County of San Diego

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August 2, 2019

Via Drop Box

Heather Halsey
Executive Director
Commission on State Mandates
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RE: Comments to Proposed Decision Dated July 12, 2019
Youth Offender Parole Hearings, 17-TC-29
Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)
County of San Diego, Claimant

Dear Ms. Halsey:

The Claimants provide the following comments in response to the Commission's Draft Proposed Decision dated July 12, 2019:

I. THE COMMISSION MAY NOT IGNORE THE COURTS' EXPLANATION OF WHAT THE STATUTES REQUIRE.

The Commission correctly notes that on their face, the test claim statutes impose requirements on the California Board of Parole Hearing, and do not expressly require any expenditures or actions by local agencies.

But a statute's plain language is only the beginning of the analysis. The Commission must also consider the meaning and effect of the statutes as construed by the courts.

Here, the *Franklin* court did not extend the common law in any manner, nor did it create any new rights. Rather, the *Franklin* court interpreted the statutes, and clarified what they mean. *See People v. Franklin*, 63 Cal.4th 261, 283 (2016) (the statutes themselves "contemplate that information regarding the juvenile offender's characteristics and offense will be available at a youth offender parole hearing"); *In re*

Cook, 441 P.3d 912, 923 (2019) ("It bears emphasis that the proceedings we outlined in *Franklin* derives from the statutory provisions of sections 3051 and 4801."). The statutes themselves, not the Constitution, require evidence preservation proceedings. *See People v. Rodriguez*, 4 Cal.5th 1123, 1132 (2018) ("We expressed no view in *Franklin*, and we need not express any view here, on whether . . . a remand [to provide a *Franklin* hearing] is constitutionally required.").

In other words, the Commission errs in finding that *Franklin* hearings are a judicial appendage to the statutes. In reality, such hearings are required by the statutes themselves, and the *Franklin* Court did nothing more than say what the law is. This basic principle—most famously articulated in *Marbury*[1]—was recently explained by the California Supreme Court:

> Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may change the law. But interpreting the law is a judicial function. After the judiciary definitively and finally interprets a statute . . . the Legislature may amend the statute to say something different. But if it does so, *it changes the law*; it does not merely state what the law always was.

McClung v. Employment Development Dept., 34 Cal.4th 467, 469 (2004) (emphasis supplied). *See also Hutchinson v. Workers' Compensation Appeals Bd.*, 209 Cal. App. 3d 372, 375 (1989) ("Final responsibility for interpretation of a statute rests with the courts, the ultimate interpretation being an exercise of judicial power to declare *the true meaning of the statute* . . ."); *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 n.12 (1994) (when "this Court construes a statute, it is explaining its understanding of *what the statute has meant continuously since the date when it became law*.") (emphasis supplied).

In other words, the *Franklin* decision did not create any new mandates. Rather, the Court explained what had been implicit in the statutes all along. *See Cnty. of Fresno v. Clovis Unified Sch. Dist.*, 204 Cal. App. 3d 417, 251 (1988) ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is contained therein, not to insert what has been omitted, or to omit what has been inserted."). The Commission errs in ignoring the Court's elucidation of what the statutes require.

Additionally, the Commission's position that the statutes must *expressly direct or require* local agencies to perform activities in order to qualify as a mandate is not supported by the definition of "costs mandated by the state" as set forth in Government Code section 17514.

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[1] *Marbury v. Madison*, 15 U.S. 137, 177 (1803) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.").

Section 17514 defines "costs mandated by the state" as follows: "any increased costs which a local agency or school district is ***required to incur*** after July 1, 1980, ***as a result of any statute*** enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

Here, ***as a result*** of the test claim statutes, as interpreted by the California Supreme Court, local entities are ***required to incur*** costs to ensure evidence of the juvenile offender's characteristics and circumstances at the time of his or her offense are preserved, so that the Board of Parole Hearings ("BPH"), years later, may properly discharge its obligation to "give great weight to" youth-related factors. Penal Code § 4801, subd. (c).

II. THE PROCEDURES MANDATED BY THE STATUTES ARE NOT COMPELLED BY FEDERAL LAW OR BY THE COURTS. RATHER, THEY ARE THE PRODUCT OF DISCRETIONARY LEGISLATIVE ACTS.

