is enforced retroactively to undo the convictions that would not have been currently possible. Thus the petition and hearing process set forth in Penal Code section 1170.95 is directly related to the enforcement of the crime of murder as defined under the amendments of Penal Code sections 188 and 189.

Accordingly, the Commission finds that Penal Code section 1170.95, as added by the test claim statute, eliminates a crime within the meaning of Government Code section 17556(g) and therefore, the Commission cannot find costs mandated by the state.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

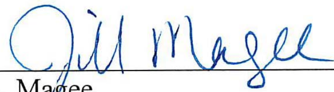
On December 9, 2020, I served the:

- **Decision adopted December 4, 2020**

  Accomplice Liability for Felony Murder, 19-TC-02
  Penal Code Sections 188, 189, and 1170.95 as added or amended by
  Statutes 2018, Chapter 1015 (SB 1437)
  County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 9, 2020 at Sacramento, California.



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Mailing List

Last Updated: 9/23/20

Claim Number: 19-TC-02

Matter: Accomplice Liability for Felony Murder

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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