A. The California Legislature Went Far Beyond What the Constitution and the Cases Require.

As the Proposed Decision acknowledges, "the test claim statutes and *Franklin* proceedings exceed the federal law mandate for offenders between the ages of 18 and 25, and for offenders that receive a sentence of less than an LWOP equivalent." *See* Proposed Decision, p. 64. *See also People v. Perez*, 3 Cal. App. 4th 612, 617 (2016) ("Because Perez was not a juvenile at the time of the offenses, *Roper*, *Graham*, *Miller*, and *Caballero* are not applicable. Our nation's, and our state's, highest court have concluded 18 years old is the bright line rule and we are bound by their holdings."). Opponents of the bills that created the statutes likewise noted the considerable disconnect between what the Constitution and cases require and what the statutes provide.[2]

In other words, even assuming that the Commission's conclusions are correct (which claimant respectfully disputes), the great bulk of its Proposed Decision applies

[2] *See* SENATE RULES COMMITTEE – ANALYSIS OF SB 261 (citing argument in opposition by the California District Attorneys Association – "The key phrase in [*People v. Caballero*] is 'committed as a juvenile.' All of the major existing case law on juveniles who receive long sentences involves individuals who were under 18 at the time of their offense, and received a lengthy prison sentence. We are unaware of any case law under which courts have considered someone a juvenile for an offense committed after they turned 18, but before they reached 23 years of age.").

only to a small subset of *Franklin* hearings. Specifically, the arguments that the mandates are the product of federal law or judicial decision (*see* Proposed Decision, pp. 51-62) apply only to proceedings involving juvenile offenders (*i.e.*, those who were under 18 at the time of their offense) who received LWOP sentences or LWOP equivalent sentences. For all others—adult offenders (*i.e.*, 18-25 at the time of the controlling offense), and juvenile offenders who did not receive LWOP or LWOP equivalent sentences—the Commission's reasoning does not apply.

B. Even as to Juvenile Offenders Who Receive LWOP Sentences, Nothing in the Constitution Nor in Any Judicial Decision Requires *Franklin* Hearings. Rather, these Hearings Have Been Imposed by Discretionary Legislative Acts.

The Commission's Proposed Decision finds that the new activities and costs to comply with the *Franklin* proceedings are mandated by federal law or the courts, and are thus not subject to reimbursement. *See* Proposed Decision, pp. 53-62, citing CAL. CONST. ART. XIII B § 9(b) (no reimbursement requirement for "mandates of the courts or the federal government which, without discretion, require an expenditure . . ."); CAL. GOV'T CODE 17556(b) (no reimbursement requirement if "the statute . . . affirmed for the state a mandate that has been declared existing law . . . by action of the courts"); CAL. GOV'T CODE § 17556(c) (no reimbursement requirement if "the statute . . . imposes a requirement that is mandated by a federal law . . . and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."). As claimant explains below, the proposed decision is in error.

1. The Constitution and cases do not mandate any particular procedures

The Supreme Court cases addressing the rights of juvenile offenders did not mandate adoption of a youth offender parole process. In *Roper v. Simmons*, the Court held the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

In *Graham v. Florida*, the Court held the Eighth Amendment forbids the sentence of life without parole for a juvenile offender who did not commit homicide. *Graham v. Florida*, 560 U.S. 48, 74, 82 (2010). It further explained that a State must give these defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" but expressly stated that "[**i]t was for the State, in the first instance, to explore the means and mechanisms for compliance**." *Id*. at 75 (emphasis

added). *Graham's* holding specifically applies to a discrete population of youth offenders—those under the age of eighteen who were not convicted of homicide and were sentenced to LWOP.

Two years later, in *Miller v. Alabama*, the Court held sentencing schemes that impose ***mandatory*** LWOP sentences on juveniles violate the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). To the extent, after *Miller*, a state ***opted*** to allow juvenile homicide offenders to be sentenced to LWOP on a non-mandatory basis, *Miller* requires the judge or jury imposing the sentence to, at the time of sentencing, "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. ***What specific procedures to employ and what evidence to consider was left to the discretion of the states***. As with *Graham*, the Supreme Court's holding applies to a specific population of youth offenders—those under the age of eighteen who received mandatory LWOP sentences.

The California Supreme Court extended the holdings of *Graham* and *Miller* to juvenile defendants serving/facing sentences that are the functional equivalent of LWOP.[3] The U.S. Supreme Court, however, has not held that a mandatory sentence that is the functional equivalent of LWOP is unconstitutional.

In response to *Graham* and *Miller*, a state could have simply banned LWOP sentences for all juvenile offenders. Indeed, the legislatures in several states did just that. *See* Hawaii HB 2116 (2014) (eliminating LWOP as a sentencing option for juveniles convicted of 1st degree murder, 1st degree attempted murder, and 2nd degree murder); Texas SB 2 (2013) (eliminating LWOP for juveniles); West Virginia HB 4210 (2014) (same); Wyoming HB 23 (2013) (same). Such a ban would have brought the state into compliance prospectively and retroactive effect could have been achieved by resentencing or providing parole hearings to prisoners serving unconstitutional sentences in keeping with the Constitutional limitations expressed by the Supreme Court.

Louisiana took a different approach. Rather than requiring preservation of evidence at the time of sentencing (as California's statutes require), Louisiana requires a written evaluation from an "expert[] in adolescent brain development" at the time of the parole hearing. LA. REV. STAT. ANN. § 15:574.4(D)(2).

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[3] *People v. Caballero*, 55 Cal. 4th 262, 268 (2012)(" sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment."); *People v. Franklin*, 63 Cal. 4th 261, 276 (2016) ("a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*").

Other states declined to pass compliance legislation at all. Portions of their sentencing statutes are now unenforceable in light of *Miller*, and it is left to the state trial courts to craft constitutional sentences on a case by case basis. *See* IOWA JUVENILE SENTENCING RULES IN LEGAL LIMBO, SIOUX CITY JOURNAL (June 8, 2014) (quoting Iowa Assistant Attorney General – "There is no clear answer as to what is required by the law right now because we don't have a statute that's applicable anymore."). *Consider also* THE SENTENCING PROJECT, POLICY BRIEF: STATE RESPONSES TO MILLER (June 2014) p. 3 ("The elimination of the harshest sentencing structures does not mean that states are required to pass new laws.").[4]

The California Legislature, of course, took a very different route. It preserved the option of LWOP sentences for youth offenders, but imposed a regime of parole hearings at specific times and specialized standards and procedural protections (*see* Cal. Penal Code §§ 3501, 4801) which the California Supreme Court ultimately determined require evidence preservation proceedings (*Franklin* proceedings). That approach was not mandated by the Constitution or by the Supreme Court decisions interpreting it. To be clear, there is no case or federal law that mandated the California Legislature establish a new parole scheme for youth offenders. In fact, as first introduced by Senate Bill 260 ("S.B. 260") (which became effective on January 1, 2014), the Youth Offender Parole process did not even apply to prisoners serving LWOP sentences—the only class of offenders addressed in the United States Supreme Court cases.[5] Rather, as originally enacted, the statutes provided an opportunity for parole for virtually all ***other*** juveniles sentenced in adult court, *i.e.* juveniles sentenced to life with parole of any length or those with a determinative sentence of 15 years or more.[6]

The Proposed Decision states: "the State here has not exercised any discretion with regard to how or when the record on youth related factors is to be established, neither in statute nor regulation. And therefore the costs and activities of local agencies in *Franklin* proceedings do not flow from a discretionary decision of the state." Proposed Decision p. 62.

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[4] Available at https://www.sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf.

[5] It was not extended to LWOP juvenile prisoners until the passage of S.B. 394. S.B. 394 was at least in part enacted in response to *Montgomery v. Louisiana*, in which the United States Supreme Court held that *Miller* applied retroactively and that a state could "remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

[6] Even without consideration of the later expansion of the Youth Offender Parole process to offenders between the ages of 18-26 (as effected by S.B. 261 and S.B. 394), the reach of the statutes is vast, and the accordant obligation on local entities to conduct *Franklin* proceedings is significant.

That proposed language misses the mark. *Franklin* proceedings are not required by the Constitution, nor are they required by federal law. Rather, as the differing approaches of other states demonstrate, they are the result of the California Legislature's discretionary actions in establishing the youth offender parole scheme to begin with. In other words, the only reason there is a need to establish the "record on youth related factors" is because of the manner in which the California Legislature opted to implement the youth offender parole process.

In the Proposed Decision, the Commission also contends that the activities required of indigent defense counsel as a result of the youth offender parole statutes are implicit in a juvenile offender's constitutional right to assistance of counsel for their defense. Proposed Decision p. 51. The Commission's argument is again flawed because it ignores the fact that the expanded duties of indigent defense counsel flow from the Legislature's discretionary implementation of the youth offender parole statutes—not from the Constitution. Following the enactment of these statutes, defense counsel is now effectively required to build a time capsule consisting of evidence of the offender's juvenile characteristics and life – not for the purpose of sentencing – but for use at a parole hearing years down the road in which they will not represent the offender.

Under settled law, discretionary legislation triggers reimbursement obligations. *See Hayes v. Commission on State Mandates*, 11 Cal. App. 4th 1564, 1592 (1992) (even if a statute is passed in response to federal requirements, what matters is whether the "manner of implementation of the federal program was left to the true discretion of the state.") If the state had "no true choice," the local government is not entitled to reimbursement. If, however, "the manner of implementation of the federal program was left to the true discretion of the state," the local government is entitled to reimbursement. *Id.* at 1593. *See also Dept. of Finance v. Commission on State Mandates*, 1 Cal.5th 749, 771 (2016) (although federal statute compelled inspections, the state dictated the scope and detail of the inspections – as such, the costs were imposed by state law, not federal mandate). Here, the state had a range of options, but chose to impose a regime of new procedural requirements that imposes costs on localities. These costs are thus subject to reimbursement.

2. Neither the California Constitution nor the statutory exception support the Commission's proposed decision.

The concluding clause of Government Code section 17556(c) further confirms that Legislative discretion is central to the reimbursement analysis. That sub-section provides that the commission shall not find costs mandated by the state if:

> The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, **unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.**

For the reasons explained above, federal law does not mandate any particular affirmative action at the outset. Indeed, many states responded to *Miller* not by imposing any new requirements on localities, but instead by barring LWOP sentences for minors outright. Here, the California Legislature did far more than was required. By enacting the statutes, it imposed costs that exceed any mandate under federal law.

The language of the California Constitution likewise supports reimbursement. Specifically, Article XIII B, section 9(b) specifies that the limitation on reimbursement does not attach if the Legislature engages in discretionary acts. CAL. CONST. ART. XIII B § 9(b) (no reimbursement requirement for "mandates of the courts or the federal government which, without discretion, require an expenditure . . ."). Here, the statutes are the product of legislative discretion. The consequent costs are thus subject to reimbursement.

III. THE COMMISSION'S (NEW) POSITION—THAT *FRANKLIN* PROCEEDINGS "CHANGE THE PENALTY FOR A CRIME"—IS INCONSISTENT WITH THE LETTER AND SPIRIT OF THE STATUTE.

The Commission's Proposed Decision states that the test claims statutes and *Franklin* proceedings 'change the penalty for a crime' pursuant to Government Code section 17556(g), and thus cannot qualify as reimbursable state mandates.[7] This conclusion is inconsistent with the plain language of section 17556(g), as well as the Legislature's intent.[8]

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[7] Respondent did not raise this argument in its response, nor did the Commission in its Draft Proposed Decision of March 25, 2019. Rather, the Commission first addressed this argument in its Proposed Decision of July 12, 2019.

[8] For reference, the full text of subsection 17556(g), along with the prefatory language, reads:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds [that] . . . (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changes the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

CAL. GOV'T CODE § 17556.

A. The Statutes Do Not "Change the Penalty for a Crime or Infraction."

As an initial matter, the statutes do not "change the penalty for a crime or infraction." They have no impact on the length of a sentence, or on the amount of any fines or restitution. Rather, they provide for parole hearings, and mandate a new proceeding at the time of sentencing to preserve evidence for any future parole hearings. That does not effectuate a substantive "change" to any existing criminal penalty. Rather, the statutes are purely procedural – the only changes they effectuate are to the purpose and timing of hearings. *Consider Franklin*, 63 Cal. 4th at 278 (noting "the continued operation of the original sentence"; "The Legislature did not envision that the original sentences would be vacated and that new sentences would be imposed").

Because the statutes are procedural, they are akin to California Penal Code section 1405, which provides a post-conviction procedure for convicted felons to obtain DNA testing of biological evidence. This Commission unanimously found that the statutes mandating such hearings imposed a reimbursable state-mandated program on local agencies. Specifically, localities are entitled to reimbursement for defense counsel's investigation and representation of the convicted person in conjunction with the mandated hearings, as well as for certain additional work required of district attorneys.[9]

To be sure, some offenders might be released following a parole hearing. But the mere possibility of early release does not constitute an actual "change [in] the penalty for a crime" – under the test claim statutes, juvenile offenders are now *eligible* for parole hearings, but this does not make them *suitable* for parole. Indeed, in practice, early release is the rare exception, not the rule. *See* R. EDWARDS, GETTING A BREAK FROM FOREVER: CHAPTER 828 PROVIDES AN OPPORTUNITY FOR JUVENILES SENTENCED TO LIFE WITHOUT PAROLE TO GET THEIR LIVES BACK, 44 McGeorge L. Rev. 744, 757 (2013) ("[B]ecause juvenile offenders enter the prison system at such a young and impressionable age, it is unlikely many will develop the interpersonal and communication skills necessary to be successful in the rigorous resentencing process.").

B. The Section 17556(g) Exception Is Intended To Exempt Changes To Sentences For Particular Crimes. It Does Not Apply To Across-The-Board Procedural Changes.

The language "*a* crime or infraction"—in particular the use of the singular article "a"—is instructive as to the Legislature's intent. So too is the use of the singular article "the" in the final clause of the section. *See* CAL. GOV'T CODE § 17556(g) ("relating

[9] *In Re Test Claim On Penal Code Sections 1405 and 1417.9*, Case Nos. 00-TC-21, 01-TC-08, Statement of Decision (July 28, 2006), available at https://www.csm.ca.gov/decisions/00tc21,01tc08sod.pdf.

directly to the enforcement of the crime or infraction"). Had the Legislature wished to exempt laws that that create new criminal procedures applicable to a broad category of crimes, it could easily have said so. For example, it could have stated: "changes the penalty for a crime, or the procedures by which crimes are prosecuted." So too could it have stated: "changes the penalty for one or more crimes or infractions." It did neither. Rather, the Legislature intended the section 17556(g) exemption to apply to statutes that change the sentences for *particular* crimes, not to statutes that indirectly impact criminal procedure more generally.

C. *Franklin* Hearings Do Not "Relate Directly" To Enforcement Of Crimes.

The plain language "relating ***directly*** to the enforcement of the crime" further confirms the Legislature intended there could be no mandate for that portion of a statute [creating a new crime or infraction, eliminating a crime or infraction, or changing the penalty for a crime or infraction] that relates directly to enforcement of the crime. For example, if a statute introduces a new crime, local entities cannot recover costs incurred in directly enforcing the new crime (*e.g.* Sheriff costs). A statutory provision, like the one here, that mandates a new criminal procedure generally applicable to a broad swath of crimes, however, does not "relate directly" to "enforcement of the crime."

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge, information and belief.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By
STEPHANIE KARNAVAS, Senior Deputy

14-90097

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.

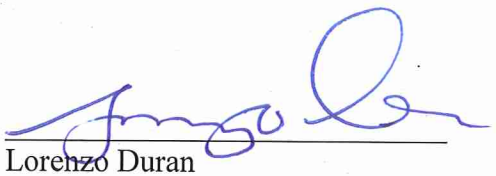
On August 6, 2019, I served the:

- **Claimant's Comments on the Proposed Decision filed August 2, 2019**

  Youth Offender Parole Hearings, 17-TC-29
  Penal Code Sections 3041, 3046, 3051, and 4801; Statutes 2013, Chapter 312 (SB 260); Statutes 2015, Chapter 471 (SB 261); Statutes 2017, Chapter 675 (AB 1308); Statutes 2017, Chapter 684 (SB 394)
  County of San Diego, 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 August 6, 2019 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/18/19

Claim Number: 17-TC-29

Matter: Youth Offender Parole Hearings

Claimant: County of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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